No.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Respondent

v.

CRAIG MULLER
Petitioner

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Third
Circuit for Denial of a Petition for Rehearing and
Affirming the Judgment of the District Court

PETITION FOR WRIT OF *CERTIORARI*

CRAIG MULLER,
Pro Se
ID No. 1858123
Red Onion State Prison
P.O. Box 1900
Pound, VA 24279
276-796-3592

RECEIVED
FEB 13 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

1) Was the Evidence Insufficient to Find that Petitioner Craig Muller Had Anything to Do with the Death of Gilbert Hendricks, Jr.?

2) Must Verdicts be Unanimous When Tested by the Jury Poll?

3) Did the District Court Err in Refusing to Give a Voluntary Manslaughter Jury Instruction?

4) Does Justice Require that Petitioner be Granted a New Trial?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES AT ISSUE	1
STATEMENT OF THE CASE	2
A. Facts and District Court Litigation	2
B. The Appellate Court Proceedings	24
REASONS WHY *CERTIORARI* SHOULD BE GRANTED	25
1. Review is warranted because the evidence was insufficient to find that Petitioner Craig Muller had anything to do with the death of Gilbert Hendricks, Jr.	25

2. Review is warranted because verdicts must be unanimous when tested by the jury poll and the verdict against Petitioner Craig Muller was not unanimous. 30

3. Review is warranted because the District Court Erred in refusing to give a voluntary manslaughter jury instruction. 34

4. Review is warranted because justice requires that Petitioner Craig Muller be granted a new trial. 35

CONCLUSION 37

APPENDICES:

Appendix A: September 6, 2017 Order of from the United States Court of Appeals for the Third Circuit 38

Appendix B: September 14, 2017 Mandate issued by the United States Court of Appeals for the Third Circuit 73

TABLE OF AUTHORITIES

	Page
Constitutional Provisions:	
U.S. Const. Amend. V	1, 29
U.S. Const. Amend. VI	2, 31, 33
U.S. Const. Amend. XIV, § 1	2
Statutes:	
28 U.S.C.§ 1254	1
Procedural Rules:	
F.R.E. 201	7
Fed. R. Crim. P. 29	21, 22, 35
Fed. R. Crim. P. 31	31, 32
Fed. R. Crim. P. 33	35, 36
Cases:	
Andres v. United States, 333 U.S. 740 (1948)	31
Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982)	30

Deutch v. United States, 367 U.S. 456 81 S.Ct. 1587 (1961) 29

Glasser v. United States, 315 U.S. 60 86 L.Ed. 680, 625 S.Ct. 457 (1942) 35

Government of the Virgin Islands, v. Davis, 35 V.I. 72 (Terr. Ct. 1997) 36

Government of the Virgin Islands v. Knight, 764 F. Supp. 1042 (D.V.I. 1991) 34

Humphries v. D.C., 174 U.S. 190 (1899) 31

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 29

Jackson v. Virginia, 443 U.S. 307 (1979) 25, 30

Johnson v. Louisiana, 406 U.S. 356 (1972) 30

Mathews v. United States, 485 U.S. 58 (1988) 34

Pilon v. Bordenkireher, 444 U.S. 1 (1979) 25

Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co., 206 F. 3d 900 (9th Cir. 2000) 32

United States v. Aguilar, 843 F. 2d 155 (3rd Cir. 1998) 26

United States v. Charles, 949 F. Supp. 365 (DCVI 1996) 35

United States v. Gonzalez, 918 F. 2d 1132 25

(3rd Cir. 1990)

United States v. Graciani, 61 F. 3d 70 (1st Cir. 1995) 36

United States v. Harber, 53 F. 3d 236 (9th Cir. 1995) 36

United States v. Idowu, 157 F.3d 265 (3rd Cir. 1998) 35

United States v. Johnson, 302 F.3d 139 (3rd Cir. 2002) 35

United States v. Kakos, 483 F. 3d 441 (6th Cir. 2007) 33

United States v. Keller, 512 D. 2d 182 (3rd Cir. 1975) 28

United States v. Kemp, 500 F. 3d 257, 304 n. 26 (3rd Cir. 2007) 31

United States v. Lafelice, 978 F.2d 92 (3rd Cir. 1982) 35

United States v. Lee, 532 F. 2d 911 (3rd Cir. 1976) 32

United States v. Lopez, 271 U.S. 472 (3rd Cir. 2001) 29

United States v. Marinari, 32 F.3d 1209 31

(7th Cir. 1994)

United States v. Mastro, 570 F.Supp. 1388 (E.D.Pa. 1983) 35

United States v. Peppers, 302 F.3d 120 (3rd Cir. 2002) 36

United States v. Sanchez, 961 F.2d 1169 (5th Cir. 1992) 30

United States v. Scalzitti, 578 F. 2d 507 (3rd Cir. 1978) 33

United States v. Singh, 54 F. 3d 1182 (4th Cir. 1995) 36

United States v. Wasserson, 4 18 F. 3d 225 (3rd Cir. 2005) 35

United States v. White, 972 F. 2d 590 (5th Cir. 1992) 32

Virgin Islands v. Commisiong, 706 F. Supp. 1172 (D.C.V.I. 1989) 36

Virgin Islands v. Davis, 35 V.I. 72 (1997) 36

Petitioner, Craig Muller ("Petitioner"), respectfully asks that a Writ of *Certiorari* issue to review the September 6, 2017 Order of from the United States Court of Appeals for the Third Circuit and the September 14, 2017 Mandate issued by the same court, Case No.: 16-1395.

OPINIONS BELOW

The Order and Mandate of the United States Court of Appeals for the Third Circuit, issued on September 6, 2017 and September 14, 2017, respectively, are attached hereto as Appendices "A" and "B" respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The Order and Mandate of the United States Court of Appeals for the Third Circuit were issued on September 6, 2017 and September 15, 2017 respectively. This petition is filed within 90 days of the United States Court of Appeals for the Third Circuit's aforesaid Order and Mandate.

CONSTITUTIONAL PROVISIONS, STATUES, AND POLICIES AT ISSUE

The *United States Constitution, Amendment 5*, "due process clause," provides in pertinent part: "[N]or shall any person... be deprived of life, liberty, or property, without due process of law."

The *United States Constitution, Amendment 6,* "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

The *United States Constitution, Amendment 14,* "due process clause," provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

A. Facts and District Court Litigation

On May 10, 2012 at approximately 8:00 p.m., 911 dispatch sent out a radio transmission to Virgin Islands Police Department ("VIPD") officers of shots fired in the vicinity of the Food Town Supermarket ("Supermarket") in Christiansted, St. Croix, Virgin Islands. Upon arrival to the scene, police officers found the victim, Gilbert Hendricks, Jr. lying on the ground across from Supermarket with gunshot wounds. Witnesses reported to police officers that a maroon truck was seen driving at a high rate of speed while a person in the truck discharged gunshots at Hendricks as he ran down the street. Witnesses saw the passenger of the truck lean out of the truck window and discharge a gun. When the truck drove off, Hendricks, Jr. was lying on the ground with gunshot wounds. Police also learned that a bullet went through the front glass of

Supermarket, which was on the opposite side of the street.

A short time later, while searching for the red/maroon truck, Officer Julio Mendez saw two black males walking down the road in the area of the St. C Condominiums ("St. C"). Officer Mendez, while seated in the police car, ordered the men to place their hands on his police car. He began to question them but as Mendez came out of his car, the two men ran away. Mendez radioed a description of the two men—black males, slim build and both rasta—and the direction they were running. Officer Leon Cruz heard Officer Mendez's transmission. He headed toward that direction. He then saw a man, later identified as Elvin Wrensford, near Schjang ballpark wearing a black shirt standing with his back towards him, by the side of the road. Cruz stopped his car, got out and ordered Wrensford to show his hands. Wrensford did not immediately respond but looked over his shoulder at Officer Cruz. Cruz ordered him to show his hands again and the man turned around to face him. Cruz knew Wrensford since he was a little boy because Wrensford was one time his neighbor. Officer Cruz ordered Wrensford to the ground and he complied. He handcuffed Wrensford and asked him if he had any weapons. Wrensford told him he had a knife in his front pocket. Officer Cruz removed the knife and also took his keys and insurance card from his front pocket and his wallet from his back pocket. Wrensford was taken to C Command, a police station, and placed in a holding cell. Sometime later that evening, Wrensford was

transferred to Rainbow Command. He was detained for several hours before his formal arrest. During this time, he was questioned by law enforcement and made a statement.

When Wrensford was transferred from C to Rainbow Command, the second police station, two police officers escorted him handcuffed from the holding cell at C Command to a police car in the parking lot. Two eyewitnesses to the earlier shooting arrived at the police station at the request of VIPD, to give their statements. Both witnesses told the officers at the station that the person being taken to the police car was involved in the shooting. An officer showed one witness the driver's license of Wrensford and the witness identified him as the shooter. At Rainbow Command, Wrensford was advised of his rights and placed under arrest. Several days later, after Wrensford's photograph appeared in local newspaper as the person arrested for the shooting, Petitioner was arrested.

A gun that tested positive for Wrensford's DNA was found a short distance from where Wrensford was found by Officer Cruz. The gun was found in the bush, alongside the road, next to a fence. Police located and recovered the maroon truck from behind an abandoned housing project. Spent casings matching the firearm were found inside and outside the truck.

Hendricks died of the gunshot wounds on May 10, 2012. An autopsy recovered two bullets from the

body of Hendricks that matched the recovered gun.

On or about September 3, 2013, Petitioner filed a motion to suppress identification evidence. The Court held a hearing on December 19, 2013. At the hearing, Detective Kirk Fieulleteau testified that he arrived at the scene of the shooting at approximately 8:30 p.m., or close to 9, and he spoke with one potential eyewitness, which was referred to as witness no. 2, i.e., Tynicia Teague. He further testified that he took the witness' written statement at Marshall Command. Det. Fieulleteau stated that while interviewing the witness, he asked the witness whether the witness had seen the shooter after the incident, and the witness replied yes. He asked the witness where and the witness replied that was the male individual that was being taken to the police car outside of the station. Det. Fieulleteau further testified that after the interview that night, he met with Ms. Teague again, a few days later, for the purpose of presenting the photo array which included a photo of Petitioner in an effort to identify the driver or the second person involved in the shooting. He testified that the witness looked at the photo array for a few minutes and then the witness indicated that she recognized one of the individuals in the photo array, no. 4, who was identified as Petitioner. Det. Fieulleteau further testified that witness no. 2 stated that she had seen Petitioner before about three or four times a month, and that she have always seen him with Wrensford. At the hearing, Det. Fieulleteau testified that witness no. 2 stated in her initial statement that that she was in the vehicle when the

incident occurred. However, witness no. 2 changed her statement the day before the suppression hearing, when the witness was interviewed at the U.S. Attorney's office. The witness stated that when she heard the initial shots from the car wash she was standing outside, and she was told to get in the vehicle. He further testified that the vehicle, that witness no. 2 was in, was parked facing the Supermarket, and the incident occurred behind the direction that the vehicle was facing. Therefore, witness no. 2 would have had to turn around and look through the back glass of the vehicle (a truck) to see the incident. The witness also told Det. Fieulleteau that the individual driving the truck was clean shaven.

Det. Fieulleteau also testified that the witness stated that she had seen the truck, that the perpetrators were driving the night of the incident, in her neighborhood and the Red Brick housing area driven by someone named "Mario". Det. Fieulleteau testified that he did not follow up on the investigation of "Mario." Det. Fieulleteau testified that witness no. 2, in her statement on May 10, 2012, stated that she did not recognize the driver of the vehicle the night of the incident. However, on May 13, 2012, when witness no. 2 was presented with the photo array, which included a photo of Petitioner, witness no. 2 then stated that she recognized Petitioner as the driver of the vehicle the night of the incident and she (witness no. 2) knew Petitioner from seeing him around Wrensford. On December 20, 2013, Petitioner filed a motion to admit additional evidence and on

January 8, 2014, he filed a supplemental motion to admit additional evidence which included a press release and newspaper article regarding the incident which provided a photo of Wrensford. Petitioner's December and January motions asked the court to take judicial notice of newspaper articles concerning the alleged incident in this matter. The court did not rule on the motions until the time of trial in March 2015.

On December 20, 2013, Petitioner filed a motion to admit additional evidence under federal rules of evidence 201. On January 8, 2014, Petitioner filed a supplemental motion to admit additional evidence under Federal Rules of Evidence 201. On March 24, 2014, the Court entered an Order denying Petitioner's motion to suppress identification evidence.

On November 22, 2013 and January 19, 2014, Wrensford filed a motion to suppress all incriminating evidence collected, including a knife, keys, wallet and insurance card taken from his person, a DNA buccal swab, identifications made by witnesses and a statement he made to law enforcement. Petitioner filed a joinder in Wrensford's motion to suppress. Appellee filed its opposition on December 30, 2013, and Wrensford filed a reply on January 7, 2014. The court held hearings on January 17, 2014 and June 26, 2014.[1] The court issued an

[1]The initial hearing was held before the district court on January 17, 2014. Wrensford raised an argument at the hearing

order and memorandum opinion on August 11, 2014. The court suppressed the keys, wallet and insurance card. The court denied the motion as to the knife, the buccal swab, the identifications and the statements to the VIPD.

At the suppression hearing, Appellee called several police officers. Officer Mendez testified that, on the evening of May 10, 2012, he heard a call on his car radio from 911 dispatch that shots had been fired in the vicinity of Supermarket. Upon arriving at the scene, he observed St. Croix Rescue treating a person with a head injury. He heard witnesses at the scene saying, that after shots were fired, a red truck left the area traveling north toward La Grande Princesse at a high rate of speed. Officer Mendez testified that he drove his car into the Princesse area to look for the red truck. He had no description of the suspects. While driving on the road toward St. C, he saw two males walking on the road in his direction. His vehicle's spotlight and headlights were on, but not the flashing blue lights or siren. Mendez stopped his car about eight to 10 feet in front of the two men, and they stopped walking. He opened the door of his cruiser, and stood on the side step. He described one of the individuals as having dreadlocks, clear

---

that the identification was unnecessarily suggestive. On January 19, 2014, the court ordered him to file a supplemental memorandum, which he did on January 25, 2014. The court continued the suppression hearing to take additional testimony on June 26, 2014.

complexion, wearing a white shirt and blue and white knee-length pants. The person had what appeared to be leaves and bush in his hair and on his shirt. The other individual was a black male with dreadlocks. He had on a white shirt, and black, short knee-length pants. Mendez saw that the two men were sweating. He asked the men where they were coming from. They did not answer immediately. Mendez he called for backup. He ordered them to place their hands on his vehicle, and repeated his command before they complied. The person with the darker skin said they came from the basketball court. As Officer Mendez began to step down from his cruiser, both men ran.

Mendez radioed a description of the two males—described in the call history as "two black males slim buil[d]" and "both rasta males"— and the directions they were running. Officer Mendez drove to the abandoned Housing Project to continue his search for the maroon truck. He found the truck partially hidden in some bushes, approximately one quarter mile from where he saw the men walking. Officer Mendez went to the Rainbow Command. He saw a "clear skin" man in a cell. He recognized the man as one of the people he had stopped earlier that evening. At the request of the prosecutor, Mendez identified Wrensford as the person he saw in the cell. He also identified Petitioner in the courtroom as the other individual he had stopped on the evening of May 10, 2012. On cross examination, Mendez admitted that he did not put this information in his report and he did not tell

his supervisor or any other officer this information. The first time that he identified Wrensford and Petitioner was in the suppression hearing. On redirect, Mendez testified that he first gave the information about the person in the cell being the same person he saw on the roadside to AUSA Andrews, the night before the suppression hearing. At that meeting, he did not call Wrensford by name.

Officer Cruz testified that on the evening of May 10, 2012, he heard the radio transmission that "two black males, slim built, left in a truck." A short time later, he heard the radio transmission from Officer Mendez concerning the two men who had ran. Officer Cruz drove down the road by in the direction Mendez saw one of the men ran in his unmarked police car. He saw an individual in a white shirt running across the road. Officer Cruz was not able to see if the person had dreadlocks at that time. He drove in the direction the person was running and, shortly thereafter, saw a male, with dreadlocks, wearing a black shirt and three-quarter jean pants, standing with his back towards him in the bush at the road side. This man was Elvin Wrensford. Cruz exited his car and ordered Wrensford to show his hands. Wrensford looked over his left shoulder and looked forward. Cruz again ordered him to show his hands. Wrensford turned around and Cruz ordered him to the ground. By that time, another officer had arrived and Cruz handcuffed Wrensford. Officer Cruz saw a white shirt hanging from the bushes. He asked Wrensford if he had any weapons on

him. Wrensford said that he had a knife in his front pocket. Cruz removed the knife and he also removed keys for a GMC truck, and vehicle insurance card from Wrensford's front pocket, and a wallet from his rear pocket without Wrenford's consent. He testified that he removed these items but did not feel that his safety was in danger. Wrensford was detained at 8:58 p.m. Cruz testified that Wrensford was not under arrest. He testified that he expected that Wrensford would be taken to the closest police station and that Mendez would go there to see if he could identify him. He expected that the case agent would come and question Wrensford. Cruz did not know if the investigation was completed. Cruz testified on cross examination that he made the same type of search of Wrensford as he would have if someone had been arrested. Wrensford asked Cruz what was going on. He told him that there had been a shooting and that he fit the description. Cruz had been his baseball coach and neighbor.

Officer Mwathia Hector took Wrensford to C Command at 9:06 p.m. Cruz heard the radio transmission that the truck had been found and drove to the location. He saw the truck and spent rounds and casings in the rear of the truck. He and other officers returned to the spot where he detained Wrensford and found a gun close to the fence where had found Wrensford standing. On cross examination, Cruz testified that he also heard that the truck that left the scene was a black truck. He also heard that there were black males on bikes in the area and someone walking in the area. He did not

have a description of the person that was doing the shooting. On cross examination, Cruz testified that he made the decision to transport Wrensford to the police station at the time he made contact with him. Wrensford was not taken to the station for questioning but for identification.

Detective Kirk Fieulleteau testified that he arrived at the scene of the shooting and spoke with two potential eyewitnesses.[2] One witness, later identified as Tynicia Teague, said that she was sitting in a car in the parking lot of Supermarket when she heard shots being fired. She looked to see what was going on and saw a man running up the street from the car wash. A maroon truck was following the man with the passenger firing shots at him. The truck cut off the path of the man, he fell, and the passenger stuck his upper body out of the truck window and fired shots at the man. The truck drove off down a side street. The window on the driver's side of the truck was halfway down. The witness gave a description of the passenger – dark skin male, little side burn goatee, hair in a stocking cap, black tshirt. On cross examination, Det. Fieulleteau testified that Tynicia Teague told him that she did not know the shooter and had never seen him before. Neither witness could provide law enforcement with the names of the shooter.

The witnesses left after speaking with

---

[2] Detective Fieulleteau and Officer Figueroa testified at the reconvened suppression hearing on June 26, 2014.

Fieulleteau. The second witness, later identified as Trevor Teague, witness No. 2 father, told Fieulleteau that he was standing outside the car when the shooting occurred. Mr. Teague said he did not know the shooter and had not seen this person before. Fieulleteau called Officer Lydia Figueroa and told her to move Wrensford to Rainbow Command "for further questioning". A short time later, Officer Fieulleteau called the Mr. Teague and his daughter and asked them to come to the police station that night to speak with him again. Det. Fieulleteau arranged for the witnesses to meet him at C Command. In order to avoid the witnesses encountering Wrensford, Fieulleteau called another officer to move Wrensford to another police station. Fieulleteau got to the station and went to the cell. He asked Wrensford his name and told him that he was being transferred to his office. Fieulleteau took Wrensford's license and told Officer Figueroa to leave with Wrensford. Officer Figueroa testified that she and her partner took Wrensford, handcuffed, from the holding cell, out of the police station and to their car. They drove him to Rainbow Command.

Sergeant Richard Matthews testified as the case agent. He told Det. Fieulleteau to contact the witnesses and ask them to come to C Command to give their statements. When the witnesses arrived, Det. Matthews interviewed Trevor Teague. Mr. Teague told him that as he arrived at the police station, he saw the shooter leaving the station in the police car. Fieulleteau interviewed and took a written statement from Tynicia Teague who also

identified the person being lead to the police car at the station as the shooter. Fieulleteau showed Tynicia Teague Wrensford's driver's license, and she identified him as the passenger that was shooting from the truck and the person that she saw being lead to the police car moments earlier in handcuffs. In an interview several days later, Tynicia Teague told Fielleteau that she has seen the person she identified as the shooter and the driver together in her neighborhood. She never identified Wrensford by name.

After arriving at Rainbow Command, Officer Matthews advised Wrensford of his *Miranda* rights Wrensford signed the form at 12:23 a.m. on May 11, 2012. He refused to sign the waiver section, but stated that he would speak to the officers. Wrensford told Matthews that he was in the Princesse area with a partner of his, and they were playing basketball. Wrensford refused to provide Matthews with the name of his partner. Wrensford was arrested at 12:23 a.m., after he made his statements to Officer Matthews. uppression hearing.

In its order dated August 11, 2014, the court suppressed the keys, wallet and insurance card. The court denied the motion as to the knife, the buccal swab, the identifications and the statements to the VIPD.

On March 9, 2015, the trial of Petitioner and Wrensford commenced. The Government called its first witness on March 11, 2015. Raphael Guadalupe

testified that he went to Ben's Car Wash ("BCW") with Petitioner and Wrensford on May 10, 2012. Guadalupe needed to turn himself in to the police for an incident he had with his girlfriend. Petitioner and Wrensford drove with Guadalupe to BCW in Petitioner's car.

Henry Mason and Mark Xavier testified that they knew Wrensford and Muller from high school. Petitioner and Wrensford were friends and they hang out at BCW. Gilbert Hendricks hangs out at BCW and his parents live next door. Earlier in the day on the night of the shooting, Petitioner and Wrensford were at BCW with Raphael Guadalupe. Mason saw what he described as an altercation between Wrensford and a heavy set Puerto Rican man with an afro "puff" hairstyle. The two were face to face with each other making arm movements. Mason could not hear what was being said. The man with the puff was on the sidewalk walking toward Supermarket and Petitioner and Wrensford were following him. Petitioner and Wrensford came back to the car wash, got in Petitioner's car and left. Close to sundown, the man with the puff returned with Hendricks. Mason was talking with Xavier. The man with the puff pointed towards Mason. Mason told them "no, not me". Xavier testified the man with the puff looked angry and cautious and had his hand holding the area by his waist. The man with the puff and Hendricks left. Later that night, Hendricks returned to BCW alone. A maroon truck with stripes and heavily tinted glass entered BCW and drove to the back of the property. The truck exited BCW and

headed east towards Five Corners. The truck went into a parking lot and turned around and headed back towards BCW. Hendricks left BCW. A few seconds later, there was the squeal of tires and the truck drove back in front of BCW at a high rate of speed. There were two people in the truck. Hendricks began to run and there were gunshots. Gunfire blast came from the passenger side of the truck. Hendricks was laying on the ground with blood coming from his head.

Dr. Francisco Landron was the medical examiner. He performed an autopsy on Hendricks on May 16, 2012. He concluded that Hendricks died from a gunshot wound to the head. He also had a gunshot wound in his left thumb and right ring finger. The gunshots were shot from a long range and did not leave the body of Hendricks. The recovered bullets were turned over to the VIPD.

Yousef Ali is the manager of Supermarket. He was not in the store at the time of the shooting. A window of Supermarket was shattered by a bullet coming from the outside of the store. Corporal Encarnacion collected a projectile from on top of a freezer in the warehouse of Supermarket. Supermarket has a surveillance system with 60 cameras. Ali turned over the videotape from two cameras to the police from the night of the shooting. Both the video from Supermarket and BCW were played for the jury.

Several officers reported to the scene of the

shooting. Mendez, Cruz and Luis Encarnacion testified both consistently and inconsistently with their earlier testimony at the suppression hearing about what they saw at the scene the night of the shooting and their subsequent encounters with Wrensford and Petitioner.

Contrary to his testimony at the suppression hearing, Mendez testified that he did not go looking for the truck after leaving the initial crime scene but went back on routine patrol. He testified that he was on patrol when he came in contact with the two male suspects. Officer Mendez also testified that he intended to pat down the suspects when he told them to approach his unit. He admitted that he had no description of the suspects and that they had no obligation to talk to him. On cross-examination, he testified that the call history did not contain a description of the suspects given by him. Consistent with his testimony at the suppression hearing, he testified that he did not put in his report or tell his supervisor that the man in the cell was one of the people he stopped on the road earlier that evening. His first identification of the man in the cell and Muller was a year later to the government's attorney the night before the suppression hearing.

Cruz testified at trial that the gun was found approximately five feet from where Wrensford was standing.

Sgt. Matthews testified consistent with his earlier testimony at the suppression hearing with

regard to his interview of Tynicia and Trevor Teague and his interview of Wrensford. Mr. Teague identified the man being led from the police station to the police car as the passenger who was shooting. He did not identify Wrensford by name. Officer Rolando Huertas testified that he arrived near the Schjang ballpark just as Wrensford was being placed in the police car. He saw a white shirt hanging from a bush. Officer Hector transported Wrensford to C Command. Huertas, along with other officers, searched for a gun in the area where Wrensford was found. Huertas found the gun on the ground approximately 5-7 feet from the roadway.

Lesa Stapleton, Wrensford's girlfriend and mother of his two children, testified that Wrensford owned a red truck in May, 2012. Ms. Stapleton did not remember if Wrensford was driving in May, 2012 and she was not able to identify the truck recovered as one Wrensford drove.

Tynicia and Trevor Teague were in Supermarket's parking lot at the time of the shooting. Tynicia Teague, witness was standing near her father's vehicle when the shooting began. Officers spoke with her and her father on the scene and at the police station. At the police station, Ms. Teague told officers that she saw a red truck with two people inside and the passenger was shooting. The police wrote what she told them, she read the statement and signed it. When asked to identify Government's Exhibit 92 as her statement, she

initially refused. On direct examination, counsel for the government asked Ms. Teague if she identified anyone. Ms. Teague did not answer at first. She was instructed by the court, on three occasions, to answer questions. She repeatedly said that she did not remember if she identified anyone. She did not remember how the people in the truck looked. She ultimately said that she identified someone at the police station being involved in the shooting that was in a red truck. Ms. Teague identified her signature on the bottom of a photo array identifying Muller. She remembers telling the police the night of the shooting that she did not recognize the driver.

Trevor Teague told the officers that while standing in the parking lot of Supermarket, he heard gunshots and saw a person running. He then saw a red truck, traveling at a high rate of speed. Mr. Teague said he only saw a silhouette of the passenger but the person had dreadlocks. Mr. Teague provided his statement to Matthews and Fielleteau. He testified that he told Matthews that the silhouette of the person he saw at the station being put in the police car could resemble the head of the passenger in the truck. He did not tell Matthews that was the person he saw because he could not identify anyone. He read his statement and signed it. He also testified that all rasta men look alike.

Officer Robin Richards testified in the defendants' case-in-chief that he spoke with Mr. Teague. Mr. Teague described the men in the truck

as two black males with black stocking caps but he was unable to provide any further description. Neither Mr. Teague nor his daughter made an identification in court. The court allowed the government to introduce Tynicia Teague's written identification in evidence over Wrensford and Muller's objections.

Officers Julisha Lansiquot, Jonathan Hitesman, George Felix and Cynthia Francis testified regarding the photographing, collection, processing and preserving of evidence. Specifically, they testified about logging spent shell casings, projectiles/bullets, the recovered firearm, buccal and non-buccal swabs and clothing, into the property room and the computer systems. Lansiquot testified that the buccal swabs were sent to DNA Labs International for evaluation and comparison. Felix photographed and collected evidence at the location where officers found the truck. The truck was locked but Felix saw spent shell casings in the bed of the truck. He collected the casings from the back of the truck. Once they received a search warrant, he opened the truck and took pictures of the interior and its contents. A 9mm spent shell casing, a blue bandana and a black stocking cap were found inside the truck. He also swabbed the door handles for DNA and processed for fingerprints. After that, Felix went to the area where the gun was recovered and processed that scene. He took the gun back to the police station and swabbed it for DNA.

Expert witness Tiffany Roy is a forensic DNA

analyst with DNA Labs International. She received several items from the VIPD for testing. Specifically, she received a red, gold and green cloth, a blue bandana, a black stocking cap, a swab from a firearm, and buccal swabs from Wrensford and Muller. The gun matched the DNA for Wrensford. Muller was excluded as a possible match for the gun. The blue bandana and black stocking cap excluded Muller but did not exclude Wrensford for possible DNA matches. The quality of the red, gold and green cloth was not suitable for an evaluation.

Reynold Desouza was the firearms examiner. He test fired the recovered gun and found that it was operable. He also testified that it was a 9mm Smith and Wesson. Desouza testified that the two bullets recovered at the autopsy of Hendricks matched the gun that was recovered. There were other 9mm cartridges that matched the gun recovered, as well as .40 caliber cartridges and .38 class bullets that did not match. Desouza testified that there were a minimum of three guns involved in the shooting.

On March 18, 2015, the government rested. The defendants made motions for judgments of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. Wrensford argued that the government had not proved the element of knowledge required under possession of a firearm in a school zone and possession of a firearm with an obliterated serial number. Wrensford also argued that there was not sufficient showing of malice aforethought or premediatation required to sustain a

finding for murder in the first degree. With regard to all counts, Wrensford argued that the government had failed to present sufficient proof that Wrensford was the shooter. Muller joined the arguments of Wrensford. He also argued that the government had failed to prove and there was insufficient evidence to prove that Muller was involved in the shooting. The court took the motions under advisement. On March 19, 2016, Wrensford presented his witnesses.

Dr. Harvey Shulman is an eyewitness expert. He testified about the science of input, storage and retrieval as applied to the study of memory. There was no more than twelve seconds between the time the truck came down the road and left the scene for the Teagues to be able to see the occupants of the truck. He explained to the jury that an identification can be affected by subsequent information received by an eyewitness. Dr. Shulman testified that seeing a person in custody prior to an identification can be suggestive and affect the subsequent identification. The fact that Ms. Teague saw Wrensford being brought out of the station in handcuffs was suggestive and was likely to lead to a misidentification if Wrensford bore any resemblance to the passenger in the truck. On March 20, 2015, the defendants rested. They renewed their Rule 29 motions. The court denied them.

The court denied Wrensford's request for a jury instruction on voluntary manslaughter. Wrensford objected. Wrensford argued that there was sufficient evidence presented for the jury to

consider that the shooting had been done in the heat of passion or evidence of sudden provocation. The evidence showed that a bullet shattered the glass of the window in Supermarket. The shattering of the glass by this bullet, as testified to by Ali and shown on the videotape, happened the same night and at the same time of the shooting. Wrensford argued that the government failed to prove that this shooting was in reaction to the so-called altercation earlier that evening. The shooting could have been in reaction to something that happened immediately preceding the shooting. The jury did not have to credit the government's theory of the case, i.e., that the shooting was as a result of the earlier altercation. Petitioner joined in the argument of Wrensford.

On March 24, 2015, the jury returned a verdict. The foreperson announced the verdict as to Wrensford and Muller. Both defendants asked the jury be polled. After polling on counts one through four for Wrensford, counsel for Wrensford asked for a sidebar. Counsels for Wrensford and Muller did not hear a verbal response from Juror 7 on count four. They saw the juror shrug her shoulders. Wrensford argued that she had not rendered an independent verdict. In addition, he was concerned that although he heard a barely audible response as to count three, he again saw the juror shrug her shoulders and believed that there was sufficient hesitation that, it too, indicated that the juror was undecided as to the count three. The court had the signed verdict form. Wrensford asked that the juror be repolled. The court polled the jury for count five without a problem. The

court then repolled Juror 7 as to counts three and four and she appeared initially to say yes. When the court clarified that it was asking as to Wrensford, the juror said that it was not her independent verdict. The court proceeded with polling the jury as to Muller. Juror 7 said it was not her independent verdict as to count one. Both Wrensford and Muller moved for a mistrial. The court continued with the polling. The jurors affirmed their agreement with the remaining verdicts on the other counts. The court denied counsels' motion for a mistrial. The verdict was published as to counts one, two and five for Wrensford and counts two, four and five for Muller. The court gave the jury additional instructions and sent them back to continue deliberations with a new verdict form. The jury returned with a guilty verdict as to all counts. The jury was polled again and there was a unanimous verdict. Wrensford and Muller were taken into custody.

B. The Appellate Court Proceedings

On or about February 25, 2016 Petitioner filed an appeal of the District Court's decision to the United States Court of Appeals for the Third Circuit. On or about July 31, 2017 aforesaid decision of the District Court was affirmed by the Court of the Third Circuit; on or about September 6, 2017 the Court of the Third Circuit denied Petitioner's Petition *En Banc* and Panel Rehearing (filed on or about August 15, 2017); and, on or about September 14, 2017, the

Court of the Third Circuit entered a Mandate memorializing and confirming the above.

REASONS WHY *CERTIORARI* SHOULD BE GRANTED

1. Review is warranted because the evidence was insufficient to find that Petitioner Craig Muller had anything to do with the death of Gilbert Hendricks, Jr.

The Due Process Clause of the United States Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). In effect, the evidence presented at trial must be sufficient in its relevance, substance and materiality to ensure that the Government meets its burden and satisfy the constitutionally mandated standard requiring conviction by proof beyond a reasonable doubt. In assessing a Motion for Acquittal which alleges the insufficiency of the evidence, the Court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. Pilon v. Bordenkireher, 444 U.S. 1 (1979). A conviction can only be sustained if a rational trier of fact could find the Petitioner guilty beyond a reasonable doubt and the conviction is supported by substantial evidence. United States v. Gonzalez, 918 F. 2d 1132 (3rd Cir. 1990).

In reviewing a claim of insufficient evidence the Court employs a substantial standard test. i.e. "Whether there is substantial evidence that when viewed in the light most favorable to the Government would allow a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt". United States v. Aguilar, 843 F. 2d 155 (3rd Cir. 1998).

Gilbert Hendricks, Sr., the father of the deceased, testified that Gilbert Hendricks, Jr., left his parents' home the evening of the incident. Gilbert Hendricks Sr., heard shot approximately 8 minutes after his son left. Kamari Jackson, the victim's cousin, lives in the yard behind the victim's father's house, in close proximity to Ben's Car Wash. Hendricks, Sr., saw Kamari Jackson at the scene and hospital following the shooting incident.

Raphael Guadelupe, friend of Petitioner and stepson of Benito Soto, who owned Ben's carwash, testified that he was dropped to the car wash by Petitioner and Wrensford on the date of the incident during the day light hours. Petitioner was driving a gold Acura. Henry Mason, who helped out at the car wash with surveillance cameras knows Petitioner and Wrensford from school, and saw them at car wash that afternoon. According to Mason, Muller was driving a gold Acura. Mason saw a red truck with heavily tinted glass pulled into the car wash sometime in the night before the shooting occurred. However, he could not see who was in that truck.

Mason testified that he believed he witnessed what appeared to be an argument earlier, between Petitioner, Wrensford and Kamari Jackson as Jackson walked through the car wash. Mason also testified that Kamari Jackson came back to the car wash with Gilbert after the argument but before the shooting.

Mark Xavier also knows the Petitioner and Wrensford from school. He saw them at the car wash a few times before the incident. He was inside his truck with another male he referred to as his carpenter when Kamari Jackson came to the car wash with Gilbert. The red truck with the assailants passed in front of him, but he could not see who was in truck. Kamari Jackson came to Xavier's truck looking for someone holding his waist stating that "I have something for them man."

Benito Soto, owner of Ben's Car wash testified that he was a police officer. He saw the truck passed in front of the car wash speeding and heard the discharge of shots, but he could not see who was in the red truck although the truck passed immediately in front of him. He also stated that the lighting from the street was very poor.

Kamari Jackson, cousin to Gilbert, testified he had no argument with anyone that day at the car wash. He saw Gilbert at lunch time when Gilbert came home to eat, and did not see him after until he saw him on the ground. He further testified that he did not see Gilbert at the car wash that day.

Ms. Teague, a minor, and earlier identified as witness No. 2, gave three different statements to police. Officer Fielleteau, who took her statement, did not testify at trial. Ms. Teague nor any other witness made an in court identification of Muller at trial. A photo array containing a photograph of Appellant Muller and signed by Ms. Teague on May 13, 2012 was admitted. Ms. Teague admitted that she signed the photo array but did not recall the circumstances under which she signed that photo array. Ms. Teague also testified that she did remember making an identification but don't remember how that happened. She also provided inconsistent testimony that she did not remember making an identification of Petitioner. She acquiesced that her signature was on Government's Exhibit 73A, the photo array containing Petitioner, but did not remember why she put her signature on that Exhibit. The pretrial photographic identification was insufficient to sustain a conviction against Petitioner. See United States v. Keller, 512 F.2d 182 (3d Cir. 1975) (Evidence insufficient to support conviction because only witness was unable to make in court identification and his out-of-court photographic identification was uncertain and tainted.)

According to the prosecution, the witnesses only saw one person shooting from the red pickup, and with one hand. Officer Reynald Desuza, Appellee's firearm expert, testified there were at least three guns on the scene and perhaps four. The

bullet recovered from Supermarket did not match the weapon attributed to Wrensford and therefore, suggests that there were other persons firing shots who were not in the red pickup or otherwise in the assailants' vehicle.

Appellee alleges that Muller was the driver of the red truck, and that he aided and abetted Wrensford in the killing of Gilbert. Yet no one has come forward to say they have seen Petitioner driving that red truck on the day of the incident or during the incident. The jury reached a verdict of guilt based on rumors and speculation. Hence, Petitioner conviction was not based on proof beyond a reasonable doubt and should therefore be reversed.

The due process clause of the Fifth Amendment "[protects] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). "The reasonable doubt standard plays a vital role in the American scheme of criminal justice procedure. It is a prime instrument for reducing the risks of convictions resting on factual error." Id. 397 U.S. at 363; Deutch v. United States, 367 U.S. 456, 471 (1961). "When evaluating a challenge to the sufficiency of the evidence, we examined whether the jury could have rationally found that each of the challenged elements had been established beyond a reasonable doubt." United States v. Lopez, 271 U.S. 472, 486 (3d Cir. 2001).

In criminal cases, the standard is high. "If the 'evidence viewed in light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, '" the reviewing court must reverse the conviction. United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir. 1992) (quoting Cosby v. Jones, 682 F.2d 1373, 1383 (11th Cir. 1982) (other citations omitted). "This is so because . . . where an equal or nearly equal theory of guilt and a theory of innocence are supported by the evidence . . . a reasonable jury must necessarily entertain a reasonable doubt." Id. (quoting Cosby) The question in this case is not whether the Court believes the evidence at trial established guilt beyond a reasonable doubt, but whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 318-19. Petitioner submits the evidence was insufficient to convict Muller on any count. The conviction should therefore be reversed.

2. Review is warranted because verdicts must be unanimous when tested by the jury poll and the verdict against Petitioner Craig Muller was not unanimous.

Unanimity of a jury is required for a valid verdict in a criminal case. See e.g. Johnson v. Louisiana, 406 U.S. 356, 363 (1972) ("A jury in a

federal court...operates under the unanimity rule"); Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required when the Sixth and Seventh Amendments apply"); United States v. Kemp, 500 F. 3d 257, 304 n. 26 (3d Cir. 2007) (noting "defendant's Sixth Amendment right to a unanimous jury verdict") Rule 31(a) of the Federal Rule of Criminal Procedure provides that a verdict must be declared in "open court" and must be "unanimous". Id.

Rule 31 (d) provides for the jury poll:

> (d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

The purpose of polling is to ensure that the verdict was truly unanimous and not coerced. See Fed. R. Crim. P. 31 (Advisory Committee Notes 1998 Amend.) (citing Humphries v. D.C., 174 U.S. 190, 194 (1899)). 'Where a poll is taken, the verdict becomes final...when the twelfth juror's assent to the verdict is made on the record." United States v. Marinari, 32 F.3d 1209, 1213 (7th Cir. 1994). If a juror says "no" during the polling in open court, then the verdict is

not entered. Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co., 206 F. 3d 900, 914 (9th Cir. 2000). "A verdict is final if (1) the deliberations are over, (2) the result is announced in open court, and (3) the jury is polled and no dissent is registered. United States v. White, 972 F. 2d 590, 595 (5th Cir. 1992).

A verdict which fails the test of unanimity upon a poll of the jury is invalid and should not be accepted. Fed. R. Civ. P. 31(d). A trial court may not accept a verdict if it is defective but must either direct the jury to further deliberation or declare a mistrial. United States v. Lee, 532 F. 2d 911, 913 (3d Cir. 1976). After being polling the jury with regards to Wrensord, the Court proceeded to poll the jury as to Petitioner. Juror No. 7 indicated that it was not her independent verdict as to count one. Both Petitioner and Wrensford moved for a mistrial. The court continued with the polling for Petitioner, and the verdict was unanimous as to the remaining counts. The Court denied counsels' motion for mistrial and found that the verdict was published and the jury was polled as to counts one, two and five for Wrensford. There was a unanimous verdict as to counts two, four and five for Muller. The court gave the jury additional instructions and sent them back to deliberate with a new verdict form. The jury returned with a guilty verdict as to all counts. Before the court instructed the jury and sent them back in to deliberate, the court, the Petitioner and Wrensford and the jurors were now aware of how each juror stood numerically, and that only juror No. 7, expressed that the verdict was not his/her

independent verdict. Instructing the jury and sending them for further deliberations under the totality of the circumstances could not supersede the Juror No. 7's "no" during polling. Any instruction the court gave after it was disclosed that only Juror No. 7 had dissented from the other jurors with respect to count one for Petitioner, would result in the instruction speaking solely to that juror and no one else. In effect the Court would be in essence instructing Juror No. 7 to get in step with the other jurors and find Petitioner guilty on count one. A defendant's liberty and freedom should not hinge on such flawed verdicts, when the court had the opportunity to declare a mistrial.

In United States v. Scalzitti, 578 F. 2d 507, 510 (3d Cir. 1978), a jury convicted three defendants by verdicts of eleven to one on various counts Id. The trial court accepted the verdict. This Court ruled that the trial court erred, explaining that "[u]nanimity serves to effectuate the purpose of the jury system by promoting the full expression of the views of all members of the jury and by insuring that those views are taken into account as fully and fairly as possible in reaching a verdict." Id. at 512. A verdict rendered by less-than-unanimous jury violates a defendant's Sixth Amendment rights by a harm that arises from the trial itself. United States v. Kakos, 483 F. 3d 441, 444 (6th Cir. 2007). Re-instructing the jury and sending back to deliberate after polling where only one jury dissented on a particular count cannot cure the defect in this case. Therefore, Petitioner's conviction should be reversed.

3. Review is warranted because the District Court Erred in refusing to give a voluntary manslaughter jury instruction.

A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988).

Under Virgin Islands law, voluntary manslaughter is defined as the unlawful killing of another in the absence of malice aforethought, upon a sudden quarrel or heat of passion with the intent to kill or to commit serious or grievous injury to cause the victim's death. Government of the Virgin Islands v. Knight, 764 F. Supp. 1042, 1048 (D.V.I. 1991)

There was sufficient evidence presented for the jury to consider that the shooting had been done in the heat of passion or upon sudden provocation. The evidence, as seen in the video at trial, showed that a bullet shattered the glass of the window in Supermarket the night of the shooting. The shattering of the glass happened around the same time of the shooting. The government failed to prove that this shooting was in reaction to the so-called altercation earlier that evening. The shooting could have been in reaction to something that happened immediately preceding the shooting. The jury did not have to credit the government's theory of the case. The facts of the case support a finding of

involuntary manslaughter. Failure to give the instruction was error.

4. Review is warranted because justice requires that Petitioner Craig Muller be granted a new trial.

On a Motion for a New Trial pursuant to Rule 33, the Court may weigh the evidence and Order a new trial in the interest of justice. United States v. Charles, 949 F. Supp. 365 (DCVI 1996). A Motion for Judgment of Acquittal is addressed to the discretion of the Court. The Court may consider the credibility of witnesses. The verdict may be set aside and a new trial granted if the miscarriage of justice may have resulted.

On a motion for judgment of acquittal, defendant recognizes that the Court must view the evidence in the light most favorable to the jury verdict, United States v. Wasserson, 4 18 F. 3d 225, 237 (3rd. Cir. 2005) quoting United States v. Lafelice, 978 F.2d 92, 94 (3rd Cir. 1982) and Glasser v. United States, 315 U.S. 60, 80 (1942); see also United States v. Mastro, 570 F.Supp. 1388 (E.D.Pa. 1983). In deciding a motion for judgment of acquittal under Rule 29, a court must determine whether substantial evidence was presented at trial sufficient to support the conviction. United States v. Idowu, 157 F.3d 265 (3d Cir. 1998); United States v. Johnson, 302 F.3d 139, 149 (3d Cir. 2002). In making this determination, a

court must view the evidence introduced at trial in a light most favorable to the Government and uphold the verdict so long as any rational trier of fact "could have found the challenged elements beyond reasonable doubt." United States v. Peppers, 302 F.3d 120, 125 (3rd Cir. 2002).

"[T]he court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). In passing on a motion for new trial, the court's role is to weigh the evidence rather than examine its sufficiency and in doing so may weigh the credibility of witnesses. Government of the Virgin Islands, v. Davis, 35 V.I. 72 (Terr. Ct. 1997). United States v. Graciani, 61 F. 3d 70, 78 (1st Cir. 1995). A motion for new trial may be made on any basis that demonstrates that the verdict was against the interest of justice. United States v. Singh, 54 F. 3d 1182, 1190 (4th Cir. 1995). This may include newly discovered evidence or juror misconduct. Id.United States v. Harber, 53 F. 3d 236 (9th Cir. 1995).

Since the verdict is contrary to the evidence, and the verdict was less than unanimous, Petitioner is entitled to a new trial. The Court must grant a new trial if trial error had a substantial influence on the verdict, resulting in a miscarriage of justice. Virgin Islands v. Commisiong, 706 F. Supp. 1172, (D.C.V.I. 1989).

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant his Petition for Writ of *Certiorari*.

Dated: 2/5/18

Respectfully submitted,

Craig Muller, *Pro Se*
Petitioner