IN THE CIRCUIT COURT FOR VIRGINIA BEACH, VIRGINIA

Case No.

PETITION FOR WRIT OF HABEAS CORPUS

MICAH PATTERSON, # 1492067,
Petitioner
vs.
HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS, SERVICE ADDRESS: VIRGINIA DEPARTMENT OF CORRECTIONS, 6900 ATMORE DR. RICHMOND, VA 23225,
Respondent.

Counsel
Dale Jensen
Dale R. Jensen (VSB 71109)
Dale Jensen, PLC
606 Bull Run, Staunton, VA 24401
(434) 249-3874
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djensen@dalejensenlaw.com

Petitioner Micah James Patterson ("Patterson") respectfully submits the following:

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief: the Virginia Beach Circuit Court, Virginia Beach, VA.

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):

a. One count of murder first degree – case number CR12003195;
b. One count of child neglect – case number CR12002017;
c. One count of object sexual penetration – case number CR12001865;

3. The date upon which sentence was imposed and the terms of the sentence: On November 6, 2013, Patterson was sentenced by the Circuit Court to life imprisonment plus forty (40) years.

4. Check which plea you made and whether trial by jury: Patterson entered pleas of not guilty and was convicted in a jury trial.

5. The name and address of each attorney, if any, who represented you at you criminal trial. Patterson was represented by Mark T. Del Duca of Slipow, Robusto & Kellam, P. C., Courthouse Marketplace, 2476 Nimmo Pkwy #121, Virginia Beach, VA 23456 and Shawn M. Cline of The Law office of Shawn M. Cline, 4445 Corporation Lane, Virginia Beach, VA 23462.

6. Did you appeal the conviction? Yes.

7. If you answered "yes" to 6, state: the result and the date in your appeal or petition for certiorari. Patterson's appeal was denied. The Virginia Court of Appeals denied Patterson's Petition for Appeal on October 15, 2014. Patterson demanded consideration of his petition by three-

judge panel, which denied Patterson's Petition on February 2, 2015. The Virginia Supreme Court denied Patterson's Petition for Appeal on November 20, 2015.

8. List the name and address of each attorney, if any, who represented you on your appeal. Patterson was represented by Afshin Farashahi of Afshin Farashahi, P.C., One Columbus Center, Suite 604, Virginia Beach, Virginia 23462.

B. Habeas Corpus

1. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court? No.

2. If you answered "yes" to 9, list with respect to each petition: the name and location of the court in which each was filed: not applicable.

3. Did you appeal from the disposition of your petition for habeas corpus? Not applicable.

4. If you answered "yes" to 11, state: the result and the date of each petition: not applicable.

C. Other Petitions, Motions or Applications

5. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. No other

petitions, motions, or applications have been filed with any other court regarding this conviction and sentence.

D. Present Petition

6. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

   a. Ineffective assistance of counsel. Patterson's counsel failed to properly investigate the case or provide testimony and evidence that should have been presented on behalf of Patterson.

   b. Ineffective assistance of counsel. Patterson's counsel also failed to properly prepare to cross-examine or contest the testimony of Robert Fromberg, who was the only witness providing evidence that was not entirely circumstantial.

   c. Ineffective assistance of counsel. Patterson's counsel also failed to retain an expert to create an adversarial test to Dr. Michelle Clayton's trial testimony to properly contest Dr. Michelle Clayton's opinion about the timeline of injuries to Aubrey Hannsz.

   d. Ineffective assistance of counsel. Patterson's counsel also failed to properly prepare and pursue DNA

testing of biological evidence that was not tested by the Commonwealth.

e. Ineffective assistance of counsel. Patterson's counsel also failed to object to the introduction of statements made by Patterson at a time when he was clearly detained, but was never advised of his Miranda rights.

7. List each ground set forth in 14, which has been presented in any other proceeding: not applicable. List the proceedings in which each ground was raised: not applicable.

8. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not: Patterson was not aware of the inadequacy of representation prior to preparing this Petition.

In further support of this Petition, Patterson states the following:

I. Introduction

The Petition should be granted because Patterson's trial counsel was constitutionally ineffective.

Patterson's counsel failed to properly investigate the case or provide testimony and evidence that should have been presented on behalf of Patterson.

Patterson's counsel also failed to properly prepare to cross-examine or contest the testimony of Robert Fromberg, who was the only witness providing evidence that was not entirely circumstantial.

Patterson's counsel also failed to retain an expert to create an adversarial test to Dr. Michelle Clayton's trial testimony to properly contest Dr. Michelle Clayton's opinion about the timeline of injuries to Aubrey Hannsz.

Patterson's counsel also failed to properly prepare and pursue DNA testing of biological evidence that was not tested by the Commonwealth.

Patterson's counsel also failed to object to the introduction of statements made by Patterson at a time when he was clearly detained, but was never advised of his Miranda rights.

II. Background

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. TT at p. 515. The injuries were determined to have been caused by abusive head trauma. TT at p. 516. There was no forensic evidence proving who inflicted the injuries. TT at p. 29.

On August 12, 2013 Patterson was tried by jury in the Circuit Court for the City of Virginia Beach with the Honorable Edward W. Hanson, Judge, presiding. Patterson was convicted of object sexual penetration; child neglect, and murder in the first degree. TT at p. 736-737.

III. Argument

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

The performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

Patterson submits that the second prong of the Strickland test is often referred to as the "prejudice prong," in that a petitioner is required to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In making this determination, a Court hearing an ineffectiveness claim must consider the totality of the evidence before the Judge or Jury. *Strickland*, 466 U.S. at 695.

A. Patterson's Trial Counsel was Constitutionally Ineffective for Failure to Properly Investigate the Case or

Provide Testimony and Evidence that Should Have Been Presented on Behalf of Patterson

After arraignment of Patterson, in which he had pled "not guilty" the court inquired, "All right. I have the Commonwealth's witness list. Is there a defense witness list?" The response from defense counsel was "No Sir, Your Honor." TT at p. 8, l. 9-12.

After the conclusion of the Commonwealth's case defense counsel informed the court, "And Judge, always in discussing the matter with my client at this point—or both of us discussing with our client, we will not be presenting evidence." TT at p. 607, l. 9-12.

Again defense counsel stated before the jury, "Your Honor, the defense has no evidence. And accordingly, Sir, we would rest at this point." TT at p. 618, l. 3-5.

Patterson submits to this Court that in Virginia a person on trial for a criminal offense has the right to introduce evidence of his good character, this follows the theory that it is improbable that a person who bears a good reputation would be likely to commit the crime charged against him. *Gardner v. Commonwealth*, 288 Va 44 (2014); *Byrdsong v. Commonwealth*, 2 Va. App. 400, at 402 (1986).

Virginia Practice of Criminal Procedures § 17:33, Defenses, states that a criminal defendant may prove his good reputation for a particular character trait by presenting evidence of good character. A witness may testify that he or she has

never heard that the accused has the reputation of possessing a certain trait.

Patterson contends that because he had an established right to present witness testimony that defense counsel had a duty and obligation to perform a reasonable investigation into possible witness testimony for the defense.

Given the gravity of the charges against Patterson at trial, and the voluminous testimony against him, defense counsel had a duty to conduct an investigation to obtain character testimony and expert testimony to subject the Commonwealth's case to an adversarial test. Because, as defense counsel stated to the jury, the Commonwealth's case was mostly circumstantial, defense counsel should have presented character testimony that Patterson was not prone to violence, was enlisted in the Navy, did not have a criminal background, and was not abusive in past relationships with women. Defense counsel could have also developed evidence as to Patterson's demeanor and behavior around children, and his proclivity toward anal sex in a relationship, if he had any prior to his relationship with the victim's mother.

Furthermore, the Commonwealth attempted to, and successfully presented to the jury, a "timeline of injuries" to the victim.

On the first day of trial the Commonwealth presented the testimony of Wendy Gunther, M.D., Assistant Chief Medical Examiner. Dr. Gunther testified about injuries to the victim in which iron

had developed, which, according to expert testimony, indicates older injuries. However, Dr. Gunther also testified, "No one knows exactly because children heal so much faster that adults, but a reasonable guess would be a few days before blood starts disappearing to the naked eye and turning to iron." TT p. 212, l. 20-25.

Dr. Gunther further testified that while she classified some of the injuries as, "fresh." she could not "have a clock on that." TT at p. 221, l. 17-18. Even when asked to narrow the time frame for the victim's injuries to a window of "twelve to eighteen hours" she could not do so. TT at p. 229, l. 9-15).

Contrary to the testimony of Dr. Gunther, Dr. Michelle Clayton narrowed down each of the established injuries to the times in which the victim was likely in the custody of Patterson. Not only was this speculation contrary to Dr. Wendy Gunther's expert opinion, it was contrary to her own testimony as well. Dr. Clayton first testified, the "evolution of a bruise is something that varies somewhat depending on the body area where the bruises are inflicted." TT p. 534, l. 2-4. This testimony is at odds with that of Dr. Clayton. TT at p. 546.

It was imperative for defense counsel to challenge the speculation of a timeline offered by the Commonwealth to create the reasonable doubt necessary to convince the jury of Patterson's innocence. The failure to present any evidence at all, expert of character, was detrimental to Patterson's defense. Nothing was offered to contradict the

Commonwealth's theory of the facts, and the jury verdict was based solely on the presentation of the prosecution. The Sixth Amendment to the Constitution demands that a trial must comport to the basic tenets of due process and a fair trial, a trial in which the prosecution's case is subjected to adversarial testing.

Patterson further avers that he had a daughter that was three years old at the time of Aubrey Hannsz tragic death. Patterson's trial counsel had a responsibility to perform a reasonable investigation and identify exculpatory evidence. Among other things, testimony from the mother of Patterson's daughter should have been obtained to show that Patterson had interacted with his daughter and never abused his daughter.

Patterson avers that a witness, Kimberly Brook Williams ("Williams"), called to testify after the jury found Patterson guilty but prior to the jury's sentencing verdict. Williams should have been called as a character witness in Patterson's defense during the trial itself.

The failure of Patterson's trial counsel to adequately investigate and present character witnesses to testify on Patterson's behalf was objectively unreasonable and thus fell below the *Strickland* standard.

The outcome of Patterson's trial would likely have been different if evidence in Patterson's favor would have been prepared and presented. The jury at Patterson's trial was presented with an

uncontroverted barrage of negative testimony about Patterson. Positive testimony about Patterson's character, which was readily available if trial counsel would have pursued it, would likely have created a reasonable doubt in the case.

B. Patterson's Counsel Also Failed to Properly Prepare to Cross-examine or Contest the Testimony of Robert Fromberg, Who was the Only Witness Providing Evidence that was Not Entirely Circumstantial

The Commonwealth called Robert Fromberg, a jail inmate, as a trial witness. TT at p. 455. Fromberg testified that he had met Patterson in the Virginia Beach Jail. TT at p. 456. Fromberg testified that the Patterson had told him "...he was watching his roommates niece who was four years old and while she slept he fingered her and when she woke up crying he put a pillow over her face until she stopped crying and now she can't cry no more." TT at p. 460, l. 3-8.

Under cross-examination, Fromberg was asked, "How many people have you called to get information on this case?" TT at p. 471, l. 23-24. Fromberg responded by repeating the question. Defense Counsel then asked, "Did you call people outside and ask them to look up the Patterson case?" TT at p. 472, l. 1-2. To which Fromberg replied, "Never." TT at p. 472, l. 3.

At the conclusion of the Commonwealth's

evidence, and a brief recess, defense counsel informed the Court of a phone call from "John Martinez" with regard to the testimony of Robert Fromberg. Defense counsel concluded, "Mr. Martinez would not have been helpful or— to our defense." TT at p. 606-607.

After disclosing the phone call from John Martinez, Defense counsel informed the Court. "And Judge, always in discussing the matter with my client at this point--or both of us discussing with our client, we will not be presenting evidence." TT at p. 607, l. 9-12.

Again, defense counsel stated before the jury, "Your Honor, the defense has no evidence. And accordingly, sir, we would rest at this point." TT at p. 618, l. 3-5.

In presenting a closing argument to the jury defense counsel stated, "I said earlier, members, that the case was entirely circumstantial, and that was unfair to the Commonwealth because it's not. They have one piece of evidence, but one, that is not circumstantial. One piece of what we call direct evidence. They have a confession. And the source of that confession is Mr. Fromberg..." (TT at p. 684, l. 11-17)

As defense counsel argued before the jury, the evidence, with the exception of Fromberg's testimony, was circumstantial. To challenge the credibility of Fromberg defense counsel relied upon cross-examination to reveal inconsistencies and inaccuracies, defense counsel made reference to, but

failed to produce evidence of, phone calls in which Fromberg obtained facts alleged in his testimony from people on the outside.

The jury became aware that phone calls from the jail were recorded when the Commonwealth played thirty (30) seconds of a phone call in which Patterson stated he knew Fromberg. (Commonwealth's Exhibit #32, introduced to jury. TT at p. 599, and referred to TT at p. 645, l. 9-16).

This line of questioning, without proof, was gravely prejudicial to the Patterson. Because the Commonwealth played an audiotape of Patterson's phone call from jail, to an outside person, the jury reasonably expected to hear an audiotape of Fromberg getting information from an outside source. Defense counsel should not have pursued this line of questioning because without proof it only bestowed more credibility on Fromberg and the Commonwealth's case against Patterson.

The preparation for this trial required thorough investigation of any witness whose credibility is questionable. Especially when the witness is a convicted felon in jail for new charges, and looking for favorable treatment from the Commonwealth.

Any phone calls made by Fromberg from the jail would have been accessible and obtainable to defense counsel. Any objectively reasonable defense counsel should and would have investigated and obtained such evidence. However, in the instant case at bar defense counsel's actions were inadequate and

prejudicial. Accordingly, the deficient performance prong of *Strickland* is met.

The closing arguments of the Commonwealth prove the adverse effect of counsel's failure to properly investigate or present audio recordings, or other evidence, of Fromberg getting details of the case from sources other than the Commonwealth.

> Now, Mr. Del Duca [Defense Counsel] in cross-examination said, Well you know, hey, who did you call? What, are your family members to get the details of this case so you come and talk to us about it? You know, implying that, you know, he didn't really have the conversation with Mr. Patterson but that he got it from somewhere else."

TT at p. 644-645.

Defense counsel failed to conduct a proper investigation to determine if, and when, Fromberg actually obtained the facts of the case from phone calls, from jail inmates, or from some other sources. In asking questions which he did not know the answers to, he harmed the Patterson's defense, prejudiced Patterson, and allowed the Commonwealth to effectively argue the point to the jury that Fromberg had actually gotten his information from Patterson.

Because Fromberg's testimony was the only non-circumstantial evidence connecting the Patterson to the alleged crimes, defense counsel had

a duty to investigate and prepare for trial. Defense counsel's argument to the jury, in closing argument, was, "Members, the Commonwealth has presented a case that relies almost entirely upon circumstantial evidence, no eyewitnesses, no confession, "with the exception of Mr. Fromberg." TT at p. 648-649.

C. Patterson's Counsel Also Failed to Properly Prepare and Present Expert Witness Testimony to Properly Contest Dr. Michelle Clayton's Opinion about the Timeline of Injuries to Aubrey Hannsz

As their final witness the Commonwealth called Michelle Clayton, MD, a doctor specializing in general pediatrics and child abuse pediatrics. TT at p. 506-508. Dr. Clayton was offered without objection, as an expert in child abuse pediatrics.

It was Dr. Clayton's testimony that the victim suffered from a brain injury "so severe and so widespread that her brain swelled up in response to the injuries she had suffered." TT at p. 514, l. 7-9. She further testified that as a result of the swelling, blood flow to the brain was cut off and the victim was "ultimately removed from life support and died." TT at p. 514–515.

Dr. Clayton's expert opinion was, "Aubrey was a victim of abusive head trauma, which is commonly called Shaken Baby Syndrome. And she also suffered many other injuries, inducing blunt force trauma to her chest and abdomen and pelvis, blunt

force trauma, and strangulation injury." TT at p. 516, l. 6-11.

Upon discovery that Aubrey Hannsz had an injury to her anal area, Dr. Clayton collected a physical evidence recovery kit to obtain any DNA evidence that was not the victim's. TT at p. 518, l. 4-14.

The Commonwealth asked Dr. Clayton to "describe the evolution of a bruise." In her response Dr. Clayton stated, "So how a bruise evolves varies depending upon the body area. But in general you may not see a bruise immediately after an injury-has been inflicted." TT at p. 534, l. 22-25.

The Commonwealth asked Dr. Clayton, "do you have an opinion to a reasonable degree of medical certainty as to whether or not this anal injury could have occurred on Tuesday morning?" TT at p. 545, l. 14-16. When Dr. Clayton's responded, "yes, I do", Defense counsel objected based on foundation and that a standard development of bruising had not been presented. TT at p. 545, l. 17-25. The court allowed the Commonwealth to continue questioning as an experience question and a "question of reasonable degree of medical certainty." TT at p. 546, l. 1-4)

It was Dr. Clayton's testimony that the injuries to the victim occurred Tuesday evening because "...redness was noted when she got to Virginia Beach General at about 8:30 in the evening. And by the time I'd examined her in the early hours of Wednesday morning, it had progressed to

extensive bruises, lacerations, and swelling." TT at p. 546, l. 13-17.

Dr. Clayton further testified, that she had the opportunity to speak to Patterson, the mother of the victim, and the grandmother. TT at p. 559, l. 4-13. It was also Dr. Clayton's testimony that Aubrey Hannsz had "suffered more than one episode of abusive head trauma prior to her death." (TT at p. 560, l. 2-3)

After a brief recess by the court, Dr. Clayton's testimony focused on the victim's symptoms days before her death. TT at p. 562-569).

Under cross-examination Dr. Clayton agreed that bruising would occur more quickly and disappear more quickly in highly vascular areas of the body. She further agreed that there is a variance from individual to individual. TT at p. 587, l. 4-19)

Defense counsel questioned Dr. Clayton in regard to the conclusion that there was more than one shaking event of the victim. Defense counsel also questioned Dr. Clayton about her conclusion with regard to her determination of when the victim was alone with Patterson, Gary Murawski, and Samantha Murawski. TT at p. 592-593). Dr. Clayton stated that she had talked to Patterson and Samantha Murawski, but did not speak to the grandfather of the victim, Gary Murawski. TT at p. 593, l. 15-23.

Dr. Clayton admitted that she couldn't "specify a time range," for some of the injuries and "Dr. Gunther is more familiar with the entire range of

findings that might be discovered." TT at p. 596.

In certain circumstances, a constitutionally adequate defense requires expert witness testimony. *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985). For example, a counsel's failure to pursue an adequate expert investigation of potentially exculpatory serological evidence in a sexual assault case constitutes ineffective assistance of counsel. *Baylor v. Estelle*, 94 F.3d 1321 (9th Cir.1996), cert, denied 520 U.S. 1151 (1997)

Patterson avers that his prior counsel's representation fell below an objective standard of reasonableness, considering the evidence in his trial. It was the testimony of Dr. Michelle Clayton that she collected swabs from the victim's body, known as a PERK. TT at p. 518. This evidence would have been listed, or disclosed, by the Commonwealth prior to trial. The results, or lack thereof, would also have been known to the defense counsel.

In addition to Dr. Clayton, the Commonwealth presented the testimony of Dr. Wendy Gunther, an Assistant Chief Medical Examiner. Defense counsel was notified these experts would testify at the trial, and reports from each of these doctors should have been part of the record. It was defense counsel's duty to investigate and review these reports to develop a strategy of defense, and to particularly to obtain expert testimony to counter the opinion of Dr. Clayton.

For these reasons, the performance of Patterson's former counsel fell below the *Strickland*

performance prong standard.

The prejudice prong of the *Strickland* standard is met because had defense counsel presented expert testimony to counter that offered by Dr. Clayton, not only would it have created an adversarial test of the evidence, it would likely have changed the outcome of the trial. As it was presented to the jury, this case did not include any contrary evidence to the jury showing that someone other than Patterson could have committed the crime. The performance of Patterson's trial counsel fell far short of the effective assistance envisioned within the Sixth Amendment to the United States Constitution.

Patterson was left with no defense at trial, could not counter any of the evidence or testimony offered by the Commonwealth, and was found guilty by the jury based on the largely uncontested testimony of Fromberg, circumstantial evidence, and speculative testimony by Dr. Michelle Clayton. It was Dr. Clayton's testimony that the evolution of the injuries established a timeline, which was a highly speculative timeline, in which only Patterson was with the victim. This timeline was apparently accorded great weight with the jury as Dr. Clayton was designated as an expert witness.

Defense counsel did not present his own expert to testify that people with injuries heal at different rates due to their metabolic rate, the area of the body where the injury occurs, whether the person is asleep or active, and the degree to which a person is susceptible to bruising. Given these many factors, a

medical expert testifying on Patterson's behalf would have provided evidence that Dr. Clayton's timeline was speculative and that likely would have been sufficient to prove reasonable doubt as to Patterson's guilt.

Accordingly, the performance prong of the *Strickland* test is met.

D. Patterson's Counsel Also Failed to Properly Prepare and Pursue DNA Testing of Biological Evidence that was Not Tested by the Commonwealth

As stated supra, Dr. Clayton testified that she "collected the physical evidence recovery kit" ("PERK"). TT at p. 517-518.

Dr. Clayton testified that after collecting the PERK she submitted it to the police department. TT at p. 519, l. 21-24; p. 597-98. Dr. Clayton stated that "A PERK Kit is used to collect evidence that may be on a child's or a person's body." TT at p. 598, l. 10-11. Dr. Clayton further testified, "well, the purpose of the PERK Kit is to collect any foreign DNA and foreign fibers and hairs on a child's body or a person's body because, of course, they're not just used in children." TT Page 598, Lines 18-21.

The Commonwealth presented the testimony of Betty Jane Blankenship, a forensic analyst employed by the Virginia Department of Forensic Science in Norfolk, Virginia. TT at p. 436, l. 13-22.

Ms. Blankenship testified as to what is "appropriate for DNA tests" and stated "we--we test

body fluids, of course, blood, seminal
fluid. Any kind of perspiration we test for. For instance, on
clothing. Everybody leaves cells behind in perspiration. TT at p. 438, l. 19-24.

It was Blankenship's testimony that while she did test samples for spermatozoa, which were negative, she "DID NOT take it forward through DNA." TT at p. 441, l. 5-9. In cross-examination Ms. Blankenship testified that there is no test to detect sweat (perspiration). TT at p. 450, l. 5-10.

Proper investigation by Patterson's defense counsel necessarily included investigating the DNA test. It is objectively unreasonable, in a case like this that was nearly entirely based upon circumstantial evidence, for Patterson's trial counsel not to have performed an investigation and have samples tested that were not tested by the Commonwealth. The performance prong of *Strickland* is met by the objectively unreasonable failure to investigate.

Patterson was prejudiced because the trial outcome would likely have been different had testing been run on the untested samples, which could have implicated someone else in the injuries and death of Aubrey Hannsz.

E. Patterson's Counsel Also Failed to Object to the Introduction of Statements Made by Patterson at a Time When he was Clearly Detained, But was Never Advised of his Miranda Rights

On January 10, 2012, Sgt. Thomas Shattuck responded to a call for "an infant in cardiac arrest." TT at p. 371-72. Upon arrival at 1120 Ocean Trace Arch, Apartment 103, Virginia Beach, Virginia, Sgt. Shattuck observed, "Mr. Patterson was in the kitchen standing with Officer Savino. They were having a conversation, and Bill Morrow was just kind of standing back by the front door." TT at p. 373, l. 17-20.

Sgt. Shattuck testified at Patterson's trial that as has been his experience, "as part of the investigation...it's possible there could be a Shaken Baby Syndrome case or an abuse case." TT at p. 374-75. Sgt. Shattuck testified that he asked Patterson if it was okay "for police to be in the apartment." TT at p. 375. Under cross-examination Sgt. Shattuck testified that at that point the apartment became a crime scene. TT at p. 383-384.

Prior to the arrival of Sgt. Shattuck, the responding Officer, Darrin C. Savino, was on scene, and had actually been the first Officer to come into contact with Patterson and the victim. Officer Savino testified, "I know my job description pretty much changed after the child left." TT at p. 397. Savino further testified

> … and once the child left and, as I said, the condition of the baby, I felt the investigative part would now begin."
>
> **Q.** Based on your years as a police officer you thought it was maybe

criminal activity?"

A. Yes, Sir.

Q. Okay. And you indicated you secured the scene and you limited the movement of the defendant, is that correct?

A. Yes.

Q. Okay, Was he free to leave?

A. Not at that point.

TT Day 2, Page 412.

Under these circumstances, Patterson was in the custody of the police. *Stansbury v. Cal.*, 511 U.S. 318, 323 (1994). The test for determining whether a person in custody is objective, not subjective, and what the suspect thinks is irrelevant. *Id.* If a reasonable person in the suspect's position would have understood that he or she was under arrest, then the police are required to provide Miranda Warnings. *Id.*

The facts, as presented in the testimony of Sgt. Shattuck and Officer Savino establish that at the time they spoke to Patterson, Patterson was in custody, and he should have been provided Miranda Warnings as subsequent comments, statements, questions, and lack of questions were used against him at trial.

Officer Savino is a Master Police Officer with almost twenty-four years on the job, and was the

first officer to respond to Patterson's apartment for a call of an infant or a small child in cardiac arrest. TT at p. 387-388. "Fairly soon after the child had left" the apartment Patterson asked to use the restroom. TT at p. 396-97. Officer Savino conducted a "sweep" of the bathroom before allowing Patterson to enter, and then stood outside the door while Patterson used the bathroom. TT at p. 397. Officer Savino limited Patterson's movements, and detained him in the kitchen while Officer Minter secured the front door. TT at p. 398.

When asked if he was questioning or interrogating Patterson, Officer Savino responded with "No, Ma'am," and stated they talked about the military. TT at p. 400. Contrary to Officer Savino's testimony, Sgt. Shattuck testified that Patterson was "answering Officer Savino's questions." TT at p. 380. Sgt. Shattuck further testified that Patterson was also answering his [Shattuck's] questions. TT at p. 380, l. 19-20.

For the purposes of Miranda requirements, Patterson was detained by Officers Savino, Minter, and Morrow. Patterson was also questioned and interrogated by Officer Savino and Sgt. Shattuck. Therefore, Patterson should have been Mirandized at the time his apartment was considered a crime scene, he was detained, and Officers questioned him. Because he was not informed of his Miranda rights, any questions he asked Officers, and any statements he made, are inadmissible at trial. Additionally, any evidence collected from the apartment is fruit of the

poisonous tree, and should not have been admitted.

Statements of the police concerning the statements and demeanor of Patterson were highly prejudicial to Patterson at trial. In particular, the Commonwealth placed great emphasis on Patterson not inquiring about the condition of Aubrey Hannsz. See, e.g., TT. at p. 405. It is objectively unreasonable that Patterson's trial counsel did not object to the admissibility of all statements by Patterson before he received *Miranda* warnings. The performance prong of *Strickland* is met by this failure to object and the admission of the statements of Patterson as evidence.

It is likely that the outcome of the trial would have been different had the statements of Patterson been excluded. The statements of Patterson that were recited at trial were highly prejudicial and placed Patterson in a very unfavorable light to the jury. Had these statements been excluded, it is likely that the outcome of the trial would have been different.

IV. CONCLUSION

For all of the reasons discussed herein, Patterson respectfully and humbly requests that this Court grant his Petition, reverse the Circuit Court convictions, order Patterson's immediate release, and grant any other relief this Court may deem Just and Proper.

RESPECTFULLY SUBMITTED,

By:_____
Counsel

Dale R. Jensen (VSB 71109)
Dale Jensen, PLC, 606 Bull Run, Staunton, VA 24401
(434) 249-3874;(866) 372-0348 facsimile
djensen@dalejensenlaw.com
Counsel for Micah Patterson

Signed sealed and delivered in the presence of:

STATE OF VIRGINIA)
)
COUNTY/CITY WISE)

The petitioner being first duly sworn says
1. He signed the foregoing petition
2. The facts stated in the petition are true to the best of his information and belief.

Executed on 11-21 , 2016

Micah Patterson
MICAH PATTERSON 1492067
Wallens Ridge Correctional Center
272 Dogwood Drive
P. O. Box 759
Big Stone Gap, VA 24219

Subscribed and sworn before me this 21st day of November 2016

Ernie M Williams /s

Notary Public
My term expires 12/31/18

ERNIE M. WILLIAMS – COMMONWEALTH OF VIRGINIA – NOTARY PUBLIC REG #7610608 MY COMMISSION EXPIRES 12/31/2018

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICAH PATTERSON, #1492067

Petitioner,

v. Case No. CL15-5306

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

MOTION TO DISMISS

The respondent, by counsel, moves this Court to dismiss the petition for a writ of habeas corpus and in support thereof says as follows:

Procedural History

1. The petitioner is confined pursuant to a final judgment of this Court entered on November 12, 2013. Following a jury trial, Patterson was convicted of first-degree murder for death of four-month-old A.H, in violation of Code § 18.2-33, object sexual penetration, in violation of Code § 18.2-67.2, and felony child neglect, in violation of Code § 18.2-

371.1 (A).[1] The jury sentenced the petitioner to a total sentence of life in prison plus 40 years. (Exhibit A, Sentencing Order, Case Nos. CR12-1865, CR12-2017, CR12-3195).

2. Patterson was represented at trial by Shawn M. Cline and Mark T. Del Duca.

3. Patterson appealed his conviction to the Court of Appeals of Virginia, where he was represented by Afshin Farashahi. On appeal, he asserted that the trial court erred in denying his Motion in Limine and challenged the sufficiency of the evidence of his identity as the perpetrator. On October 15, 2014, the Court issued a *per curiam* order denying his petition for appeal. Patterson appealed this decision to a three-judge panel of the Court of Appeals, which denied his petition for appeal on February 2, 2015. (Exhibit B, Orders, Record No. 2359-13-1). Similarly, on November 20, 2015, the Supreme Court of Virginia refused Patterson's petition for appeal to that Court. (Exhibit C, Record No. 150356).

4. On November 22, 2016, the petitioner, by counsel, filed the instant habeas petition in this Court. In his petition, Patterson raises the following allegations:[2]

a. Ineffective assistance of counsel. Patterson's counsel failed to properly investigate the case or provide testimony and evidence that

should have been presented on behalf of Patterson.

i. Counsel failed to present general character evidence including that the petitioner was not violent and a good parent;
ii. Counsel failed to present testimony about the petitioner's sexual proclivities;
iii. Counsel failed to call Kimberly Brook Wilkins, who testified at sentencing, in his case-in-chief; and
iv. Counsel failed to present expert testimony to challenge the Commonwealth's timeline of injuries.

b. Ineffective assistance of counsel. Patterson's counsel also failed to properly prepare to cross-examine or contest the testimony of Robert Fromberg, who was the only witness providing evidence that was not entirely circumstantial.
c. Ineffective assistance of counsel. Patterson's counsel also failed to retain an expert to create an adversarial test to Dr. Michelle Clayton's trial testimony to properly contest Dr. Michelle Clayton's opinion about the timeline of injuries to [A.H.].

d. Ineffective assistance of counsel. Patterson's counsel also failed to properly prepare and pursue DNA testing of biological evidence that was not tested by the Commonwealth.

e. Ineffective assistance of counsel. Patterson's counsel also failed to object to the introduction of statements made by Patterson at a time he was clearly detained, but was never advised of his Miranda rights.

(Pet. 4).

Statement of Facts

5. The evidence at trial, as summarized by the Court of Appeals, was:

> The evidence proved that in November 2011, S.M. began dating appellant, and on January 5, 2012, S.M. and her four-month-old daughter, A.H., moved into appellant's residence. On January 8, 2012, S.M.'s father watched A.H. while S.M. was at work. At approximately 3:00 p.m., appellant picked up A.H. and appellant cared for A.H. until S.M. returned. On January 9, 2012, S.M. took A.H. to see Dr. Debbie Holland because A.H. had a fever and was fussy. Dr. Holland did not notice any bruises on A.H.'s abdomen, pelvis, neck, or

anus. On January 10, 2012, S.M. noticed two thumbprint shape bruises on A.H.'s pelvis and appellant told S.M. he did not know how the bruising occurred. While appellant cared for A.H., S.M. left the residence and went to the courthouse to change her address. Appellant called S.M. and said that A.H. looked lifeless. After S.M. called Dr. Holland, S.M. tried to feed A.H. small amounts with a syringe as directed by Dr. Holland. Later, appellant and S.M. went to the mall, and while S.M. changed A.H.'s diaper, S.M. noticed a bruise on A.H.'s abdomen. S.M. called the doctor's office and told appellant they needed to go home.

While waiting for the doctor's office to return the call, S.M. rocked A.H. and put her in the crib. While on the phone with a nurse, appellant pulled up S.M.'s dress, she told him to stop, but he continued. After S.M. completed the phone call with the nurse, S.M. and appellant had vaginal sex and appellant also tried to have anal sex, but S.M. refused. After they finished, S.M. went to the store and appellant remained with A.H. Prior to S.M. returning, appellant called 911 at 8:03 p.m. because AH. Was not breathing. A.H. was transported to a hospital. Dr. Michelle Clayton, an expert in child abuse pediatrics, examined A.H. and noticed several areas of bruising,

including an intense purple coloring around her anus, as well as swelling and lacerations. Dr. Clayton testified the injuries to A.H.'s anus were caused by severe blunt trauma. On January 11, 2012, A.H. was pronounced dead. Dr. Wendy Gunther, the assistant chief medical examiner, testified to A.H.'s numerous injuries and explained A.H.'s anus had a ring of purple bruising around it that went into the anal canal a quarter of an inch and contained microscopic tears. According to Dr. Gunther, this type of injury was associated with sexual abuse and it was a fresh injury.'

According to S.M., prior to January 10, 2012, appellant requested to have anal sex several times, but she did not enjoy it and thought it was painful. She informed appellant, appellant suggested an anal numbing cream, and at some point, appellant inserted the cream into S.M.'s buttocks using a syringe.

After appellant was arrested, the authorities found photographs on his cell phone. One photograph showed S.M.'s buttocks with a syringe in her buttocks. A second photograph showed S.M.'s buttocks with words appellant had written on her buttocks. Appellant wrote A.H.'s name, "enter here,"

"open all the time," and "my ass loves Micah's dick" on S.M.'s buttocks.

* * *

[Relating to A.H.'s other injuries, the Court found that when] A.H. arrived at a hospital in Virginia Beach, she was not breathing on her own and she had red marks on her neck and anus. A.H.'s diaper was dirty and was changed.

A.H. was transported to Children's Hospital of the King's Daughter (CHKD) for further treatment. Dr. Clayton examined A.H. and collected vaginal and anal swabs, which were sent for analysis.[3] Dr. Clayton saw an oval bruise on each side of the pelvis, one bruise on the abdomen, several areas of bruising around the neck, an intense purple coloring around the anus with swelling and lacerations, and symptoms associated with severe brain injury. Dr. Clayton testified it was unusual to see bruising in a four-month-old baby because they did not move around. Dr. Clayton testified that when A.H. arrived at the Virginia Beach hospital, A.H.'s neck and anus only had red marks, but that when she arrived at CHKD, the red marks had developed into bruises. Dr. Clayton testified since the injuries

were changing, they were recent injuries and occurred on the evening of January 10, 2012. Dr. Clayton testified [a] ligature was applied more than once to A.H.'s neck because there were several bruises on different planes. When describing the anal injuries, Dr. Clayton testified they were caused by severe blunt force trauma. Dr. Clayton also described A.H.'s neck, spine, and head trauma, and she testified A.H. experienced three separate episodes of abusive head trauma, one on January 9, one on the morning of January 10, and one on the evening of January 10, 2012.

Dr. Gunther testified A.H. died from abusive head trauma consistent with shaken baby syndrome. Dr. Gunther testified in detail regarding A.H.'s injuries, which included rib fractures, retinal hemorrhages, bruises, and the anal injury. Dr. Gunther found iron in several of A.H.'s organs, which was indicative of old injury. Dr. Clayton testified the iron in A.H.'s organs could be the result of earlier shaking episodes.

Robert Fromberg, an inmate in the jail, testified he met appellant and appellant said he was incarcerated for murdering a child. Fromberg testified appellant said he was watching his roommate's four-year-old niece,

> he "fingered" her, she woke up crying, and he put a pillow over her face to stop the crying. Fromberg admitted he was a convicted felon and had pending felony charges.
>
> The authorities determined that from January 11 through January 12, 2012, appellant used his phone to conduct several internet searches with the terms "blood around infant's brain," "shaken baby syndrome," and "abusive head trauma." On January 11, 2012, appellant received a text message from a woman stating that S.M. probably committed the crimes and that he should not take the blame. Appellant responded that it was not S.M. and that she would never hurt A.H.

(Exhibit B, Record No. 2359-13-1)

Argument

THE PETITION IS UNTIMELY

6. The Court cannot consider the merits of Patterson's claims because his petition is untimely.

> A habeas corpus petition attacking a criminal conviction or sentence...shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time

> for filing such appeal has expired, whichever is later.

Code § 8.01-654(A)(2).

7. Final judgment in the instant case was entered on November 12, 2013. (Exhibit A, Final Order). Direct appeal concluded on November 20, 2015, when the Supreme Court of Virginia denied Patterson's petition for appeal. Because one year from the conclusion of his direct appeal is the later date, pursuant to Code § 8.01-654(A)(2), the petitioner had until November 20, 2016, to file his habeas corpus petition. Because November 20, 2016 was a Sunday, the petitioner had until Monday, November 21, 2016 to file. See Code § 1-210. The instant petition was filed on Tuesday, November 22, 2016. Patterson, therefore, has filed his petition one day too late.[4]

8. Virginia Code § 8.01-654(A)(2) "contains no exception allowing a petition to be filed after the expiration of these limitations periods." Hines v. Kuplinski, 267 Va. 1, 2, 591 S.E.2d 692, 693 (2004). Regardless, Patterson's multiple allegations of ineffective assistance of counsel involve errors from the trial itself. The grounds for relief asserted in his petition, therefore, could have been discovered within the period established by Code § 8.01-654(A)(2), and he does not assert otherwise. Contrast Hicks v. Director. 289 Va. 288, 768 S.E.2d 415 (2015)

(acknowledging petitioner's timely filing was obstructed by a Brady violation). Accordingly, Patterson's petition is untimely and must be dismissed.

THE PETITION ALSO FAILS ON THE MERITS

Standard of Review

9. Claims of ineffective assistance of counsel are determined based on the highly demanding standard set forth for such claims in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the petitioner has the burden to show both that his attorney's performance was deficient and that he was prejudiced as a result. See Strickland, 466 U.S. at 687. "Unless [the petitioner] establishes both prongs of the two- part test, his claims of ineffective assistance of counsel will fail." Jerman v. Director of the Department of Corrections, 267 Va. 432,438, 593 S.E.2d 255, 258 (2004). This two- part analysis presents a "high bar" to petitioners. Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

10. The first prong of the Strickland test, the "performance" inquiry, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The petitioner first "must show that 'counsel's

representation fell below an objective standard of reasonableness.'" Shaikh v. Johnson. 276 Va. 537, 544, 666 S.E.2d 325, 328 (2008) (quoting Strickland, 466 U.S. at 687-88).

11. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Richter, 131 S. Ct. at 788 (quoting Strickland, 466 U.S. at 690). "'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Knowles v. Mirzavance, 556 U.S. Ill, 124 (2009) (quoting Strickland, 466 U.S. at 688). See DeCastro v. Branker, 642 F.3d 442,451 (4th Cir. 2011) (pertinent inquiry is not which strategy is best, but whether strategy counsel chose is reasonable). In making this determination, "the court reviewing the habeas petition 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Shaikh, 276 Va. at 544, 666 S.E.2d at 328 (quoting Strickland, 466 U.S. at 689).

12. The second prong of the Strickland test, the "prejudice" inquiry, requires showing that there is a "***reasonable probability*** that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694 emphasis added). "It is not enough 'to show that

errors had some conceivable effect on the outcome of the proceeding.'" Richter. 131 S. Ct. at 787 (quoting Strickland, 466 U.S. at 693). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Strickland. 466 U.S. at 694.

13. An ineffective counsel claim may be disposed of on either prong of the Strickland test. "It is not necessary for a court deciding an ineffective assistance claim to address both components of the inquiry, or to address them in any particular order. If the petitioner makes an insufficient showing on either component of the test, the other need not be considered." Shaikh, 276 Va. at 544, 666 S.E.2d at 328. Accord Spencer v. Murray, 18 F.3d 229,232-33 (4th Cir. 1994) (An ineffective counsel claim may be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements."); Smith v. Spisak. 558 U.S. 139, 149, 130 S. Ct. 676, 685 (2010); Williams v. Warden. 278 Va. 641, 647-49, 685 S.E.2d 674, 677-78 (2009). Applying this standard, the petitioner is not entitled to the relief he seeks.

Claim (a)(i)

14. In claim (a)(i), the petitioner alleges trial counsel was ineffective for failing to present character evidence to the jury, including that that Patterson was in the Navy, was not prone to

violence, did not have a criminal background, was not abusive in past relationships with women, and was not abusive toward his own daughter. (Pet. 9,11).

15. At the threshold, tactical decisions, such as what witnesses to call and what evidence to present, are part of the development of the defense strategy and lie solely within the province of counsel. Gonzalez v. United States, 553 U.S. 242, 249 (2008); accord Townes v. Commonwealth, 234 Va. 307, 320, 362 S.E.2d 650, 657 (1987). See also New York v. Hill. 528 U.S. 110, 115 (2000) (lawyer has full authority to manage conduct of trial). A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action. In other matters, a defendant, who has chosen to be represented by counsel must "accept the consequences of the lawyer's decisions. . . ." Taylor v. Illinois, 484 U.S. 400, 418 (1988). In particular, "'[decisions relating to witness selection are normally left to counsel's judgment, and this judgment will not be second-guessed by hindsight.'" Williams v. Armentrout, 912 F.2d 924, 934 (8th Cir. 1990) (en

banc) (quoting Frank v. Brookhart, 877 F.2d 671, 674 (8th Cir. 1989)).

16. Moreover, the record shows that counsel did elicit much of the testimony the petitioner alleges should have been presented to the jury. For example, S.A. testified that Patterson had a three-year old daughter of his own, and she felt there was "no reason not to trust him." (Tr. 286). Patterson's daughter lived in Missouri, and S.A. observed him interact with his daughter using Skype, an internet video calling service. (Tr. 286, 326). Both S.A. and S.A.'s father testified that the petitioner always acted "appropriately" around the baby and they had "no concerns." (Tr. 326, 262). Similarly, the jury heard testimony that the petitioner was in the armed forces from Detective Savino. (Tr. 400). Trial counsel's decision to elicit this testimony from disinterested witnesses, rather than from the petitioner's friends or family was a sound tactical decision.

17. Furthermore, the fact that the petitioner did not abuse his own daughter has no bearing on whether the petitioner would assault A.H. Petitioner met A.H.'s mother on the internet and had only known her for a few months at the time of this incident. He had no biological or emotional ties to A.H. as compared to his own child. Trial counsel could have reasonably determined that self-serving testimony that he had not abused his own child

would not be useful. Finally, although the *petitioner* has averred he did not abuse his child, he has failed to proffer an affidavit from the child's mother to this effect. This failure to proffer is fatal to any suggestion that the mother of petitioner's child should have been called as a witness in this matter. See Muhammed v. Warden, 274 Va. 3, 19, 646 S.E.2d 182, 195 (2007) (failure to proffer affidavits regarding testimony witness would have offered is fatal to Strickland claims).

18. Patterson has further failed to demonstrate that any of the proffered character evidence would have significantly impacted the strength of the Commonwealth's case. The petitioner merely speculates a different outcome would have occurred but for counsel's failing to introduce this additional evidence. Speculation, however, does not prove prejudice under Strickland. See Burger v. Kemp, 483 U.S. 776, 793 (1987); Orbe v. True, 233 F. Supp. 2d 749, 781 (E.D. Va. 2002). Indeed, to satisfy Strickland's prejudice standard, Petitioner must show a "substantial," not just "conceivable," likelihood of a different result. Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011); Richter, 131 S. Ct. at 792. Self-serving character testimony from the petitioner's family and friends cannot meet this demanding test. Claim (a)(i) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (a)(ii)

19. In this claim, Patterson submits counsel should have presented evidence regarding his "proclivity toward anal sex in a relationship" before meeting SA. (Pet. 9, 11). This claim is without merit. As a preliminary matter, the petitioner has failed to proffer any sworn testimony in this regard. This failure is fatal to his claim. See Muhammed, 274 Va. at 19, 646 S.E.2d at 195. Furthermore, the decision to present evidence is reserved solely to counsel. See Gonzalez, 553 U.S. at 249; Taylor, 484 U.S. at 418; Townes, 234 Va. at 320, 362 S.E.2d at 657. Assuming the petitioner could provide sworn testimony on this issue, trial counsel made a reasonable tactical decision not to present it. Defense counsel argued persuasively in closing that what the defendant did with a consenting adult partner had no bearing on the issues in this case. (Tr. 683). By contrast, presenting further evidence of the defendant's sexual proclivities would distract the jury from the real issues, and serve to highlight the negative evidence presented by the Commonwealth. Cf. Evans v. Thompson, 881 F.2d 117, 125, (4th Cir. 1989) (holding that the decision not to object to a prosecutor's argument to avoid emphasizing it is a tactical decision that lawyers routinely make).

20. In addition, prior to trial, the parties litigated a motion in limine in which the trial court excluded from evidence dozens of text messages

retrieved from the petitioner's phone seeking sexual attention from a multitude of women. See Tr. 1/1/13. The trial court also excluded professional pornography found on the defendant's phone depicting anal sex acts. Had the defendant put on evidence regarding his sexual proclivities, the Commonwealth would have been permitted to use all of the excluded evidence to impeach such testimony. (Tr. 1/1/13 at 20). Under these circumstances, trial counsel's performance was not constitutionally defective for failing to put on evidence of the defendant's sexual preferences, nor can the petitioner demonstrate, in light of the entire record, that this evidence would have had led to a substantial likelihood of a different result at trial. Accordingly, claim (a)(ii) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (a)(iii)

21. Trial counsel was also not constitutionally defective for failing to call Kimberly Wilkins as a witness in the defendant's case-in-chief. As noted previously, "'[decisions relating to witness selection are normally left to counsel's judgment, and this judgment will not be second-guessed by hindsight.'" Williams, 912 F.2d at 934 (citation omitted). Patterson does not proffer an affidavit from Wilkins; however, presumably he intends to rely on her testimony at sentencing, which was sworn.

22. At sentencing, Wilkins testified that she was Patterson's aunt, and lived next to his family growing up. She trusted Patterson with her children and felt he was a good person. Trial counsel noted that she sat through the entire trial, and asked if she had anything she wanted to tell the jurors. At this time, she said that Patterson had always been calm and methodical in times of crisis. (Tr. 761-762). This testimony, offered by a close family member **after observing the whole of trial**, is not significant. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Wilkins' testimony was influenced by what she observed at trial and not elicited by any direct question from counsel. Given the backward-looking nature of her testimony and her close family ties to the petitioner, it cannot be said on this record that failure to call her as a witness was an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Claim (a)(iii) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (b)

23. In claim (b), Patterson contends that trial counsel failed to properly cross- examine Robert

Fromburg, the Commonwealth's jailhouse witness. This claim focuses on one exchange - when counsel asked Fromburg, "did you call people outside and ask them to look up Patterson's case?" and Fromburg replied, "never." (Tr. 472). The petitioner reasons that because the jury heard other jail phone call tapes, the lack of substantiation behind counsel's question was highly damaging. He concludes a proper cross-examination avoiding this question or presentation of the phone calls alluded to by counsel would have changed the outcome of the trial.

24. First, this Court should not engage in dissecting a single question asked by trial counsel over the course of a three-day jury trial. As the United States Supreme Court has noted, in assessing counsel's performance,

> a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance ***because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.***

Bell v. Cone, 535 U.S. 685, 702 (2002) (emphasis added). See also Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000) (reviewing court "must be highly deferential in scrutinizing [counsel's] performance and must filter the distorting effects of hindsight from [its] analysis"). This Court should not

consider the attorney's performance in the vacuum of what he did not do. Instead a proper analysis of the lawyer's "performance" requires the court to consider "all the circumstances." See Bullock v. Carver, 297 F.3d 1036, 1046-1051 (10th Cir. 2002). To put it another way, in analyzing a claim that trial counsel "should have done something more, [the Court] first look[s] at what the lawyer did in fact." See Chandler v. United States, 218 F.3d at 1320.

25. Reviewing the whole of cross-examination, it is evident that trial counsel aggressively pursued Fromburg. Counsel established that Fromburg had was prepared to testify against multiple other inmates in the past, and painted him as a professional snitch. (Tr. 473). He elicited testimony from Fromburg that in other cases Fromburg had charges dropped in exchange for his testimony, in particular, a charge that carried a five-year mandatory minimum. (Tr. 470). Fromburg admitted multiple times he was hoping for favorable treatment because of his testimony. (Tr. 464,470,474).

26. Counsel also discussed Fromburg's testimony in closing, highlighting that Fromburg was a multiple-time convicted felon. Counsel also noted that Fromburg had pled guilty to raping a 16-year old girl, casting doubt on his position at trial that he was willing to testify against the defendant because kids were "untouchable." (Tr. 685, 468, 459). Finally,

counsel noted that all of the ***correct*** information in Fromburg's testimony was readily ascertainable from the news. (Tr. 685-686, 472). The remainder of his testimony regarding the defendant's purported confession was inaccurate: A.H. was four months old, not four years old, and there was no evidence she was smothered with a pillow. Fromburg's testimony about the confession he received simply did not match the Commonwealth's theory of the case. (Tr. 685-686).

27. Under these circumstances, one question from counsel that did not produce a favorable response did not render counsel's cross-examination of Fromburg constitutionally deficient. "As Strickland made clear, [this Court's] role on habeas review is not to nitpick gratuitously counsel's performance. After all, the constitutional right at issue here is ultimately the right to a fair trial, not to perfect representation." Hodges v. Colson, 711 F.3d 589, 617 (6th Cir. 2013) (citations omitted). This portion of claim (b) cannot satisfy either prong of the Strickland test and should be dismissed.

28. The petitioner has likewise failed to demonstrate that trial counsel was ineffective for failing to play jail phone calls from Fromburg to outside sources in which Fromburg solicited information about the petitioner's case. Patterson has failed to demonstrate the existence of these recordings, much less their content. "[W]ithout a

specific, affirmative showing of what the missing evidence or testimony would have been, a 'habeas court cannot even begin to apply Strickland's standards' because 'it is very difficult to assess whether counsel's performance was deficient, and nearly impossible to determine whether the petitioner was prejudiced by any deficiencies in counsel's performance." Anderson v. Collins, 18 F.3d 1208, 1221 (5th Cir. 1994) (quoting United States ex rel. Partee v. Lane, 926 F.2d 694, 701 (7th Cir. 1991)). Absent an appropriate proffer, this portion of claim (b) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (c) and (a)(iv)

29. In claim (c) and claim (a)(iv), the petitioner asserts trial counsel was ineffective for failing to present expert testimony to challenge the Commonwealth's medical experts. The petitioner, however, has not proffered who counsel should have called to testify, much less any sworn testimony on this point. Even in capital cases, this failure is fatal to his habeas claim. See Muhammad, 274 Va. at 19, 646 S.E.2d at 195 (petitioner's claim that counsel failed to consult with expert witnesses did not satisfy either prong of the Strickland test where he failed to include affidavit from those experts detailing what information they would have provided at trial). Cf. Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990) (holding that in absence of proffer of witness

testimony, petitioner cannot demonstrate either deficient performance or prejudice under Strickland): Burger, 483 U.S. at 793 (holding that petitioner could not show prejudice where he did not submit an affidavit from the witness establishing that the witness would have offered substantial mitigating evidence if he had testified). For this reason alone, claim (c) and (a)(iv) cannot satisfy either prong of the Strickland test, and should be dismissed.

30. In any event, in the abstract, trial counsel's tactical decision not to hire an additional expert and rely on cross-examination was reasonable. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Moore v. Hardee, 723 F.3d 488, 498 (4th Cir. 2013) (citation omitted). Cf. Winston v. Kelly, 592 F.3d 535, 544 (4th Cir. 2010), 592 F.3d at 544 (citation omitted) ("[d]efense counsel's strategy of attacking [witness] credibility" through "undeniably focused and aggressive" cross-examination "falls within the wide range of reasonable professional assistance"). Indeed, in raising this claim, Patterson cites inconsistencies elicited by trial counsel using the very strategy Patterson is now alleging was deficient. (Pet. 10-11, 19-20 citing Tr. 212, 221, 229, 534, 546). Counsel, thus, was able to accomplish what Patterson claims an expert could have done. Trial counsel was not ineffective because this strategy was ultimately

unsuccessful. See Lawrence v. Branker, 517 F.3d 700, 716 (4th Cir. 2008) ("effective trial counsel cannot always produce a victory for the defendant"). Claims (c) and (a)(iv) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (d)

31. In claim (d), Patterson asserts counsel failed to properly pursue DNA testing of biological evidence that was not tested by the Commonwealth. Patterson, however, has failed to proffer what favorable evidence DNA testing would have revealed. See Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) ("an allegation of inadequate investigation does not warrant habeas relief absent a proffer of what favorable evidence or testimony would have been produced."). Indeed, the petitioner's burden in this habeas corpus proceeding requires him to come forward with facts sufficient to support his claims. See Code § 8.01-654(B)(2); Collins, 18 F.3d at 1221 (requiring a "specific, affirmative showing of what the missing evidence or testimony would have been"); Hedrick v. Warden, 264 Va. 486, 521, 570 S.E.2d 847, 862 (2002) (finding habeas petitioner had not established deficient performance or prejudice because he failed to provide any evidence to support claim). For this reason alone, claim (d) cannot satisfy either prong of the Strickland test, and should be dismissed.

32. In any event, counsel, could have strategically decided not to test the evidence in question. First, the record establishes no DNA testing was performed because no foreign biological substance, such as sperm, was found on the samples taken from the victim. (Tr. 441). The forensic expert at trial explained that DNA can be left by touch alone, but only on an inanimate object, like a weapon. (Tr. 450). If the subject is person with its own DNA, that DNA will overwhelm any foreign DNA. (Tr. 449, 451). Under these circumstances, counsel could have reasonably determined this would not be a line of investigation worth pursuing.

33. Further, Patterson's petition appears to assume DNA evidence existed and would be favorable to him. Instead, eliciting further DNA testing could have backfired: it was possible Patterson's DNA would be found. Handing the Commonwealth this critical evidence would have been devastating to Patterson's case. Cf. Lewis v. Warden, 274 Va. 93, 116, 645 S.E.2d 492, 505 (2007) (Counsel is not ineffective for failing to present evidence that has the potential of being "double-edged."). Instead, in the absence of testing, counsel argued in both opening and closing that the Commonwealth had failed to test the DNA evidence in question. He painted the police investigation as cursory at best. (Tr. 678). Electing to use the lack of forensic evidence to argue the Commonwealth had

not met its burden was reasonable. Cf. Williams v. Kelly, 816 F.2d 939, 950 (4th Cir. 1987) ("Counsel is not ineffective merely because he overlooks one strategy while vigilantly pursuing another."). Moreover, all of the A.H.'s family members handled A.H. in the days leading up to her death. DNA evidence from one of these parties found on A.H.'s skin would not have exonerated the petitioner, and would not have created a substantial likelihood of a different result at trial. For all of the forgoing reasons, this claim cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (e)

34. In claim (e), Patterson alleges that he was not read his Miranda[5] rights prior to speaking with law enforcement officers at his apartment. He alleges that trial counsel was ineffective for failing to object to the admission of his statements on this basis as well as the admission of all evidence taken from the apartment. Patterson, however, has not demonstrated that a motion to suppress, or other objection, would have been successful. Because an attorney cannot be held ineffective for failing to make a futile motion, the petitioner cannot establish deficient performance. See Correll v. Commonwealth, 232 Va. 454, 470, 352 S.E.2d 352, 361 (1987) (holding counsel had no duty to object to admission of presentence report because it was admissible); see also Moody v. Polk, 403 F.3d 141, 151 (4th Cir. 2005)

(holding counsel not required to file frivolous motions).

35. The petitioner alleges his initial interaction with the police was custodial because the police officers characterized the apartment as a crime scene and testified that Patterson was not free to leave. (Tr. 383-384, 412). These facts do not give rise to "custody" for purposes of Miranda. Under "Miranda case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." Howes v. Fields, 132 S. Ct. 1181, 1189 (2012). Miranda warnings are only required when an officer interrogates a suspect who is subject to "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Brooks v. Commonwealth, 282 Va. 90, 96 (2011). Consequently, Miranda "does not apply to a temporary investigatory detention" short of "a de facto" arrest." Testa v. Commonwealth, 55 Va. App. 275, 283 n.5, 685 S.E.2d 213, 217 n.5 (2009). "Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." Howes, 132 S. Ct. at 1192 (citation omitted).

36. Indeed, as the United States Supreme Court recently recognized in Howes, whether the suspect being questioned is free to leave ***is not***

dispositive of whether the Miranda warning is required:

> Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of Miranda. We have decline[d] to accord talismanic power to the freedom-of- movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda. Our cases make clear ... that the freedom-of-movement test identifies only a necessary and not a sufficient condition for Miranda custody.

Howes, 132 S. Ct. at 1189-90 (citations and internal quotation marks omitted).

37. Applying these well-established principles, it is plain that an objectively reasonable attorney could have determined that was no basis to suppress the petitioner's statements. The investigating officer and detective arrived on the scene of a recently reported crime that involved the suspicious death of a four-month-old child and did what any trained law enforcement officers would do: secured the scene and asked questions of anyone who

might know something about what had happened. The officers did not place Patterson in any physical restraints, did not tell him he was not free to leave, did not remove him from his apartment, did not, on this record, engage him in a series of prolonged accusatory questions, and did not threaten him with any show of force. Cf. Dixon v. Commonwealth, 270 Va. 34, 40-41, 613 S.E.2d 398 (2005) (concluding defendant was in custody for Miranda purposes when handcuffed ***and*** locked in a police patrol car, but noting "the presence of either of these factors, in the absence of the other, may not result in a curtailment of freedom ordinarily associated with a formal arrest"). Under these circumstances, an objectively reasonable defense attorney could conclude the petitioner was not in custody and that there was no basis for a motion to suppress.

38. Perhaps more significantly, the petitioner has not identified what statements he sought to suppress. Instead, he appears to take issue with statements he ***did not*** make. For example, multiple officers testified that he did not ask after A.H.'s health and that he did not ask to ride to the hospital with his girlfriend. He has not, however, identified any incriminating statements that would be subject to suppression. Trial counsel was not ineffective for failing to object to these non-statements. Even assuming the evidence could have been suppressed, however, "[i]t is well established that failure to object

to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland." Humphries v. Ozmint, 397 F.3d 206,234 (4th Cir. 2005) (collecting cases). Indeed, part of counsel's strategy at trial was to reiterate that the petitioner had nothing to hide and had cooperated with the police at every opportunity. Counsel argued that his openness with the police was strong circumstantial evidence of his innocence. In light of this trial strategy, and especially as the petitioner did not actually make any incriminating statements, trial counsel was reasonable in not objecting to this testimony.

39. Further, even absent Patterson's non-statements, the evidence against him was overwhelming. Perhaps most significantly, he was the only person alone with the baby immediately prior to her death. He had a demonstrated interest in anal sex, and had previously written the baby's name on S.A.'s buttocks, keeping a picture of it on his phone, along with other internet search history included searches inquiring what the punishment was for shaken baby syndrome photographs of S.A.'s buttocks. Petitioner later confessed his crime to Fromburg while incarcerated. Finally, each of the other family members was asked outright whether they had shaken or abused the baby, and responded no. The jury had the opportunity to judge the credibility of these witnesses and found them

truthful. What the defendant said or failed to say after A.H. was hospitalized was not so significant as to create a substantial likelihood of a different result at trial. For all of these reasons, claim (e) cannot satisfy either prong of the Strickland test, and should be dismissed.

CONCLUSION

40. Any allegation not expressly admitted or addressed in this response should be deemed denied.

41. The record is sufficient for this Court to rule upon the petitioner's claim and there is no need for an evidentiary hearing. Arey v. Peyton, 209 Va. 370,164 S.E.2d 691 (1968); Yeatts v. Murray, 249 Va. 285, 455 S.E.2d 18 (1995); Shaikh, 276 Va. at 549,666 S.E.2d at 331; Code 8.01-654(B)(4).

WHEREFORE, the respondent asks this Court to deny and dismiss the petition for a writ of habeas corpus as untimely and without merit.

Respectfully submitted,
DIRECTOR, DEPARTMENT OF CORRECTIONS

By: Elizabeth K Fitzgerald
Counsel

Elizabeth Kiernan Fitzgerald (VSB 82288)
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
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Richmond, Virginia 23219
PHONE: (804) 786-2071
FAX: (804) 371-0151
oagcriminallitigation@oag.state.va.us

CERTIFICATE OF SERVICE

On January 30, 2017, a copy of this Motion to Dismiss was mailed to Dale Jensen Esq., Dale Jensen, PLC, 606 Bull Run, Staunton, VA 24401, counsel for the petitioner.

By: Elizabeth K Fitzgerald
Counsel

---

[1] The jury also convicted Patterson of second-degree murder, but that conviction was vacated by this Court, by agreement of the parties. See Exhibit A

[2] To the extent Patterson's lettered claims allege multiple different instances of ineffective assistance of counsel, they are addresses separately herein. See Lenz v. Warden of the Sussex I State Prison. 267 Va. 318, 340, 593 S.E.2d 292, 305 (2004) (rejecting argument that counsel's actions and omissions during sentencing phase of trial should be considered cumulatively).

[3] No forensic evidence was developed from the swabs but an expert testified any seminal fluid or sperm that may have been present in A.H.'s diaper was discarded when it was changed.

[4] Rule 3A:25, the "prison mailbox rule," is not applicable as the instant matter is counsel-filed. See generally Lahey v. Johnson, 283 Va. 225, 720 S.E.2d 534 (2012) (discussing when a pleading is "filed" for purposes of habeas review).

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE' NOVEMBER 6. 2013
JUDGE. HANSON
COMMONWEALTH OF VIRGINIA VS
MICAH PATTERSON. DEFENDANT
CASE NO. CR12-1865/CR12-2017/CR12-3195

SENTENCING ORDER

ATTORNEY FOR THE COMMONWEALTH:
K. Paulding/P. Hollowell

ATTORNEY FOR THE DEFENDANT:
M. DelDuca/S. Cline

COURT REPORTER:
Fiduciary Reporting, Inc

The defendant was present and represented by counsel

On August 15, 2013, a jury found the defendant GUILTY of the following offense(s):

OFFENSE DESCRIPTION	OFFENSE DATE	CODE SECTION	VA CRIME CODE REF
Murder-1st Degree	01/10/12	18.2-32: 18.2-10	999-9999-99
Murder-2nd Degree	01/10/12	18.2-32: 18.2-10	999-9999-99
Object Sexual Penetration	01/10/12	18.2-67.2	999-9999-99
Child Neglect	01/10/12	18.2-371.1(A); 18.2-10	FAM-3806-F4

Micah Patterson – Motion to Dismiss Exhibit 1

The presentence report was considered and filed as part of the record in accordance with the provisions of Code §19.2-299.

Upon the agreement of counsel, the Court VACATED the Murder-2nd Degree conviction and sentence imposed by the jury and dismissed the charge.

Pursuant to the provisions of Code § 19.2-298.01 the applicable discretionary sentencing guidelines and the guidelines worksheets were reviewed and considered by the Court and are ordered filed as part of the record.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court, this day, affirmed the jury's verdicts and SENTENCES the defendant to:

Incarceration in the Virginia Department of Corrections for the term of: LIFE on the charge of Murder-]' Degree: 30 YEARS on the charge of Object Sexual Penetration; and 10 YEARS on the charge of Child Neglect.

The total sentence imposed is LIFE PLUS 40 YEARS.

Credit for time served. The defendant sentenced to a term of confinement in a correctional facility shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.
Costs. The defendant shall pay costs pursuant to statute.

Micah Patterson – Motion to Dismiss Exhibit 1

Distribution of copies: The Clerk shall send a copy of this order to the:
Sheriff, Department of Corrections, Probation Office of this Court

DEFENDANT IDENTIFICATION:
SSN: 487-02-5909
DOB: 06/15/1989
SEX: MALE

ENTER: 11/12/13
JUDGE: Edward W. Hanson III

clerk: bnl

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday *the* 15th *day of* October, 2014.

Micah Patterson, Appellant,

Against Record No. 2359-13-1
Circuit Court Nos. CR12-1865, CR12-2017 and CR12-3195

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach
Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. and II. A jury convicted appellant of first-degree murder for a killing that occurred during the commission of object sexual penetration, object sexual penetration, and child neglect. He argues the trial court erred in denying his motion *in limine* to exclude testimony he desired to engage in sodomy with an adult because it was not relevant, and if the evidence was relevant, its probative value was outweighed by its prejudicial effect. Appellant also argues the trial court erred in denying his motion *in limine* to exclude certain photographs found on his cell phone because they were not relevant, and if the

photographs were relevant, their probative value was outweighed by their prejudicial effect.

> Evidence is relevant if it has any logical tendency to prove an issue in a case. Relevant evidence may be excluded only if the prejudicial effect of the evidence outweighs its probative value. The question whether the prejudicial effect of evidence exceeds its probative value lies within the trial court's discretion.

Goins v. Commonwealth, 251 Va. 442,461-62,470 S.E.2d 114,127 (1996) (citation omitted).

"Evidence of other independent acts of an accused is inadmissible if relevant only to show a probability that the accused committed the crime for which he is on trial because he is a person of criminal character." Sutphin v. Commonwealth, 1 Va. App. 241,245,337 S.E.2d 897,899

> "Evidence of other offenses is [admissible] if it shows the conduct and feeling of the accused toward his victim, if it establishes their prior relations, or if it tends to prove any relevant element of the offense charged. Such evidence is permissible in cases where the motive, intent or knowledge of the accused is involved, or where the evidence is connected with or leads up to the offense for which the accused is on trial."
>
> Foster v. Commonwealth, 6 Va. App. 313,323,369 S.E.2d 688,694 (1988) (quoting

Kirkpatrick v. Commonwealth, 211 Va. 269,272,176 S.E.2d 802,805 (1970)).

The evidence proved that in November 2011, S.M. began dating appellant, and on January 5, 2012, S.M. and her four-month-old daughter, A.H., moved into appellant's residence. On January 8, 2012, S.M.'s father watched A.H. while S.M. was at work. At approximately 3:00 p.m., appellant picked up A.H. and appellant cared for A.H. until S.M. returned. On January 9,2012, S.M. took A.H. to see Dr. Debbie Holland because A.H. had a fever and was fussy. Dr. Holland did not notice any bruises on A.H.'s abdomen, pelvis, neck, or anus. On January 10, 2012, S.M. noticed two thumbprint shape bruises on A.H.'s pelvis and appellant told S.M. he did not know how the bruising occurred. While appellant cared for A.H., S.M. left the residence and went to the courthouse to change her address. Appellant called S.M. and said that A.H. looked lifeless. After S.M. called Dr. Holland, S.M. tried to feed A.H. small amounts with a syringe as directed by Dr. Holland. Later, appellant and S.M. went to the mall, and while S.M. changed A.H.'s diaper, S.M. noticed a bruise on A.H.'s abdomen. S.M. called the doctor's office and told appellant they needed to go home.

While waiting for the doctor's office to return the call, S.M. rocked A.H. and put her in the crib. While on the phone with a nurse, appellant pulled up S.M.'s dress, she told him to stop, but he continued. After S.M. completed the phone call with the nurse, S.M. and appellant had vaginal sex and appellant

also tried to have anal sex, but S.M. refused. After they finished, S.M. went to the store and appellant remained with A.H. Prior to S.M. returning, appellant called 911 at 8:03 p.m. because A.H. was not breathing. A.H. was transported to a hospital. Dr. Michelle Clayton, an expert in child abuse pediatrics, examined A.H. and noticed several areas of bruising, including an intense purple coloring around her anus, as well as swelling and lacerations. Dr. Clayton testified the injuries to A.H.'s anus were caused by severe blunt trauma. On January 11, 2012, A.H. was pronounced dead. Dr. Wendy Gunther, the assistant chief medical examiner, testified to A.H.'s numerous injuries and explained A.H.'s anus had a ring of purple bruising around it that went into the anal canal a quarter of an inch and contained microscopic tears. According to Dr. Gunther, this type of injury was associated with sexual abuse and it was a fresh injury.

According to S.M., prior to January 10, 2012, appellant requested to have anal sex several times, but she did not enjoy it and thought it was painful. She informed appellant, appellant suggested an anal numbing cream, and at some point, appellant inserted the cream into S.M.'s buttocks using a syringe.

After appellant was arrested, the authorities found photographs on his cell phone. One photograph showed S.M.'s buttocks with a syringe in her buttocks. A second photograph showed S.M.'s buttocks with words appellant had written on her

buttocks. Appellant wrote A.H.'s name, "enter here," "open all the time, and "my ass loves Micah's dick" on S.M.'s buttocks.

The Commonwealth indicted appellant for capital murder in violation of Code § 18.2-31(5).[1] Prior to trial, the trial judge held a hearing on appellant's motion *in limine* to exclude testimony regarding appellant's request to engage in anal sex with S.M. and the photographs of S.M.'s buttocks. The prosecutor argued that it was a circumstantial case that injured A.H., and in the days prior to her death, appellant, S.M., and S.M.'s father cared for A.H. The prosecutor argued since appellant was charged with object sexual penetration and capital murder in regards to object sexual penetration, the testimony and photographs were relevant to show appellant's state of mind and intent. The prosecutor argued shortly before appellant called 911, S.M. had vaginal sex with appellant, she refused to have anal sex, she went to the store, and A.H. sustained anal injuries. The prosecutor argued the testimony also went to negate the possibility that A.H.'s injuries were sustained by accident or mistake. The prosecutor also argued the evidence was relevant to

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[1] Code § 18.2-32(5) provides that capital murder includes, "The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration."

show appellant would put his own sexual desires above any pain or discomfort of other individuals.

Appellant was charged with capital murder during the commission of object sexual penetration. Appellant's defense was that another individual injured A.H. and caused her death. The Commonwealth was required to prove appellant anally sexually assaulted A.H. and caused A.H.'s death. Appellant, S.M., and S.M.'s father cared for A.H. in the days prior to her injuries, and there were no eyewitnesses to the crimes. Evidence of appellant's sexual history of requesting to perform anal sex on S.M., coupled with her refusal to engage in anal sex with appellant shortly before A.H. was anally sexually assaulted, was admissible to show motive, intent, and knowledge. Prior to the incident, appellant continued to ask S.M. to engage in anal sex after she told him that she did not enjoy it and he suggested a numbing cream to reduce the pain. Appellant took photographs of S.M.'s buttocks with a syringe containing the numbing cream and words he had written on S.M.'s buttocks. The words included A.H.'s name. Evidence that suggests appellant's desire to engage in anal sex was probative because it tended to show that he, and not S.M. or S.M.'s father, committed the sexual assault and murder. Although the trial judge acknowledged that the evidence and the photographs were prejudicial, he found that the probative value of the evidence and the photographs outweighed any unfair prejudice. Based upon a review of the circumstances in this case, the trial

judge did not abuse his discretion in admitting into evidence appellant's history of requesting anal sex with S.M. and photographs he took of S.M.'s buttocks.

111. Appellant argues the evidence was insufficient to support the convictions because there was no physical evidence linking him to the crimes and the evidence did not rule out reasonable hypotheses of innocence.

Circumstantial evidence is as competent and is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." Coleman v. Commonwealth, 226 Va. 31,53,307 S.E.2d 864,876 (1983). "Whether a hypothesis of innocence is reasonable is a question of fact." Patrick v. Commonwealth, 27 Va. App. 655,662,500 S.E.2d 839,843 (1998).

"The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133,138,455 S.E.2d 730, 732 (1995).

"On review, this Court does not substitute its judgment for that of the trier of fact Instead, the jury's verdict will not be set aside unless it appears that it is plainly wrong or without supporting evidence." Canipe v. Commonwealth, 25 Va. App. 629,644,491 S.E.2d 747,754 (1997).

"On appeal, *we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1,11,492 S.E.2d 826,831 (1997) (quoting Martin v. Commonwealth, 4 Va. App. 438,443,358 S.E.2d 415,418 (1987)). So viewed, the evidence proved that S.M.'s father cared for A.H. on January 8,2012 and he did not see any bruising on her body. S.M.'s father testified he never shook A.H. S.M. testified that she never shook A.H., but testified that on January 8,2012, she bumped A.H.'s head into a door: On January 9,2012, S.M. took A.H. to see Dr. Holland because A.H. was fussy and had a fever. Dr. Holland examined Ail. and did not see any bruising on A.H.'s pelvis, abdomen, anus, or neck. Appellant, S.M., and A.H. spent die evening together. On January 10,2012, S.M. noticed two thumbprint shape bruises on A.H.'s pelvis and appellant told S.M. he did not know how the bruising occurred. S.M. left A.H. with appellant while she went to the courthouse. While S.M. was gone, A.H. vomited, was not acting herself, appellant called S.M., and appellant told S.M. that A.H. looked lifeless. S.M. called the doctor's office and was told to feed A.H. small amounts with a syringe. Later, at the mall, S.M. changed A.H.'s diaper and noticed a bruise on A.H.'s abdomen. A.H. also vomited and was fussy. S.M. called the doctor's office and told appellant they needed to go home.

S.M. rocked A.H., put her in a crib, and did not notice any marks on A.H.'s neck. After speaking with

a nurse and engaging in vaginal sex with appellant, S.M. went to the store to get supplies recommended by the nurse. When S.M. left, A.H. was in her crib. Appellant called 911 while S.M. was at the store. When

A.H. arrived at a hospital in Virginia Beach, she was not breathing on her own and she had red marks on her neck and anus. A.H.'s diaper was dirty and was changed. A.H. was transported to Children's Hospital of the King's Daughter (CHKD) for further treatment. Dr. Clayton examined A.H. and collected vaginal and anal swabs, which were sent for analysis.[2] Dr. Clayton saw an oval bruise on each side of the pelvis, one bruise on the abdomen, several areas of bruising around the neck, an intense purple coloring around the anus with swelling and lacerations, and symptoms associated with severe brain injury. Dr. Clayton testified it was unusual to see bruising in a four-month-old baby because they did not move around. Dr. Clayton testified that when A.H. arrived at the Virginia Beach hospital, A.H.'s neck and anus only had red marks, but that when she arrived at CHKD, the red marks had developed into bruises. Dr. Clayton testified since the injuries were changing, they were recent injuries and occurred on the evening of January 10,2012. Dr. Clayton testified the ligature was applied more than once to A.H.'s neck because there were several

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[2] No forensic evidence was developed from the swabs but an expert testified any seminal fluid or sperm that may have been present in A.H.'s diaper was discarded when it was changed.

bruises on different planes. When describing the anal injuries, Dr. Clayton testified they were caused by severe blunt force trauma. Dr. Clayton also described A.H.'s neck, spine, and head trauma, and she testified A.H. experienced three separate episodes of abusive head trauma, one on January 9, one on the morning of January 10, and one on the evening of January 10, 2012.

Dr. Gunther testified A.H. died from abusive head trauma consistent with shaken baby syndrome. Dr. Gunther testified in detail regarding A.H.'s injuries, which included rib fractures, retinal hemorrhages, bruises, and the anal injury. Dr. Gunther found iron in several of A.H.'s organs, which was indicative of old injury. Dr. Clayton testified the iron in A.H.'s organs could be the result of earlier shaking episodes.

Robert Fromberg, an inmate in the jail, testified he met appellant and appellant said he was incarcerated for murdering a child. Fromberg testified appellant said he was watching his roommate's four-year-old niece, he "fingered" her, she woke up crying, and he put a pillow over her face to stop the crying. Fromberg admitted he was a convicted felon and had pending felony charges.

The authorities determined that from January 11 through January 12,2012, appellant used his phone to conduct several internet searches with the terms "blood around infant's brain," "shaken baby syndrome," and "abusive head trauma." On January 11, 2012, appellant received a text message from a

woman stating that S.M. probably committed the crimes and that he should not take the blame. Appellant responded that it was not S.M. and that she would never hurt A.H.

The jury heard the testimony of the witnesses and observed their demeanor. It was for the jury to determine whether appellant's hypothesis of innocence was credible. The jury evaluated the evidence and determined that appellant, and not S.M. or S.M.'s father, committed the crimes. Based upon a review of the circumstances in this case, the trial judge did not err in denying appellant's motion to strike and permitting the jury to evaluate the evidence. The evidence supports the jury's decision. The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of first-degree murder for a killing that occurred during the commission of object sexual penetration, object sexual penetration, and child neglect.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

This Court's records reflect that Afshin Farashahi, Esquire, is counsel of record for appellant in this matter.

Micah Patterson – Motion to Dismiss Exhibit 1

A Copy,

Teste:
Cynthia L. McCoy, Clerk

By:
Unclear Signature
Deputy Clerk

VIRGINIA

In the Court of Appeals of Virginia on
Monday *the* **2nd** *day of* **February 2015.**

Micah Patterson, Appellant,
Against Record No. 2359-13-1
Circuit Court Nos. CR12-1865, CR12-2017 and CR12-3195

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Judges Humphreys, Petty and Decker

For the reasons previously stated in the order entered by this Court on October 15,2014, the petition for appeal in this case hereby is denied. This order shall be certified to the trial court.

Teste:
Cynthia L. McCoy, Clerk

By:
Unclear Signature
Deputy Clerk

Micah Patterson – Motion to Dismiss Exhibit 1

VIRGINIA

In the Supreme Court of Virginia at the Supreme Court Building in the City of Richmond on Friday the 20th day of November, 2015.

Micah Patterson, Appellant,

against Record No. 150356
Court of Appeals No. 2359-13-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Teste:
Patricia L Harrington, Clerk

By:
Unclear Signature
Deputy Clerk

Micah Patterson – Motion to Dismiss Exhibit 1

IN THE CIRCUIT COURT FOR VIRGINIA BEACH, VIRGINIA

MICAH PATTERSON,
1492067,

Petitioner

vs.

HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. CL15-5306

OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

Comes now the Petitioner, Micah James Patterson ("Patterson"), by counsel, presents this Memorandum in Opposition to the Motion to Dismiss (the "Motion") Patterson's Petition for Writ of Habeas Corpus (the "Petition"); and in opposition of the Motion states:

I. Introduction

The Motion should be denied. The Commonwealth first argues that the Petition was not timely. As an initial matter, the plain language of Virginia Code § 8.01-654 provides that the statute of limitations clock does not begin to tick until the time for appeal has expired. Here, Patterson's time for appeal did not expire until three months after his appeal was denied by the Virginia Supreme Court, the time at which Patterson's time for appeal of that decision to the United States Supreme Court expired.

In addition, the filing date accorded the Petition by this Court does not reflect when the document was actually received by, and in possession of, the Court. All of the documents of the present Petition were in possession of this Court on November 21, 2016, which was within even the artificially shortened deadline asserted by the Commonwealth. It is simply not Patterson's fault that the clerical personnel of this Court failed to timely put the documents in their possession in the record of this case on the date that they were received.

At a substantive level, the Motion attempts to mischaracterize the arguments of Patterson's Petition in a manner that is simply not supported by evidence. The key highlighted failings of Patterson's trial counsel involved a failure to reasonably investigate the case prior to trial, which resulted in Patterson being prejudiced. Sticking one's head in the sand and failing to properly investigate a case

has never been held to be a "strategic decision" that is entitled to deference. Because of numerous failures to investigate critical aspects of the case, the performance prong of the Strickland test is met by Patterson's Petition on many issues.

Patterson was prejudiced by the very deficient investigation of his trial counsel and the resultant failure to adequately present evidence or properly advocate for Patterson at trial.

When viewed in its entirety, the Motion is without merit and should be denied in its entirety.

II. Argument

A. The Petition Was Timely Filed

If statutory language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it. See, e.g., *Brown v. Lukhard*, 229 Va. 316, 321, (1985).

Here, Virginia Code § 8.01-654 states in pertinent part (emphasis added):

> A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court **or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later**.

There is no dispute that the Virginia Supreme Court on November 20, 2015. However, the Motion

fails to recognize that Patterson had until February 18, 2016 to file a Petition for Writ of Certiorari with the United States Supreme Court (see USCS Supreme Ct R 13). Since the time for Patterson to appeal the refusal of his appeal by the United States Supreme Court did not expire until February 18, 2016 the Petition was timely filed.

It does not appear that the Commonwealth has made such a contention on any past petition because no state court opinion appears to exist that is on point. Although it does not appear that any Virginia court has construed the phrase "final disposition" in this statute, the underlying legal principles have been explored in analogous federal statutory language for habeas corpus petitions. The federal statute of limitations for inmates seeking habeas corpus relief in state court cases is 28 U.S.C. § 2244, which states in pertinent part, the "limitation period shall run from the latest of … the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review". The phrase "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" is semantically equivalent to the Virginia statutory language of "within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later."

Federal courts have generally held that triggering event for the federal statute of limitations

to begin running is either the completion of certiorari proceedings in the United States Supreme Court following completion of direct appeal, or the expiration of the time for filing a Petition for a Writ of Certiorari. See, e.g., *Locke v. Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001) (joining other "circuit courts that have explicitly ruled on the issue of timeless under 28 U.S.C. 2244 (d)(1)(A)").

In construing a statute, Virginia courts apply its plain meaning, and courts are not free to add language, nor to ignore language, contained in statutes. *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331 (2007). Here, the statutory language of "final disposition of the direct appeal in state court or the time for filing such appeal has expired" is apparently at issue. The phrase "final disposition" should be construed in conjunction the other cited statutory language "the time for filing such appeal has expired". Clearly this language considered the possibility that appeals could be taken in criminal cases and evidence a desire of the legislature to not include time during which an appeal was pending against convicted persons' ability to file for habeas corpus relief.

Perhaps the clearest way to understand why the statute has the meaning asserted herein is to consider what would have happened if Patterson had appealed to the United States Supreme Court had been successful and his convictions had been reversed. Under any contrary interpretation of VA Code § 8.01-654(A)(2), the affirmation of Patterson's

conviction by the Virginia Supreme Court represented a "final disposition" even if that "final disposition" was actually reversed in part (or in total) by the United States Supreme Court. Such a view is simply unreasonable.

Moreover, the undersigned counsel respectfully submits Exhibit A with this Opposition Brief. The undersigned counsel represents to this Court that the United States Postal Service Record shows receipt of the Petition by this Court on November 21, 2016, which the Motion admits was within even the Commonwealth's artificially short timeline for submittal of the Petition. The undersigned counsel further represents that he sent a paralegal to this Court on November 21, 2016 to deliver the signed oath of Patterson required for submittal with the Petition and to advise this Court's clerical staff of receipt of the Petition on that date in order to avoid arguing the very issue raised in the Motion by the Commonwealth. The person purporting to be responsible for intake of petitions for writ of habeas corpus refused the request of the undersigned counsel's paralegal to locate the Petition and show a filing date on November 21, 2016. Patterson is simply not responsible for a failure of this Court's staff to do their job properly.

Accordingly, the Commonwealth's argument is meritless and the Petition was timely filed.

B. Patterson's Trial Counsel was Constitutionally Ineffective for Failure

to Properly Investigate the Case or Provide Testimony and Evidence that Should Have Been Presented on Behalf of Patterson

The overall structure of the Motion concerning the deficiencies of trial counsel is telling. On one hand, the Motion argues that the performance of Patterson's trial counsel should be viewed in its totality and not be analyzed atomistically for deficiencies. See Motion at p. 14-15. On the other hand, the Motion is structured in a manner that attempts to dissect Patterson's claims atomistically and argues that none of the deficiencies of Patterson's trial counsel when so dissected and considered individually met the Strickland standard. The Commonwealth cannot have it both ways. According to binding precedent, the overall performance of Patterson's trial counsel should be reviewed objectively for reasonableness under prevailing professional norms. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

Patterson respectfully declines to respond to the Commonwealth's dissected structure presented in the Motion or respond to the arguments as framed in the Motion tit for tat. Instead, Patterson asks this Court to review the performance of Patterson's trial counsel in total considering prevailing professional norms as required under the binding precedent of *Wiggins* and similar cases.

Patterson also notes that portions of the Motion are generally unintelligible and do not seem

to relate to his case at all. For example, repeated references are made to someone called "S.A." that doesn't appear to be anyone connected with this case. Patterson does not know who "S.A." is or where the statements about anyone having the initials "S.A." came from or how they have any relevance to this case. In particular, the Motion at page 23 states:

He had a demonstrated interest in anal sex, and had previously written the baby's name on S.A. 's buttocks, keeping a picture of it on his phone, along with other internet search history included searches inquiring what the punishment was for shaken baby syndrome photographs of S.A.'s buttocks.

Patterson has no idea what this paragraph means or how to respond to it. There was no testimony at trial about "S.A." to the best of Patterson's recollection and Patterson has no idea what it means to have made "searches inquiring what the punishment was for shaken baby syndrome photographs of S.A.'s buttocks" means. Accordingly, Patterson reserves the right to supplement this Opposition if the Commonwealth clarifies the meaning of this paragraph or any other aspect of the Motion.

1. **The Failure to Investigate or Obtain a Medical Expert**

The most serious and objectively unreasonable deficiencies of Patterson's trial counsel representation was in failing to investigate the

Commonwealth's timeline prior to the trial or retain an independent expert to provide testimony challenging a highly questionable timeline. The Commonwealth presented to the jury the highly questionable "timeline of injuries" to the victim that went essentially unchallenged.

Patterson's catastrophic impact of trial counsel's errors is brought into relief by examining the testimony of two of the Commonwealth's expert witnesses. On the first day of trial the Commonwealth presented the testimony of Wendy Gunther, M.D., Assistant Chief Medical Examiner. Dr. Gunther testified about injuries to the victim in which iron had developed, which, according to expert testimony, indicates older injuries. However, Dr. Gunther also testified, "No one knows exactly because children heal so much faster that adults, but a reasonable guess would be a few days before blood starts disappearing to the naked eye and turning to iron." TT p. 212, l. 20-25.

Dr. Gunther further testified that while she classified some of the injuries as, "fresh." she could not "have a clock on that." TT at p. 221, l. 17-18. Even when asked to narrow the time frame for the victim's injuries to a window of "twelve to eighteen hours" she could not do so. TT at p. 229, l. 9-15).

Contrary to the testimony of Dr. Gunther, Dr. Michelle Clayton claimed to narrow down each of the established injuries to the times in which the victim was likely in the custody of Patterson. Not only was this speculation contrary to Dr. Wendy Gunther's

expert opinion, it was contrary to her own testimony as well. Dr. Clayton first testified, the "evolution of a bruise is something that varies somewhat depending on the body area where the bruises are inflicted." TT p. 534, l. 2-4. This testimony is at odds with her later testimony in which Dr. Clayton claimed that she had an expert opinion about exactly when the injuries occurred. TT at p. 546.

Significantly, Dr. Clayton testified that her timeline was not just based upon forensic evidence, but was also based upon having been given information about times when Patterson was alone with the victim, Aubrey Hannsz. See, e.g., TT at p. 585. So, Dr. Clayton's analysis began with a conclusion about who committed the crimes against Aubrey Hannsz. She then made the facts of her examination of Aubrey Hannsz conform to that preconceived conclusion and was unwilling to allow any other possibilities enter her mind.

In view of how critical the timeline was to the case against Patterson, it was imperative that Patterson's trial counsel retain a medical expert to testify concerning the injuries and the inherent variability of attempting to establish when injuries occurred based upon bruising. The utter failure of Patterson's counsel to even retain and expert or have anyone else review the medical evidence was certainly well below objective performance standards and is even worse than the lack of investigation that resulted in the granting of a petition for writ of habeas corpus in the *Wiggins* case. Even a very

cursory Internet search made by the undersigned counsel revealed an article that in pertinent part states "Symptoms vary among children based on how old they are, how often they've been abused, how long they were abused each time, and how much force was used." See, "Shaken Baby Syndrome – Topic Overview", which can be viewed at http://www.webmd.com/parenting/baby/tc/shaken-baby-syndrome-topic-overview?print=true (attached hereto as Exhibit 2). The article further states (emphasis added), "Symptoms can start quickly, especially in a badly injured child. **Other times, it may take a few days for brain swelling to cause symptoms.**" Given the ease with which this medical article was found, it would not have been difficult at all for Patterson's trial counsel to find a medical expert that would have both supported Dr. Gunther's inability to establish a time for the injuries and specifically refute Dr. Clayton's contrived timeline testimony.

It was imperative for defense counsel to challenge the speculation of a timeline offered by the Commonwealth to create the reasonable doubt necessary to convince the jury of Patterson's innocence. The failure to perform any independent investigation of the timeline evidence, retain an expert, or present any evidence at all contesting the Commonwealth's speculative timeline, was detrimental to Patterson's defense. Nothing was offered to contradict the Commonwealth's theory of the facts, and the jury verdict was based solely on

the presentation of the prosecution. The Sixth Amendment to the Constitution demands that a trial must comport to the basic tenets of due process and a fair trial, a trial in which the prosecution's case is subjected to adversarial testing.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins*, 539 U.S. at 521. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. *Id.*

Here, it is objectively unreasonable that Patterson's trial counsel failed to investigate the Commonwealth's timeline or retain an expert to contest that timeline. In view of the testimony of Dr. Gunther and the ease with which timeline uncertainties associated with shaken baby syndrome can be found online, it is certain that Patterson's trial counsel could and should have found a medical expert that would contest the timeline of Dr. Clayton, which was contrived to fit the Commonwealth's theory of Patterson's guilt. Accordingly, the performance prong of *Strickland* is met.

Since Patterson was found guilty based almost entirely on circumstantial evidence, the contrived testimony of Dr. Clayton was crucial to the jury's conviction of Patterson. Objectively, it would not have required much evidence contrary to that of Dr. Clayton to create a reasonable doubt. There is a

reasonable probability that if Patterson's trial counsel had properly investigated the Commonwealth's timeline and obtained expert testimony challenging that timeline, that the trial result would have been different.

Accordingly, Patterson has met the prejudice burden under *Strickland* as well.

2. Patterson's Counsel Also Failed to Object to the Introduction of Statements Made by Patterson at a Time When he was Clearly Detained, But was Never Advised of his Miranda Rights

The Motion asserts that the police were not required to advise Patterson of his Miranda rights prior to questioning because Patterson was not in custody. The Motion cites to a readily distinguishable case in support of its contention that Patterson was not in custody. The case relied upon is readily distinguishable from this case because the defendant was incarcerated by was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted. *Howes v. Fields*, 565 U.S. 499, 15 (2012).

The initial step of determining whether a person is considered in custody is to ascertain whether, in light of the objective circumstances of the interrogation, whether a reasonable person would have felt he or she was not at liberty to terminate the

interrogation and leave. *Stansbury v. California*, 511 U.S. 318, 322-323, 325 (1994) *(per curiam)*; *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In this case, it is clear that Patterson was not at liberty to terminate the interrogation and leave. TT Day 2, Page 412.

The next inquiry is how Patterson gauged his freedom of movement, in examination of all of the circumstances surrounding the interrogation. *Stansbury*, 511 U.S., at 322, 325.

As to Patterson's interrogation, there is no question that the police viewed the location thereof (Patterson's apartment) as a crime scene and were investigating criminal activity. The fact that the police remained in Patterson's apartment for an extended period of time after Aubrey Hannsz was taken to the hospital reasonably led Patterson to gauge that he had no freedom of movement.

It is clear that Patterson was not free at that point to leave, for example, to go to the hospital to find out the condition of Aubrey Hannsz.

"Fairly soon after the child had left" the apartment Patterson asked to use the restroom. TT at p. 396-97. Officer Savino conducted a "sweep" of the bathroom before allowing Patterson to enter, and then stood outside the door while Patterson used the bathroom. TT at p. 397. Officer Savino limited Patterson's movements, and detained him in the kitchen while Officer Minter secured the front door. TT at p. 398. Officer Savino testified that the

interrogation was over any hour in duration. TT at p. 400.

It is objectively unreasonable to assert based on the behavior of the police in this case that any reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. Accordingly, Patterson was in custody and should have been advised of his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436 (1966).

It is objectively ludicrous to contend that after Patterson asked to use the bathroom and Officer Savino conducted a "sweep" of the bathroom before allowing Patterson to enter, and then stood outside the door while Patterson used the bathroom to assert that Patterson was not in custody and would have believed himself to be free to terminate the interrogation and leave. Officer Savino also testified that he limited Patterson's movements. TT at p. 398. No reasonable person would have felt free to leave under such circumstances, particularly with Officer Minter securing the front door and barring his exit.

At trial, one key part of Sergeant Shattuck's testimony that was very damaging to Patterson was Patterson never asked about Aubrey's condition or inquired about her well being. TT at p. 376. Similarly, Officer Savino testified that Patterson did not ask to go meet with the mother or to go to the hospital. TT at p. 405. In addition, Officer Savino was allowed to testify that he believed that Patterson was acting nervous during questioning. TT at p. 405-406.

Particularly because Patterson was never advised of his right to remain silent or that he was entitled to have an attorney present during questioning, no testimony about his statements or lack of statements should have been admitted. Indeed, Patterson's trial counsel should have moved to suppress any testimony concerning statements made or not made by Patterson during that interrogation. Patterson's trial counsel failed to do so.

Recognizing basic rights violations during a custodial interrogation is objectively a requisite for constitutionally adequate representation. The performance prong of *Strickland* is clearly met by such objectively unreasonable failures to properly analyze the custodial questioning and object to testimony based thereon.

It is objectively apparent that the highly prejudicial testimony from both Sergeant Shattuck and Officer Savino had an impression on the jury that was highly detrimental to Patterson. Accordingly, there is a reasonable probability that the result of Patterson's trial would have been different had testimony about Patterson's custodial interrogation been properly excluded. Accordingly, the prejudice prong under *Strickland* is met.

3. Trial Counsel's Failure to Properly Prepare By Pursuing DNA Testing of Biological Evidence that was Not Tested by the Commonwealth

Trial testimony established that samples taken from the body of Aubrey Hannsz were tested for spermatozoa, which were negative; however the samples were not tested for DNA. TT at p. 441, l. 5-9.

The Motion argues that somehow Patterson's claim fails because he did not explicitly state what was very implicit in the Petition. It is axiomatic that since the samples were not tested for DNA, it is impossible to know what tests that were never run would have revealed.

However, proper investigation by Patterson's defense counsel necessarily included investigating the DNA test. It is objectively unreasonable, in a case like this that was nearly entirely based upon circumstantial evidence, for Patterson's trial counsel not to have performed an investigation and have samples tested that were not tested by the Commonwealth.

The performance prong of *Strickland* is met by the objectively unreasonable failure to investigate. The testing of those samples could well have implicated someone else in the injuries and death of Aubrey Hannsz. Patterson avers that he is not guilty of the crimes for which he was convicted. Constitutionally competent counsel would have pursued evidence that could have proved Patterson's innocence.

Had the samples taken from Aubrey Hannsz, there is a reasonable probability that the results of the trial would have been different.

4. The Failure to Investigate or Obtain Positive Character Testimony

The Motion asserts that failure to present affirmative testimony of his good character, this follows the theory that it is improbable that a person who bears a good reputation would be likely to commit the crime charged against him. The Motion contends that a failure to present such testimony was a mere strategy. That contention does offense to objective reasonableness.

While it is true, as noted in the Motion, that Patterson's trial counsel elicited a couple of very short and terse statements that were positive about Patterson from adverse witnesses, those statements were de minimis in view of approximately 750 pages of almost entirely adverse trial testimony over a four-day period.

Virginia law is clear that such evidence of good character was a right of Patterson. *Gardner v. Commonwealth*, 288 Va. 44 (2014); Virginia Practice of Criminal Procedures § 17:33.

Understandably, the Motion is silent as to any objectively reasonable theory as to why Patterson's trial counsel did not investigate or pursue such testimony. Instead, the Commonwealth makes an objectively unreasonable assertion that somehow the jury in Patterson's case would have viewed such favorable testimony negatively. Apparently, it is the Commonwealth's view that no evidence could or

should have been introduced that did not affirmatively fit into their theory of Patterson's guilt.

In Patterson's case, given the totality of circumstances, it was objectively unreasonable for Patterson's trial counsel not to properly investigate and present character testimony in his favor. There is simply no reasonable justification for not doing so. Accordingly, the performance prong of the *Strickland* test has been met.

As to prejudice, the Motion misrepresents that law. The Motion attempts to misinterpret the law in a manner that would make it impossible to ever prove prejudice under any circumstances. Typical of the misrepresentations is a stated premise that somehow Patterson's claims of a reasonable probability of a different outcome are speculative and "Speculation does not prove prejudice under Strickland." However, neither of the cited cases alleged to support this premise (*Burger v. Kemp* 483 U.S. 776, 793 (1987) and *Orbe v. True*, 233 F. Supp. 2d 749, 781 (E.D. Va. 2002)) say any such thing.

Instead, binding authority states that to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Wiggins*, 539 U.S. at 534. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In assessing prejudice, evidence is reweighed against the totality of available evidence. *Id.*

We know with certainty what Kimberly Brook Williams testified to at Patterson's sentencing hearing and have every reason to expect other witnesses would have similarly testified as to Patterson's good character had Patterson's trial counsel performed a requisite investigation and called them as he should have.

It is certainly possible to weigh positive character evidence that was never put before the jury against the totality of the evidence of the case. There was no forensic evidence proving who inflicted the injuries. TT at p. 29. The evidence against Patterson was entirely circumstantial and the timeline proffered by the Commonwealth was highly suspect (see Petition at p. 10-11).

Given the weakness of the evidence against Patterson, there is a reasonable probability that had significant positive testimony about Patterson's character would have been likely to change the outcome of Patterson's trial.

5. Trial Counsel's Failure to Properly Prepare to Cross-examine or Contest the Testimony of Robert Fromberg

The Motion admits that Patterson's counsel did not conduct any inquiry about telephone conversations that Robert Fromberg ("Fromberg") had around the time that he claimed to have heard Patterson make incriminating statements. It really doesn't matter that Patterson's trial counsel was able

to cast doubt on Fromberg's testimony under cross-examination.

It was objectively unreasonable for Patterson's counsel not to investigate communications that Fromberg had in which he could have obtained information concerning Patterson's case from sources other than Patterson. The performance prong of Strickland is met by this failure to reasonably investigate defenses as required under cases like *Wiggins*.

III. Conclusion

For all of the reasons discussed herein, Patterson respectfully and requests that this Court deny the Motion to Dismiss in its entirety.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was, on this 21st day of February, 2017, sent via Priority Mail to the Virginia Beach Circuit Court and a true copy thereof was served by US Mail to the following:

Elizabeth Kiernan Fitzgerald
Assistant Attorney General
202 North Ninth Street
Richmond, VA 23219

Dated: February 21, 2017

Respectfully Submitted,

Dale R. Jensen
Counsel for Petitioner

Tracking Number. **ELS64577599US**
Delivered
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Updated Delivery Day: Monday, November 21,2016•
Scheduled Delivery Day: Monday, November 21, 2016, 3:00pm,
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Signed for By: J CALEVAS // V1RGINlA BEACH, VA 2345611 11:11 am
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Postal Product: Priority Mail Express 2-Day™	**Features:** Insured Up to $100 insurance included Restrictions Apply	PO to Addressee
DATE & TIME	STATUS OF ITEM	LOCATION
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Micah Patterson – Opposition to Motion to Dismiss Exhibit 1

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November 21, 2016, 10:03 am	Out for Delivery	VIRGINIA BEACH, VA 23456
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November 21, 2016, 4:59 am	Departed USPS Facility	NORFOLK, VA 23501
November 21, 2016, 12:43 am	Arrived at USPS Destination Facility	NORFOLK, VA 23501
November 19, 2016, 11:41 pm	In Transit to Destination	
November 19, 2016, 10:44 am	Departed USPS Facility	SALT LAKE CITY, UT 84199
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November 18, 2016, 7:30 pm	Arrived at USPS Origin Facility	PROVO, UT 84606
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WebMD
Shaken Baby Syndrome – Topic Overview

What is shaken baby syndrome?

If you want to save this information but don't think it is safe to take it home, see if a trusted friend can keep it for you. Plan ahead. Know who you can call for help, and memorize the phone number.

Be careful online too. Your online activity may be seen by others. Do not use your personal computer or device to read about this topic. Use a safe computer such as one at work, a friend's house, or a library.

Shaken baby syndrome is brain injury that occurs when someone shakes a baby or throws a baby against an object. It is a form of child abuse. It may happen to children up to 5 years of age, but it is most common in babies younger than 1 year old.

It is never okay to shake or throw a young child. It may not leave any obvious sign of injury, but it can cause serious long-term problems or even death.

Shaken baby syndrome often occurs when a baby won't stop crying and a caregiver loses control of his or her emotions. Parents can help prevent this problem by learning healthy ways to relieve stress and anger. It's also important to choose child care providers carefully.

Shaken baby syndrome may also be called "shaken-impact syndrome." Many doctors use the term

"abusive head trauma" to describe the injury. They may use "intentional head injury" to describe how it happened.

What causes the brain injury?

When a baby is shaken or thrown, the head twists or whips back and forth. This can cause tears in brain tissue, blood vessels, and nerves. The child's brain slams against the skull. This can cause bleeding and swelling in the brain

Young children are at high risk for brain injury when they are shaken or thrown. That's because they have:

- Heavy, large heads for their body size.
- Weak neck muscles that don't hold up the head well.
- Delicate blood vessels in their brains.

Normal play, such as bouncing a child on a knee or gently tossing a child in the air, does not cause shaken baby syndrome.

What are the symptoms?

Symptoms vary among children based on how old they are, how often they've been abused, how long they were abused each time, and how much force was used.

Mild injuries may cause subtle symptoms. For example, a child may:

- Be fussy, grouchy, or sluggish.
- Vomit.

- Not be hungry.

A child with more severe injuries may have symptoms such as:

- Seizures.
- A slow heartbeat.
- Trouble hearing.
- Bleeding inside one or both eyes.

A child who has been shaken or thrown may also have other signs of abuse, such as broken bones, bruises, or burns.

Symptoms can start quickly, especially in a badly injured child. Other times, it may take a few days for brain swelling to cause symptoms.

Sometimes caregivers who harm a child will put the child to bed. They may hope that symptoms will get better with rest. By the time the child gets to a doctor, the child may need urgent care. In some cases, the child may be in a coma before a caregiver seeks help.

How is shaken baby syndrome diagnosed?

Shaken baby syndrome can be hard to detect because often there aren't clear signs of abuse. Instead, a baby may have vague symptoms, such as vomiting or a poor appetite. At first these symptoms may seem related to an infection, such as the flu or a kidney infection. Sadly, shaken baby syndrome may not be discovered until repeated abuse or more severe harm occurs.

To confirm a diagnosis of shaken baby syndrome, a doctor will:

- Ask about the child's medical history, including when changes in behavior began.
- Do a physical exam to look for signs of injury and increased blood pressure.
- Do imaging tests such as a CT scan or an MRI to look for bleeding or other injury in the brain.
- Take X-rays to check for broken bones.

A doctor may also do tests to rule out other possible causes of the child's symptoms. For example, a lumbar puncture checks the spinal fluid for signs of meningitis. Blood tests may be done to check for internal injuries or to rule out other conditions, such as rare blood disorders.

A doctor who suspects shaken baby syndrome must report it to the local child welfare office and police.

How is it treated?

A child with shaken baby syndrome needs to be in the hospital, sometimes in an intensive care unit (ICU). Oxygen therapy may be used to help the child breathe.

Doctors may give the child medicine to help ease brain swelling. Sometimes a cooling mattress will help lower the child's body temperature and reduce brain swelling.

Depending on the symptoms, doctors may try seizure medicine, physical therapy, or other treatments. A

child who has severe bleeding in the brain may need surgery.

What are the long-term problems from shaken baby syndrome?

A child may have brain damage that causes one or more serious problems, such as:

- Seizures. A baby may have uncontrolled muscle movement and be unable to speak, see, or interact normally.
- Blindness or trouble seeing or hearing.
- Cerebral palsy, with muscle stiffness (spasticity) that results in awkward movements.
- Intellectual disabilities that can affect every area of a child's life. For example, a child may have trouble learning to talk or may not be able to care for himself or herself in the future.
- Learning disabilities that may not appear until the child starts school.
- Emotional or behavior problems.

Some children die from their injuries.

What should you do if you suspect shaken baby syndrome?

It is important to get help if something doesn't seem right with your baby. Shaken baby syndrome may cause only mild symptoms at first, but any head injury in a young child can be dangerous.

Call or other emergency services immediately if a child:

- Is having trouble breathing.
- Is unconscious.
- Has a seizure.
- Is in immediate danger of further abuse.

Young children can't defend themselves, so it is up to adults who care to protect them. If you suspect abuse and the child is not in immediate danger:

- Call local child protective services or the police.
- Do not confront the person who may have abused the child. This may cause more harm to the child.

AMERICAN ACADEMY OF PEDIATRICS
Committee on Child Abuse and Neglect

Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report

ABSTRACT. Shaken baby syndrome is a serious and clearly definable form of child abuse. It results from extreme rotational cranial acceleration induced by violent shaking or shaking/impact, which would be easily recognizable by others as dangerous. More resources should be devoted to prevention of this and other forms of child abuse.

ABBREVIATIONS. CT, computed tomography; MRI, magnetic resonance imaging.

INTRODUCTION

Physical abuse is the leading cause of serious head injury in infants.[1-2] Although physical abuse in the past has been a diagnosis of exclusion, data regarding the nature and frequency of head trauma consistently support the need for a presumption of child abuse when a child younger than 1 year has suffered an intracranial injury.[1-2]

Shaken baby syndrome is a serious form of child maltreatment most often involving children younger than 2 years but may be seen in children up to 5 years old.[2-5] It occurs commonly, yet may be misdiagnosed in its most subtle form and underdiagnosed in its most serious form.[6] Caretakers may misrepresent or claim to have no knowledge of the cause of the brain injury. Caretakers who are not responsible for the injuries may not know how they occurred. Externally visible injuries are often absent. Given possible difficulties in initially identifying an infant as having been abusively shaken and the variability of the syndrome itself, physicians must be extremely vigilant when dealing with any brain trauma in infants and be familiar with radiologic and clinical findings that support the diagnosis of shaken baby syndrome.

HISTORY

In 1972, pediatric radiologist John Caffey[7] popularized the term "whiplash shaken baby syndrome" to describe a constellation of clinical findings in infants, which included retinal hemorrhages, subdural and /or subarachnoid hemorrhages, and little or no evidence of external cranial trauma. One year earlier, Guthkelch[8] had postulated that whiplash forces caused subdural

hematomas by tearing cortical bridging veins. In the mid-1970s, computed tomography (CT) began to be used to help with diagnosis.

The recommendations in this statement do not indicate an exclusive course of treatment or serve as a standard of medical care. Variations, taking into account individual circumstances, may be appropriate, PEDIATRICS (ISSN 0031 4005). Copyright <D 2001 by the American Academy of Pediatrics. The advent of magnetic resonance imaging (MRI) in the mid-1980s has furthered the diagnostic capabilities.9

ETIOLOGY

The act of shaking leading to shaken baby syndrome is so violent that individuals observing it would recognize it as dangerous and likely to kill the child. Shaken baby syndrome injuries are the result of violent trauma. The constellation of these injuries does not occur with short falls, seizures, or as a consequence of vaccination. Shaking by itself may cause serious or fatal injuries.[10-11] In many instances, there may be other forms of head trauma, including impact injuries.[10-12] Thus, the term shaken/slam syndrome (or shaken-impact syndrome) may more accurately reflect the age range of the victims (who are not always babies) and the mechanisms of injury seen. Such shaking often results from tension and

frustration generated by a baby's crying or irritability, yet crying is not a legal justification for such violence.[13] Caretakers at risk \ for abusive behavior generally have unrealistic expectations of their children and may exhibit a role reversal whereby care-takers expect their needs to be met by the child.[14]

Additionally, parents who are experiencing stress as a result of environmental, social, biological, or financial situations may also be more prone to impulsive and aggressive behavior. Those involved with domestic violence and/or substance abuse may also be at higher risk of inflicting shaken baby syndrome. Small children are particularly vulnerable to such abuse because of the large disparity in size between them and an adult-sized perpetrator.

EPIDEMIOLOGY

Head injuries are the leading cause of traumatic death and the leading cause of child abuse fatalities. Homicide is the leading cause of injury-related deaths in infants younger than 4 years.[2] Serious injuries in infants, particularly those that result in death, are rarely accidental unless there is another clear explanation, such as trauma from a motor vehicle crash. Billmire and Meyers[15] found that when uncomplicated documented severe trauma such as that resulting in skull fractures were excluded, 95%

of serious intracranial injuries and 64% of all head injuries in infants younger than 1 year were attributable to child abuse. Bruce and Zimmerman[5] documented that 80% of deaths from head trauma in infants and children younger than 2 years were the result of non-accidental trauma. Contrary to early speculations,[7-8] shaken baby syndrome is unlikely to be an isolated event. Evidence of prior child abuse is common.[16] Specific evidence of previous cranial injuries (eg, old intracranial hemorrhages) from shaking episodes is found in about 33% to 40% of all cases.[16-17] As with other forms of physical abuse, males are more often perpetrators than are females.[2-18] However, in an individual case, gender should not be considered when trying to identify a possible perpetrator.

CLINICAL FEATURES AND EVALUATION

Signs of shaken baby syndrome may vary from mild and nonspecific to severe and immediately identifiable clinically as head trauma.[6] There is a spectrum of the consequences of shaken baby syndrome, and less severe cases may not be brought to the attention of medical professionals and may never be diagnosed. A shaken infant may suffer only moderate ocular or cerebral trauma. A victim of sublethal shaking may have a history of poor feeding,

vomiting, lethargy, and/or irritability occurring for days or weeks. These clinical signs of shaken baby syndrome are immediate and identifiable as problematic, even to parents who are not medically knowledgeable.[19] However, depending on the severity of clinical signs, this may or may not result in caretakers seeking medical attention. These nonspecific signs are often minimized by physicians or attributed to viral illness, feeding dysfunction, or colic.[6] In these relatively milder cases, signs may resolve without the true cause being discovered. If the child presents later with indications for cerebral imaging (eg, altered consciousness and other physical signs of head trauma), signs of older intracranial trauma may retrospectively explain previously seen nonspecific signs and also serve as markers of previous assaults.[10-16] In the most severe cases, which usually result in death or severe neurologic consequences, the child usually becomes immediately unconscious and suffers rapidly escalating, life-threatening central nervous system dysfunction. A caretaker who violently shakes a young infant, causing unconsciousness, may put the infant to bed hoping or expecting that the baby will later recover.[5] Thus, the opportunity for early therapeutic intervention may be lost.[6] When brought to medical attention, the brain-injured infant may be convulsing, may have altered consciousness, may not

be able to suck or swallow, and may be unable to track with eye movements, smile, or vocalize. Occasionally, the comatose state may be unrecognized by caretakers or medical providers who assume that the infant is sleeping, lethargic, or suffering from a minor acute ailment or possibly an infection. Respiratory difficulty progressing to apnea or bradycardia, which requires cardiorespiratory resuscitation, results from severe injuries.[4-5] Evidence of other injuries, such as bruises, rib fractures, long-bone fractures, and abdominal injuries, should be meticulously searched for and documented. Any external injuries should be documented with forensic photographs labeled with the patient's name and the date. Repeated physical examinations may reveal additional signs of trauma. In 75% to 90% of cases, unilateral or bilateral retinal hemorrhages are present but may be missed unless the child is examined by a pediatric ophthalmologist, pediatric neurologist, pediatric neurosurgeon, or other experienced physician who is familiar with such hemorrhages, has the proper equipment, and dilates the child's pupils.[4-5-21] The number, character, location, and size of retinal hemorrhages after a shaking injury vary from case to case. More severe retinal hemorrhages are associated with more dire brain injury.[22] Retinal and vitreous hemorrhages and nonhemorrhagic changes, including retinal folds and

traumatic retinoschisis, are characteristic of shaken baby syndrome.[21,23,24]

At times, the clinical signs suggest meningitis, and a spinal tap yields bloody cerebrospinal fluid.[4] Centrifuged spinal fluid that is xanthochromic should raise the suspicion of cerebral trauma that is at least several hours old and not the result of a traumatic spinal tap. Because of confusing respiratory symptoms, chest roentgenograms may be obtained and may appear normal or show unexplained rib fractures. The shaken infant is often mildly to moderately anemic.[25] Clotting dysfunction from cerebral trauma should be assessed initially and followed up. Mild to moderate changes in coagulation studies are common with brain trauma and occasionally severe (eg, disseminated intravascular coagulation).[26] High amylase levels may signify pancreatic damage, and elevated transaminase levels may indicate occult liver injury.[27]

RADIOLOGY

CT has the first-line role in the imaging evaluation of a brain-injured child, adequately demonstrating injuries that need urgent intervention. CT often fails to reveal some aspects of the injury, and some false-negative results occur, particularly early in the evolution of cerebral edema.[28] The initial CT

evaluation should be performed without intravenous contrast and should be assessed using bone and soft-tissue windows. CT is generally the method of choice for demonstrating subarachnoid hemorrhage, mass effect, and large extra-axial hemorrhages.[28] CT should be repeated after a time interval or if the neurologic picture changes rapidly.[29]

MRI is of great value as an adjunct to CT in the evaluation of brain injuries in infants.[30] Because of the lack of universal availability of the technology, physical limitations of access to MRI when life support is required for critically ill infants or children, and relative insensitivity to subarachnoid blood and fractures, MRI is considered complementary to CT and should be obtained 2 to 3 days later if possible. Sato et al[28] have demonstrated a 50% greater rate of detection of subdural hematomae using MRI, compared with CT. The ability to detect and define in traparenchymal lesions of the brain is substantially improved by use of MRI, yet in the study by Sato et al,[28]

CT did not miss any surgically treatable injuries. MRI and CT can assist in determining when injuries occurred and substantiating repeated injuries by documenting changes in the chemical states of hemoglobin in affected areas.[28]

A skeletal survey of the hands, feet, long bones, skull, spine, and ribs should be obtained as soon as the infant's medical condition permits. Skull films complement CT bone windows in detection of skull fractures. In a retrospective series of abused children, skull films were more sensitive and improved the confidence of diagnosis of skull fracture, compared with CT.[31] Skull fractures that are multiple, bilateral, diastatic, or that cross suture lines are more likely to be nonaccidental.[31] Single or multiple fractures of the midshaft or metaphysis of long bones or rib fractures may be associated findings. Specialized views may be needed to delineate subtle fractures.[30] In selected patients, a skeletal survey should be repeated after 2 weeks to better delineate new fractures that may not be apparent until they begin to heal (a process that does not become radiologically apparent for 7-10 days). [30]

PATHOLOGY

Subdural hemorrhage caused by the disruption of small bridging veins that connect the dura to the pia arachnoid is a common result of shaking.[7-8] Such hemorrhage may be most prominent in the inter hemispheric fissure and minimal over the convexities of the hemispheres.[5] Cerebral edema with sub-arachnoid hemorrhage may be the only finding. A child may have subdural hemorrhages, subarachnoid

hemorrhages, or both. Intracranial or retinal hemorrhages may be unilateral or bilateral. Visible cerebral contusions are unusual, but diffuse axonal injury is common.[32] However, for technical reasons, it is often not possible to demonstrate this pathologically or radiologically in individual cases. Isolated or concomitant hypoxicischemic damage may result in mild to severe cerebral edema initially and cerebral atrophy and/or infarction as a later finding. Chronic extraaxial fluid collections, cerebral atrophy, and cystic encephalomalacia are common late sequelae.[29] Sequential cranial imaging studies are recommended. The diagnostic entity of "benign subdural effusions" should be viewed with caution, because multidisciplinary evaluations in previously described cases were lacking.[33]

OUTCOME AND CONSEQUENCES

There is a high rate of morbidity and mortality among infant victims of shaken baby syndrome.[2,4,11,16] Mortality rates range from 15%4 to 38%,[10] with a median of 20% to 25%. In one series, of those infants who were comatose when initially examined, 60% died or had profound mental retardation, spastic quadriplegia, or severe motor dysfunction. Other infants initially had seizures, irritability, or lethargy but had no lacerations or infarctions of brain tissue. These children did not have severely elevated

intracranial pressure, subtle neurologic sequelae, or persistent seizures.[29] When severely brain-injured children survive, they may be cortically blind; have spasticity, seizure disorders, or microcephaly; or have chronic subdural fluid collections, enlarging ventricles, cerebral atrophy, encephaloma lacia, or porencephalic cysts.[28] The outcome of shaken infants who do not receive medical attention is presently unknown but may be revealed later as learning, motor, or behavior problems of unknown cause.

CLINICAL AND COMMUNITY MANAGEMENT OF ABUSIVE HEAD INJURIES

Because the differential diagnosis of head trauma is predominately that of accidental versus inflicted injury, prompt and accurate investigation is essential. A carefully recorded time line of the child's condition is of great assistance in determining when injuries may have occurred. Suspicion of serious head injury as a result of abuse must be reported immediately to the appropriate authorities. This facilitates a thorough investigation before the histories become clouded by time or caregivers compare or invent explanations. The clinical team should include a physician who can immediately resuscitate and stabilize the baby while diagnostic radiologic studies are being done. Specialists in

pediatric radiology, pediatric neurology and/or pediatric neurosurgery, and ophthalmology and a pediatrician who specializes in child abuse should form the diagnostic team. Many children will need to be followed in a pediatric intensive care unit. In rural or medically under-served areas in which one or more of these specialists are not available, a regional consultation network for child abuse cases should be developed. Careful follow-up by this same team is desirable to document and treat ocular, developmental, and neurologic sequelae of the trauma. Ideally, a physician who works with a multidisciplinary child abuse team should be available to take a broad but detailed history from the caretakers. Information regarding symptom onset and information regarding the chain of caretakers needs to be quickly passed on to mandated law enforcement and child protection investigators. Physicians can provide interpretation of the likely scenario, timing, and nature of the injuries involved.[34] If notified promptly, investigators may be able to explore the scene of the injury and elicit detailed information from the caretaker before defensive reactions develop. A psychosocial assessment of the caretakers should be a part of this comprehensive team approach. Siblings or other children in the same environment may have signs of inflicted trauma or repeated shaking.[9] Therefore,

medical and child protection assessments need to be available immediately to ensure the current and future safety of these children.

PREVENTION

As a part of anticipatory guidance, the pediatrician should ask about caretaker stress, discipline practices, substance abuse, and response to the crying infant. The efficacy of home visitation programs in preventing intrafamilial physical abuse is established. Nationwide home visitation programs have been repeatedly recommended by the US Advisory Board on Child Abuse and Neglect.[2,35] Because males commit most physical abuse, special programs should also be developed to target them. Shaken baby syndrome awareness programs that erroneously state that shaken baby syndrome may be caused by bouncing a child on a knee, by tossing him in the air, or even by rough play are to be discouraged, because they are inaccurate and may cause parents who have not abused their child to feel guilty.[1] Whether or not educational efforts will prevent critically stressed or homicidal adults from violently shaking babies needs to be evaluated. The prevention of extrafamilial abuse in out-of-home care settings is more problematic. Careful checking of references, frequent unannounced visits, and conversations with others who use the same

caretaker may be valuable, but there are no data available to verify the efficacy of these preventive measures as there are for home visitation programs.

SUMMARY

Shaken baby syndrome is a clearly definable medical condition. A proper response requires integration of specific clinical management and community intervention in an interdisciplinary fashion. Greater attention and resources should be devoted to prevention of abusive injuries.

RECOMMENDATIONS

The American Academy of Pediatrics recommends that pediatricians:

1. Become educated about the recognition, diagnosis, treatment, and outcome of shaken baby and abusive head-impact injuries in infants and children;
2. Be aware of and exercise their responsibility to report these injuries to appropriate authorities;
3. Provide pertinent medical information to other members of multidisciplinary teams investigating these injuries;
4. Support home visitation programs and any other child abuse prevention efforts that prove efficacious; and

5. Provide or have appropriate referrals to resources to educate parents about healthy coping strategies when dealing with their child.

REFERENCES

1. Alexander R, Levitt C, Smith W. Abusive head trauma. In: Reece RM, Ludwig S, eds. Child Abuse: Medical Diagnosis and Management. 2nd ed. Philadelphia, PA: Lippincott, Williams & Wilkins; 2001:47-80

2. US Advisory Board on Child Abuse and Neglect. A Nation's Shame: Fatal Child Abuse and Neglect in the United States. Washington, DC: US Department of Health and Human Services; 1995. Report No. 5

3. Alexander R, Smith W, eds. Abusive Head Trauma: Proceedings of a Consensus Conference. Funded by Brain Trauma Foundation. Iowa City, 1A: University of Iowa; 1991

4. Ludwig S, Warman M. Shaken baby syndrome: a review of 20 cases. Ann Emerg Med. 1984;13:104-107

5. Bruce DA, Zimmerman RA. Shaken impact syndrome. Pediatr Ann. 1989;18:482-494

6. Jenny C, Hymel KP, Ritzen A, Reinert SE, Hay TC. Analysis of missed cases of abusive head trauma. }AMA. 1999;281:621-626

7. Caffey J. On the theory and practice of shaking infants. Its potential residual effects of permanent brain damage and mental retardation. Am f Dts Child. 1972;124:161-169

8. Guthkelch AN. Infantile subdural haematoma and its relationship to whiplash injury. Br Med /. 1971;2:430-431

9. Alexander RC, Schor DP, SmithWL Jr. Magnetic resonance imaging of intracranial injuries from child abuse. / Pediatr. 1986;109:975-979

10. Alexander R, Sato Y, Smith W, Bennett T. Incidence of trauma with cranial injuries ascribed to shaking. Am J Dis Child. 1990;144:724-726

11. Gilliland MG, Folberg R. Shaken babies—some have no impact Injuries. J Forens Sci. 1996;41:114-116

12. Duhaime AC, Gennerelli TA, Thibault LE, Bruce DA, Margulies SS, Wiser R. The shaken baby syndrome. A clinical, pathological, and biomechanical study. / Neurosurg. 1987,66:409-415

13. Dykes LJ. The whiplash shaken infant syndrome: what has been learned? Child Abuse Negl. 1986;10:211-221

14. Steele BF, Pollock CB. A psychiatric study of parents who abuse infants and small children. In: Heifer RE, Kempe CH, eds. The Battered Child. 2nd ed. Chicago, 1L: University of Chicago Press; 1974:89-133

15. Billmire ME, Myers PA. Serious head injury in infants: accident or abuse? Pediatries. 1985;75:340-342

16. Alexander R, Crabbe L, Sato Y, Smith W, Bennett T. Serial abuse in children who are shaken. Am } Dis Child. 1990;144:58-60

17. Ewings-Cobb L, Kramer L, Prasad M, et al. Neuroimaging, physical, and developmental findings after inflicted and non-inflicted traumatic brain

injury in young children. Pediatrics. 1998;102:300-307

18. Starling SP, Holden JR, Jenny C. Abusive head trauma: the relationship of perpetrators to their victims. Pediatrics. 1995;95:259-262

19. Duhaime AC, Christian CW, Rorke LB, Zimmerman R. A non-accidental head injury in infants—the "shaken baby syndrome." N Engl / Med. 1998-338:1822-1829

20. Chad wick DL, Chin S, Salerno C, Landsverk J, Kitchen L. Deaths from falls in children: how far is fatal? / Trauma. 1991;31:1353-1355

21. Levin AV. Ocular manifestations of child abuse. Ophthalmol Clin North Am. 1990;3:249-264

22. Wilkinson WS, Han DP, Rappley MD, Owings CL. Retinal hemorrhage predicts neurologic injury in the shaken baby syndrome. Arch Ophthal-mol. 1989;107:1472-1474

23. Greenwald MJ, Weiss A, Oesterle CS, Friendly DS. Traumatic retinos-chisis in battered babies. Ophthalmology. 1986;93:618-625

24. Levin AV. Retinal hemorrhages: a review. In: David TJ, ed. Recent Advances in Paediatrics. London, United Kingdom: Churchill-Livingstone; 1999:151-219

25. Hadley MN, Sonntag VK, Rekate HL, Murphy A. The infant whiplash-shake injury syndrome: a

clinical and pathological study. Neurosurgery. 1989;24:536-540

26. Hymel KP, Abshire TC, Luckey DW, Jenny C. Coagulopathy in pedi-atric abusive head trauma. Pediatrics. 1997,99:371 -375

27. Coant PN, Kornberg AE, Brody AS, Edwards-Holmes K. Markers for occult liver injury in cases of physical abuse in children. Pediatrics. 1992;89:274-278

28. Sato Y, Yuh WT, Smith WL, Alexander RC, Kao SC, Ellerbroek CJ. Head injury in child abuse: evaluation with MR imaging. Radiology. 1989;173: 653-657

29. Sinai SH, Ball MR. Head trauma due to child abuse: serial computerized tomography in diagnosis and management. South Med }. 1987;80: 1505-1512

30. American Academy of Pediatrics, Section on Radiology. Diagnostic imaging of child abuse. Pediatrics. 2000;105:1345-1348

31. Meservy CJ, Towbin R, McLaurin RL, Myers PA, Ball W. Radiographic characteristics of skull fractures resulting from child abuse. AfR Am / Roentgenol. 1987;149:173-175

32. Vowles GH, Schoitz CL, Cameron JM. Diffuse axonal injury in early infancy. / Clin Pathol. 1987;40

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DEDICATED TO THE HEALTH OF ALL CHILDREN

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH MICAH PATTERSON, #1492067

Petitioner,

v. Case No. CL15-530

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

OBJECTION AND RESPONSE

The respondent, by counsel, objects to petitioner's response to the motion i& dismiss. This matter is ripe for adjudication and the Court should enter the respondent's proposed order.

1. The petitioner is confined pursuant to. a final judgment of this Court entered on November 12, 2013. Following a jury trial, Patterson was convicted of first-degree murder for death of four-month-old A.H, object sexual penetration* and felony child neglect. The jury sentenced the petitioner to a total sentence of life in prison plus 40 years. (Case Nos. CR12-1865, CR12-2017, CR12-3195).

2. Petitioner filed his petition for a writ of habeas corpus in this Court on November 22,2016. On November 29,2016, this Court entered an Order directing the respondent to file an answer within 60. days of receipt of the Court's order. Respondent received the Court's order on December 2, 2016, and timely filed his Motion to Dismiss on January 31, 2017. On February 24, 2017, the petitioner filed a memorandum in opposition to the Motion to Dismiss.

3. The petitioner, however, has no statutory right to file a response to the Motion to Dismiss in a habeas corpus proceeding. Indeed, Code §§ 8.01-654 and 8.01¬657 together contemplate only two pleadings in habeas corpus cases: the petition and a responsive pleading by the respondent. See id.; see also Strong v. Johnson, 495 F.3d 135, 139 (4th Cir. 2007) (pursuant to Rule 5:7 only two pleadings are permitted in habeas corpus cases absent specific authorization by the court). "Absent court authorization, no other documents may be filed." Strong, 495 F.3d at 139. See also Taylor v. Murray, 855 F. Supp. 124, 126 (E.D. Va. 1994) (recognizing that pursuant to Code § 8.01-654(B)(2) and Rule 5:7 only two pleadings are permitted in habeas corpus cases); Whitehead v. Johnson, No. I:07cvll93, 2008 U.S. Dist. LEXIS 63212, at *8-9 (citing Rule 5:7 and Taylor, 855 F. Supp. at 126, to hold circuit court did not err in failing to address petitioner's response to respondent's motion to dismiss). Because the petitioner has neither requested nor been granted leave to file a response in this matter, the petitioner's

response is not properly before the Court and should not be considered.

4. Should the Court, in its discretion, elect to consider the petitioner's response, the Director submits that the petition is barred by the statute of limitations. Unlike the federal statute cited by the petitioner, the state statute of limitations runs from "final disposition of the direct appeal ***in state court*** or the time for such appeal has expired, whichever is later." Code § 8.01-654 (emphasis added). The Supreme Court of the United States is not a state court. Accordingly, the time to file a petition for certiorari in the Supreme Court of the United States does not prolong the petitioner's time to file his state habeas petition. Instead, petitioner's time to file a habeas expired one year after the Virginia Supreme Court denied his petition for appeal: on Monday, November 21, 2016. See Lahey v. Johnson, 283 Va. 225, 227, 720 S.E.2d 534, 535 (2012) (noting petitioner's time to file a habeas corpus petition expired one year after the Virginia Supreme Court denied his petition for appeal).

5. The petitioner's alternative argument that the Virginia Beach Circuit Court Clerk's Office failed to appropriately file his petition is also without merit. Assuming the petition was mailed to the correct address, the petition is not deemed filed when it enters the courthouse complex. Each of the documents submitted by the petitioner in the instant case, including the signature page which he submits was hand-filed, was stamped received by the Clerk

on Tuesday, November 22, 2016, at 9:31 a.m., the day after the statute of limitations had run. [1]

6. Upon further investigation, it appears Patterson's pleading may have been misdirected. The Clerk's Office of this Court logs priority mail as it is received and has no record of receiving any priority mail from petitioner's counsel on ***either*** November 21, 2016 or November 22, 2016. Likewise, the person who signed for the priority mail does not to work in the Clerk's Office. Instead, the pleading was signed for by "J. Calevas" at the "VA Beach City Mailroom." (Exhibit 1). Thus, contrary to the petitioner's contention, any delay in filing his pleading is not attributable to the Clerk's Office.

7. Accordingly, this Court should dismiss the instant matter as time barred.

8. The Court may resolve this matter without conducting an evidentiary hearing. Virginia Code § 8.01-654(B)(4); Yeatts v. Murray, 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995). The respondent's motion to dismiss and proposed order remain properly before this Court, and the Court enter the proposed order.

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[1] The page containing the notarized signature of the petitioner was signed on Monday November 21, 2016, in Wise County, presumably at the Wallens Ridge Detention Center where the petitioner resides. It is an approximately 7.5-hour drive between that facility and the Clerk's Office of this Court. See https://www.goodle.com/maps

WHEREFORE, respondent prays that the Court grant the respondent's Motion to Dismiss and enter the respondent's proposed order.

Respectfully submitted,

HAROLD W. CLARKE,
DIRECTOR,
VIRGINIA DEPARTMENT OF
CORRECTIONS

Respondent.

By: s/ Elizabeth K. Fitzgerald
Counsel

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CERTIFICATE OF SERVICE

On March 1, 2017, a copy of this Motion to Strike was mailed to Dale Jensen Esq., Dale Jensen, PLC, 606 Bull Run, Staunton, VA 24401, counsel for the petitioner.

s/ Elizabeth K. Fitzgerald
Elizabeth Kiernan Fitzgerald

UNITED STATES, POSTAL SERVICE,

Date: February 28, 2017

Elizabeth Fitzgerald:

The following is in response to your February 28, 2017 request for delivery information on your Priority Mail Express® item number EL564577599US. The delivery record shows that this item was delivered on November 21,2016 at 11:11 am in VIRGINIA BEACH, VA 23456 to J CALEVAS. The scanned image of the recipient information is provided below.

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Sincerely,
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VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH MICAH PATTERSON, #1492067

Petitioner,

v. Case No. CL16-5306

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

FINAL ORDER

This matter came before the Court on Petition for Writ of Habeas Corpus and Respondent's Motion to Dismiss. Upon mature consideration of the pleadings, controlling legal authority, and the record in the case of Commonwealth v. Micah Patterson, Case Nos. CR12-1865, CR12-2017, CR12-3195, which is hereby made a part of the record in this case, the Court makes the following findings of fact and conclusions of law in accordance with Code §8.01-654(B)(5):

Procedural History

1. The petitioner is confined pursuant to a final judgment of this Court entered on November 12, 2013. Following a jury trial, Patterson was convicted of first-degree murder for death of four-month-old A.H, in violation of Code § 18.2-33, object sexual penetration, in violation of Code § 18.2-67.2, and felony child neglect, in violation of Code § 18.2-371.1(A).[1] The jury sentenced the petitioner to a total sentence of life in prison plus 40 years. Patterson was represented at trial by Shawn M. Cline and Mark T. Del Duca.

2. Patterson appealed his conviction to the Court of Appeals of Virginia, where he was represented by Afshin Farashahi. On appeal, he asserted that the trial court erred in denying his Motion in Limine and challenged the sufficiency of the evidence of his identity as the perpetrator. On October 15, 2014, the Court issued a per curiam order denying his petition for appeal. Patterson appealed this decision to a three-judge panel of the Court of Appeals, which denied his petition for appeal on February 2, 2015. (Record No. 2359-13- 1). Similarly, on November 20, 2015, the Supreme Court

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[1] The jury also convicted Patterson of second-degree murder, but that conviction was vacated by this Court, by agreement of the parties.

of Virginia refused Patterson's petition for appeal to that Court. (Record No. 150356).

3. On November 22, 2016, the petitioner, by counsel, filed the instant habeas petition in this Court. In his petition, Patterson raises the following allegations: [2]

a. Ineffective assistance of counsel. Patterson's counsel failed to properly investigate the case or provide testimony and evidence that should have been presented on behalf of Patterson.

i. Counsel failed to present general character evidence including that the petitioner was not violent and a good parent;

ii. Counsel failed to present testimony about the petitioner's sexual proclivities;

iii. Counsel failed to call Kimberly Brook Wilkins, who testified at sentencing, in his case-in-chief; and

[2] The Court adopts Respondent's numbering as the petitioner's claims should be considered individually. See Lenz v. Warden of the Sussex I State Prison, 267 Va. 318, 340, 593 S.E.2d 292, 305 (2004) (rejecting argument that counsel's actions and omissions during sentencing phase of trial should be considered cumulatively).

iv. Counsel failed to present expert testimony to challenge the Commonwealth's timeline of injuries.

b. Ineffective assistance of counsel. Patterson's counsel also failed to properly prepare to cross-examine or contest the testimony of Robert Fromberg, who was the only witness providing evidence that was not entirely circumstantial.

c. Ineffective assistance of counsel. Patterson's counsel also failed to retain an expert to create an adversarial test to Dr. Michelle Clayton's trial testimony to properly contest Dr. Michelle Clayton's opinion about the timeline of injuries to [A.H.].

d. Ineffective assistance of counsel. Patterson's counsel also failed to properly prepare and pursue DNA testing of biological evidence that was not tested by the Commonwealth.

e. Ineffective assistance of counsel. Patterson's counsel also failed to object to the introduction of statements made by Patterson at a time he was clearly detained, but was never advised of his Miranda rights.

Statement of Facts

4. The Court adopts the Court of Appeals' summary of the evidence, repeated here to provide context to the discussion that follows:

> The evidence proved that in November 2011, S.M. began dating appellant, and on January 5, 2012, S.M. and her four-month-old daughter, A.H., moved into appellant's residence. On January 8, 2012, M.'s father watched A.H. while S.M. was at work. At approximately 3:00 p.m., appellant picked up A.H. and appellant cared for A.H. until S.M. returned. On January 9, 2012, S.M. took A.H. to see Dr. Debbie Holland because A.H. had a fever and was fussy. Dr. Holland did not notice any bruises on A.H.'s abdomen, pelvis, neck, or anus. On January 10, 2012, S.M. noticed two thumbprint shape bruises on A.H.'s pelvis and appellant told S.M. he did not know how the bruising occurred. While appellant cared for A.H., S.M. left the residence and went to the courthouse to change her address. Appellant called S.M. and said that
>
> A.H. looked lifeless. After S.M. called Dr. Holland, S.M. tried to feed A.H. small amounts with a syringe as directed by Dr. Holland. Later, appellant and S.M. went to the mall, and while S.M. changed A.H.'s diaper, S.M. noticed a bruise on A.H.'s abdomen. S.M.

called the doctor's office and told appellant they needed to go home.

While waiting for the doctor's office to return the call, S.M. rocked A.H; and put her in the crib. While on the phone with a nurse, appellant pulled up S.M.'s dress, she told him to stop, but he continued. After S.M. completed the phone call with the nurse, S.M. and appellant had vaginal sex and appellant also tried to have anal sex, but S.M. refused. After they finished, S.M. went to the store and appellant remained with A.H. Prior to S.M. returning, appellant called 911 at 8:03 p.m. because AJH. was not breathing. A.H. was transported to a hospital. Dr. Michelle Clayton, an expert in child abuse pediatrics, examined A.H. and noticed several areas of bruising, including an intense purple coloring around her anus, as well as swelling and lacerations. Dr. Clayton testified the injuries to A.H.'s anus were caused by severe blunt trauma. On January 11, 2012, A.H. was pronounced dead. Dr. Wendy Gunther, the assistant chief medical examiner, testified to A.H.'s numerous injuries and explained A.H.'s anus had a ring of purple bruising around it that went into the anal canal a quarter of an inch and contained microscopic tears. According to Dr. Gunther, this type of injury was associated with sexual abuse and it was a fresh injury.

According to S.M., prior to January 10, 2012, appellant requested to have anal sex several times, but she did not enjoy it and thought it was painful. She informed appellant, appellant suggested an anal numbing cream, and at some point, appellant inserted the cream into S.M.'s buttocks using a syringe.

After appellant was arrested, the authorities found photographs on his cell phone. One photograph showed S.M.'s buttocks with a syringe in her buttocks. A second photograph showed S.M.'s buttocks with words appellant had written on her buttocks. Appellant wrote A.H.'s name, "enter here," "open all the time," and "my ass loves Micah's dick" on S.M.'s buttocks.

* * *

[Relating to A.H.'s other injuries, the Court found that when] A.H. arrived at a hospital in Virginia Beach, she was not breathing on her own and she had red marks on her neck and anus. A.H.'s diaper was dirty and was changed.

A.H. was transported to Children's Hospital of the King's Daughter (CHKD) for further treatment. Dr. Clayton examined A.H. and collected vaginal and anal swabs, which

were sent for analysis.[3] Dr. Clayton saw an oval bruise on each side of the pelvis, one bruise on the abdomen, several areas of bruising around the neck, an intense purple coloring around the anus with swelling and lacerations, and symptoms associated with severe brain injury. Dr. Clayton testified it was unusual to see bruising in a four-month-old baby because they did not move around. Dr. Clayton testified that when A.H. arrived at the Virginia Beach hospital, A.H.'s neck and anus only had red marks, but that when she arrived at CHKD, the red marks had developed into bruises. Dr. Clayton testified since the injuries were changing, they were recent injuries and occurred on the evening of January 10, 2012. Dr. Clayton testified [a] ligature was applied more than once to A.H.'s neck because there were several bruises on different planes. When describing the anal injuries, Dr. Clayton testified they were caused by severe blunt force trauma. Dr. Clayton also described A.H.'s neck, spine, and head trauma, and she testified A.H. experienced three separate episodes of abusive head trauma, one on January 9, one on the morning of January 10, and one on the evening of January 10, 2012.

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[3] No forensic evidence was developed from the swabs but an expert testified any seminal fluid or sperm that may have been present in A.H.'s diaper was discarded when it was changed.

Dr. Gunther testified A.H. died from abusive head trauma consistent with shaken baby syndrome. Dr. Gunther testified in detail regarding A.H.'s injuries, which included rib fractures, retinal hemorrhages, bruises, and the anal injury. Dr. Gunther found iron in several of A.H.'s organs, which was indicative of old injury. Dr. Clayton testified the iron in A.H.'s organs could be the result of earlier shaking episodes.

Robert Fromberg, an inmate in the jail, testified he met appellant and appellant said he was incarcerated for murdering a child. Fromberg testified appellant said he was watching his roommate's four-year-old niece, he "fingered" her, she woke up crying, and he put a pillow over her face to stop the crying. Fromberg admitted he was a convicted felon and had pending felony charges.

The authorities determined that from January 11 through January 12, 2012, appellant used his phone to conduct several internet searches with the terms "blood around infant's brain," "shaken baby syndrome," and "abusive head trauma." On January 11, 2012, appellant received a text message from a woman stating that S.M. probably committed the crimes and that he should not take the blame. Appellant responded that it was not S.M. and that she would never hurt A.H.

(Record No. 2359-13-1)

Analysis

THE PETITION IS UNTIMELY

5. The Court finds it cannot consider the merits of Patterson's claims because his petition is untimely.

> A habeas corpus petition attacking a criminal conviction or sentence...shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

Code § 8.01-654(A)(2).

6. Final judgment in the instant case was entered on November 12, 2013. Direct appeal concluded on November 20, 2015, when the Supreme Court of Virginia denied Patterson's petition for appeal. Because one year from the conclusion of his direct appeal is the later date, pursuant to Code § 8.01-654(A)(2), the petitioner had until November 20, 2016, to file his habeas corpus petition. Because November 20, 2016 was a Sunday, the petitioner had until Monday, November 21, 2016 to file. See Code § 1¬210. The instant petition was filed on Tuesday,

November 22, 2016. Patterson, therefore, has filed his petition one day too late.[4]

7. The Court further notes that Code § 8.01-654(A)(2) "contains no exception allowing a petition to be filed after the expiration of these limitations periods." Hines v. Kuplinski, 267 Va. 1, 2, 591 S.E.2d 692, 693 (2004). Regardless, Patterson's multiple allegations of ineffective assistance of counsel involve errors from the trial itself. The Court finds that the grounds for relief asserted in his petition, therefore, could have been discovered within the period established by Code § 8.01-654(A)(2), and he does not assert otherwise. Contrast Hicks v. Director, 289 Va. 288, 768 S.E.2d 415 (2015) (acknowledging petitioner's timely filing was obstructed by a Brady violation). Accordingly, Patterson's petition is untimely and must be dismissed.

THE PETITION ALSO FAILS ON THE MERITS

Standard of Review

[4] The Court notes that Rule 3A:25, the "prison mailbox rule," is not applicable as the instant matter is counsel-filed. See generally Lahey v. Johnson, 283 Va. 225, 720 S.E.2d 534 (2012) (discussing when a pleading is "filed" for purposes of habeas review).

8. Claims of ineffective assistance of counsel are determined based on the highly demanding standard set forth for such claims in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the petitioner has the burden to show both that his attorney's performance was deficient and that he was prejudiced as a result. See Strickland, 466 U.S. at 687. "Unless [the petitioner] establishes both prongs of the two- part test, his claims of ineffective assistance of counsel will fail." Jerman v. Director of the Department of Corrections, 267 Va. 432, 438, 593 S.E.2d 255, 258 (2004). This two- part analysis presents a "high bar" to petitioners. Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

9. The first prong of the Strickland test, the "performance" inquiry7, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The petitioner first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" Shaikh v. Johnson, 276 Va. 537, 544, 666 S.E.2d 325, 328 (2008) (quoting Strickland, 466 U.S. at 687-88).

10. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common

custom." Richter, 131 S. Ct. at 788 (quoting Strickland, 466 U.S. at 690). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Knowles v. Mirzavance, 556 U.S. Ill, 124 (2009) (quoting Strickland, 466 U.S. at 688). See DeCastro v. Branker, 642 F.3d 442, 451 (4th Cir. 2011) (pertinent inquiry is not which strategy is best, but whether strategy counsel chose is reasonable). In making this determination, "the court reviewing the habeas petition 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Shaikh, 276 Va. at 544, 666 S.E.2d at 328 (quoting Strickland, 466 U.S. at 689).

11. The second prong of the Strickland test, the "prejudice" inquiry, requires showing that there is a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694 (emphasis added). "It is not enough 'to show that errors had some conceivable effect on the outcome of the proceeding.'" Richter, 131 S. Ct. at 787 (quoting Strickland, 466 U.S. at 693). A reasonable probability7 is a "probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

12. An ineffective counsel claim may be disposed of on either prong of the Strickland test. "It

is not necessary for a court deciding an ineffective assistance claim to address both components of the inquiry, or to address them in any particular order. If the petitioner makes an insufficient showing on either component of the test, the other need not be considered." Shaikh, 276 Va. at 544, 666 S.E.2d at 328. Accord Spencer v. Murray, 18 F.3d 229, 232-33 (4th Cir. 1994) (An ineffective counsel claim may be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements."); Smith v. Spisak, 558 U.S. 139, 149, 130 S. Ct. 676, 685 (2010); Williams v. Warden, 278 Va. 641, 647-49, 685 S.E.2d 674, 677-78 (2009). Applying this standard, the petitioner is not entitled to the relief he seeks.

Claim (a)(i)

13. In claim (a)(i), the petitioner alleges trial counsel was ineffective for failing to present character evidence to the jury, including that that Patterson was in the Navy, was not prone to violence, did not have a criminal background, was not abusive in past relationships with women, and was not abusive toward his own daughter. The Court finds that this claim does not entitled the petitioner to relief.

14. At the threshold, tactical decisions, such as what witnesses to call and what evidence to

present, are part of the development of the defense strategy and lie solely within the province of counsel. Gonzalez v. United States, 553 U.S. 242, 249 (2008); accord Townes v. Commonwealth, 234 Va. 307, 320, 362 S.E.2d 650, 657 (1987). See also New York v. Hill, 528 U.S. 110, 115 (2000) (lawyer has full authority to manage conduct of trial). A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action. In other matters, a defendant, who has chosen to be represented by counsel must "accept the consequences of the lawyer's decisions. . . ." Taylor v. Illinois, 484 U.S. 400, 418 (1988). In particular, "'[decisions relating to witness selection are normally left to counsel's judgment, and this judgment will not be second-guessed by hindsight.'" Williams v. Armentrout, 912 F.2d 924, 934 (8th Cir. 1990) (en banc) (quoting Frank v. Brookhart, 877 F.2d 671, 674 (8th Cir. 1989)).

15. The Court finds, in any event, that counsel did elicit much of the testimony the petitioner alleges should have been presented to the jury. For example, S.A. testified that Patterson had a three-year old daughter of his own, and she felt there

was "no reason not to trust him." Patterson's daughter lived in Missouri, and S.A. observed him interact with his daughter using Sykpe, an internet video calling service. Both S.A. and S.A.'s father testified that the petitioner always acted "appropriately" around the baby and they had "no concerns." (Tr. 326, 262). Similarly, the jury heard testimony that the petitioner was in the armed forces from Detective Savino. The Court concludes that trial counsel's decision to elicit this testimony from disinterested witnesses, rather than from the petitioner's friends or family was a sound tactical decision.

16. The Court further finds that the fact that the petitioner did not abuse his own daughter has no bearing on whether the petitioner would assault A.H. Petitioner met A.H.'s mother on the internet and had only known her for a few months at the time of this incident. He had no biological or emotional ties to A.H. as compared to his own child. Trial counsel could have reasonably determined that self-serving testimony that he had not abused his own child would not be useful. Finally, although the petitioner has averred he did not abuse his child, he has failed to proffer an affidavit from the child's mother to this effect. This failure to proffer is fatal to any suggestion that the mother of petitioner's child should have been called as a witness in this matter. See Muhammed v. Warden, 274 Va. 3, 19, 646 S.E.2d

182, 195 (2007) (failure to proffer affidavits regarding testimony witness would have offered is fatal to Strickland claims).

17. Patterson has further failed to demonstrate that any of the proffered character evidence would have significantly impacted the strength of the Commonwealth's case. The petitioner merely speculates a different outcome would have occurred but for counsel's failing to introduce this additional evidence. Speculation, however, does not prove prejudice under Strickland. See Burger v. Kemp, 483 U.S. 776, 793 (1987); Orbe v. True, 233 F. Supp. 2d 749, 781 (E.D. Va. 2002). Indeed, to satisfy Strickland's prejudice standard, Petitioner must show a "substantial," not just "conceivable," likelihood of a different result. Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011); Richter, 131 S. Ct. at 792. Self-serving character testimony from the petitioner's family and friends cannot meet this demanding test. Claim (a)(i) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (a)(ii)

18. In this claim, Patterson submits counsel should have presented evidence regarding his "proclivity toward anal sex in a relationship" before meeting S.A. The Court finds that this claim does not

entitled the petitioner to relief. As a preliminary matter, the petitioner has failed to proffer any sworn testimony in this regard. This failure is fatal to his claim. See Muhammed, 274 Va. at 19. 646 S.E.2d at 195. Furthermore, the decision to present evidence is reserved solely to counsel. See Gonzalez, 553 U.S. at 249; Taylor, 484 U.S. at 418: Townes, 234 Va. at 320. 362 S.E.2d at 657. Assuming the petitioner could provide sworn testimony on this issue, the Court finds that trial counsel made a reasonable tactical decision not to present it. Defense counsel argued persuasively in closing that what the defendant did with a consenting adult partner had no bearing on the issues in this case. By contrast, presenting further evidence of the defendant's sexual proclivities would distract the jury from the real issues, and serve to highlight the negative evidence presented by the Commonwealth. Cf. Evans v. Thompson, 881 F.2d 117. 125. (4th Cir. 1989) (holding that the decision not to object to a prosecutor's argument to avoid emphasizing it is a tactical decision that lawyers routinely make).

19. The Court further finds that, prior to trial, the parties litigated a motion in limine in which the trial court excluded from evidence dozens of text messages retrieved from the petitioner's phone seeking sexual attention from a multitude of women. The trial court also excluded professional pornography found on the defendant's phone

depicting anal sex acts. Had the defendant put on evidence regarding his sexual proclivities, the Commonwealth would have been permitted to use all of the excluded evidence to impeach such testimony. Under these circumstances, trial counsel's performance was not constitutionally defective for failing to put on evidence of the defendant's sexual preferences, nor can the petitioner demonstrate, in light of the entire record, that this evidence would have had led to a substantial likelihood of a different result at trial. Accordingly, the Court concludes claim (a)(ii) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (a) (i)

20. In claim (a)(iii) the petitioner alleges trial counsel was ineffective for failing to call Kimberly Wilkins as a witness in the defendant's case-in-chief. The Court finds that this claim does not entitled the petitioner to relief.

21. As noted previously, [decisions relating to witness selection are normally left to counsel's judgment, and this judgment will not be second-guessed by hindsight.'" Williams, 912 F.2d at 934 (citation omitted). Patterson does not proffer an affidavit from Wilkins; however, the Court presumes he intends to rely on her testimony at sentencing, which was sworn.

22. At sentencing, Wilkins testified that she was Patterson's aunt, and lived next to his family growing up. She trusted Patterson with her children and felt he was a good person. Trial counsel noted that she sat through the entire trial, and asked if she had anything she wanted to tell the jurors. At this time, she said that Patterson had always been calm and methodical in times of crisis. (Tr. 761-762). The Court finds that this testimony, offered by a close family member *after observing the whole of trial*, is not significant. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Wilkins' testimony was influenced by what she observed at trial and not elicited by any direct question from counsel. Given the backward-looking nature of her testimony and her close family ties to the petitioner, it cannot be said on this record that failure to call her as a witness was an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The Court concludes that claim (a)(iii) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (b)

23. In claim (b), Patterson contends that trial counsel failed to properly cross-examine Robert Fromburg, the Commonwealth's jailhouse witness. The Court finds that this claim does not entitled the petitioner to relief.

24. This claim focuses on one exchange - when counsel asked Fromburg, "did you call people outside and ask them to look up Patterson's case?" and Fromburg replied, "never." The petitioner reasons that because the jury heard other jail phone call tapes, the lack of substantiation behind counsel's question was highly damaging. He concludes a proper cross-examination avoiding this question or presentation of the phone calls alluded to by counsel would have changed the outcome of the trial.

25. First, this Court refuses to dissect a single question asked by trial counsel over the course of a three-day jury trial. As the United States Supreme Court has noted, in assessing counsel's performance,

> a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance *because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight*.

Bell v. Cone, 535 U.S. 685, 702 (2002) (emphasis added). See also Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000) (reviewing court "must be highly deferential in scrutinizing [counsel's] performance and must filter the distorting effects of hindsight from [its] analysis"). Indeed, an attorney's performance should not be considered in the vacuum of what he did not do. Instead a proper analysis of the lawyer's "performance" requires the court to consider "all the circumstances." See Bullock v. Carver, 297 F.3d 1036, 1046-1051 (10th Cir. 2002). To put it another way, in analyzing a claim that trial counsel "should have done something more, [the Court] first look[s] at what the lawyer did in fact." See Chandler v. United States, 218 F.3d at 1320.

26. Reviewing the whole of cross-examination, the Court finds that trial counsel aggressively pursued Fromburg. Counsel established that Fromburg had was prepared to testify against multiple other inmates in the past, and painted him as a professional snitch. He elicited testimony from Fromburg that in other cases Fromburg had charges dropped in exchange for his testimony, in particular, a charge that carried a five-year mandatory7 minimum. Fromburg admitted multiple times he was hoping for favorable treatment because of his testimony.

27. Counsel also discussed Fromburg's testimony in closing, highlighting that Fromburg was

a multiple-time convicted felon. Counsel noted that Fromburg had pled guilty to raping a 16-year old girl, casting doubt on his position at trial that he was willing to testify against the defendant because kids were "untouchable." Finally, counsel noted that all of the correct information in Fromburg's testimony was readily ascertainable from the news. The remainder of his testimony regarding the defendant's purported confession was inaccurate: A.H. was four months old, not four years old, and there was no evidence she was smothered with a pillow. Fromburg's testimony about the confession he received simply did not match the Commonwealth's theory of the case.

28. Under these circumstances, the Court concludes that one question from counsel that did not produce a favorable response did not render counsel's cross-examination of Fromburg constitutionally deficient. "As Strickland made clear, [this Court's] role on habeas review is not to nitpick gratuitously counsel's performance. After all, the constitutional right at issue here is ultimately the right to a fair trial, not to perfect representation." Hodges v. Colson, 711 F.3d 589, 617 (6th Cir. 2013) (citations omitted). The Court finds that this portion of claim (b) cannot satisfy either prong of the Strickland test and should be dismissed.

29. The Court further finds that petitioner has failed to demonstrate that trial counsel was ineffective for failing to play jail phone calls from

Fromburg to outside sources in which Fromburg solicited information about the petitioner's case. Patterson has failed to demonstrate the existence of these recordings, much less their content. "[Without a specific, affirmative showing of what the missing evidence or testimony would have been, a 'habeas court cannot even begin to apply Strickland's standards' because 'it is very difficult to assess whether counsel's performance was deficient, and nearly impossible to determine whether the petitioner was prejudiced by any deficiencies in counsel's performance." Anderson v. Collins, 18 F.3d 1208, 1221 (5th Cir. 1994) (quoting United States ex rel. Partee v. Lane, 926 F.2d 694, 701 (7th Cir. 1991)). Absent an appropriate proffer, the Court finds this portion of claim (b) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (c) and (a)(iv)

30. In claim (c) and claim (a)(iv), the petitioner asserts trial counsel was ineffective for failing to present expert testimony to challenge the Commonwealth's medical experts. The Court finds that this claim does not entitled the petitioner to relief.

31. At the threshold, the Court finds the petitioner has not proffered who counsel should have

called to testify, much less any sworn testimony on this point. Even in capital cases, this failure is fatal to his habeas claim. See Muhammad, 274 Va. at 19, 646 S.E.2d at 195 (petitioner's claim that counsel failed to consult with expert witnesses did not satisfy either prong of the Strickland test where he failed to include affidavit from those experts detailing what information they would have provided at trial). Cf. Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990) (holding that in absence of proffer of witness testimony, petitioner cannot demonstrate either deficient performance or prejudice under Strickland); Burger, 483 U.S. at 793 (holding that petitioner could not show prejudice where he did not submit an affidavit from the witness establishing that the witness would have offered substantial mitigating evidence if he had testified). For this reason alone, the Court concludes that claim (c) and (a)(iv) cannot satisfy either prong of the Strickland test, and should be dismissed.

32. In any event, in the abstract, the Court finds that trial counsel's tactical decision not to hire an additional expert and rely on cross-examination was reasonable. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Moore v. Hardee, 723 F.3d 488, 498 (4th Cir. 2013) (citation omitted). Cf. Winston v. Kelly, 592 F.3d 535, 544 (4th Cir. 2010), 592 F.3d at 544 (citation omitted) ("[d]efense

counsel's strategy of attacking [witness] credibility" through "undeniably focused and aggressive" cross-examination "falls within the wide range of reasonable professional assistance"). Indeed, in raising this claim, Patterson cites inconsistencies elicited by trial counsel using the very strategy Patterson is now alleging was deficient. Counsel, thus, was able to accomplish what Patterson claims an expert could have done. Trial counsel was not ineffective because this strategy was ultimately unsuccessful. See Lawrence v. Branker, 517 F.3d 700, 716 (4th Cir. 2008) ("effective trial counsel cannot always produce a victory for the defendant"). The Court finds claims (c) and (a)(iv) cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (d)

33. In claim (d), Patterson asserts counsel failed to properly pursue DNA testing of biological evidence that was not tested by the Commonwealth. The Court finds that this claim does not entitled the petitioner to relief.

34. At the threshold, the Court finds that Patterson has failed to proffer what favorable evidence DNA testing would have revealed. See Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) ("an allegation of inadequate investigation

does not warrant habeas relief absent a proffer of what favorable evidence or testimony would have been produced."). Indeed, the petitioner's burden in this habeas corpus proceeding requires him to come forward with facts sufficient to support his claims. See Code § 8.01¬18 654(B)(2); Collins, 18 F.3d at 1221 (requiring a "specific, affirmative showing of what the missing evidence or testimony would have been"); Hedrick v. Warden, 264 Va. 486, 521, 570 S.E.2d 847, 862 (2002) (finding habeas petitioner had not established deficient performance or prejudice because he failed to provide any evidence to support claim). For this reason alone, the Court finds that claim (d) cannot satisfy either prong of the Strickland test, and should be dismissed.

35. The Court further finds that, in any event, counsel, could have strategically decided not to test the evidence in question. First, the record establishes no DNA testing was performed because no foreign biological substance, such as sperm, was found on the samples taken from the victim. The forensic expert at trial explained that DNA can be left by touch alone, but only on an inanimate object, like a weapon. If the subject is person with its own DNA, that DNA will overwhelm any foreign DNA. Under these circumstances, counsel could have reasonably determined this would not be a line of investigation worth pursuing.

36. Further, the Court notes that Patterson's petition appears to assume DNA evidence existed and would be favorable to him. Instead, eliciting further DNA testing could have backfired: it was possible Patterson's DNA would be found. Handing the Commonwealth this critical evidence would have been devastating to Patterson's case. Cf. Lewis v. Warden, 274 Va. 93, 116, 645 S.E.2d 492, 505 (2007) (Counsel is not ineffective for failing to present evidence that has the potential of being "double-edged."). In the absence of testing, however, counsel argued in both opening and closing that the Commonwealth had failed to test the DNA evidence in question. He painted the police investigation as cursory at best. Electing to use the lack of forensic evidence to argue the Commonwealth had not met its burden was reasonable. Cf. Williams v. Kelly, 816 F.2d 939, 950 (4th Cir. 1987) ("Counsel is not ineffective merely because he overlooks one strategy while vigilantly pursuing another."). Moreover, all of the A.H.'s family members handled A.H. in the days leading up to her death. DNA evidence from one of these parties found on A.H.'s skin would not have exonerated the petitioner, and would not have created a substantial likelihood of a different result at trial. For all of the forgoing reasons, the Court concludes this claim cannot satisfy either prong of the Strickland test, and should be dismissed.

Claim (e)

37. In claim (e), Patterson alleges that he was not read his Miranda[5] rights prior to speaking with law enforcement officers at his apartment. He alleges that trial counsel was ineffective for failing to object to the admission of his statements on this basis as well as the admission of all evidence taken from the apartment. The Court finds that this claim does not entitled the petitioner to relief.

38. The Court finds that Patterson has not demonstrated that a motion to suppress, or other objection, would have been successful. Because an attorney cannot be held ineffective for failing to make a futile motion, the petitioner cannot establish deficient performance. See Correll v. Commonwealth, 232 Va. 454, 470, 352 S.E.2d 352, 361 (1987) (holding counsel had no duty to object to admission of presentence report because it was admissible); see also Moody v. Polk, 403 F.3d 141, 151 (4th Cir. 2005) (holding counsel not required to file frivolous motions).

39. The petitioner alleges his initial interaction with the police was custodial because the police officers characterized the apartment as a crime scene and testified that Patterson was not free

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

to leave. The Court finds that these facts do not give rise to "custody" for purposes of Miranda. Under "Miranda case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." Howes v. Fields, 132 S. Ct. 1181, 1189 (2012). Miranda warnings are only required when an officer interrogates a suspect who is subject to "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Brooks v. Commonwealth, 282 Va. 90, 96 (2011). Consequently, Miranda "does not apply to a temporary7 investigatory7 detention" short of "a de facto" arrest." Testa v. Commonwealth, 55 Va. App. 275, 283 n.5, 685 S.E.2d 213, 217 n.5 (2009). "Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." Howes, 132 S. Ct. at 1192 (citation omitted).

40. Indeed, as the United States Supreme Court recently recognized in Howes, whether the suspect being questioned is free to leave is not dispositive of whether the Miranda warning is required:

> Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount

> to custody for purposes of Miranda. We have declined] to accord talismanic power to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda. Our cases make clear . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for Miranda custody.

Howes, 132 S. Ct. at 1189-90 (citations and internal quotation marks omitted).

41. Applying these well-established principles, the Court finds that an objectively reasonable attorney could have determined that was no basis to suppress the petitioner's statements. The investigating officer and detective arrived on the scene of a recently reported crime that involved the suspicious death of a four-month-old child and did what any trained law enforcement officers would do: secured the scene and asked questions of anyone who might know something about what had happened. The officers did not place Patterson in any physical restraints, did not tell him he was not free to leave, did not remove him from his apartment, did not, on this record, engage him in a series of prolonged accusatory questions, and did not threaten him with any show of force. Cf. Dixon v. Commonwealth, 270 Va. 34, 40-41, 613 S.E.2d 398 (2005) (concluding defendant was in custody for Miranda purposes when

handcuffed and locked in a police patrol car, but noting "the presence of either of these factors, in the absence of the other, may not result in a curtailment of freedom ordinarily associated with a formal arrest"). Under these circumstances, an objectively reasonable defense attorney could conclude the petitioner was not in custody and that there was no basis for a motion to suppress.

42. Perhaps more significantly, the Court notes the petitioner has not identified what statements he sought to suppress. Instead, he appears to take issue with statements he did not make. For example, multiple officers testified that he did not ask after A.H.'s health and that he did not ask to ride to the hospital with his girlfriend. He has not, however, identified any incriminating statements that would be subject to suppression. Trial counsel was not ineffective for failing to object to these non-statements. Even assuming the evidence could have been suppressed, however, "[i]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland." Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (collecting cases). Indeed, part of counsel's strategy at trial was to reiterate that the petitioner had nothing to hide and had cooperated with the police at every opportunity. Counsel argued that his openness with the police

was strong circumstantial evidence of his innocence. In light of this trial strategy, and especially as the petitioner did not actually make any incriminating statements, the Court finds that trial counsel was reasonable in not objecting to this testimony.

43. Further, even absent Patterson's non-statements, the Court finds that the evidence against him was overwhelming. Perhaps most significantly, he was the only person alone with the baby immediately prior to her death. He had a demonstrated interest in anal sex, and had previously written the baby's name on S.A.'s buttocks, keeping a picture of it on his phone, along with other internet search history included searches inquiring what the punishment was for shaken baby syndrome photographs of SA.'s buttocks. Petitioner later confessed his crime to Fromburg while incarcerated. Finally, each of the other family members was asked outright whether they had shaken or abused the baby, and responded no. The jury had the opportunity to judge the credibility of these witnesses and found them truthful. What the defendant said or failed to say after A.H. was hospitalized was not so significant as to create a substantial likelihood of a different result at trial. For all of these reasons, the Court concludes claim (e) cannot satisfy either prong of the Strickland test, and should be dismissed.

The Court finds this petition can be resolved on the basis of the present record without the need for an evidentiary hearing. Friedline v. Commonwealth, 265 Va. 273, 576 S.E.2d 491 (2003); Yeatts, 249 Va. at 288, 455 S.E.2d at 20; Code § 8.01-654(B)(4).

The Court concludes that the petitioner is not entitled to the relief sought. It is, therefore, ORDERED that the petition for a writ of habeas corpus be, and hereby is, DENIED and DISMISSED WITH PREJUDICE.

It is further ORDERED that the Clerk serve by mail a certified copy of this Order to both counsel of record.

This order is FINAL.

ENTERED: 3/20/17

/S ILLEGIBLE
Judge

CERTIFIED TO BE A TRUE COPY
OF RECORD IN MY CUSTODY
TINA E. SINNEN, CLERK
CIRCUIT COURT, VIRGINIA BEACH, VA
BY /S ILLEGIBLE
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Endorsements on following page

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IN THE CIRCUIT COURT FOR VIRGINIA BEACH, VIRGINIA

Case No. CL15-5306

NOTICE OF APPEAL

MICAH PATTERSON,
1492067,

Petitioner

vs.

HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

NOTICE OF APPEAL

Petitioner Micah Patterson ("Patterson"), by counsel, and pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, hereby files its Notice of Appeal to the Supreme Court of Virginia from the Order of the Circuit Court of the City of Virginia Beach, Virginia dated March 20, 2017 for the above styled case.

There is no transcript of the proceeding since no hearing was held. A statement of facts of the case, shall be filed. Patterson certifies that copies of this Notice have been mailed to all opposing counsel.

RESPECTFULLY SUBMITTED,

By:_____ Counsel

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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Notice of Appeal was faxed and mailed, first-class postage prepaid, to:

Elizabeth Kiernan Fitzgerald
Assistant Attorney General
202 North Ninth Street
Richmond, VA 23219

This 9th day of April, 2017.

_____
Dale R. Jensen

PETITION FOR APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF VIRGINIA BEACH VIRGINIA

Record No. _____

Circuit Court Case No. CL15-5306

PETITION FOR APPEAL OF DENIAL OF WRIT OF HABEAS CORPUS

MICAH PATTERSON,

1492067,

Petitioner

vs.

HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
SERVICE ADDRESS:
VIRGINIA DEPARTMENT OF CORRECTIONS
6900 ATMORE DR.
RICHMOND, VA 23225

Respondent.

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA. The appellant, Micah Patterson ("Patterson"), respectfully presents the following:

I. STATEMENT

The decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value in that Patterson's constitutional rights to effective assistance of counsel were violated and it was error to hold that they were not. Further, the Court of Appeals erroneously dismissed the case as untimely and reversal of that ruling will have significant precedential value because issues of first impression are raised that cry out for reversal.

II. MATERIAL PROCEEDINGS BELOW

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. TT p. 515 (references to the trial transcript herein are denoted as "TT p. **" – a copy of the trial transcript is included as an Exhibit hereto if this Court desires to cross-reference that document to confirm facts). The injuries were determined to have been caused by abusive head trauma. TT p. 516. There was no forensic evidence proving who inflicted the injuries. TT p. 29.

On August 12, 2013 Patterson was tried by jury in the Circuit Court for the City of Virginia Beach with the Honorable Edward W. Hanson, Judge, presiding. Patterson was convicted of object

sexual penetration; child neglect, and murder in the first degree. TT p. 736-737.

Patterson timely appealed his convictions, but the Virginia Court of Appeals denied Patterson's Petition for Appeal on October 15, 2014. Patterson demanded consideration of his petition by three-judge panel, which denied Patterson's Petition on February 2, 2015. The Virginia Supreme Court denied Patterson's Petition for Appeal on November 20, 2015.

Patterson timely filed a Petition for Writ of Habeas Corpus on November 20, 2016 in the Circuit Court for the City of Virginia Beach (the "Circuit Court"). Patterson's Petition for Writ of Habeas Corpus was denied on March 20, 2017. Patterson timely filed a Notice of Appeal on or about April 9, 2017. Because of prior issues with clerical personnel with the Circuit Court, in an abundance of caution Patterson directed a second Notice of Appeal to the Circuit Court via hand delivery on April 20, 2017.

III. ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN DISMISSING PATTERSON'S PETITION AS UNTIMELY
2. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO PROPERLY INVESTIGATE THE CASE.

3. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO PROPERLY CONTEST TESTIMONY OF ROBERT FROMBERG.
4. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AS PATTERSON'S COUNSEL FOR FAILURE TO PRESENT ADVERSARIAL EXPERT TESTIMONY.
5. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR FAILURE TO PURSUE DNA TESTING.
6. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR FAILURE TO OBJECT TO STATEMENTS MADE IN VIOLATION OF PATTERSON'S CONSTITUTIONAL RIGHTS.

IV. STATEMENT OF FACTS

On January 10, 2012, Patterson made a call emergency services to seek medical assistance for Aubrey Hannsz. TT p. 368. Sgt. Thomas Shattuck responded to that call. TT p. 371-72. Upon arrival at 1120 Ocean Trace Arch, Apartment 103, Virginia Beach, Virginia, Sgt. Shattuck observed, "Mr. Patterson was in the kitchen standing with Officer

Savino. They were having a conversation, and Bill Morrow was just kind of standing back by the front door." TT p. 373.

Sgt. Shattuck testified at Patterson's trial that as has been his experience, "as part of the investigation ... it's possible there could be a Shaken Baby Syndrome case or an abuse case." TT p. 374-75. Sgt. Shattuck testified that he asked Patterson if it was okay "for police to be in the apartment." TT p. 375. Under cross-examination Sgt. Shattuck testified that at that point the apartment became a crime scene. TT p. 383-384.

Prior to the arrival of Sgt. Shattuck, the responding Officer, Darrin C. Savino, was on scene, and had actually been the first Officer to come into contact with Patterson and the victim. Officer Savino testified, "I know my job description pretty much changed after the child left." TT p. 397. Savino testified:

> … and once the child left and, as I said, the condition of the baby, I felt the investigative part would now begin."
> Q. Based on your years as a police officer you thought it was maybe criminal activity?"
> A. Yes, Sir.
> Q. Okay. And you indicated you secured the scene and you limited the movement of the defendant, is that correct?
> A. Yes.
> Q. Okay, Was he free to leave?
> A. Not at that point.

TT Day 2, Page 412.

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. TT p. 515. The injuries were determined to have been caused by abusive head trauma. TT p. 516. There was no forensic evidence proving who inflicted the injuries. TT p. 29.

After arraignment of Patterson, in which he had pled "not guilty" the court inquired, "All right. I have the Commonwealth's witness list. Is there a defense witness list?" The response from defense counsel was "No Sir, Your Honor." TT p. 8.

The Commonwealth attempted to, and successfully presented to the jury, a "timeline of injuries" to the victim. However, the evidence was inconsistent. On the first day of trial the Commonwealth presented the testimony of Wendy Gunther, M.D., Assistant Chief Medical Examiner. Dr. Gunther testified about injuries to the victim in which iron had developed, which, according to expert testimony, indicates older injuries. However, Dr. Gunther also testified (emphasis added), "No one knows exactly because children heal so much faster that adults, **but a reasonable guess would be a few days before blood starts disappearing to the naked eye and turning to iron**." TT p. 212.

Dr. Gunther further testified that while she classified some of the injuries as, "fresh." she could not "have a clock on that." TT p. 221. Even when asked to narrow the time frame for the victim's injuries to a window of "twelve to eighteen hours" she could not do so. TT p. 229.

Contrary to the testimony of Dr. Gunther, the Commonwealth's witness Dr. Michelle Clayton, a doctor specializing in general pediatrics and child abuse pediatrics, purported to narrow down each of the established injuries to the times in which the victim was likely in the custody of Patterson. See, e.g., TT p. 546. Not only was this speculation contrary to Dr. Wendy Gunther's aforementioned expert opinion, it was contrary to Dr. Clayton's earlier testimony as well. Dr. Clayton first testified, the "evolution of a bruise is something that varies somewhat depending on the body area where the bruises are inflicted." TT p. 534. Yet, later Dr. Clayton opined that the injuries occurred on Tuesday evening based upon bruises sustained by the victim. TT p. 546. The Commonwealth asked Dr. Clayton to "describe the evolution of a bruise." In her response Dr. Clayton stated, "So how a bruise evolves varies depending upon the body area. But in general you may not see a bruise immediately after an injury-has been inflicted." TT p. 534.

Under cross-examination Dr. Clayton agreed that bruising would occur more quickly and disappear more quickly in highly vascular areas of the body. She further agreed that there is a variance from individual to individual. TT p. 587.

Importantly, Dr. Clayton testified, that she questioned Patterson, the mother of the victim, and the grandmother. TT p. 559.

Despite having proffered highly prejudicial testimony about the injury timeline that appears to

have been largely based upon her presumption of Patterson's guilt, Dr. Clayton admitted that she couldn't "specify a time range," for some of the injuries and "Dr. Gunther is more familiar with the entire range of findings that might be discovered." TT p. 596.

It was also Dr. Clayton's testimony that Aubrey Hannsz had "suffered more than one episode of abusive head trauma prior to her death." TT p. 560. Defense counsel questioned Dr. Clayton in regard to the conclusion that there was more than one shaking event of the victim. Defense counsel also questioned Dr. Clayton about her conclusion with regard to her determination of when the victim was alone with Patterson, Gary Murawski, and Samantha Murawski. TT p. 592-593). Dr. Clayton stated that she had talked to Patterson and Samantha Murawski, but did not speak to the grandfather of the victim, Gary Murawski. TT p. 593.

Dr. Clayton testified that she "collected the physical evidence recovery kit" ("PERK") to obtain any DNA evidence that was not the victim's. TT p. 517-518. Dr. Clayton testified that after collecting the PERK she submitted it to the police department. TT p. 519; p. 597-98.

The Commonwealth presented the testimony of Betty Jane Blankenship, a forensic analyst employed by the Virginia Department of Forensic Science in Norfolk, Virginia. TT p. 436. It was Blankenship's testimony that while she did test

samples for spermatozoa, which were negative, she "DID NOT take it forward through DNA." TT p. 441. In cross-examination Ms. Blankenship testified that there is no test to detect sweat (perspiration). TT p. 450.

The Commonwealth called Robert Fromberg, a jail inmate, as a trial witness. TT p. 455. Fromberg testified that he had met Patterson in the Virginia Beach Jail. TT p. 456. Fromberg testified that the Patterson had told him (emphasis added) "...he was watching his roommates niece who was four years old and while she slept he fingered her and when she woke up crying he put a pillow over her face until she stopped crying and now she can't cry no more." TT p. 460.

Under cross-examination, Fromberg was asked, "How many people have you called to get information on this case?" TT p. 471. Fromberg responded by repeating the question.

After the conclusion of the Commonwealth's case defense counsel informed the court, "And Judge, always in discussing the matter with my client at this point—or both of us discussing with our client, we will not be presenting evidence." TT p. 607.

In presenting a closing argument to the jury defense counsel stated, "I said earlier, members, that the case was entirely circumstantial, and that was unfair to the Commonwealth because it's not. They have one piece of evidence, but one, that is not circumstantial. One piece of what we call direct

evidence. They have a confession. And the source of that confession is Mr. Fromberg...". TT p. 684.

V. ARGUMENT

The Circuit Court erred by adopting verbatim an order prepared by the Commonwealth without any apparent review of Patterson's Petition or Patterson's Opposition Brief to the Commonwealth's Motion to Dismiss. Thereby, the circuit court erred and failed to fulfill the role of fair adjudicator. This is particularly egregious in view of the Circuit Court's highly erroneous holding that Patterson's Petition was not timely filed without any apparent consideration of USPS records conclusively proving otherwise. The adopting of the Commonwealth's order without any apparent independent review of the law and facts presented by Patterson diminishes the integrity of the courts and cries out for reversal.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

The performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

Patterson submits that the second prong of the *Strickland* test is often referred to as the "prejudice prong". To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In assessing prejudice, evidence is reweighed against the totality of available evidence. *Id.*

1. THE CIRCUIT COURT ERRED IN DISMISSING PATTERSON'S PETITION AS UNTIMELY

The Circuit Court erred by dismissing Patterson's Petition as being untimely filed.

If statutory language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it. See, e.g., Brown v. Lukhard, 229 Va. 316, 321 (1985).

Here, Va. Code § 8.01-654 states in pertinent part (emphasis added):

A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been

imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

There is no dispute that the Virginia Supreme Court dismissed Patterson's appeal on November 20, 2015. Patterson avers that under by the statutory language, his deadline in this case was not until February 18, 2016 (the deadline for Patterson's filing a Petition for Writ of Certiorari with the United States Supreme Court for his appeal (see USCS Supreme Ct R 13), discussed in detail, *infra*. However, even if this Court holds that Patterson's deadline was November 21, 2016 (Since November 20, 2016 fell on a weekend, any deadline on that date was extended until the following business day pursuant to Va. Code § 1-210), Patterson's Petition was still timely filed.

A. The Petition was filed in the Circuit Court on November 21, 2016

The undersigned counsel respectfully submits his Declaration and Exhibit A thereto with this Petition. The undersigned counsel was attending to out of state family issues in November of 2016, but sent Patterson's Writ of Habeas Corpus via United States Postal Service ("USPS") Express Mail on November 18, 2016. D. Jensen Decl. ¶4-5. Exhibit A to the Declaration shows actual receipt of the Petition in the Circuit Court at 11:11 am on

November 21, 2016, which was even within the artificially short timeline for submittal of the Petition asserted by the Circuit Court. D. Jensen Decl. ¶6-7. A Declaration is also filed herewith of a paralegal of the undersigned counsel's firm who personally traveled to the Circuit Court on November 21, 2016 to deliver the signed oath of Patterson to complete the Petition and to advise the Circuit Court's clerical staff of receipt of the Petition on that date. J. Jensen Decl. ¶4-5. This hand delivery was done in order to avoid having to argue this very issue improperly relied upon by the Circuit Court in dismissing the Petition. The person purporting to be responsible for intake of petitions for writs of habeas corpus refused the request of the undersigned counsel's paralegal to locate the Petition that was already filed in the Circuit Court and properly record a filing date on November 21, 2016. J. Jensen Decl. ¶5-7.

The governing statute, Va. Code § 8.01-654, DOES NOT require that a petition be placed in the hands of any specific person at a court. Instead, the statute requires that the petition be filed "in the circuit court".

Patterson presented clear evidence to the Circuit Court that the Petition was filed in the court on November 21, 2016, at 11:11 AM and provided the name of the court's agent accepting the pleading, one J. Calevas. The Circuit Court's reliance on *Lahey v. Johnson*, which involved the failure to pay a filing fee, thus delaying the filing, is misplaced since there

was no such issue in the instant case. Failure to properly date-stamp a pleading when it was initially received is not the same as "refusing to accept it for failure to pay a filing fee." The focus of this inquiry should be on the day the petition for Writ of Habeas Corpus was delivered, and therefore filed, with the Circuit Court. What transpired afterward was solely a result of negligence or misconduct on the part of the Commonwealth, for which the Commonwealth is solely responsible. The Petition was received at 11:11 AM, and Circuit Court personnel were presumably working for several hours after that time. It is apparent that Patterson's Petition was not accorded its proper filing date.

Circuit Courts, and pleadings to those courts, are inherently time sensitive. Any employee, or agent, of the court that is made aware of time limitations and fails to timely process a pleading tendered to the court obstructs that filing.

Patterson further relies upon Va. Sup. Ct. R. Rule 3:3 (a), which states in pertinent part:

> The **clerk shall receive and file all pleadings when tendered, without the order of the court. The clerk shall note and attest the date of filing thereon** … Any controversy over whether a party who has filed a pleading has a right to file it shall be decided by the court.

It is clear that the Circuit Court clerk violated this rule of this Honorable Court and the Circuit Court ruling was erroneous.

B. If the Petition is not deemed filed on November 21, 2016, Circuit Court personnel obstructed such filing and the statute of limitations was tolled pursuant to Va. Code § 8.01-229

Incredibly, in its Order dismissing Patterson's Petition, the Circuit Court completely ignored the USPS records, which were provided as a part of Patterson's pleadings. Even though the USPS records clearly show that the Petition was timely filed with the Circuit Court, although apparently improperly logged by clerical personnel of the Court as having been received the following day, the Circuit Court falsely stated that there was no obstruction to timely filing. See Order p. 6-7. That Circuit Court's ruling is erroneous in view of the filing of Patterson's Petition on November 21, 2016 as documented by USPS records. The Petition was not accorded a proper filing date due to the obstruction of Circuit Court personnel, which had the Petition at 11:11 am on November 21, 2016, but for some reason failed to properly acknowledge or record its timely delivery until the following day. Such an obstruction to filing was certainly beyond the control of Patterson or his counsel and falls squarely within the type of exception invoking statutory tolling of the statute of limitations pursuant to Va. Code Ann. § 8.01-229(D).

C. The Deadline was February 18, 2016

Since the time for Patterson to appeal the dismissal of his appeal by the United States Supreme Court did not expire until February 18, 2016 the Petition was timely filed for that reason as well.

Whether the time for filing a Petition for Certiorari with the United States Supreme Court is within the scope of Va. Code § 8.01-654 appears to be an issue of first impression. Although it does not appear that any Virginia court has construed the phrase "final disposition" in this statute, the underlying legal principles have been explored in analogous federal statutory language for habeas corpus petitions. The federal statute of limitations for inmates seeking habeas corpus relief in state court cases is 28 U.S.C. § 2244, which states in pertinent part, the "limitation period shall run from the latest of … the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review". The phrase "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" is semantically equivalent to the Virginia statutory language of "within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later."

Federal courts have generally held that triggering event for the federal statute of limitations to begin running is either the completion of certiorari proceedings in the United States Supreme Court

following completion of direct appeal, or the expiration of the time for filing a Petition for a Writ of Certiorari. See, e.g., *Locke v. Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001) (joining other "circuit courts that have explicitly ruled on the issue of timeless under 28 U.S.C. 2244 (d)(1)(A)").

In construing a statute, Virginia courts apply its plain meaning, and courts are not free to add language, nor to ignore language, contained in statutes. *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331 (2007). Here, the statutory language of "final disposition of the direct appeal in state court or the time for filing such appeal has expired" is at issue. Clearly this language considered the possibility that appeals could be taken in criminal cases and evidence a desire of the legislature to not include time during which an appeal was available against a convicted person's ability to file for habeas corpus relief.

Perhaps the clearest way to understand why the statute has the meaning asserted herein is to consider what would have happened if Patterson had appealed to the United States Supreme Court had been successful and his convictions had been reversed. Under any contrary interpretation of VA Code § 8.01-654(A)(2), the affirmation of Patterson's conviction by the Virginia Supreme Court represented a "final disposition" even if that "final disposition" was actually reversed in part (or in total) by the United States Supreme Court. Such a view is

simply unreasonable and misconstrues the plain statutory language.

Accordingly, the Circuit Court erred and their judgment should be reversed because the Petition was timely filed.

2. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO PROPERLY INVESTIGATE THE CASE.

In Virginia a person on trial for a criminal offense has the right to introduce evidence of his good character, this follows the theory that it is improbable that a person who bears a good reputation would be likely to commit the crime charged against him. *Gardner v. Commonwealth*, 288 Va 44 (2014); *Byrdsong v. Commonwealth*, 2 Va. App. 400, 402 (1986).

Virginia Practice of Criminal Procedures § 17:33, Defenses, states that a criminal defendant may prove his good reputation for a particular character trait by presenting evidence of good character. A witness may testify that he or she has never heard that the accused has the reputation of possessing a certain trait.

Patterson contends that because he had an established right to present witness testimony that defense counsel had a duty and obligation to perform a reasonable investigation into possible witness

testimony for the defense including character testimony.

Given the gravity of the charges against Patterson at trial, and the voluminous testimony against him, defense counsel had a duty to conduct an investigation to obtain both expert testimony and character testimony to assure that Patterson had a fair trial. Among other things discussed herein, defense counsel should have presented character testimony that Patterson was not prone to violence, was enlisted in the Navy, did not have a criminal background, and was not abusive in past relationships with women. Defense counsel could have also developed evidence as to Patterson's demeanor and behavior around children.

It was imperative for defense counsel to challenge the speculation of a timeline offered by the Commonwealth to create the reasonable doubt of Patterson's guilt. The failure to perform any investigation or present any evidence at all, expert or character, fell below the *Strickland* standard. The Sixth Amendment to the Constitution demands that a trial must comport to the basic tenets of due process and a fair trial, a trial in which the prosecution's case is subjected to adversarial testing.

Patterson had a daughter that was three years old at the time of Aubrey Hannsz tragic death. TT p. 286. Patterson's trial counsel had a responsibility to perform a reasonable investigation and identify exculpatory evidence. Among other things, testimony from the mother of Patterson's daughter

should have been obtained to show that Patterson had interacted with his daughter and never abused his daughter.

Patterson avers that a witness, Kimberly Brook Williams ("Williams"), called to testify after the jury found Patterson guilty but prior to the jury's sentencing verdict, should have been called as a character witness in Patterson's defense during the trial itself.

The failure of Patterson's trial counsel to adequately investigate and present character witnesses to testify on Patterson's behalf was objectively unreasonable and thus fell below the *Strickland* standard.

The outcome of Patterson's trial would likely have been different if evidence in Patterson's favor would have been prepared and presented. The jury at Patterson's trial was presented with an uncontroverted barrage of negative testimony about Patterson. Positive testimony about Patterson's character, which was readily available if trial counsel would have pursued it, would likely have created a reasonable doubt in the case.

The overall performance of Patterson's trial counsel was objectively for unreasonable under prevailing professional norms. See, e.g., *Wiggins*, 539 U.S. at 523.

3. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR

FAILURE TO PROPERLY CONTEST TESTIMONY OF ROBERT FROMBERG.

A significant element Fromberg's testimony, with relation to ineffective assistance of counsel, is that during cross-examination defense counsel asked him, "How many people have you called to get information on this case?" TT p. 471, Lns 23-24. Fromberg simply repeated the question and never answered.

Given that trial counsel knew that Fromberg's testimony was the only non-circumstantial evidence presented in the case, that trial counsel had a responsibility to perform a reasonable investigation into that testimony. TT p. 684.

Here, trial counsel should have subpoenaed recorded phone calls of Robert Fromberg and determine whether their was evidence his testimony was derived from sources other than Patterson. By not doing so, defense counsel failed to meet the *Strickland* performance standard.

Had Patterson's trial counsel properly investigated and impeached Fromberg, it is likely that the jury would have found reasonable doubt in Patterson's case.

4. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR FAILURE TO PRESENT ADVERSARIAL EXPERT TESTIMONY.

In certain circumstances, a constitutionally adequate defense requires expert witness testimony. *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985). For example, a counsel's failure to pursue an adequate expert investigation of potentially exculpatory serological evidence in a sexual assault case constitutes ineffective assistance of counsel. *Baylor v. Estelle*, 94 F.3d 1321 (9th Cir.1996), cert, denied 520 U.S. 1151 (1997).

It is apparent given the facts cited, supra, that Dr. Clayton's analysis and investigation began with a preconceived conclusion that Patterson was guilty and that she had crafted her expert opinion to conform to that preconceived conclusion. This expert opinion carried great weight with the jurors, and was even referenced in the trial court's FINAL ORDER dismissing the Patterson's Petition. Order p. 5.

Patterson was prejudiced with regard to defense counsel's failure to subject the Commonwealth's testimonial evidence to the jury to a true adversarial test. The expert opinions of Dr. Gunther and Dr. Clayton, with regard to a timeline of injuries to A.H. were polar opposites. Given how critical the timeline was to the case against Appellant, it was imperative that defense counsel conduct a reasonable investigation and present adversarial medical expert testimony, which, based upon Dr. Gunther's testimony, could have been obtained.

The catastrophic impact of trial counsel's errors is brought into relief by examining the

testimony of two of the Commonwealth's expert witnesses. On the first day of trial the Commonwealth presented the testimony of Wendy Gunther, M.D., Assistant Chief Medical Examiner. Dr. Gunther testified about injuries to the victim in which iron had developed, which, according to expert testimony, indicates older injuries. However, Dr. Gunther also testified (emphasis added), "No one knows exactly because children heal so much faster that adults, but a reasonable guess would be a few days before blood starts disappearing to the naked eye and turning to iron." TT p. 212.

Dr. Gunther further testified that while she classified some of the injuries as "fresh." she could not "have a clock on that." TT p. 221. Even when asked to narrow the time frame for the victim's injuries to a window of "twelve to eighteen hours" she could not do so. TT p. 229.

Contrary to the testimony of Dr. Gunther, Dr. Michelle Clayton claimed to narrow down each of the established injuries to the times in which the victim was likely in the custody of Patterson. Not only was this speculation contrary to Dr. Wendy Gunther's expert opinion, it was contrary to her own testimony as well. Dr. Clayton first testified, the "evolution of a bruise is some¬thing that varies somewhat depending on the body area where the bruises are inflicted." TT p. 534. This testimony is at odds with her later testimony in which Dr. Clayton claimed that she had an expert opinion about exactly when the injuries occurred. TT p. 546.

Significantly, Dr. Clayton testified that her timeline was not just based upon forensic evidence, but was also based upon having been given information about times when Patterson was alone with the victim, Aubrey Hannsz. See, e.g., TT p. 585. So, Dr. Clayton's analysis began with a conclusion about who committed the crimes against Aubrey Hannsz. She then made the facts of her examination of Aubrey Hannsz conform to that preconceived conclusion and was unwilling to allow any other possibilities enter her mind.

In view of how critical the timeline was to the case against Patterson, it was imperative that Patterson's trial counsel retain a medical expert to testify concerning the injuries and the inherent variability of attempting to establish when injuries occurred based upon bruising. The utter failure of Patterson's counsel to even retain and expert or have anyone else review the medical evidence was certainly well below objective performance standards and is even worse than the lack of investigation that resulted in the granting of a petition for writ of habeas corpus in the *Wiggins* case. Even a very cursory Internet search made by the undersigned counsel revealed an article that in pertinent part states "Symptoms vary among children based on how old they are, how often they've been abused, how long they were abused each time, and how much force was used." See, "Shaken Baby Syndrome – Topic Overview", which can be viewed at http://www.webmd.com/parenting/baby/tc/shaken-

baby-syndrome-topic-overview?print=true(attached hereto as Exhibit 2). The article further states (emphasis added), "Symptoms can start quickly, especially in a badly injured child. **Other times, it may take a few days for brain swelling to cause symptoms.**" Given the ease with which this medical article was found, it would not have been difficult at all for Patterson's trial counsel to find a medical expert that would have both supported Dr. Gunther's inability to establish a time for the injuries and specifically refute Dr. Clayton's contrived timeline testimony.

It was imperative for defense counsel to challenge the speculation of a timeline offered by the Commonwealth to create the reasonable doubt necessary to convince the jury of Patterson's innocence. The failure to perform any independent investigation of the timeline evidence, retain an expert, or present any evidence at all contesting the Commonwealth's speculative timeline, was detrimental to Patterson's defense. Nothing was offered to contradict the Commonwealth's theory of the facts, and the jury verdict was based solely on the presentation of the prosecution. The Sixth Amendment to the Constitution demands that a trial must comport to the basic tenets of due process and a fair trial, a trial in which the prosecution's case is subjected to adversarial testing.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Wiggins, 539 U.S. at 521. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. *Id.*

Here, it is objectively unreasonable that Patterson's trial counsel failed to investigate the Commonwealth's timeline or retain an expert to contest that timeline. In view of the testimony of Dr. Gunther and the ease with which timeline uncertainties associated with shaken baby syndrome can be found online, it is certain that Patterson's trial counsel could and should have found a medical expert that would contest the timeline of Dr. Clayton, which was contrived to fit the Commonwealth's theory of Patterson's guilt. Accordingly, the performance prong of *Strickland* is met.

Since Patterson was found guilty based almost entirely on circumstantial evidence, the contrived testimony of Dr. Clayton was crucial to the jury's conviction of Patterson. Objectively, it would not have required much evidence contrary to that of Dr. Clayton to create a reasonable doubt. There is a reasonable probability that if Patterson's trial counsel had properly investigated the Commonwealth's timeline and obtained expert testimony challenging that timeline, that the trial result would have been different.

Accordingly, Patterson has met the prejudice burden under *Strickland* as well.

To demonstrate that it would have been reasonably possible to strongly contest the obviously biased findings of Dr. Clayton's timeline, the undersigned counsel presented to the trial court an article from WebMD concerning "Shaken Baby Syndrome - Topic Overview." (Exhibit 2, Opposition to Motion to Dismiss). Also presented to the trial court an article from the American Academy of Pediatrics discussing Shaken Baby Syndrome. These articles establish that "Symptoms vary among children based on how old they are, how often they've been abused, how long they were abused each time, and how much force was used" and "Symptoms can start quickly, especially in a badly injured child. Other times, it may take a few days for brain swelling to cause symptoms." THE TRIAL COURT DID NOT EVEN CONSIDER OR ADDRESS THIS EVIDENCE IN ITS ORDER DISMISSING PATTERSON'S PETITION.

Defense counsel did not present his own expert in support of Dr. Gunther's testimony that people with injuries heal at different rates due to their metabolic rate, the area of the body where the injury occurs, whether the person is asleep or active, and the degree to which a person is susceptible to bruising. Given these many factors, a medical expert testifying on Patterson's behalf would have provided evidence that supported Dr. Gunther's testimony and provided further persuasive proof that Dr. Clayton's timeline was speculative and such expert testimony

had a probability of changing the outcome of Patterson's case.

5. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AS PATTERSON'S COUNSEL FOR FAILURE TO PURSUE DNA TESTING.

Trial testimony established that samples taken from the body of Aubrey Hannsz were tested for spermatozoa, which were negative; however the samples were not tested for DNA. TT p. 441.

The Motion argues that somehow Patterson's claim fails because he did not explicitly state what was very implicit in the Petition. It is axiomatic that since the samples were not tested for DNA, it is impossible to know what tests that were never run would have revealed.

However, proper investigation by Patterson's defense counsel necessarily included investigating the DNA test. It is objectively unreasonable, in a case like this that was nearly entirely based upon circumstantial evidence, for Patterson's trial counsel not to have performed an investigation and have samples tested that were not tested by the Commonwealth.

The performance prong of *Strickland* is met by the objectively unreasonable failure to investigate. The testing of those samples could well have implicated someone else in the injuries and death of Aubrey Hannsz. Patterson avers that he is not

guilty of the crimes for which he was convicted. Constitutionally competent counsel would have pursued evidence that could have proved Patterson's innocence.

Had the samples taken from Aubrey Hannsz, there is a reasonable probability that the results of the trial would have been different.

6. THE CIRCUIT COURT ERRED BY DENYING PATTERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR FAILURE TO OBJECT TO STATEMENTS MADE IN VIOLATION OF PATTERSON'S CONSTITUTIONAL RIGHTS.

The initial step of determining whether a person is considered in custody is to ascertain whether, in light of the objective circumstances of the interrogation, whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *Stansbury v. California*, 511 U.S. 318, 322-323, 325 (1994) (*per curiam*); *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In this case, it is clear that Patterson was not at liberty to terminate the interrogation and leave. TT Day 2, Page 412.

The next inquiry is how Patterson gauged his freedom of movement, in examination of all of the circumstances surrounding the interrogation. *Stansbury*, 511 U.S. at 322, 325.

There is no question that the police viewed Patterson's apartment as a crime scene and were

investigating criminal activity when he was interrogated there. The fact that the police remained in Patterson's apartment for an extended period of time after Aubrey Hannsz was taken to the hospital reasonably led Patterson to gauge that he had no freedom of movement. It is clear that Patterson was not free to leave, for example, to go to the hospital to find out the condition of Aubrey Hannsz.

"Fairly soon after the child had left" the apartment Patterson asked to use the restroom. TT p. 396-97. Officer Savino conducted a "sweep" of the bathroom before allowing Patterson to enter, and then stood outside the door while Patterson used the bathroom. TT p. 397. Officer Savino limited Patterson's movements, and detained him in the kitchen while Officer Minter secured the front door. TT p. 398. Officer Savino also testified that he limited Patterson's movements. TT p. 398. Officer Savino testified that the interrogation was over any hour in duration. TT p. 400.

It is objectively unreasonable to assert based on the behavior of the police in this case that any reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. No reasonable person would have felt free to leave under such circumstances, particularly with Officer Minter securing the front door and barring his exit.

Accordingly, Patterson was in custody and should have been advised of his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436 (1966).

At trial, one key part of Sergeant Shattuck's testimony that was very damaging to Patterson was Patterson never asked about Aubrey's condition or inquired about her well being. TT p. 376. Similarly, Officer Savino testified that Patterson did not ask to go meet with the mother or to go to the hospital. TT p. 405. In addition, Officer Savino was allowed to testify that he believed that Patterson was acting nervous during questioning. TT p. 405-406.

Particularly because Patterson was never advised of his right to remain silent or that he was entitled to have an attorney present during questioning, no testimony about his statements or lack of statements should have been admitted and admission of those statements as well as statements about Patterson's silence violated Patterson's Fifth Amendment rights. Indeed, Patterson's trial counsel should have moved to suppress any testimony concerning statements made or not made by Patterson during that interrogation. Patterson's trial counsel failed to do so.

Recognizing basic rights violations during a custodial interrogation is objectively a requisite for constitutionally adequate representation. The performance prong of *Strickland* is clearly met by such objectively unreasonable failures to properly analyze the custodial questioning and object to testimony based thereon.

It is objectively apparent that the highly prejudicial testimony from both Sergeant Shattuck and Officer Savino had an impression on the jury

that was highly detrimental to Patterson. Accordingly, there is a reasonable probability that the result of Patterson's trial would have been different had testimony about Patterson's custodial interrogation been properly excluded. Accordingly, the prejudice prong under *Strickland* is met.

VI. CONCLUSION AND ORAL ARGUMENT

The conviction of Patterson for charges of such magnitude as First-Degree Murder for which a life sentence is imposed should demand more than highly questionable circumstantial evidence. The testimony of a jail informant relaying information that was highly inconsistent with the crime that Patterson was accused of committing did not significantly bolster the circumstantial evidence. Concerning this appeal, Patterson's Petition required more than a cursory dismissal with an obviously erroneous order drafted by opposing counsel with no direction fro the Circuit Court.

Had the court afforded an evidentiary hearing, Patterson would have been afforded a compulsory process to obtain the evidence to further support his claims.

Patterson desires to state orally and in person why his Petition should be granted.

WHEREFORE, Appellant, Micah Patterson, prays for the following;

1. A full and proper statutory construction of Va. Code § 8.01-654(A)(2);

2. A determination that the trial court's application of Va. Code § 8.01-654(A)(2) was in error and Patterson's Petition was timely filed;
3. A finding that the trial court's ruling, with regard to the merits of Appellant's claims, was erroneous;
4. A reversal of the trial court's dismissal of Appellant's Petition for Writ of Habeas Corpus;
5. A remand of this matter to the trial court for further proceedings; and
6. For any other relief this Court may deem just and proper.

RESPECTFULLY SUBMITTED,

By: /S Dale Jensen
Counsel

Dale R. Jensen (VSB 71109)
Dale Jensen, PLC, 606 Bull Run, Staunton, VA 24401
(434) 249-3874;(866) 372-0348 facsimile
djensen@dalejensenlaw.com
Counsel for Micah Patterson

Certificate

The undersigned counsel certifies:

1. that the name of the Appellant is Micah Patterson.

2. That contact information of counsel is:

Dale R. Jensen (VSB 71109), Dale Jensen, PLC
606 Bull Run, Staunton, VA 24401
(434) 249-3874 phone; (866) 372-0348 facsimile
djensen@dalejensenlaw.com

3. That the name of the Appellee is HAROLD W. CLARKE, Director of the Virginia Department of Corrections, who is believed to be represented by Elizabeth Kiernan Fitzgerald, Assistant Attorney General, 202 North Ninth Street, Richmond, VA 23219, PHONE: (804) 786-2071, FAX: (804) 371-0151, oagcriminallitigation@oag.state.va.us;

4. that a copy of the petition for appeal has been mailed on June 17, 2017 to all opposing counsel known to Appellant;

5. that the page count for this Petition is 34;

6. that counsel has been retained; and

7. that appellant desires to state orally to a panel of this Court the reasons why the petition for appeal should be granted.

Dated: June 20, 2017

By:
Dale Jensen

Counsel
Dale R. Jensen (VSB 71109)
Dale Jensen, PLC
606 Bull Run, Staunton, VA 24401
(434) 249-3874
(866) 372-0348 facsimile
djensen@dalejensenlaw.com

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was, on this 16th day of June, 2017, sent via Priority Mail to the Virginia Supreme Court and a true copy thereof was served by US Mail to the following:

Elizabeth Kiernan Fitzgerald
Assistant Attorney General
202 North Ninth Street
Richmond, VA 23219

Respectfully Submitted,

/S Dale R. Jensen
Dale R. Jensen
Counsel for Micah Patterson

PETITION FOR APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF VIRGINIA BEACH VIRGINIA

MICAH PATTERSON,
1492067,
Petitioner
vs.
HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
SERVICE ADDRESS:
VIRGINIA DEPARTMENT OF CORRECTIONS
6900 ATMORE DR.
RICHMOND, VA 23225
Respondent.

Record No. _____
Circuit Court Case No. CL15-5306

PETITION FOR APPEAL OF DENIAL OF WRIT OF HABEAS CORPUS

AFFIDAVIT OF DALE JENSEN IN SUPPORT OF MICAH PATTERSON'S PETITION FOR APPEAL

I, Dale Jensen, hereby affirm the following, of which I have personal knowledge:

1. I am over the age of eighteen, have never been convicted of a crime of moral turpitude, and am

legally competent to make this declaration. I have personal knowledge of the matters stated herein and would testify that they are true if called upon to do so.

2. I am counsel of record for Micah Patterson, the Appellant in this case.

3. I have personally controlled the preparation of filing of documents in the above styled case.

4. During much of November of 2016 I was out of state in Utah attending to family issues.

5. While in Utah, I completed preparation of Micah Patterson's Petition for Writ of Habeas Corpus and sent that document to the Virginia Beach Circuit Court via United States Postal Service ("USPS") Express Mail on November 18, 2016.

6. Exhibit A is a true and accurate copy of the tracking information concerning the USPS Express Mail record for Micah Patterson's Petition for Writ of Habeas Corpus.

7. Exhibit A was received by one J. Calevas of the Virginia Beach Circuit Court at 11:11 am on November 21, 2016.

I affirm and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.
DATED: July 15, 2017.
S/ Dale Jensen
Dale Jensen

Tracking Number. **ELS64577599US**
Delivered
On Time
Updated Delivery Day: Monday, November 21,2016•
Scheduled Delivery Day: Monday, November 21, 2016, 3:00pm,
Money Back Guarantee
Signed for By: J CALEVAS // V1RGINlA BEACH, VA 2345611 11:11 am
Product & Tracking Information

Postal Product: Priority Mail Express 2-Day™	**Features:** Insured Up to $100 insurance included Restrictions Apply	PO to Addressee
DATE & TIME	STATUS OF ITEM	LOCATION
November 21, 2016, 11:11 am	Delivered, To Agent	VIRGINIA BEACH, VA 23456
Your item has been delivered to an agent at 11:11 am on November 21, 2016 in VIRGINIA BEACH, VA 23456 to CIRCUIT COURT. The item was signed for by J CALEVAS		
November 21, 2016, 11:11 am	Notice Left (No Authorized Recipient Available)	VIRGINIA BEACH, VA 23456

Micah Patterson – Petition for Appeal Exhibit 1A

November 21, 2016, 10:23 am	Arrived at Post Office	VIRGINIA BEACH, VA 23456
November 21, 2016, 10:03 am	Out for Delivery	VIRGINIA BEACH, VA 23456
November 21, 2016, 9:53 am	Sorting Complete	VIRGINIA BEACH, VA 23456
November 21, 2016, 4:59 am	Departed USPS Facility	NORFOLK, VA 23501
November 21, 2016, 12:43 am	Arrived at USPS Destination Facility	NORFOLK, VA 23501
November 19, 2016, 11:41 pm	In Transit to Destination	
November 19, 2016, 10:44 am	Departed USPS Facility	SALT LAKE CITY, UT 84199
November 18, 2016, 11:41 pm	Arrived at USPS Origin Facility	SALT LAKE CITY, UT 84199
November 18, 2016, 7:30 pm	Arrived at USPS Origin Facility	PROVO, UT 84606
November 18, 2016, 4:55 pm	Departed Post Office	CEDAR CITY, UT 84720
November 18, 2016, 11:40 am	Acceptance	CEDAR CITY, UT 84720

Micah Patterson – Petition for Appeal Exhibit 1A

PETITION FOR APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF VIRGINIA BEACH VIRGINIA

MICAH PATTERSON,
1492067,
Petitioner
vs.
HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.
Record No. _____
Circuit Court Case No. CL15-5306

PETITION FOR APPEAL OF DENIAL OF WRIT OF HABEAS CORPUS

AFFIDAVIT OF JOSEPH JENSEN IN SUPPORT OF MICAH PATTERSON'S PETITION FOR APPEAL

I, Joseph Jensen, hereby affirm the following, of which I have personal knowledge:

1. I am over the age of eighteen, have never been convicted of a crime of moral turpitude, and am legally competent to make this declaration. I have personal knowledge of the matters stated herein and would testify that they are true if called upon to do so.

2. I am a paralegal for Dale Jensen, PLC, counsel of record for Micah Patterson, the Appellant

in this case.

3. I have personally been involved in the filing of certain documents in the above styled case.

4. On November 21, 2016 I was directed by Dale Jensen to hand deliver a signed oath of Micah Patterson to the Virginia Beach Circuit Court, which was the only part of the Petition for Writ of Habeas Corpus (the "Petition") that was not sent by mail to that Court.

5. I hand delivered the signed oath of Micah Patterson to the Virginia Beach Circuit Court (the "Circuit Court") on November 21, 2016.

6. I was advised of the person on the clerical staff of the Circuit Court responsible for petitions for writ of habeas corpus and advised her that the Petition had been received by J. Calevas of the Virginia Beach Circuit Court at 11:11 am on November 21, 2016.

7. I requested that the aforementioned clerical staff person locate the Petition that was already filed in the Circuit Court and properly record a filing date on November 21, 2016.

8. The aforementioned clerical staff person refused my request.

I affirm and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: July 15, 2017.

S/ Joseph Jensen

Dale Jensen

COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

July 7, 2017

The Honorable Patricia L. Harrington, Clerk
Supreme Court of Virginia
Supreme Court Building
100 North Ninth Street
Richmond, Virginia 23219

Re: Micah Patterson v. Harold W. Clarke, Director of the Va Dep't of Corrections
Record No. 170802

Dear Ms. Harrington:

The Director has reviewed the Petition for Appeal in this case and has compared the Petition filed in this Court to the Petition for Writ of Habeas Corpus, Motion to Dismiss and subsequent Objection filed in the Virginia Beach Circuit Court, and the final order of that court.

Because Patterson's habeas petition is barred by the statute of limitations and does not raise any claims that were not addressed in the Motion to Dismiss and subsequent Objection filed in the Virginia Beach Circuit Court and the final order of that court, this letter is to advise you that, pursuant to Rule 5:18(a), the Director does not plan to file a brief in opposition to the Petition for Appeal in the above-referenced matter. The Director notes, however, that the affidavits attached to the Petition were not part of the record below and should not be considered by this Court.

The Director remains ready to respond to any questions or concerns posed by the Court and, if requested, to submit a brief i n opposition to the instant petition.

Thank you for your attention to this matter.

Sincerely,
/S Elizabeth K. Fitzgerald
Elizabeth Kiernan Fitzgerald,
VSB #82288
Assistant Attorney General
Criminal Appeals Section

cc: Dale R. Jensen, Esq.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 23rd day of January, 2018.

Micah Patterson, Appellant,

against Record No. 170802
Circuit Court No. CL1 6-5306

Harold W. Clarke, Director of the Virginia Department of Corrections, Appellee.

From the Circuit Court of the City of Virginia Beach

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

A Copy,
Teste:
Patricia L. Harrington, Clerk

By: /s Illegible

Deputy Clerk

VIRGINIA SUPREME COURT

MICAH PATTERSON,
1492067,

Petitioner

vs.

HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.
Case No. 170802

PETITION FOR REHEARING OF DISMISSAL OF PETITION FOR WRIT OF HABEAS CORPUS

Counsel
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djensen@dalejensenlaw.com

PETITION FOR REHEARING OF DISMISSAL OF PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to Va. Sup. Ct. R. 5:20, Micah Patterson ("Patterson"), by counsel, respectfully submits this Petition for Rehearing of the Dismissal of his Petition for Writ of Habeas Corpus dated January 23, 2018 (the "Dismissal"), and in support thereof states the following:

I. INTRODUCTION.

Patterson's Petition for Writ of Habeas Corpus (the "Petition") was improperly denied.

Patterson asserted six separate assignments of error, each of which was and is meritorious for reasons stated in the Petition.

Patterson hereby petitions this Court to reconsider its recent ruling and grant his Petition for Appeal.

II. ARGUMENT

A. The Petition Was Timely

If statutory language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it. See, e.g., Brown v. Lukhard, 229 Va. 316, 321 (1985).

Here, Va. Code § 8.01-654 states in pertinent part (emphasis added):

A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-

654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

Even if the time for appeal of Patterson's appeal of his underlying conviction to the United States Supreme Court did not toll the time for filing the Petition, a premise strongly contested by Patterson, the Petition was timely filed on November 21, 2016. The filing date was proved by the official United States Postal Service record filed with the Circuit Court with Patterson's Opposition to the Motion to Dismiss (the "Opposition"), which was filed on or about February 21, 2017. The referenced Opposition also included the additional information that a paralegal working for the undersigned counsel's firm actually went to the Circuit Court on November 21, 2016, told the clerical employee responsible for receiving habeas corpus filings that the Petition had been received via mail, and requested that the clerical employee retrieve the document and accord it the proper filing date. The clerical employee refused.

The plain language of Va. Code § 8.01-654 did not require placing the Petition in the hands of any particular person. Instead, the only requirement was for the Petition to be "filed" "in the trial court". Moreover, to the extent that this Court holds that the plain language of the trial court means

something different than its plain language, the one day delay in according the filing date to the Petition by the Circuit Court constituted an obstruction to filing and tolled the statute of limitations by one day pursuant to Va. Code § 8.01-229(B).

Failure to grant the Petition on this ground not only is contrary to Virginia law, but it also violates Patterson's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, the denial of the Petition should be reconsidered and the Petition granted.

B. The Substantive Grounds for Habeas Relief Warrant Reconsideration

Patterson's ineffective assistance of counsel claims are meritorious and warrant relief. Failures of trial counsel to properly investigate defenses and mitigating circumstances of a case have been held to constitute constitutionally ineffective assistance of counsel. See, e.g., Wiggins v. Smith, 539 U.S. 510, 523 (2003).

a. Trial Counsel Failed to Investigate and Present Positive Character Testimony at Trial and To Contest the Contrived Timeline of the Commonwealth

At a minimum, Patterson's trial counsel should have presented testimony of his good character. Patterson was active military at the time

of the incident, which resulted in Patterson's conviction. Patterson had no prior criminal record. Accordingly, positive testimony about Patterson should have been presented at trial.

b. Trial Counsel Failed to Investigate and Present Testimony at Trial To Contest Fromberg's Testimony

Moreover, an investigation should have been performed to subpoena recorded phone calls to Robert Fromberg while he was in jail to determine whether his knowledge of Patterson's case came from other sources. Instead, Patterson's trial counsel did no such investigation.

c. Trial Counsel Failed to Investigate and Present Testimony at Trial To Contest Dr. Clayton's Testimony

Most importantly, Patterson's trial counsel should have retained an expert in forensics that could have provided reasonable doubt as to the speculative timeline of the Commonwealth's expert witness, Dr. Michelle Clayton. As discussed in detail in the Petition, testimony indicating uncertainty in the timeline was present even by another witness used to present the Commonwealth's case (Wendy Gunther, M.D). Patterson presented evidence with the Petition showing that it should have been a straightforward process to find an expert witness to affirm Dr. Gunther's testimony and to create reasonable doubt as to Dr. Clayton's contrived

timeline, which timeline was critical to the conviction of Patterson. In short, Dr. Clayton testified that her timeline was not just based upon forensic evidence, but was also based upon having been given information about times when Patterson was alone with the victim, Aubrey Hannsz. See, e.g., TT p. 585. So, Dr. Clayton's analysis began with a conclusion about who committed the crimes against Aubrey Hannsz. She then made the facts of her examination of Aubrey Hannsz conform to that preconceived conclusion and was unwilling to allow any other possibilities enter her mind. The trial court erred by not even mentioning this argument or the evidence provided in support of the argument.

d. Trial Counsel Failed to Investigate DNA Evidence

Lastly, proper investigation by Patterson's defense counsel necessarily included investigating testing of the DNA samples. It is objectively unreasonable, in a case like this that was nearly entirely based upon circumstantial evidence, for Patterson's trial counsel not to have performed an investigation and have samples tested that were not tested by the Commonwealth. Failure to perform any investigation resulted in the performance of Patterson's trial counsel falling well below constitutional standards.

For all of the reasons stated in the Petition, the overall performance of Patterson's trial counsel

was objectively for unreasonable under prevailing professional norms.

e. Trial Counsel Failed to Object to Testimony Presented in Violation of Patterson's Constitutional Rights

As shown in the Petition, the totality of the circumstances shows that Patterson was in police custody after Aubrey Hannsz was transported to the hospital.

At trial, one key part of Sergeant Shattuck's testimony that was very damaging to Patterson was Patterson never asked about Aubrey's condition or inquired about her well being. TT p. 376. Similarly, Officer Savino testified that Patterson did not ask to go meet with the mother or to go to the hospital. TT p. 405. In addition, Officer Savino was allowed to testify that he believed that Patterson was acting nervous during questioning. TT p. 405-406.

Particularly because Patterson was never advised of his right to remain silent or that he was entitled to have an attorney present during questioning, no testimony about his statements or lack of statements should have been admitted and admission of those statements as well as statements about Patterson's silence violated Patterson's Fifth Amendment rights. Indeed, Patterson's trial counsel should have moved to suppress any testimony concerning statements made or not made by Patterson during that interrogation. Patterson's trial counsel failed to do so.

Recognizing basic rights violations during a custodial interrogation is objectively a requisite for constitutionally adequate representation. The performance prong of Strickland is clearly met by such objectively unreasonable failures to properly analyze the custodial questioning and object to testimony based thereon.

It is objectively apparent that the highly prejudicial testimony from both Sergeant Shattuck and Officer Savino had an impression on the jury that was highly detrimental to Patterson.

There is a reasonable probability that the result of Patterson's trial would have been different had testimony about Patterson's custodial interrogation been properly excluded. Accordingly, the prejudice prong under Strickland is met.

III. CONCLUSION

For all of the reasons discussed herein, Patterson respectfully and humbly requests that this Court reconsider its denial of his Petition for Appeal.

Dated: February 6, 2018
RESPECTFULLY SUBMITTED,

By: Dale Jensen, Counsel
/S Dale Jensen Dale R. Jensen (VSB 71109)
Dale Jensen, PLC
606 Bull Run, Staunton, VA 24401
(434) 249-3874
(866) 372-0348 facsimile
djensen@dalejensenlaw.com

Certificate

The undersigned counsel certifies:

1. that the page count for this document is 8.

Dated: February 6, 2018

By: Dale Jensen, Counsel
/S Dale Jensen Dale R. Jensen (VSB 71109)
Dale Jensen, PLC
606 Bull Run, Staunton, VA 24401
(434) 249-3874
(866) 372-0348 facsimile
djensen@dalejensenlaw.com

Certificate

The undersigned counsel certifies:

I certify that on February 6, 2018, I e-mailed a true copy of the foregoing document to:

Mark Herring
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

Dated: February 6, 2018

By: Dale Jensen, Counsel
/S Dale Jensen Dale R. Jensen (VSB 71109)
Dale Jensen, PLC
606 Bull Run, Staunton, VA 24401
(434) 249-3874
(866) 372-0348 facsimile
djensen@dalejensenlaw.com

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 23rd day of March, 2018

Micah Patterson, Appellant,

against Record No. 170802
Circuit Court No. CL16-5306

Harold W. Clarke, Director of the
Virginia Department of Corrections, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 23rd day of January, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /S Illegible

Deputy Clerk