

No. 17-6406

7:16-cv-00223-NMM-RSB

IN THE
SUPREME COURT OF THE UNITED STATES

Jerad Ross — PETITIONER
(Your Name)

vs.

Leslie Fleming — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jerad Ross
(Your Name)

Wallens Ridge State Prison, PO Box 759
(Address)

Big Stone Gap, VA 24219
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Grounds 1 and 4: Does the seating of a juror currently employed by the prosecution's witness's father, with counsel's failure to strike said juror, constitute a denial of the Sixth amendment right to a fair trial by impartial jury, and effective assistance of counsel?

Grounds 2 and 5: Can a juror reasonably be considered fair and impartial who has followed the case via reading and media, obtained facts of the case from her boss who obtained it from a sheriff's officer working in the same department investigating the case, and knew several of prosecution's testifying officers that handled her son's death just two years prior? And does counsel's failure to strike said juror render him ineffective assistance of counsel? If so, does it require a new trial?

Grounds 3, 6, 7: When trial court fails to inquire whether or not pretrial publicity had impacted a juror's ability to be fair and impartial, and counsel fails to strike such juror, can it be reasonably presumed and concluded that such juror was fair and impartial in rendering its verdict and that counsel was effective assistance? If not, was petitioner's Sixth and Fourteenth amendment rights to an impartial jury, effective assistance of counsel, and a fair trial denied? And does it require a new trial?

Grounds 8-13: Did the introduction of falsified incoming text messages from petitioner's cell phone to appear incriminating as adoptive admission and conclusive proof of guilt, upon which prosecution relied on during its closing argument, from persons whom neither made statements nor testified in any proceeding as to its content or authenticity of said messages, with prosecution's failure to correct, and counsel's failure to object, deny petitioner his Sixth and Fourteenth amendment rights to the confrontation clause, effective assistance of counsel, and the due process clause? If so, does it require a new trial?

Ground 14: Does trial counsel's failure to present and interview able witnesses, constitute ineffective assistance of counsel? If so does it require a new trial?

Ground 15: Does counsel's failure to present an expert medical examiner, in an unsuccessful attempt to argue matters profoundly beyond his purview that required such expertise under the circumstances in ascertaining causality, constitute ineffective assistance of counsel?

Ground 16: Can counsel's statement praising and encouraging bias, during voir dire, be considered and reasonably concluded as to have had no prejudicial effect in and towards the trial and petitioner? And can counsel be said to have been effective assistance of counsel? If not does it require a new trial?

Ground 17: Does counsel's failure to inquire into both of prosecution's witnesses' motives for their testimony after one had been inconsistent in statements and testimony and threatened with perjury if she didn't testify, and the other a convicted felon just released from prison months earlier and on parole, and had been threatened with an accessory to first degree murder if he didn't testify, constitute ineffective assistance of counsel? If so, should it require a new trial especially since their brother who was a few years into a 33 year prison sentence was released from prison after petitioner's trial?

Continuance of the Questions Presented.

Ground 18:

When evidence of gang affiliation is objected to on relevance grounds, but is overruled and constrained to prosecution's establishment of petitioner's and other's membership as motive for the crime, and prosecution fails to attempt to establish said requirement, but uses the evidence anyway, and counsel fails to reobject and or present the matter to the state's appellate courts, does counsel's failure constitutes ineffective assistance of counsel? If so, does it require a new trial?

Ground 19:

When prosecution argue fabricated evidence to delude the jury during closing argument and counsel allows it, can counsel reasonably be considered as to have been effective assistance of counsel? If not, does it require a new trial?

Ground 20:

Did the prosecution's proclamation during its closing argument that petitioner is a "stone cold killer" and a "cowardly, vile and malicious person" because he didn't cry during police interrogation, and counsel's failure to object to the statement to preserve it for post-conviction purposes, deny petitioner his Sixth and Fourteenth amendment rights to effective assistance of counsel, a fair trial, and Due process of Law? If so, should it require a new trial?

Ground 21:

When the Commonwealth argue false evidence in its Brief in opposition to petition for appeal, in the state's appeals court, and said court bases its conclusion of denial on the false evidence presented, and appellate counsel doesn't address said falsification, can appellate counsel reasonably be considered to have been effective assistance of counsel? If not, should it require a new trial?

Continuance of the Questions Presented.

Grand 22:

Does the prosecution's suppression of exculpatory evidence directly relating to guilt and punishment, and or counsel's failure to present the exculpatory evidence, and or object to it and motion for a Mistrial, when the exculpatory evidence appeared in prosecution's attempt to falsify the veracity of the evidence that stemmed from its own key witness, and cross-examine the witness on her statement, and preserve and present the issue for appellate review, deny petitioner his Sixth and Fourteenth amendment right to effective assistance of counsel, a fair trial, and Due process of Law? If so, should it require a new trial?

Grand 23:

Did trial court's failure to grant motion to strike evidence of first degree murder as insufficient to sustain a conviction, deprive petitioner of Due process of Law, when the decedent died six months after inflection from a natural cause, and where there was no evidence to prove that death was the result of a criminal act or agency? If so, does it require a dismissal?

LIST OF PARTIES

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

[✓] 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:

Norman K. Moon, Senior District Judge

Duncan, WYNN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Graig Starikard, Assistant Attorney General, Richmond Virginia for Appellee.

Virginia Supreme Court Justice (See APPENDIX C).

Petty, Huff, Judges, and Senior Judge Annunziata

Virginia's District Court of Appeals Judge (See APPENDIX E).

25th Circuit Trial Court Judge, Victor V. Ludwig.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	28

INDEX TO APPENDICES

APPENDIX A Opinion of the United State Court & Appeals For the Fourth circuit in Ross V Fleming, 17-6406 7-16-CV-00222-NKM-RSB July 20, 2017 - Decided July 25, 2017

APPENDIX B Opinion of the United States District Court for the Western District of Virginia Entered 4-10-2017

APPENDIX C Opinion of the Virginia Supreme Court, Record No. 141714, Court & Appeals NO 1650-13-3, May 15, 2015

APPENDIX D Opinion of the Virginia three judge panel, October 30, 2014

APPENDIX E Opinion of the Virginia Court & Appeals, April 10, 2014

APPENDIX F The Facility Instruction for Habeas Corpus, provided by the prison, Number # 8.

APPENDIX G. Correspondences to and from Counsel and trial Judge in attempt to fire counsel.

APPENDIX H. Text message log sheet.

APPENDIX I. Counsel's Affidavit.

APPENDIX J. Letter from Middle River Regional Jail denying access to recorded phone calls between Precious Smith and Reddiner.

TABLE OF AUTHORITIES CITED

CASES

<u>Archie, V. Commonwealth, 14 Va App 684 (1992).</u>	<u>25,</u>
<u>Avila, V. Galaza, 297 F3d 971, 919 (9th cir 2002).</u>	<u>24</u>
<u>Berger, V. U.S., 295 US 78, 88 (1935)</u>	<u>20</u>
<u>Betancourt, V. Commonwealth, 26 VA App 363, 372-73 (1998).</u>	<u>25-27</u>
<u>Blue Cross and Blue Shield, V. Philip Morris, Inc., 138 F. Supp. 357, 2001</u>	<u>17</u>
<u>U.S. Dist. LEXIS 4837 (E.D.V. 2001)</u>	
<u>Brady, V. Maryland, 373 US 83 (1963).</u>	<u>22</u>
<u>Chandler, V. Fla., 449 US 560, 574 (1981)</u>	<u>8</u>
<u>Clark, V. Commonwealth, 220 Va 201 (1999)</u>	<u>25</u>
<u>Daniel, V. Lee, 316 F3d 477 (4th cir 2003)</u>	<u>10, 19</u>
<u>Duncan, V. Ornoski, 528 F3d 1222, 1235 (2008)</u>	<u>14</u>
<u>Dyer, V. Calderon, 151 F3d 970, 970-73 (9th cir 1998)</u>	<u>6, 7</u>
<u>Giglio, V. U.S., 405 US 156, 153 (1972)</u>	<u>10</u>
<u>Green, V. Warden, 970 F2d 1355, 1358 (4th cir 1992)</u>	<u>13</u>
<u>Hall, V. Director of Correction, 343 F3d 967 (9th cir 2003)</u>	<u>10</u>
<u>Haywood, V. Commonwealth, 20 Va App 562, 567 (1995).</u>	<u>27</u>

STATUTES AND RULES

<u>Federal Rule of Evidence 701</u>	<u>19</u>
<u>Federal Rule of Evidence 702</u>	<u>19</u>
<u>Federal Rule of Evidence 401</u>	<u>17</u>
<u>Subsection (e) of the Justice Act, 18 USC § 3006 (a)</u>	<u>14</u>
<u>Va Code Section 19.2-264.4 (b).</u>	<u>17</u>
<u>3 Wright, Federal Practice and Procedure Section 553 (1982)</u>	<u>27</u>

OTHER

<u>Thayer Evidence (1889)</u>	<u>17</u>
<u>John E. Thepman, Admissibility of Evidence of Defendant's</u>	
<u>membership in gang, 39 A.L.R 4th 775 (1985) 1d/Supp 1997</u>	<u>17</u>
<u>Jerron L. Ingram, John C. Motter, Criminal Evidence Ninth</u>	
<u>Edition, Justice Administration Legal Series, page 189</u>	<u>17</u>

Continuance of table of Authorities.

Cases	Page Number
Hickman V. Commonwealth, 11 Va. App 369 (1990) aff'd 242 Va 263 (1991).	25
Holladay V. Haley, 209 F2d 1243 (11th cir 2000).	13
Hyde V. Commonwealth, 217 Va 950, 955 (1997)	27
In re winship, 391 US 364 (1970).	25
Inge V. Commonwealth, 217 Va 360, 366 (1976)	27
Johnson V. Armontrout, 961 F2d 748 (8th cir 1992)	6, 7, 8
Lane V. Commonwealth, 219 Va 509, 515 (1978)	27
Littlejohn V. Commonwealth, 24 Va. App 401, 414-15 (1997)	27
Livingston V. Commonwealth, 55 Va 592, 602 (1857)	27
Lord V. Commonwealth, 184 F2d 1081, 1095-96 (1999)	24
Miller V. Anderson, 255 F3d 455, 458-59 (7th cir 2001)	14
Morris V. Commonwealth, 17 Va. App 575, 581 (1994)	25
Mu'Min V. Virginia, 500 US 415, 424-39 (1991)	6, 8
Napue V. Illinois, 360 US 264, 271 (1959)	10
Opanowich V. Commonwealth, 196 Va 342 (1954)	25
Patterson V. Colorado, ex rel. Attorney General, 205 US 454, 462 (1907)	6
Persone V. Miller, 854 F2d 656, 664 (4th cir 1988)	7
Ragland V. Commonwealth, 16 Va. App 913, 918 (1993)	17
Raygoza, 474 F3d 938, 964-65 (2007)	13
Reynoso V. Gurbino, 462 F3d 1099, 1110-20 (9th cir 2006)	16
Rodriguez V. Marshall, 125 F3d 739 (1997)	6
Rosen V. US, 245 US 467, 471 (1918)	13
Sheppard V. Maxwell, 384 US 333, 351 (1966)	6, 8
Smith V. Phillips, 455 US 209 (1982)	1

Soles. V. Cochrell, 342 F.2d 392, 396 (5th cir 2003)	6
Spain. V. Commonwealth, 7 Va. App 385, 393 (1988)	25
Stanley. V. Bartley, 465 F.3d 810 (2006)	13
Strickland. V. Washington, 466 US 668 (1984)	12
Talbert. V. Commonwealth, 17 Va. App 32, 39 (1993)	26
Tibbs. V. Fla., 457 U.S. 31, 38 n.11 and 44 n.20 (1982)	27
Tinsley. V. Borg, 895 F.2d 520 (1990)	7
US. V. Arrington, 757 F.2d 1484 (4th cir 1985)	27
US. V. Bristol-Martin, 570 F.3d 29, 42-44 (2009)	8
US. V. Gonzalez, 214 F.3d 1109 (9th cir 2000)	6, 8
US. V. Gray, 788 F.2d 1031, 1032-33 (4th cir 1986)	6, 8
US. V. Ollivierre, 378 F.3d 412 (4th cir 2004)	19
US. V. Price, 888 F.2d 1206, 1211 (7th cir 1989)	8
US. V. Shipp, 409 F.2d 33, 36-37 (4th cir 1969)	27
Utz. V. Commonwealth, 28 Va. App 411, 418-19 (1998)	17
Watkins. V. Commonwealth, 238 Va. 341, 350 n.3 (1989) - cert. denied 484 U.S. 1020 (1988)	26
Willie. V. Maggio, 737 F.2d 1372, 1379-81 (5th cir 1984)	6
Britz V Thieret, 940 F.2d 226, 232 (7th cir 1989)	8
United States V Beckner, 69 F.3d 1290, 1293-94 (1995)	8
Williams. V. Com, 234 Va. 168, 175 (1987, cert. denied, 484 US 1020 (1988)	25
Stover. V. Com, 222 Va 618, 623 (1981)	27

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

☐ For cases from **federal courts**:

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

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

☒ reported at Rec No: 141714 - 1650-13-3; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Virginia Court of Appeals court appears at Appendix E to the petition and is

☒ reported at 1650-13-3; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was July 25, 2017.

[☒] 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 May 15, 2015.
A copy of that decision appears at Appendix C.

[] 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

Sixth Amendment to the United States Constitution provides in pertinent part as follows: In all criminal prosecutions, the accused shall enjoy the right to a trial by an impartial jury; to be confronted with witnesses against him; and to have the assistance of counsel in his defense.

Fourteenth Amendment to the United States Constitution provides in pertinent part as follows: Nor shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

On May 24, 2012 in Augusta County, Virginia Melvin Jordan ("Jordan") was shot several times. On November 27, 2012 Jordan died of a Pulmonary Embolism. It was alleged at trial that petitioner shot Jordan as the two argued on the ground of the Skyline Motel.

Precious Smith and her brother Traon Jordan testified that they along with Petitioner drove to the Skyline Motel on May 24, 2012 (tr-4-10-2013 pg 120-123, 4-11-2013 pg 7-10).

Traon testified that he dropped Precious and Petitioner at the front of the Motel then drove to the back to wait and heard gunshots. Precious testified that an altercation occurred between Petitioner and Jordan whereupon Jordan tried to "weed out" petitioner's face (tr-4-11-2013 pg 11).

Debbie Sprouse was unable to identify Petitioner as the shooter at trial (tr-4-10-2013, 10103-109). Petitioner was convicted of First degree Murder, Aggravated Malicious Wounding, and Use of a Firearm in commission of a Felony and sentenced to 56 years in prison.

The Virginia's Court of Appeals denied petitioner's appeal April 10, 2014; As did the three judge panel October 30, 2014; and the Supreme Court of Virginia, May 15, 2015.

A timely petition for a writ of Habeas Corpus was then brought to the United States District Court for the Western District of Virginia, and was denied March 10, 2017; as was the same in the United States Fourth Circuit Court of Appeal, July 25, 2017.

Petitioner now bring a petition for Writ of Certiorari to this Court.

REASONS FOR GRANTING THE PETITION

For the Cause as to the state's courts not reviewing, grounds 1-22 are (1) An incorrect Habers Corpus instructional sheet provided by the prison's Law Library (APPENDIX F #87). (2) Petitioner relies on the holding in *Alston v. Garrison*, 720 F.2d 812 (1983).

Petitioner provides the prejudice respectfully within and at the end of each ground.

Grounds 1 and 4

Denial of Sixth and Fourteenth amendment rights to effective assistance of counsel, and a fair trial by impartial jury.

Failure to strike Scott Childress, who at the time of trial was employed by prosecutor's witness Steven Swearingen's Father.

Justice O'Connor reasoned in *Smith v. Phillips*, 455 U.S. 209 (1982) that a court may find a just basis as a matter of law if that person is an employee of the prosecuting agency or a relative of a participating person in the trial. This should apply to Mr. Childress as well. If not, prosecutors would be able to fill jury panels with co-workers, relatives of the witnesses, and or employees of the witnesses' close relatives, effectively breaking the equilibrium of the trial and the fact finding process. Counsel didn't address this ground in his affidavit. Previous court rulings were contrary to Federal Law determined by this court.

Prejudice: Ineffective Assistance / Procedural default.

Mr. Childress may have felt compelled to vote guilty because his boss's daughter was an eye witness for the prosecution, especially if he had suffered emotional trauma that was expressed to Mr. Childress by her father. Counsel's failure to strike facilitated a guilty vote. There's a reasonable probability of a different outcome absent counsel's errors. If this instance of ineffectiveness isn't sufficiently prejudicial itself to require reversal, the cumulative instances of ineffective assistance of counsel clearly create the reasonable probability of a different outcome.

Grounds 2 & 5 Counsel's Failure to Strick Dona Harris.

Denial of the Sixth and Fourteenth amendment rights to effective assistance of counsel, impartial jury, and a fair trial.

Dona Harris followed the case via articles and media (Tr-4-10-2013, p27) which court nor counsel inquired its contents nor its prejudice towards petitioner. Courts must make precise inquiries about content of any new reports read in order to constitute contextual information essential to an accurate assessment of the believability of a juror's profession of impartiality, and a failure must render trial fundamentally unfair, *Mu'Min v. Virginia*, 500 US 415, 424, 439 (1991) and reversible error, *US v. Gray*, 788 F.2d 1031, 1032-33 (4th Cir 1986). She also obtained personal knowledge of the facts, and perhaps petitioner, from her boss, who's land was involved, who obtained it via a Sheriff's officer from the same department investigating the case (Tr-4-10-2013, p27). A juror's private investigation beyond the courtroom must be grounds for reversal because conclusions reached must be deduced only by evidence and argument in open court, not via any outside influence in private talk or public print. *Mu'Min v. Virginia* at 439 (Justices Marshall, Blackmun, and Stevens dissenting) (quoting *Patterson v. Colorado ex. rel. Attorney General*, 205 US 454, 462 (1907); *Shepard v. Maxwell*, 384 US 333, 351 (1966)). The facts she obtained were never inquired, trial court cannot realistically assess the impartiality of a juror without first establishing what a juror already has learned about the case, *Mu'Min v. Virginia* (dissenting opinion at 434) nor its prejudicial effect, id at 424, which is reversible error. *US v. Gray*, at 1032-33. Also bias is implied when a juror is aware of highly prejudicial information about the defendant *US v. Gonzales*, 204 F.3d 1109, 1112-13 (9th Cir 2000). If one juror is influenced verdict is as if all were *Rodriguez v. Marshall*, 125 F.3d 739 (1997); *Johnson v. Armstrong*, 961 F.2d 748, 755 (8th Cir 1992); *Dyes v. Calderon*, 151 F.3d 970, 970-73 (9th Cir 1998); *Solis v. Cockrell*, 342 F.3d 392, 396 (5th Cir 2003); *Willie v. Maggio*, 137 F.3d 1372, 1377-81 (5th Cir 1998) (collecting cases where jurors were apprised of highly prejudicial information). Court and counsel sat Ms. Harris entirely blind to what she in fact already knew about the case based solely on her assertion of impartiality. Content questions is essential to give legal depth to trial court's finding of impartiality. *Mu'Min*

V. Virginia at 442. Additionally, she knew several of prosecution's testifying deputies who handled her son's death two years prior (tr. 4-10-2013 p 20). The court nevertheless inquired the manner in which her son died to ascertain if it was via murder. If it was via murder, her mind would've inevitably turned to her own unsatisfied wrong and her judgment would be so affected thereby as to deprive her the capacity to act impartially, disinterestedly, and dispassionately, which she would've had been emotionally involved in and a victim of a similar crime which would inherently create a substantial emotional involvement, adversely affecting her impartiality. Solis V Cockrell, at 398-99; Tinsley V. Borg, 895 F2d 520 (1990) (quoting Person V. Miller, 854 F2d 656, 664 (4th cir 1988)). Due process requires sufficient voir dire questioning; Johnson V. Armentrout 95 at 754, and a bias juror is a structural defect tantamount to a bias judge id 756, and requires new trial; Dyer V. Calderon, at 970. Counsel must be considered as ineffective assistance of counsel. To conclude that Ms. Harris qualified to sit as a juror, and that petitioner was provided effective assistance and a trial by impartial jury, would be to abolish Voir Dire and the Sixth amendment completely.

Prejudice:

The presence of Ms. Harris prejudiced the trial because she knew several testifying officers; She obtained facts from her boss who obtained it from a sheriff's officer from the same department investigating the case; her son could have been murdered which would've created an emotional involvement in the outcome; and there is no manner to ascertain the amount of influence she may have had on other jurors in their judgement. If this instance of ineffectiveness isn't sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance of counsel clearly creates the reasonable probability of a different outcome.

Grounds 3, 6, 7

Failure to Strive Sharon Eye

Denial of Sixth and Fourteenth Amendment rights to effective assistance of counsel, to a fair and impartial jury, and to a fair trial.

Sharon Eye obtained facts via media and news articles, including that morning article (11/4/10 - 2011 p 26-27). It's recognized that pretrial publicity can prejudice jurors and violate defendant's rights to an impartial jury, (Chandler v. Fla., 449 U.S. 560, 574 (1981)), and deliberations should result from evidence and not external publicity. Sheppard v. Maxwell, 384 U.S. 333, 351 (1966). Court nor counsel inquired if the contents highly prejudiced petitioner, which is reversible error. United States v. Gray, 788 F.2d 1031, 1032-33 (4th Cir. 1986). And a trial court can't realistically assess the impartiality of a juror without first establishing what the juror already has learned about the case. Mu'Min v. Virginia, 500 U.S. 415, 434 (1991). -1) (dissenting opinion).

Moreover, the court never asked, nor did she state, if the aforementioned impacted her ability to, and can she be, and or remain, fair and impartial in rendering a verdict. The Seventh and eighth circuit stated "due process requires the court to undertake sufficient voir dire questioning to produce a reasonably knowledgeable exercise of the right to challenge." Johnson v. Armontrout, 961 F.2d 748, 754 (8th Cir. 1992); Britz v. Thieret, 940 F.2d 226, 232 (7th Cir. 1989); United States v. Price, 888 F.2d 1206, 1211 (7th Cir. 1989). The first circuit found abuse of discretion not to question all jurors regarding their ability to remain impartial. United States v. Bristol-Martin, 570 F.3d 29, 42-44 (2009). While the fifth and ninth circuits found reversible error in allowing jurors to determine their own impartiality regarding pretrial publicity. United States v. Beckner, 69 F.3d 1290, 1293-94 (1995), and a failure to excuse juror for cause, who didn't state they can serve fairly and impartially. United States v. Gonzalez, 214 F.3d 1109 (2000).

It's essential to the purity of trial by jury and the Sixth and Fourteenth amendment rights to an impartial jury and a fair trial, that every juror shall be bias free. The possibility of prejudice or bias isn't so remote as to justify the risks involved in failing

to inquire jurors' ability to be fair and impartial. It would be far too injurious to the Sixth and Fourteenth amendments to permit it to be thought that persons entertaining a disqualifying prejudice are to be allowed to serve as jurors, which might so distort other jurors' judgments as to prevent honest and fair considerations.

Suppose the question had been asked and she had answered such that she couldn't show equal and impartial justice between the state and petitioner. Would it not be immediately seen that she would have been grossly unfit to sit as a juror?

Therefore, the question then becomes, what is the difference between absolutely knowing that a juror can't show equal and impartial justice between the state and defendant, by confirming so themselves, and not asking the question to afford the juror an opportunity to state that they can't show equal and impartial justice between the state and defendant? It can't be reasonably presumed or concluded that counsel wasn't ineffective and that Ms. Eye was without prejudice or bias and fair and impartial in her judgment and verdict, and didn't influence other jurors' judgments and verdicts. To rule against petitioner would be to abolish voir dire proceedings and effectively amending the Sixth and Fourteenth amendments to a trial by impartial jury and a fair trial. In doing so, prosecutors nation wide would be allowed to flood jury panels with neo-nazis in trials with African American defendants, or rape victims in trial for rape, etc. There would be no more true justice in America.

Prejudice: Ineffective assistance / Procedural default

Counsel's failure to strike Ms. Eye was ineffective assistance. Had the court inquired into her ability to be fair and impartial and/or counsel had struck her from the panel, it could have been revealed that she indeed entertained some sort of bias or prejudice against petitioner and wouldn't have served as a juror and possibly influence other jurors' judgments, and could have resulted in a different verdict.

There is a reasonable probability of a different outcome absent counsel's errors. If this instance of ineffectiveness isn't sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance clearly create the probability of a different outcome.

Grounds 8-13

Denial of Sixth and Fourteenth amendment rights to effective assistance of counsel, the confrontation clause, and the Due process clause.

Prosecution introduced into evidence three text messages from James Chisley which one was manipulated, Fax from Tom Jefferson, of which two were manipulated, and one from Robin Reed. (tr-4-11-2013 p 283-85). (1) The first altered message from Tom Jefferson reads: "Now want to move, hit me later on if you get the chance" (See Appendix H message # 82 for original).

Investigator Jenkins proclaimed this message related to the shooting but didn't elaborate further. The second read "make this the last time we talk, I want you to know whenever you come home you are going to live the life you always dreamed of when you get out my niggas" (See appendix H message # 85 for original).

The substitution of "if" into "make" changes it from a statement into a command that implies Mr. Jefferson had knowledge of the shooting and didn't want to communicate further and that an arrest were for seen. The third read:

"I got a plan so we can get rich again" This was used to suggest that the plan to get rich was the alleged \$200 owed to Mrs. Smith from the victim and was therefore motive.

The fourth read "U good niggas" (2) The altered message from James Chisley read "I tried to get away, when can you?" (See appendix H message # 79 for original). This was delivered to imply that it asked when could petitioner get away from the area of the shooting.

The second and third was use to imply guilt. (3) Robin Reed's message read "Whits going on?" Prosecution relied on these messages as adoptive admission and conclusive proof of guilt in closing argument (tr-4-11-2013 p 115-16, 127).

These messages constitutes false evidence and testimony that weren't corrected, which violated the Fourteenth amendment due process clause which forbids prosecutors from knowingly using, or failing to correct, false testimony, and requires reversal.

Giglio v. United States, 405 U.S. 150, 153 (1972); Napue v. Illinois, 360 U.S. 264, 271 (1959); Daniel v. Lee, 316 F.3d 477 (4th cir 2003); Hall v. Director of Correction, 343 F.3d 967 (9th cir 2003).

Moreover, James Chisley, Tom Jefferson, nor Robin Reed never testified at any proceedings or made any statements nor subpoenaed to testify at trial regarding the context & authenticity of the messages, which violated petitioner's Sixth amendment

right to the Confrontation Clause.

Counsel's failures to object to false evidence and testimony, and Confrontation clause denial, and preserve these violations for post-conviction proceedings, and argued them in the appellate courts, must be concluded as to have been ineffective assistance of counsel.

To conclude that petitioner's Sixth and Fourteenth amendment rights weren't denied, would be to conclude that prosecutors are permitted to selectively manipulate irrelevant incoming text messages in a defendant's cell phone, to present them as adoptive admissions and conclusive proof of guilt without having the sender subpoenaed or presented to testify to its context and authenticity, given prosecutors nationwide a certain windfall.

Prejudice = Ineffective assistance / Procedural Default

Counsel's failure allowed jurors to incorporate false evidence and testimony into their fact finding process which certainly contributed to its verdict, and prevented the preservation and presentment of these violations to the appellate courts. There's a reasonable probability of a different outcome absent counsel's errors. If this instance of ineffectiveness itself isn't sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance of counsel clearly creates the reasonable probability of a different outcome.

Ground 14

Denial of the Sixth and Fourteenth amendment rights to effective assistance of counsel and a Fair trial
Failure to present alibi witnesses.

Counsel was well informed that Jaron Keys and Marlon Wright were alibi witnesses. Marlon would've testified that on the early evening of May 23, 2012, he and Sharren picked up petitioner from Precious Smith's house due to an argument between petitioner and Precious over petitioner's communications with Tresha, which Precious admits via phone to haven't seen petitioner since that argument (tr-4-11-2012 p 291). Jaron and Marlon would've testified that Jaron and Land say picked petitioner and Marlon up from Sharren's house May 24, 2012 around 11:00 am to go to the shooting range in Augusta Springs called Mike Hollow Rifle and Pistol Shooting Range and were there from around 11:30 am until after 1:00 pm, then took Marlon and petitioner back to Sharren's house around 1:40 pm. Further, Marlon would've testified that petitioner spent about a hour and a half cleaning the weapons petitioner used at the range and afterwards they played the video game Call of Duty Modern Warfare 3 until about after 4:00 pm, that Jessica and Pooh arrived around 4:30 pm and Jessica, Pooh, Marlon, and Petitioner left at around 4:50 pm to visit Pooh's friend in Warysboro for a gathering, that an argument ensued between Jessica and petitioner over \$35 dollars of gas money she wanted from him that he didn't agree with which led to her putting petitioner out of the car around 5:30 pm near the same lake that the police HQ started its search. Counsel ensured petitioner and Curt that petitioner's witnesses would give testimony (tr-4-10-2013 p 5), and never informed petitioner nor Curt otherwise. The Court stated in *Strickland v. Washington*, 466 U.S. 668, that "the more particular duties of counsel is to consult with the defendant on important decisions" at 674. Moreover, Counsel had ample time before the day of trial to interview Marlon and Jaron, but purportedly waited until sometime during trial (See # 3 of counsel's affidavit - Appendix I). Marlon informed petitioner, when eventually housed in the same unit, that counsel never interviewed him nor Jaron on the day of trial, but merely told the transportation officers that he didn't need them to testify. Even hypothetically assuming that counsel actually interviewed them during an interval, with intention to call them, Counsel wouldn't have had sufficient preparation for an effective direct examination.

of them. Additionally, there isn't any indication in the record of counsel's purported interview of the witnesses' potential testimony. The court in *Stanley v. Backley*, 465 F.3d 810 (2006) held counsel's failure to interview witnesses was deficient and prejudicial. *Id.* The court in *Ruggoza*, 474 F.3d 938 (2007), held such failure as ineffective assistance at 964-65. *See Griffin v. Warden*, 970 P.2d 1355 (4th Cir. 1992) at 1358. The court in *Holladay v. Halper*, 204 F.2d 1243 (11th Cir. 2000), held that an attorney's investigation is not "reasonable within the meaning of *Strickland* when facts of a case supply him with notice that a particular line of potential investigation may substantially benefit his client and he doesn't pursue it."

Furthermore, it's been long recognized that "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court" not the attorney. *Rosen v. U.S.*, 245 U.S. 467 (U.S. N.Y. 1918) at 471.

Prejudice:

The absence of their testimony prevented petitioner from testifying and deprived the court and jury from developing the facts. Their testimony would've established a timeline beginning from May 23, 2012, and given corroborated petitioner's reasons for having guns on his hands, and for being in the area which he told investigators during interrogation.

Ground 15

Denial of Sixth and Fourteenth amendment right to effective assistance of counsel and a fair trial.

Failure to present medical examiner.

Metain Jordan, received several gunshot wounds on May 24, 2012 released from the hospital six days later, and died November 27, 2012 from a Pulmonary Embolism (P.E.). Prosecution's medical examiner Dr. Amy Tharpe was only provided with medical records regarding the shooting, pp 68-70, 81. Some susceptible risk factors are smoking, which produce hyper-coagulated blood, of which Mr. Jordan smoked three packs of cigarettes a day for twenty-five years pre-mortem (p 69-70). A genetic disorder, in which there wasn't any investigation into his family medical history (p 69-70). Dr. Tharpe, was unable to pin point where the clot originated (p 67-68) but opined that it developed in the leg, called Deep Venous Thrombosis (DVT). However, she didn't discover any clots nor its residue upon dissecting his legs (p 67). Subsection (e) of the Criminal Justice Act, 18 U.S.C. § 3006 (a), provides indigent defendants the assistance of all experts necessary for adequate defense. Counsel failed to present expert medical examiner's testimony. Few circuits has found counsel's performances deficient in failing to present expert testimony. Duncan v. Ornoski, 528 F.3d 1222, 1235 (2008), and that a counsel's cross-examination alone could weaken the prosecution's expert evidence, but not to the point of denying it the essential corroborative value for which the prosecutor was using it. Miller v. Anderson, 255 F.3d 455, 458 (10th Cir 2001), and "the minimally competent lawyer would have presented expert evidence to contradict that of the prosecution's expert, id. at 459. The presence and testimony of an expert medical examiner was essential to an adequate defense. Counsel's unsuccessful attempt to argue matter profoundly beyond his purview, that essentially required the expertise of an expert medical examiner under the circumstances in ascertaining causal phy, must be concluded to have been ineffective assistance of counsel.

Prejudice

Had counsel presented an expert medical examiner, to contradict prosecution's expert, the jury would've heard testimony from an expert in the medical field that were contrary to prosecution's expert, which could have contributed to jury's fact finding process. There is a reasonable probability of a different outcome absent counsel's error. At this instance of ineffectiveness, it is not sufficiently prejudicial to require reversal, the cumulative instances clearly creates the reasonable probability of different outcome.

Grand 16

Promotion and encouragement of bias by counsel.

Denial of the Sixth amendment right to effective assistance of counsel.

During voir dire, counsel's statement that "bias is generally a good thing and without it you don't have (inaudible)" was extremely prejudicial towards petitioner and trial proceedings by promoting and encouraging bias (As-4-10-2013 p. 33 line 12-14).

How were the jurors supposed and expected to be fair and impartial towards the defendant and render a fair and impartial verdict, when the very person representing the defendant is promoting and encouraging bias? The reason for voir dire is to find and eliminate those jurors who entertain prejudice and bias in order to preserve the purity of trial, not to promote and encourage it. Ruling against petitioner in concluding that counsel's statement didn't prejudice petitioner and trial, would be tantamount to concluding that defendants no longer has the right to counsel and must fend for themselves, effectively abolishing a significant portion of the Sixth amendment. Therefore previous deciding courts rulings were contrary to clearly established Federal Law, determined by the United States Supreme court, to the Sixth amendment right to effective assistance of counsel.

Prejudice & Ineffective assistance.

Counsel's promotion and encouragement allowed jurors to disregard the evidence presented and subjectively render their verdict. There's a reasonable probability of a different outcome absent counsel's statement. If this instance of ineffectiveness isn't itself sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance of counsel, clearly creates the reasonable probability of a different outcome.

Ground 17

Denial of Sixth amendment right to effective assistance of counsel.
Failure to inquire prosecution's witnesses' motives for their testimony.

Traon Jordan stated that he was threatened with being charged as an accessory to first degree murder if he didn't testify (tr-4-10-2013 p 132-36).

Precious Smith (the older sister of Traon Jordan) stated to petitioner via phone that she was threatened with the loss of her children and perjury, before and during trial, to which she asked for testimonial guidance from prosecution. (tr-4-11-2013 p 15).

Moreover, their brother Jason Jordan was released from prison after petitioner's trial after only serving a few years of a 33 year prison sentence.

The Ninth Circuit found counsel's failure to interview witnesses regarding rewards for their testimony was ineffective assistance because credibility of witnesses was determinative and that failure led to the failure to elicit essential impeachment evidence through cross-examination which would provide reasons for fabricated testimony. *Reynoso v. Giubino*, 462 F.2d 1099, 1110-20 (9th Cir 2006).

Counsel must be concluded to have been ineffective assistance of counsel in light of the aforementioned threats and early release of their brother from prison.

To conclude that counsel's aren't required by law to inquire into the motives of prosecution's witnesses reasons for testifying, would be to permit prosecutors to provide and solicit testimony from vagrants who need the funds or from persons with incarcerated loved ones in order to free them. This would provide prosecutors windfall convictions.

Prejudice:

Had counsel inquired, it could have been discovered that it was coerced, or for monetary reasons, or the early release of their brother from prison, effectively providing the jury with reason to believe they would fabricate their testimony which would have diminished their credibility. If this instance of ineffectiveness isn't itself sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance of counsel, clearly creates the reasonable probability of a different outcome.

Grand 18

Denial of Sixth Amendment right to effective assistance of counsel

Failure to make a relevance objection

Counsel's objection to evidence of gang affiliation was overruled provided that the prosecution establishes petitioner's and others as gang members with affiliation being motive for the crime (tr-4-10-2013 p 220-226). Prosecution then withdrew for post-conviction purposes. However, the substance of prosecution's questioning were calculated to directly solicit responses of affiliation without establishing petitioner's and other's membership and affiliation as motive (tr-4-10-2013 pp 270-271, 282, 285). One principle which forbids receiving anything irrelevant and not logically probative is that nothing is to be received which is not logically probative of some matter required to be proved. THAYER EVIDENCE (1898), Criminal Evidence Ninth Edition, by Jefferson L. Ingram, John C. Klotter, Justice Administration Legal Series, page 189, copyright 2007. If the proposition of fact is not required to be proved under applicable rules of substantive law governing a case, that evidence is not material under Rule 401 and should be excluded from admission to evidence. Thus any evidence introduced solely to prove or disprove a relatively inconsequential fact, directly or indirectly, is irrelevant and should be excluded. Blue Cross of Blue Shields v. Philip Morris, Inc., 138 F. Supp. 357, 2001 U.S. Dist. LEXIS 4837 (E.D.N.Y. 2001). Moreover, Code Section 19.2-264.4(b) doesn't require admission of irrelevant evidence. So the question that needs to be answered is, does the evidence offer a substantially important fact to prove or disprove a charge against the petitioner without being unfairly prejudicial? No, the evidence didn't logically assist the jury's determining an important fact at issue. Bagland v. Commonwealth, 16 Va. App. 913, 918 (1993); Vt2 v. Commonwealth, 28 Va. App. 411, 418-419 (1998), nor a "proper issue," id. at 421. Even relevant inflammatory affiliation evidence has its limits, id. at 419. The real was whether a murder had been committed by petitioner. The answers were solicited only to lure the jury to find guilt for the wrong reasons, which has been recognized on basis of inferences as to the defendant's character id. at 421. John E. Thompson, Admissibility of evidence of defendant's membership in gang, 39 A.L.R. 4th 775 (1985); See id. (supp 1991) (citing additional cases). Rejection of this grand would lead prosecutor's to introduce irrelevant inflammatory character evidence to gain an unjust conviction, thereby, effectively eliminating the Sixth Amendment.

right to a fair trial. Previous deciding court's rulings were contrary to established Federal Law determined by this court.

Prejudice? Ineffective assistance / Procedural default.

Had counsel reobjected and/or raised this on appeal, as was feared by the prosecution, the jury would have been instructed to disregard the evidence as irrelevantly inadmissible, or the appellate courts could have reversed the conviction, or at least it wouldn't be procedurally defaulted.

Grand 19

Denial of Sixth and Fourteenth amendment rights to effective assistance of counsel, and to a fair trial.

Failure to object to false evidence.

Prosecution argued to the jury in closing that Mr. Jordan was "Healthy as a horse" and in "tremendous shape" prior to being shot (tr-4-11-2013 p 109-10). Prosecution's inference stemmed from the Skyline's Motel owner's Mani Patel's testimony that Mr. Jordan moved the bank of the motel three to four times a year. (tr-4-10-2013 p 66-67). Mr. Patel never testified that Mr. Jordan was healthy and in shape. Even if he had testified as such, a lay witness isn't permitted to state an opinion that is inconsistent with or finds no support in the facts. The fact are that Mr. Jordan's medical conditional state prior to the shooting was unclear because the court only obtained records pertaining to the shooting and not prior (tr-4-11-2013 p 69-70, 81).

Moreover, pursuant to Federal Rules of Evidence 701, lay witnesses' opinions can't be based on scientific, technical, or other specialized knowledge within the scope of Rule 702. (Amended, eff. 10-1-87, Apr. 17, 2000, eff. Dec 1, 2000). Also "a prosecutor should not portray matters as fact that are not in evidence." United States v. Ollivierre, 378 F3d 412 (4th cir 2001); Daniels v. Lee, 316 F3d 477 (4th cir 2003). Prosecution's inferences were unreasonably improper and unsupported by the record and facts.

Counsel's failure to object must be considered as ineffective assistance of counsel.

Prejudice: Ineffective assistance.

Counsel's failure allowed the jury to be lulled into believing that the prosecution possessed evidence of Mr. Jordan's alleged healthy conditional state prior to the shooting.

If this instance of ineffectiveness itself isn't sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance of counsel clearly creates the reasonable probability of a different outcome.

Ground 20

Prosecutorial Misconduct / Ineffective assistance

Petitioner's Sixth and Fourteenth amendment rights to effective assistance of counsel and due process of law to a fair trial were denied.

Prosecution argues in its closing argument that petitioner was a "stone cold killer" because he didn't cry during interrogation (tr-4-11-2013 p.114-15), and a "coldly, vile, malicious person" (p.117).

Prosecutors doesn't have hunting licenses exempt from the ethical constraints on advocacy, and must "refrain from improper methods calculated to produce a wrongful conviction" and must use "legitimate means to bring about justice." *Berger v. U.S.* 295 U.S. 78, 88 (1935). The statement implies the existence of evidence of similar prior acts which doesn't exist.

The previous court's rulings is contrary to established Federal law determined by the Supreme Court of the United States.

Prejudice "Ineffective assistance / Procedural Defect / Misconduct."

Counsel's Failures to object left this ground unpreserved for state's court appellate review and on the minds of the jury that the statements were true which could have contributed in its decision.

There's a reasonable probability of a different outcome absent the remarks and counsel's error. If this instance of ineffectiveness isn't sufficiently prejudicial to require reversal, the cumulative instances of effective assistance clearly create the reasonable probability of a different outcome.

Ground 21

Ineffective assistance of Appellate Counsel

Failure to object to false evidence on appeal

In the Commonwealth's Brief in opposition to petition for appeal in the State's Court #16:1650-13-3, Commonwealth falsely argued that Traon Jordan identified petitioner as the individual who was fighting with Melvin Jordan (the decedent) (See Commonwealth's brief in opposition to petition for appeal p8).

There isn't any proclamation of identification by Traon Jordan anywhere in the record. Traon testified that he didn't see the fight or the shooting, but only heard the gunshot.

Commonwealth also falsely argued, according to the Virginia's Court of Appeals conclusion (See Appendix E p3 of the Virginia's Court of Appeals, Pre Curran), that all three witnesses "described the shooter as a young heavyset black male, which is absolutely false. There was no witness whom stated or testified to the features of the shooter beyond hue and hair style.

By this false evidence, it concluded that petitioner "exactly matched" the description of the shooter, and denied the appeal.

The same rule that prosecution's argument cannot roam beyond evidence presented during trial, must also be applicable to appellate argument. If not, prosecutors would be given licenses to create false evidence to argue on appeal.

Prejudice:

Counsel's allowance of fabricated evidence tainted the appellate's court's fact finding process, which were predicated on false evidence. If this instance of ineffectiveness isn't itself sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance of counsel clearly creates the probability of a different outcome on appeal.

Grand 22

Denial of Sixth and Fourteenth amendment rights to effective assistance of counsel, and a fair trial.
Counsel's Failure to present exculpatory evidence and/or object and move for mistrial for Brady Violation purposes.

There existed many telephonic correspondences between petitioner and prosecution's key witness Precious Smith, which petitioner was unsuccessful in procuring (Appendix J), that occurred before and after her grand jury testimony but before trial, which comprised of coerced grand jury testimony via threats of perjury, loss of children, harassment from law enforcement, but the one at issue contained information of the actual perpetrator. Ms. Smith was asked if the exculpatory statement was a "made up story" to which she replied "no", but yet was there to testify in the opposite of truth, she was threatened with perjury, to which she responded with a somewhat subtle request for testimonial guidance. (4-11-2013, p. 15) Trial Counsel's Failure to present this call would have only been the result of:
(1) Counsel's derelictions in conducting reasonable pre-trial investigation rendered him unaware of its existence. (2) Counsel was so ineffective and derelict that he wasn't present of mind to recognize the Brady Violation when it appeared. (3) He recognized the Brady violation but choose to allow it to occur. (4) He knew of the existence of the call but choose not to use it. Or (5) Prosecution failed to disclose the call to counsel prior to trial and calculatedly and deliberately surprised counsel during its direct examination of Ms. Smith, upon attempting to falsify the veracity of her revelation of the actual perpetrator, which could have prevented counsel from adequate preparation for an effective impeachment cross-examination. In the event that a Brady violation occurred, the prosecution had a responsibility to make exculpatory evidence available even when it includes evidence that might help impeach its witness. That duty to disclose is imbedded in the principal that a criminal defendant is deprived of a fair trial when the state withholds exculpatory evidence that is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). Since Ms. Smith was essential to affecting the case and jury, the important facts and assisted in facilitating the introduction of direct and narrative evidence as to what she allegedly observed and heard, she served as the eyes and ears of the court in recreating the operative facts of the crime, and since the suppressed

liberating, revelational statement was of culpability, it was exculpatory and material to guilt and punishment.

In this event, the Brady violation could have been completely cured with an objection and motion for mistrial, which if granted this entire petition wouldn't exist, and it would've adequately supplied counsel with (i) an effective new trial, exculpatory and effectively damaging, impeachment, evidence for the cross-examination of Ms. Smith. to aid the jury, in its fact finding process while wholly disregarding her testimony.

However, if the objection was overruled and the motion for mistrial was denied, Counsel would've then possessed a powerfully effective guilty phase, sentencing phase, closing and appellate argument, and this ground would've been properly preserved for post-conviction review.

Contrarily, if counsel didn't know of the existence of the exculpatory statement but recognized it when it appeared, or knew and choose not to address it in the form of an objection and motion for mistrial, he must be considered to have been ineffective assistance of counsel.

Counsel possessed opportunity and responsibility not only to cross-examine her on the revelation, to introduce exculpatory evidence to the jury that stemmed from her to relate and impeach her testimony and credibility, but also to object, for post-conviction preservation, and move for a motion for mistrial for Brady purposes. In lieu of capitalizing on the opportunity presented, Counsel sat idly which prevented the possibility of a new trial by mistrial and post-conviction preservation and presentment, ipso facto rendering his representation ineffective. In either manner, both the possible Brady violation and or counsel's dereliction, which prevent the possibility of a new trial by mistrial and post-conviction preservation and presentment, deprived petitioner of three substantially guaranteed rights provided by the Sixth and Fourteenth amendment to effective assistance of counsel, Due process of law, and a fair trial, which creates a reasonable probability that the verdict might have been different, and constitutes a new trial.

When examining the cumulative effects of the suppression and or counsel's derelictions, it's axiomatic that if a mistrial had occurred, a new jury would've been impeached thereby,

eliminating all issues in grounds 1-7 and its procedural default. The ninth circuit has held that counsel's failure to investigate evidence of another person as the perpetrator, constituted deficient performance. *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002); *Lord v. Wood*, 184 F.3d 1081, 1095-96 (9th Cir. 1999). Reversing deciding courts decisions were contrary to clearly established Federal law, and to rule otherwise in favor of the oppositen, would result in unfairness and injustice, effectively punishing prosecutor's action with a windfall by not having to disclose exculpatory evidence favorable to the defendant that's material to guilt or punishment. And it would allow counsel to disregard any presentation of exculpatory evidence, which would dramatically interfere with the jury's fact finding process.

Prejudice: Ineffective assistance/Procedural default.

Counsel's ineffectiveness immensely prejudiced petitioner. MS. Smith's testimony was directly related to motive and guilt. Had counsel objected and/or motioned for mistrial, and cross-examined her on the statement, and argued this statement during closing argument, guilty phase, and sentencing phase, and argued this Brady violation in the appellate court's of Virginia, either: (1) (a) the case could have been dismissed (b) the objection would be sustained and the motion for mistrial granted, which would've resulted in a new trial and jury which would have effectively eliminated grounds 1-7 and its procedural default; (c) this would've provided counsel with an extremely powerful, effective and damaging impeachment cross-examination of MS. Smith and to the new jury in a new trial. Or (2) (a) the objection and motion would've been denied which counsel then could have cross-examined MS. Smith regarding the exculpatory statement, and played the recording for the jury, which would've diminished her credibility; (b) Counsel's argument to the jury during closing, guilty phase, sentencing phase of trial could've been more effective and resulted in a different outcome; (c) or this ground would've been properly preserved for, and argued in, the appellate court allowing its review and ruling. And if denied, it would've ^{given} petitioner a better chance in the habeas corpus proceedings because it would not be procedurally barred defaulted. There's a reasonable probability of a different outcome absent counsel's error, and/or the Brady violation. If this instance of ineffectiveness itself isn't sufficiently prejudicial to require reversal, the cumulative instances of ineffective assistance of counsel clearly create the reasonable probability of a different outcome.

Ground 23

Trial Court's Failure to grant Motion to strike evidence of First Degree Murder as insufficient to sustain a conviction.

Every prosecution for murder must prove the corpus delicti comprising of a showing of death, and that death resulted from the criminal act or agency of another. *Clark v. Commonwealth*, 220 Va. 201 (1999); *Opanowich v. Commonwealth*, 196 Va. 342 (1954); *Williams v. Commonwealth*, 234 Va. 168, 175 (1987), cert. denied, 484 US 1020 (1988). Melvin Jordan sustained gunshot wounds May 24, 2012, stayed six days at UVA, and died November 27, 2012 via Pulmonary Embolism (P.E). This doesn't necessarily impose criminal liability upon the accused. *Spain v. Com.*, 7 Va. App. 385, 393 (1988). Unfortunately many die via (P.E) without the intervention of a criminal agency. To prove premeditated murder, Commonwealth must establish (1) a killing, (2) a reasoning process antecedent to the act of killing, (3) the performance of that act with malice intent. *Betancourt v. Com.*, 26 Va. App. 363, 372-73 (1998) (quoting *Archie v. Com.*, 14 Va. App. 684 (1992)). Witnesses testified that the shooter was on his back while the victim stood over him with a weed eater, which are known to contain "razor blades, and tried to weed eat his face," (tr-4-11-2013, p.11) and only then he shot him (tr-4-10-2013, p.105). The evidence shows an act of self-defense without a "reasonable process to form specific intent to kill maliciously." Each element must be proved beyond a reasonable doubt. *Betancourt* id. at 372; *Morris v. Com.*, 17 Va. App. 575, 581 (1994) (Benjamin J. concurring and dissenting) (citing *In re Winship*, 397 US 364 (1970)). Previously deciding courts in the instant case suggest that the malice inherent within the predicate Felony of Aggravated Malicious Wounding constitutes the malice required for First degree murder. In Virginia's Felony-murder cases, the malice inherent in the predicate felony is sufficient to prove malice required for a conviction of second degree murder, *Betancourt* at F.V. 1; see *Hickman v. Com.*, 11 Va. App. 369 (1990) & 242 Va. 263 (1991), but doesn't satisfy the elements of premeditation required for first degree murder. *Betancourt* at F.V. 1; *Archie v. Com.*, 14 Va. App. 684 (1992). Additionally, Felony-murder requires

that death occur within the res gestae of the predicate offense, the two events may not be separated by time, place, or other circumstances. Betancourt at FNI; See Talbent v. Com, 17 Va App 32, 37 (1993). The predicate felony and victim's death were separated by all three. Dr. Amy Thorpe testified that 95% of blood clots form in the legs, known as Deep Venous Thrombosis (DVT), exit it and travel to the lungs (tr-4-11-2013 p 58-60) resulting in (PE). In fact, it's scientifically proven that (DVT's) and (PE's) are pathologically synonymous as 95% of (PE's) stem from (DVT's), to have a linking term (tr-4-11-2013 p 77-78), but Dr. Thorpe specifically referenced in her report that there wasn't any (DVT's) (p 78) along with her inability to pinpoint the precise region the clot traveled from (p 67). Furthermore, she testified that upon dissection of his legs, she discovered zero traces of blood clots nor its residual presence ever existing (pg 67-68). She also testified that big clots causes "Congestive heart failure" (pg 60), and that the victim had "big clots" that blocked vessels the "diameter of a dime" (pg 59), but there wasn't any mention of congestive heart failure in her report nor at trial. One of Virchow's Triad three basic categories of risk factors for blood clots are Hypercoagulable blood which can be engendered from Smoking, or from Genetic or inherited disorders (pg 69-70, 81). The decedent smoked three packs of cigarettes daily for 25 years pre-mortem (pg 69-70) and there wasn't any investigation into his nor his family's prior medical history to ascertain if Hypercoagulable blood was a genetic, or an inherited disorder, or a preexisting condition (pg 68-70). The ascertainment of whether or not it was a preexisting condition was readily available via the availability or the lack thereof "Lines of Zahn" which confirms its a "true clot" formed pre-mortem (p 59), and not post-mortem, but Dr. Thorpe never confirmed nor refuted in her report or at trial, the existence of the lack thereof Lines of Zahn, which hindered the truth seeking process. Proof of the elements includes proof of Corpus delicti. Betancourt at 372; Watkins v. Com, 238 Va 341, 353 n.3 (1999) cert. denied, 494 US 1074 (1990). The (PE) wasn't proven beyond a reasonable doubt to have been the product of a criminal act or agency or another, and proof by circumstantial evidence "isn't sufficient if it engenders"

only a suspicion or probability of guilt nor can a conviction rest upon suspicion and conjecture no matter how strong the suspicion, it's not enough. Betancourt, at 373, 376; Littlejohn v. Com, 24 Va. App. 401, 414-415 (1997) (citing Hyde v. Com, 217 Va. 930, 955 (1997)). Moreover, where a fact is equally susceptible of two interpretations one of which is consistent with the innocence of the accused, the trier of fact cannot arbitrarily adopt that interpretation which incriminates the accused. Betancourt at 375; Littlejohn at 411; Accord Haywood v. Com, 20 Va. App. 562, 567 (1993); See Livingston v. Com, 55 Va. 592, 602 (1857), especially when the necessary circumstances weren't proven as to have been consistent with guilt nor inconsistent with innocence and didn't exclude every reasonable hypothesis of innocence as required. Betancourt at 373; Stover v. Com, 222 Va. 618, 623 (1981) (quoting Inge v. Com, 217 Va. 366, 366 (1976)). From the evidence presented coupled with the lack thereof, the reasonable hypothesis that Mr. Jordan genetically inherited hypercoagulable blood, considering the absence his prior and his family's medical history, or was the product of 25 years of smoking 3 packs of cigarettes daily pre-mortem and a preexisting or an inevitable condition or not post-mortem, with the failure of Dr. Thorpe to state the existence or the lack thereof Lines of Zahn on the blood clot, in her report and at trial is inconsistent with guilt, consistent with innocence, nor is it proof beyond a reasonable doubt that death was the criminal act or agency of another person and the performance of that act with malicious intent required for the corpus delicti and actus reus elements of premeditated murder. Betancourt at 375. Moreover, when the evidence weighs against the verdict, the court should grant a new trial. U.S. v. Arrington, 757 F.2d 1484 (4th Cir. 1985); U.S. v. Shipp, 409 F.2d 33, 36-37 (4th Cir. 1969); See Tibbs v. Florida, 457 U.S. 31, 38 n.11 and 44 n.20 (1982); 3 Wright, Federal Practice and Procedure Section 553 (1982). To hold that the death was the product of a criminal act, when the verdict was based on no more than a possibility is contrary to the medical evidence and the lack thereof and amount to pure speculation and surmise. Lane v. Com, 219 Va. 509, at 515 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerald Ross *[Signature]*

Date: November 4, 2017

City, County of Wise
Commonwealth of Virginia Dept. of Corrections
Subscribed and Sworn Before me this 18th day
of December 20 17, by
Notary Public B. Turnbull
My Commission Expires 6-30-2020

