ORIGINAL

No. 18-8244

IN THE SUPREME COURT OF THE UNITED STATES

Justin Cornell, Petitioner

v.

Mark Herring, Virginia Attorney General,

Commonwealth of Virginia, Respondents

ON PETITION FOR A WRIT OF CERTIORARI

VIRGINIA COURT OF APPEALS

Petition for writ of Certiorari Grant/Vacate/Remand

in light of Jackson v. Virginia, 443 U.S. 307 (1979)

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pro se

QUESTION PRESENTED

As a result of state court proceedings, the Commonwealth of Virginia obtained a conviction before a jury for second-degree murder against Justin Cornell on circumstantial evidence alone. On appeal, the Supreme Court of Virginia held as reasonable that the jury concluded the evidence excluded all reasonable hypotheses of Cornell's innocence using evidence alleging defilement.

The question presented is whether the Supreme Court of Virginia erred in applying the criteria of excluding all reasonable hypotheses of appellant's innocence, rather than the criteria of "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," in evaluating the alleged evidence of defilement to infer murder, and the evidence in total to find each element, and guilt beyond a reasonable doubt in accordance with Jackson v. Virginia, 443 U.S. 307 (1979).

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed on the cover page.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Justin Cornell, respectfully prays for a Grant/Vacate/Remand in light of (G/V/R ilo) Jackson v. Virginia be issued, or a writ of certiorari to review the Virginia Court of Appeals judgment in this case.

OPINIONS BELOW

The decision of the Virginia Court of Appeals (VACOA)(Appendix A, hereafter App.A) is unpublished, as are: the VACOA decision to deny rehearing (App.C), the Supreme Court of Virginia (SCOVA) denial of review (App.D) and denial to rehear (App.E), and the trial court, Virginia Beach Circuit Court, decision (App.B).

JURISDICTION

The date on which the highest state court decided my case was 06/28/2018. A copy of that decision appears at Appendix D. A timely petition for rehearing was thereafter denied on the following date: 10/05/2018, and a copy of the order denying rehearing appears at Appendix E. An extension of time to file the petition for writ of certiorari was granted to and including 3/4/2019 on 12/14/2018 in Application No. 18A623. The jurisdiction of this Court is involked under 28 USC 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Appendix F.

STATEMENT OF THE CASE

This inferential case began as an insufficiency of evidence of: malice, criminal agency, and guilt appeal to a conviction for second-degree murder. The jury returned a verdict and sentenced the then 39 year-old Justin Cornell to 40 years incarceration, $100,000 fine, and two years post-release supervised probation. William R. O'Brien, Chief Judge for the Virginia Beach Circuit Court entered judgment on November 16, 2016. The VACOA upheld the decision on

June 30, 2017, stating, "the jury could reasonably infer from these circumstances that appellant acted with malice." App.A.5. The SCOVA denied review without comment finally on 10/05/2018 after request for rehearing was made. The decision rests upon the erroneous interpretation of the term 'murder' as it pertains to Code of Virginia (COV) 18.2-32 and 18 USC 1111(a), failure to prove the elements of malice aforethought and criminal agency beyond a reasonable doubt with sufficient evidence to support them or the inference of guilt; rather than exclude hypotheses of innocence.

Petitioner raised the sufficiency of evidence issue repeatedly at trial, at sentencing, and on appeal. Petitioner challenged the sufficency of evidence to establish venue, corpus delicti, and criminal agency as the prosecution rested in a motion to strike. J. O'Brien overruled. Tr. 977-988. App.G. Petitioner renewed his motion to strike for insufficient evidence of corpus delicti, cause of death, and criminal agency at the close of all evidence; J. O'Brien overruled. Tr. 1059-1064. App.H. Petitioner submitted a Motion to Set Aside the Verdict and For A New Trial (App.I) at sentencing for, inter alia, insufficient evidence as a matter of law to find malice aforethought, intent, actus reus, or guilt. Overruled by J. O'Brien. S.Tr. 11-13. App.J. On appeal, petitioner argued by assignment of error the evidence was not sufficient to support a jury finding malice, criminal agency, or guilt (II, III, VI, respectively). Petitioner's Brief pp. 19-24, 31-35. App.K.

The evidence being insufficient to infer homicide or guilt from the alleged evidence of defilement was raised at trial, Tr. 981, App.G, and at sentencing in the Motion to Set Aside in numbers 4-9. App.I. These insufficiencies were repeated in the appellant's brief pp. 21, 23, 32-33. App.K. "A state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier

of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim." Jackson v. Virginia, 443 U.S. 307, 321 (1979).

The issue of sufficiency of evidence is most common in the Court of Appeals, and their processes of determination are contrary to those of this Court, the U.S. Circuit Courts of Appeals, and other states' highest courts. They are adversely affecting thousands of appellants every year, and plenary review is required.

1. Background. Justin Cornell was a licensed massage therapist in three states with over ten years of experience, employed then at Knuckles N Knots, a day spa in Virginia Beach, VA during May, 2015. On the Thursday before Mother's Day, Brianna Armstrong (decedent) went to Cornell's apartment at 516 Peak Court, Virginia Beach around 9 pm. Together with a neighbor, Mr. Witchey, they had dinner and drinks. After Mr. Witchey left, he witnessed Armstrong leave alone after 11 pm. This was the last she was reportedly seen. At 11:30 pm she sent a text message to Cornell with a picture of two guns captioned, "Bri need this."

Her body was found 24 days later by Mr. Spicer on Douglas Road in Chesapeake, VA, without her forearms, near trash taken from Cornell's residence. Forensic technician Pittman testified that the trash was "in the road area." Tr. 330. App.L. Mr. Spicer testified that the remains were "all visible from the road." Tr. 291. App.M.

Dr. Stokes, the medical examiner, did not rule her death a homicide. Instead he ruled: "the manner of death: undetermined; cause of death: unspecified criminal violence with decapitation, dismemberment, postmortem mutilation, and concealment contributing." App.N. He did not rule out suicide or accident. Ms. Armstrong was clinically depressed, and prescribed medication for depression and anxiety. He ruled out gunshot wound, blunt force trauma, sharp

force trauma, and blows to the neck (i.e. strangulation) as possible causes.

Mr. Cornell was arrested on June 9, 2015, and charged with second-degree murder. He has always maintained his actual innocence to this crime. As the Commonwealth never established a date, place, or time of death, Mr. Cornell was never asked for an alibi, and did not testify at trial.

2. Trial Proceedings. On the first day of trial the prosecution established this to be a circumstantial case. The Virginia statute for murder, COV 18.2-32 is a corollary to the federal statute 18 USC 1111(a), "[m]urder is the unlawful killing of a human being with malice aforethought." It is well established in both Virginia and Federal law that the 'malice aforethought' refers to the 'unlawful killing.' It may be that 'malice aforethought' as a legal construct has taken on a meaning other than the plain understanding that the intent to commit murder was formed before the act. However, 18 USC 1111 n.2 Construction reads, "[i]n construing 18 USC 1111(a), customary rule of strict construction in favor of the accused is applicable and if two words are capable of two constructions, more favorable to accused prevails. Ornelas v. U.S., 236 F.2d 392 (9th Cir. NV 1956)." App.F.

Also established was that Armstrong and Cornell dated from December, 2014 to February, 2015. They then resumed a platonic relationship. No evidence at trial alleged that they had a romantic relationship after February, 2015.

The decedent's husband, Corey Creek, described Armstrong as depressed since her mother and brother had both recently died. Creek and decedent were sleeping in separate rooms. Their marriage had been strained with arguments and talks of divorce. She had recently learned of Creek's history as a violent sex offender. Creek had been convicted of contributing to the delinquency of a minor, manufactoring and distributing child pornography.

Though they had been married for only three years, Creek testified, that

Armstrong did not spend Thanksgiving day or night, Christmas day or night, or New Year's Eve or day with him. She was with Mr. Cornell and his friends during those times. Creek called decedent a "pathological liar." Tr. 321. App.O. It was not clear from his testimony when he learned of decedent's infidelity.

On cross, the Commonwealth objected to questions about the life insurance policy Creek held on decedent. J. O'Brien sustained the objection even though clearly relevant and the door to "other property" had been opened on direct. Tr. 164, 208-209. App.P. Creek did not answer whether the policy had a suicide clause. Other evidence of third-party guilt was artfully excluded by the Commonwealth's Motion to Exclude Evidence of Third-Party Guilt, filed a few (3-6) days before trial. App.Q. The jury never heard about Creek's financial motive.

Although motive is not an essential element of murder, it is most relevant in cases where intent must be proved by circumstantial evidence, such as here. Creek had a motive. Mr. Cornell did not.

Over the next four days the Commonwealth put on several scientific expert witnesses.

Dr. Pope, forensic anthropologist, testified that the marks found on some of the bones were made by a "straight single edged [tool] without serrations." Tr. 674. App.R. When viewing some of the many graphic photos shown to the jury Dr. Pope remarked, "there was heavy manipulation... It wasn't just a straight single linear incision." Tr. 677. App.S. She was given no tools to compare the marks, which she could have done. Tr. 685. App.T.

At no point did Dr. Pope mention a single ante-, or peri-mortem injury. She made no conclusions about, nor discussed any cause of death.

Forensic specialist Day searched Cornell's car. She collected twenty-two (22) swabs. There was no blood or DNA belonging to Armstrong, nor signs it had

been recently cleaned. She collected some red or green plastic pieces no bigger than a fingernail. The green plastic pieces did not match any other green plastic pieces collected anywhere.

The Commonwealth then asked Day about items collected from Douglas Road. A piece of floor molding, that Cornell had told detectives he had thrown out, also had pieces of green plastic on it. The green plastic on the molding was similar to a faux Christmas tree Cornell had up during Christmas time, and to other pieces in a 'Target' bag of bathroom trash on Douglas Road. None of the pieces had blood or DNA on them. Their relevance was never established.

Red plastic bits were also found in the 'Target' bag. These were found to be different in color, but similar to the pieces in the car. Again, no blood or DNA, no link to a crime, nor relevance was established.

Forensic scientist Hood, latent print expert, was then questioned. None of Cornell's fingerprints were matched to anything found on Douglas Road, not the bags containing the body, nor anything else. Tr. 759. App.U.

Forensic scientist Townley, biology and DNA expert, testified next. A small stain on the edge of the carpet next to the bathroom of Peak Court matched Armstrong's DNA. There was no other blood anywhere in the apartment. J. O'Brien weighed in, "[h]ow does it show, though, that this murder occured in the apartment?" Tr. 985 App.G. No testimony established how long the stain had been there. Armstrong went to Cornell's apartment frequently for months.

Townley then testified about two bloody gloves collected on Douglas Road. On the gloves was a mixture profile, two or more types of DNA. One was matched to Armstrong. Cornell was not a match. Tr. 777. App.V.

A tee shirt was tested for blood and DNA. Though blood was indicated, Cornell was not matched. Nor was Cornell's DNA on the inside of the shirt. Tr. 779. App.W.

A pair of boxer briefs were examined and sent to Richmond for additional testing when the traditional test yielded no results. Forensic scientist Ballard, forensic biology expert, did a new kind of DNA test, Y-chromosome specific to males. All results will pertain only to men, and it does not distinguish between patrilineally related men, she explained. On the inside of the boxers was another mixture profile. It would be impossible for two or more men to be wearing the boxers at the same time. To obtain a mixture profile, two or more men would have had to come in direct contact with the briefs. The mixture profile was separated into a major, and a minor profile. Cornell could not be excluded from the major, yet the minor was never matched to anyone. Whoever handled the briefs and left their DNA on them was never established. Tr. 817. App.X.

In the alternative, the Y-chromosome test is far less specific than the traditional test. Instead of excluding everyone on the planet (besides a twin) like the regular test, the 'Y' test is only accurate to 2,400 men. Therefore, in a sample of 4,800 men we would expect to have two men matched to the DNA found in the briefs. There are about 4,000,000 men in Virginia alone. If every man were to be tested, then we would expect about 1,667 men would match the DNA. If all the 3.628 Billion men (approx.) on the planet were tested, then the defendant was only one of the 1,511,876 men on the planet who would also match the DNA. This is hardly exclusive evidence of Cornell's involvement.

The presence of the second man's DNA was never explained. The sample was too small for comparison with Corey Creek. Only after the DNA results were known to the prosecution, did they draft their motion to exclude evidence of third-party guilt. No evidence was entered to prove how the trash or body got to Douglas Road.

Forensic technician Mileski, digital forensics expert, gave the most

albeit, superficially, damaging testimony. It appeared from the report released one month before trial that there were thirty lines of data on the hard drive of Cornell's phone which reflected Google Maps searches of Douglas Road.

There are several problems with this evidence. First, no evidence was presented at trial to show that Cornell was the one to make the searches. The Google Maps App history did not match the data on the hard drive. Second, Mileski easily duplicated the searches on another phone. Someone tech savvy could have copied and pasted the data from one phone to another as there were no digital footprints identifying the data as originating from Cornell's phone. App.Y. Third, the data was in the system files not in the user files; as Mileski testified that, "this is not something that the user would go in and save." Tr. 963. App.Z. Last, AT&T reported that there was at least one bug in their system affecting the day 'Monday.' App.Y.

Mileski's testimony was a bit technical. She pointed out that cell phones save data in two places. 'User files' such as call logs, text messages, internet history, and voicemails are examples. No inculpatory evidence was found in the thousands of user files on Cornell's phone.

The other place is 'system files' which are blocked to everyone except system administrators and hackers. The data amounted to lines of text (i.e. HTTPS/Google.maps.com/example/123456.789012.34) showing longitude, latitude, and zoom level. They were time stamped for around 3 a.m. on the same day that her body was found. Cornell claims to have searched for Douglas Road on Monday June 1. However, the glitch made the day of the search appear to be Sunday at 3 a.m. instead of Monday at 3 a.m., causing the search to appear to have taken place 7 hours before the body was found instead of 5 hours after Cornell was informed by police. To be clear, these were lines of data that describe a map, where the body was known to be, not location data from the phone. The location

data from the GPS shows that Cornell was never any where near Douglas Road. App.BB.

The entomologist report proved that Armstrong's body was on Douglas Road on or before the afternoon of May 28. At least three days before the searches appeared on Cornell's phone. App.ZZ. Whether the search was made on Sunday or Monday, it could not have been to find a place to dispose of her body.

3. **Stokes' Testimony and Cause of Death.** Judge O'Brien summed up Stokes' testimony by saying, "you cannot in your evidence establish a cause of death, mechanism of death, or a time of death." Tr. 987. App.G. Other key testimony from Stokes included:

> [n]ot sure she didn't die of suicide, (643)
> there were no lethal ante- or peri-mortem injuries (644),
> there was a big gape where her neck was, from animal predation (649)
> all cuts were post-mortem (624), and
> she could have died on Douglas Road. (653)

App.CC. Judge O'Brien might have added that Stokes could not establish either a place, or a date of death.

The VACOA pointed out in their decision a part of Stokes' testimony:

> I didn't see any evidence of natural disease or heart attack or stroke, liver disease, or something like that that killed her. I didn't see any evidence of -- well, we talked about the trauma, the bruising on her buttocks and thighs, but I didn't see like a skull fracture or evidence of accumulation of blood inside her head that made me think she died as a result of a blow to the neck. I wasn't able to examine the organs, the structures of the neck, because they were skeletonized

(App.A), meaning that the throat was missing due to animals, and that death was not caused by strangulation. The forearms were not removed from animals. Stokes' autopsy lists among the decedent's diagnoses, "anxiety" and "depression." She was prescribed Alprazolam (Xanax). Stokes' examination determined she was not shot, stabbed, beaten, or strangled to death. Her alcohol was 0.188% by volume at the time of autopsy, and was negative for opiates. Benzo-

diazepines were not tested, nor were barbiturates, although both were found in her house. App.N.

No evidence was entered to supply a reason for the dismemberment, mutilation, and decapitation. The criminal agency for such defilement is not found in the evidence. Cornell has no history of anger or violence issues.

The Commonwealth entered knives from Cornell's collection into evidence which only served to prejudice the jury. Defense counsel Jones did not object. The knives had no blood or DNA on them, were not recently cleaned, nor matched to any of the post mortem cuts. Did they have any probative value? Judge O'Brien was moved to say, "this is about as thin of a case as we have had," and it is not a "run-of-the-mill case." Tr. 1049. App.DD.

The location of the remains can be organized into two categories: hiding, and disposal. Mr. Spicer testified that the body was not hidden, it was "visible from the road." Tr. 291. App.M. The road is surrounded by 750sq miles of swampland. If the intent was to hide the remains, then there was ample space in which to hide them. However, the diagram in the autopsy shows the body was found next to the road. The body was not hidden, nor was the trash that was placed with the body hidden in any way. App.N.

The Commonwealth focused most of their attention on alleged evidence of disposal. Forensic technician Pittman testified that a receipt with Cornell's name and address was found in a "Thank You" grocery bag "in the road area." Tr. 330. App.L. The receipt was dated 10-17-2014." Tr. 385. App.T. The receipt went into the trash seven months before Armstrong went missing. Armstrong and Cornell had just begun exchanging physical therapy treatments around this time. When Detective Thomas asked Cornell about the receipt, he readily claimed ownership. Cornell pointed out that after he put the trash in the unsecured apartment complex dumpster, he had no idea where it went.

Also found on Douglas Road was a 'Target' bag with red pieces of plastic, and green pieces of plastic, which Pittman placed in the body bag. The Commonwealth brought in a trace evidence analysis expert, Weimer, to testify that the red pieces found in the 'Target' bag and in the back seat of the car were "similar...due to slight differences in color," and they could have come from "the same source or different sources." Tr. 878. App.EE. They had no blood, or DNA on them. They were smaller than a postage stamp, and in no way were they linked to a crime.

There were three types of green pieces found in the trash. One type could not have come from Cornell's residence as there were only two types in the Christmas tree packed in the closet of 516 Peak Court. The other two types were similar, but not identical. Tr. 874. App.FF. Again, there was no blood, or DNA on the tiny fibers of plastic. They were not connected to any crime.

The green plastic from the trunk of Cornell's car was inconsistent with any of the other pieces collected in either the trash or Cornell's home. App. GG. No evidence linked Cornell's car to the disposal of Armstrong's body.

The Commonwealth rested and Jones made a motion to strike the evidence pointing out that even viewing all of the evidence in the light most favorable to the Commonwealth, it only alleges defilement, homicide was never proven; that the jury cannot convict [as a matter of law] on evidence of dismemberment alone. Tr. 981. App.G. Without giving any reason, O'Brien overruled.

The defense then put on three witnesses. Two were friends of Cornell's, husband and wife, Adam and Kendall Nazario. The third was a neighbor, Mr. Witchey. A fourth witness was not allowed to testify.

K. Nazario testified that Justin and Brianna spent the night at her house twice, Thanksgiving, and New Year's Eve. Tr. 992. She went on to describe Cornell and Armstrong's relationship as friendly and romantic. Tr. 996. After

Armstrong went missing, she described Cornell's emotional state as "worried, sad, and stressed." Tr. 999. After Brianna's body was found, Cornell was "very upset, tearful and again my husband and I offered to have him come to our house," Kendall went on to say. Cornell took them up on their offer and stayed with them the night of May 31. Together they looked up Douglas Road on Cornell's phone. Mrs. Nazario also testified that there was never any type of aggressive argument, or violence between Justin and Brianna. Tr. 1000. App.HH.

In describing Cornell's apartment on cross she said, "[k]nives weren't generally laying around...usually displayed on walls." Tr. 1003. That the condition of Cornell's apartment - after he learned of Brianna's death and that he was being set up for it - with knives spread around, was different from the way she saw it when she was there. Tr. 1006. App.II.

A. Nazario explained that he observed Justin and Brianna in public and that they made no attempt to hide their relationship. Tr. 1010. Mr. Nazario also testified that in the April time frame he saw damage to the floor in the hallway, and "[t]he whole ceiling in the hallway leading to the bedroom and bathroom area was torn out." Tr. 1013. He went on to say that there was never a time when he was not allowed access to any area of Cornell's apartment. App.JJ.

The defense attempted to call Jason Helwig to testify that he drove an hour to check on Ms. Armstrong's safety in 2013, "before she ever met Mr. Cornell," fearing her life was in danger. Tr. 1027. App.KK. However, his testimony was excluded due to the Commonwealth's motion "dealing with evidence of third-party guilt." Tr. 1020. App.P.

This motion in limine was discussed in chambers, without Cornell even in the courtroom. There is no record of whether Jones objected to this motion. Jones neglected to secure a court reporter. Such negligence was held to be

grounds of malpractice in the 7th U.S. Circuit Court of Appeals case Williams v. Washington, 50 F.3d 673 (1995). Cornell is currently pursuing a legal malpractice suit against Mr. Jones.

This motion prevented Cornell from presenting an alternative perpetrator defense. Detective Brenner's report includes his meeting with:

> Dennis Santos with NCIS who stated that he heard mi [sic] we were working a missing persons case with Brianna Armstrong. Dennis stated that NCIS was investigating Corey in a multimillion dollar fraud case. We set up a meeting on 5/22/15 in their office. At the meeting I learned that Corey was the right hand man for head of the fraud operation who had scammed the U.S. government out of 5.2 million dollars. Corey is extremely tech savvy and very good with record keeping, numbers and computers and had apparently kept all of the records for the operation. In September of 2014, NCIS served a search warrant for Corey's property at Baldwin St. Bri showed up during the execution of the search warrant. Agents described her as very hostile and argumentative towards them and Corey. At one point she yelled at Corey for not calling her that day to check in with her. Corey on the other hand was docile and compliant.

App.LL.4.

Cornell was prevented from questioning Creek about these allegations as they gave him motive to defraud the life insurance policy. Instead, Creek was only asked to confirm that he was a convicted violent sex offender. Tr. 161. That he had access to his parents' empty house after she went missing, and that he was aware of his wife's infidelity. Tr. 166, 188. App.MM.

The last witness the defense called was Mr. Witchey. His uncontraverted testimony was, "I saw Brianna leaving out the front door of the house [Cornell's] heading toward her car with Justin still inside the house." Tr. 1037. He went on to say on cross examination that, "I did not see her get in the car, but I did hear a car start." Tr. 1038. App.NN. This was on the 7th of May, 2015, around 11:30pm. He did not see her after that. The Commonwealth imagined that she started her car, then turned it off, and went back inside unseen, by the same route she was just witnessed leaving. They entered no

evidence to support such speculation.

4. **Investigative Evidence.** The police investigation evidence presented at trial revealed no motive, anger, hostility, or history of violence. There was no confession, nor did Mr. Cornell make any incriminating statements. Cornell cooperated with the police, fully answering all questions truthfully to the best of his knowledge, until directed by cousel to stop assisting during the execution of the search warrant on his home, when counsel was retained.

The Commonwealth has tried to misconstrue Cornell's statement on 5/14 that he hadn't seen Brianna in a "while." Detective Logan reported Cornell as having said "a few days." App.OO. Either way, Cornell had last heard from Armstrong via text message on 5/7. This was unusual because they frequently talked or texted a few times a day. To suddenly not hear from someone in a week is aptly a "while" under these circumstances. Immediately after being asked about the last communication with Brianna, Justin showed his phone to the detectives. He showed them the text message she sent, and the appointment on his calendar for 5/7/2015, Thursday night to exchange physical therapy. There was no obfuscation.

The detectives went through the apartment on 5/14 before the whole carpet was shampooed. They did not report any blood stains. Two days later, in accordance with his lease, Mr.Cornell rented a Rug Doctor and cleaned his carpet in an effort to get his security deposit back. Cornell had given notice of his intent to vacate to the lessor, Re/Max, App.PP, to his friends and family, and to Brianna in April. App.QQ.

Detective Hatchell reported on 5/21 about his questioning of Mr. Cornell "[h]is demeanor is completely calm and appears to be compliant to any requests made. His apartment is small but mostly tidy. His mannerisms didn't reflect any nervousness." App.RR. There is no mention of knives being spread around.

Detective Branch reported Justin "and Brianna had been romantically involved from December 2014 until February 2015... She told him she was divorced and the breakup was violent... [in] November he had seen her with a black eye and a bruised arm...she had indicated it was her "ex-husband" Corey." App.SS. 5.

Detective Thomas went on to report, "I asked about the carpet threshold [kitchen/dining room] which he replaced. He said the old one was coming up and he kept snagging his socks on it so he replaced it. I asked about the cut marks on the kitchen floor and he advised me they were there when he moved in and showed me the check list which was dated 6/2014 noting the cut to kitchen floor... He advised he drinks a ginseng bottle every day. I took his DNA sample and swabs of the bathtub drain, and took photos of all item [sic] of interest found in his apartment." App.TT.8. Mr. Cornell offered his DNA without requiring a warrant. None of the swabs indicated blood or foul play.

Upon execution of the search warrant, no blood was discovered in the living room, bathroom, kitchen, office, or bedroom. There was no blood spray or splatter. There was only a coin-sized drop on the edge of the carpet between the hall and bathroom. There was not enough blood to support the speculation that she was dismembered there in the apartment. App.A.

Although Mr. Cornell worked construction in his 20's, and owned a handsaw, a hacksaw, a circular saw, and a recipricating saw, any of which would make dismembering a body physically easier (not emotionally), none of them were used to dismember the corpse. The tool used was "non-serrated," unlike a saw. That would include such things as box cutters and scissors, swords and scalpels and everything in between. Yet, nothing in Cornell's collection.

The items found on Douglas Road, and in Cornell's apartment were blue latex gloves, and black trash bags with red drawstrings. The gloves can be

purchased in any Autozone, the trash bags, at any Target; and both of them in myriad other grocery stores and pharmacies.

Cornell's car, his only means of transportation, showed no signs of having had a body in it, nor was it recently cleaned. The only evidence the Commonwealth pointed at to link the car to the body was the one piece of red plastic "floss" in the back seat that looked like a piece of similar plastic in the 'Target' bag. The pieces were first thought to be dental floss, they were that small. They were not floss. The Commonwealth never proved what they were, but they did prove that they could not have been used to transport a dismembered body, as they were too small and had no physical or biological evidence on them.

Mr. Cornell willingly opened the door for the detectives to search his apartment on June 9, 2015. During the search there were signs that Mr. Cornell was concerned for his safety. Cans were hung from the door knobs to alert him to intruders, according to Detective Cole's report. App.UU. Mr. Cornell had also removed his knives from the wall displays and placed then defensively around the apartment. App.VV.

Contrast this with Creek's behavior as reported by Detective Branch, "Mr. Spivey is aware Corey lost his job around Thanksgiving," and "Mr. Spivey explained he had been buying and trading comic books with Cory [sic] Creek since May 2014... He found out recently that Brianna had been missing and remembered Corey hadn't acted upset or even mentioned Brianna was missing... He thought that was very "weird."" App.SS.5-6.

Detective Brenner reported three witnesses telling him they believed either Corey Creek or Scott Armstrong (ex-ex-husband) had something to do with her disappearance. Corey had access to multiple vehicles, a "large black truck - crew cab (drove the night of May 8th)," and a "black sentra," and a "silver -

Nissan" and yet witnesses told Brenner that Creek suddenly started driving a sedan with handicapped plates. App.LL. Creek is not handicapped.

In a series of emails to Detective Hatchell II, Sybil Colver, a friend of Armstrong's and unknown to Cornell, related that "after only 8 days of her missing, Corey was ready to get rid of all Brianna's cats, move into her house, and rent out his to a renter." App.QQ.

Ms. Colver confirmed a statement Creek made to police that "he thinks Brianna might have joined a convent or left on a boat to the Philippines..." which she found "highly unlikely." She pointed out that, "Corey was so angry at her. About several things." App.QQ.

Tammy Tabor reported by Detective Hatchell that "Corey Creek is abusive." App.SS. Jones did not call any of these witnesses to the stand, nor did he interview any of them before he decided not to call them.

Detective Thomas reported finding the following medications on the shelf over Brianna's stove on May 31, the day her body was found:

> Butalbital - Dr. Michael Hurban; Clonazepam - Dr. Viviana Skansi;
> Minocycline - Dr. Larry Legum; Cymbalta - Dr. Viviana Skansi;
> Hydrocodone - Dr. Helena Guarda; Hydrocodone - Dr. Joseph Dunford;
> Hydrocodone - Dr. Taylor Doyce; Condansetron - Dr. Michael Hurban;
> Alprazolam - Dr. Viviana Skansi; Doxycycline - Dr. M. Mitsch

App.TT. However, in Detective Hatchell's missing person report, "Creek states that Brianna is possibly suffering from depression due to a loss of several close family members in a relatively short amount of time. He is not sure if she's taken any medication for depression or not." App.RR.

According to drugs.com, Butalbital is a barbiturate; Alprazolam is a benzodiazepine; and both can be fatal when mixed with alcohol. These drugs were discovered before the autopsy was performed. No reason was given why they were not tested for, when there was no clear cause of death.

5. Virginia Court of Appeals Decision. The Supreme Court of Virginia

(SCOVA) denied review of petitioner's appeal without comment. In the VACOA decision the issue of suicide is completely ignored. There is no mention of a possible overdose, intentional or accidental. There was only a cursory dismissal of natural causes of death.

No principle-based metric was used to determine the sufficiency of evidence. Contrary to Jackson v. Virginia, VACOA claimed that the evidence need "exclude all reasonable hypotheses of appellant's innocence." App.A.9. Cf. 443 U.S. 326. Although after making that claim, they fail to follow through, and exclude only the hypothesis of death by natural cause. The evidence does not exclude suicide, nor accident. Furthermore, it does not support homicide.

Malice is addressed, "[t]he authorities are replete with definitions of malice, but a common theme running through them is a requirement that a wrongful act be done 'willfully or purposefully.'" Vaughan v. Commonwealth, 7 Va. App. 665, 674, 376 S.E.2d 801, 806 (1989)(citation omitted), and that, "[k]illing with malice but without premeditation and deliberation is murder in the second degree." Elliot v. Commonwealth, 30 Va. App. 430, 436, 517 S.E.2d 271, 274 (1999)(citation omitted).

To argue criminal agency, the Appellee's Brief points to Epperly v. Commonwealth, 224 Va. 214, 294 S.E.2d 882 (1982), which in turn cites a California Court of Appeals case, both distinguishable from these circumstances in that this case examined the body, whereas those cases did not have a body. The Commonwealth argued "that the mutilation and disposal of the body...leads to the natural inference that the death was caused by criminal agency." App.XX.

VACOA agreed, "[a]lthough the dismemberment and mutilation occurred postmortem, the jury could reasonably infer from these circumstances that appellant acted with malice... Nothing indicated any disease or natural cause of death." App.A.5. The apparent rationale being that malice of murder can be

inferred by an act of defilement done at some later time.

In addressing the sufficiency of circumstantial evidence to identify the appellant as the criminal agent, VACOA listed alleged circumstances of the disposal of Brianna's body. Nothing they indicated suggested that Cornell embarked 'willfully or purposefully' to kill Armstrong.

The decision ignored the evidence that Armstrong's body was examined and was not ruled a homicide. Her forearms were not examined for self-inflicted injuries because they were never recovered. That the evidence showed she was depressed. She was mixing alcohol with powerful prescription medications. And, that her husband, rather than Cornell, had a motive to see her harmed.

Mr. Cornell pointed out in the MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL, the well established Virginia law, "where the evidence leaves it indefinite which of several hypotheses is true, or establishes only some finite probability in favor of one hypotheses, such evidence cannot amount to proof [beyond a reasonable doubt], however great the probability may be." Massie v. Commonwealth, 140 Va. 557, 125 S.E. 146 (1924). App.I.

REASONS FOR GRANTING THE WRIT

The VACOA decision uses the standard of review for the sufficiency of circumstantial evidence "that when viewed in its entirety, the evidence excluded all reasonable hypotheses of appellant's innocence." App.A.9. Petitioner avers that this standard is not compliant with the constitutionally prescribed standard as determined by Jackson v. Virginia. When the Commonwealth's case is held to the Jackson standard, it is shown to be insufficient. In the alternative, the VACOA and SCOVA erred in finding that all reasonable hypotheses of innocence had been excluded. Nor does it satisfy the standard set in LaPrade v. Commonwealth,

> If the proof relied upon by the commonwealth is wholly circumstantial then to establish guilt beyond a reasonable doubt all necessary circumstances proved must be consistent with guilt and inconsis-

> tent with innocence. They must overcome the presumption of innocence and exclude all reasonable conclusions with that of guilt. To accomplish that the chain of necessary circumstances must be unbroken, and the evidence as a whole must satisfy the guarded judgment that both the corpus delicti and the criminal agency of the accused have been proved to the exclusion of any other rational hypothesis and to a moral certainty. (emphasis added)

191 Va. 410, 415, 61 S.E.2d 313 (1950). The phrase 'moral certainty' is commonly interpreted as 'beyond a reasonable doubt,' as there can be no greater degree of certainty in a criminal proceeding.

The Commonwealth's burden to prove 'beyond a reasonable doubt' every essential element is not sufficiently met under the SCOVA standard of merely excluding all rational hypotheses of innocence for review of circumstantial evidence. "Evidence which has a tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence (that is, "relevant" evidence) cannot, by itself, rationally support a conviction of a crime beyond a reasonable doubt, as is required by due process. Jackson v. Virginia, 443 U.S. 307," Constitutional Law 840.3 U.S. Supreme Court Digest - Lawyer's Edition 5A:316. 2001-2003.

Petitioner alleges that though the disrespectful and disgusting treatment of Brianna's body after death was certainly the act of another, it makes the hypothesis of homicide only slightly more probable when viewing the evidence as a whole. Mr. Cornell had no motive, no murder weapon or tool of dismemberment, he made no statements or confessions, nor did any of his behavior indicate guilt. When one takes into account her medical history, the causes of death excluded, and her missing forearms, the likelihood of suicide as the proximal cause of death cannot be ignored. There can be no murder, where there is no homicide. The inferences by VACOA of Cornell's guilt, and that he acted with malice are unsubstantiated. The corpus delicti is not met where there is no actus reus, and no evidence of the requisite mens rea to accompany a killing act.

The due process clause of the Fourteenth Amendment to the U.S. Constitution as determined by Jackson v. Virginia, sets the standard of proof for every element of the crime to be 'beyond a reasonable doubt.' COV 18.2-32 states in relevant part, "[a]ll murder other than capital murder and murder in the first degree is murder in the second degree." 18 USC 1111(a) reads, "murder is the unlawful killing of a human being with malice aforethought." The elements are malice and the corpus delicti. COV 18.2-126(B) is a separate statute for the defilement of a dead human body. It is not a lesser included charge of second-degree murder. App.F.

According to Barron's Dictionary of Legal Terms, malice aforethought: "modern homicide statutes do not employ malice aforethought but instead rely upon intent to cause death and the absence of extenuating circumstances." 5th Ed. 2016. However, Jackson echoes the federal statute in attaching 'malice aforethought.' And in deed, malice aforethought and murderous malice as defined by Black's Law Dictionary give us more useful definitions. App.WW. Neither VACOA, nor the Commonwealth can point to evidence presented at trial to prove any of those eleven (11) definitions to any rational juror beyond a reasonable doubt.

The corpus delicti encompasses an actus reus and the mens rea, and as pointed out in Aldridge v. Commonwealth, "[the corpus delicti] of homicide consists of two components: (1) the death of the party alleged to have been murdered, and (2) the fact that death resulted from the criminal act or agency of another person." 44 Va. App. 618, 648 (2004)(cite omitted)(emphasis added). The corpus delicti was not proved beyond a reasonable doubt.

Aldridge went on to add the stipulation, as the decedent was a newborn, that the Commonwealth must prove that the baby was born alive. The rationale being one cannot be convicted of murdering an already dead person. The circumstances particular to that case necessitated the stipulation.

The case at bar needed a similar stipulation to fit its unique circumstances. Armstrong was last seen alive leaving Cornell's apartment, by the uncontraverted testimony of Mr. Witchey. Her body was found 24 days later. The dismemberment and all cuts were proved to have been done after death. The Commonwealth should have had to prove that she was alive prior to Cornell embarking on some willful or purposeful act likely to result in death. The Commonwealth was not held to this standard, and cannot do so.

Instead the Court of Appeals relied on the post hoc ergo propter hoc inference, with no supporting facts, that because she was dismembered, she must have been murdered. U.S. v. McNeill, defines 'legitimate inferences' as those that rely on "a logical and convincing connection between the facts established and the conclusion inferred." 887 F.2d 448, 450 (3rd Cir. 1989). West v. Wright, has established "the inferences to be drawn by the jury on the facts of this case violated the proof-beyond-a-reasonable-doubt test of Jackson v. Virginia," which is not violative of "the more likely than not" test of rationality." 931 F.2d 262, 266 (4th Cir. 1991). The same is true here.

Jackson defines the "due process test -- "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Supra at 319. And, West clarified, this is "necessarily an evidence-specific judgment call." Supra at 268. Yet, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt...such an occurence has traditionally been deemed to require reversal of the conviction." Jackson, supra at 317. How could this have happened?

Bright and Goodman-Delahunty, in their Law and Human Behavior article, "Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision Making," con-

cluded that, "in criminal cases that involve visual presentations of evidence, including gruesome evidence [such as the gruesome photos used in Cornell's case], jurors' decisions about culpability may be biased because available legal safeguards are not used to exclude such evidence." LAW HUM BEHAV (2006). 200. DOI 10.1007/s 10979-006-9027-y. 30:183-202. App.YY.

Bright and Goodman-Delahunty's research was consistent with the multitude of studies going back to the 1970's. In the current study the specific emotion 'anger' elicited through showing jurors gruesome photos, prejudicially impacted the jurors' decision-making, lowered their thresholds of proof, rated the prosecution's evidence as significantly more sufficient, and increased their likelihood to convict. "Interestingly, all participants indicated that the photographs should not and did not influence their verdicts...mock jurors were unaware or unwilling to admit the influence of this evidence." Id. at 186.

The Fourteenth Amendment was ratified in 1868, well before and without the foresight of digital photographs being entered at trial. How do the rights to due process and a fair trial stand up to this evidence? Bright and Goodman-Delahunty put it this way, "[j]urors who attribute weight to gruesome evidence in determining their verdict separate and apart from the probative value of the evidence, violate core assumptions of the criminal justice system, such as the defendant's right to a fair trial, the jury's role as impartial finders of fact, and the defendant's right to be considered innocent until proven guilty beyond reasonable doubt." Id. at 183.

I. Insufficient Proof of Homicide and Corpus Delicti. COV 18.2-32, and 18 USC 1111(a) rely on the homicide as a proven fact. In nearly all cases this is a given, either by direct evidence, autopsy, or the apparent cause of death. There was no direct evidence of a murder in this case. The autopsy revealed no injuries sufficient to cause death. There was not cause of death determined

in this case. The medical examiner refused to label the death a homicide.

In spite of this, or perhaps because of it, the Commonwealth argued that this case should be treated as if her body was not found and determined not to have died from homicide. In this way the fact that there is no evidence - in the skull or torso, brain or heart, from skin to lungs - of her being murdered can be ignored. If the autopsy is ignored, then the fact that her forearms were never examined for self-inflicted wounds can also be ignored.

True, the exact mechanism of death does not have to be proved as an element of the crime, but that she died as a result of the act or agency of another person does have to be proved. It is the most basic fact, the actus reus, and it is missing. See Aldridge supra at p.21.

The Commonwealth has not and cannot point to any act or set of circumstances that the accused embarked upon willfully or purposefully that resulted in her death. That she died is not in dispute, nor that someone else dismembered her remains. But how she came to be dead is the actus reus, and it is a mystery not solved by the evidence entered by the prosecution.

The Commonwealth argued that there was a cause of death, namely, "unspecified criminal violence." However, that is not exclusively murder. This nebulous phrase encapsulates suicide, as well as many accidents. To specify, if she slit her wrists in an attempt to get attention, that would fall under the umbrella of criminal violence. Claiming an unknown category as the cause of death cannot amount to proof beyond a reasonable doubt.

The Georgia Supreme Court ruled that, "the fact of death is not sufficient; it must affirmatively appear that the death was not due to natural causes, it was not accidental, and that it was not due to the act of the deceased." Warren v. State, 153 Ga. 354 (1922). This is much more stringent than the Virginia standard, or even the federal standard.

The federal precedent does not require 'affirmative' evidence, but there is no precedent for finding guilt beyond reasonable doubt where the body was examined and no cause of death could be determined. At least, petitioner could find none. Presumably, this is because no conviction was obtained at trial.

In cases where no body was found, entertaining the Commonwealth's argument only for argument's sake, certain types of evidence are weighed to determine if a homicide did in fact take place, and if the evidence is sufficient for conviction. The Third Circuit U.S. Court of Appeals did an extensive historical review of cases where no body was found in Virgin Islands v. Harris. "In most cases we reviewed, the court emphasized the defendant's admissions or statements," of which Mr. Cornell made none, he has always maintained his absolute innocence; and "the victim's normal mental and physical health to negate any suggestion that the disappearance was due to a suicide or natural causes," which we do not have in Ms. Armstrong, she was clinically depressed, anxious, and on multiple medications for anxiety and depression while self-medicating with alcohol. 938 F.2d 401, 417 (1991). The rest of the criteria listed pertained only to cases where the missing person might still be alive.

The Fourth Circuit, in U.S. v. Russell, went a different route, establishing means, motive, and opportunity. "The Government introduced evidence that either directly established or provided a basis from which a reasonable juror could infer that Russell was unhappy in his marriage to Gibbs [victim-wife] and that he regularly subjected her to emotional and physical abuse." 971 F.2d 1098, 1110 (4th Cir. 1992). Thereby motive was established. VACOA did not do this in Mr. Cornell's case, nor did the Commonwealth. There was evidence that Corey Creek was unhappy in his marriage and he had a motive, which supports a hypothesis of Mr. Cornell's innocence.

"Russell was planning a murder; that he believed that a shot behind the

ear was an effective way to kill a person; that he had purchased a pistol only two days before [wife] disappeared; and that he possessed a homemade silencer." Id. 1111. Thus, the Government established Russell had the means. VACOA did not follow this process either. The Commonwealth pointed to the fact that Mr. Cornell collected knives, but their own medical examiner ruled out stabbing as a cause of death. The knives also showed no signs of having been used to dismember a body, nor of having been cleaned.

"Russell and [wife] were together...the last time [wife] was seen or heard from; that Russell took steps to ensure that Gibb's sister would not be present at that time; that Russell appeared nervous and agitated...around the time the murder allegedly took place." Ibid. Thereby establishing opportunity to commit murder.

This, too, is contrary to the circumstances of Mr. Cornell's case. Armstrong was last seen walking to her car alone. Before she left, Cornell welcomed a neighbor to join them for dinner and drinks. Mr. Cornell did not have an opportunity to commit a murder.

"Although he owned a pickup truck, Russell borrowed a station wagon and drove to Pennsylvania that same afternoon; that he once remarked that a body could easily be disposed of in a Pennsylvania mine shaft; that he thoroughly cleaned and deodorized the car before returning it, which he had never done before; that following Gibb's disappearance, Russell asked a friend how long it would take a body to decompose." Ibid. Thus they established the opportunity to hide the body.

Contrasting this with Mr. Cornell's behavior we find striking differences. Cornell went to work for the next three days for ten hours each day. He drove his own car, which was not cleaned or deodorized before being searched. He did not have an opportunity to dismember and dispose of a body.

Creek, on the other hand, had a pickup truck, but was witnessed driving a sedan with handicapped plates; his whereabouts for the day after Armstrong went missing are unaccounted for; he had access to his parents' empty house (which was never searched by police); he got rid of Brianna's cats weeks before her body was found; he was ready to move into her house and rent his out. Creek had the opportunity to dismember, and dispose of the body; the means, and the motive.

This Court, in determining whether intent and premeditation exsisted in Jackson v. Virginia, weighed the evidence on the applicable scales of Virginia law stating, "premeditation need not exist for any particular length of time, and that the intent to kill may be formed at the moment of the commission of the unlawful act." 443 U.S. 307, 323 (1979)(citation omitted). The evidence reviewed consisted of: (1) Jackson's admission to having fatally shot the victim twice at close range, (2) his statement prior to the killing of his intent "to have sexual relations with the victim," and (3) "immediately after the shooting, [Jackson] drove without mishap from Virginia to North Carolina." Id. at 325. Thus this Court concluded Jackson's "calculated behavior both before and after the killing demonstrated that he was fully capable of committing premeditated murder. His claim of self-defense would have required the trial judge to draw a series of improbable inferences from the basic facts." Ibid.

The evidence used to determine the sufficiency of proof of the elements of the murder were the admissions and statements of the accused, his conduct both before and after the alleged murder, and whether the inferences from the basic facts were probable. VACOA did not follow this process either. Nor that of the U.S. Court of Appeals, or even that of SCOVA laid out in LaPrade. p.19.

Analyzing Mr. Cornell's case through the Jackson lens, Cornell adamantly denies having killed Armstrong, and has made no statement to the contrary; his

behavior both before and after the alleged killing was consistent with innocence, welcoming guests and the police into his home; never restricting access to any area of his home; never going anywhere near Douglas Road; he did not have a motive; not the means to transport or dismember a body; his car and apartment did not reflect a murder having taken place; when he found out about Brianna's death he was so upset he went and stayed with friends for consoling.

The inferences required for Cornell's innocence are probable. The inference that Armstrong died as a result of her own act, either intentionally or accidentally, is supported by the autopsy, and multiple witnesses including her husband. That someone would try to obscure her death out of fear of implication, embarrassment, or disinheiritance is certainly not improbable.

However, the inferences required to find guilt are not supported by the evidence, and are therefore improbable: (1) Armstrong would have had to return to Cornell's unobserved, in the middle of an apartment complex, without calling or texting (unlikely these days); (2) with no motive, no weapon, and without struggle or strangulation, and for no reason, he would have had to kill Brianna without making any noise, as the apartment had four neighbors, both sides, above and behind; (3) Cornell then would have had to dismember her body without leaving more than a drop of blood in the apartment, and no DNA anywhere on a tool, saw, or knife; (4) then he would have had to transport her dismembered body in his car without leaving any blood or DNA in it, to an area of Virginia he had never heard of without the aid of GPS (Cornell had only been in Virginia for a year); (5) Cornell then would have had to dispose of her body, his bathroom trash, and a receipt with his name and address on it, on the side of the road instead of in the surrounding swampland (absurd on the face); and (6) leave his shirt, pants, and underwear with not only his DNA on the inside of his underwear, but somehow with another man's DNA as well (plainly impossible).

No rational trier of fact could find this string of inferences probable. However, an irrational, emotionally charged, and angry jury might overlook the improbability and convict in spite of the evidence and reasonable doubt, after all, they had just seen gruesome pictures of a dead woman. "[S]uch an occurrence," Jackson tells us, "has traditionally been deemed to require reversal of the conviction." Idem at 317.

This writ should be G/V/R ilo Jackson v. Virginia, Virgin Islands v. Harris, and/or U.S. v. Russell, (supra et al.), because the corpus delicti of a homicide has not been proved beyond a reasonable doubt. Petitioner is not suggesting that the Commonwealth was "under an affirmative duty to rule out every hypothesis except that of guilt." Jackson at 326. Only that the historical facts do not support the inferences in favor of the prosecution beyond a reasonable doubt. "Inferences from established facts are accepted methods of proof when no direct evidence is available." U.S. v. Bycer, 593 F.2d 549, 550 (3rd Cir. 1979). Here we have direct evidence in the detectives' and Mr. Witchey's testimonies, and in the autopsy, that contradict the inferences required by the prosecution to support their hypotheses.

II. Evidence Insufficient to Prove Malice. This certiorari writ should be G/V/R ilo Jackson v. Virginia, and/or West v. Wright, 931 F.2d 262 (4th Cir. 1991), because VACOA made impermissible inferences of malice, violating the due process clause and Rules 10(b) and (c). As well, the inference of murder is unsupported by the basic fact of dismemberment. Such inferences are contrary to decisions made by this Court and multiple U.S. Courts of Appeals.

Malice as an element of murder needs to be proven beyond a reasonable doubt. Jackson v. Virginia, supra. "The Commonwealth is not entitled to the presumption of malice in the absence of evidence." Lawhorne v. Commonwealth, 213 Va. 608, 194 S.E.2d 747 (1973). The VACOA pointed to Vaughan v. Common-

wealth, to hold that the trier of fact is permitted to infer malice from the evidence." App.A.5. However, Vaughan was quoting Hodge v. Commonwealth, "when the Commonwealth has proved the commission of a homicide and has pointed out the accused as the criminal agent, the facts of the case may be such as to permit the trier of fact to draw an inference of malice." 217 Va. 338, 343, 228 S.E.2d 692, 696 (1976)(citation omitted). This is a far cry from the carte blanche implied by VACOA.

The Commonwealth has not proved the commission of a homicide. They have not proved Mr. Cornell to be the criminal agent. The facts of this case are such that malice may not be inferred where there is no evidence to support said inference.

SCOVA, in Essex v. Commonwealth, states clearly, the "governing principles" in Virginia "of second-degree murder: the victim must be shown to have died as a result of the defendant's conduct; the defendant's conduct must be shown to be malicious. In the absence of direct malice," such as here, "this element may only be implied from conduct likely to cause death or great bodily harm willfully or purposefully undertaken." 228 Va. 273, 281 (1984). Neither the VACOA, nor the Commonwealth has shown, or can show any such conduct.

VACOA mistakenly identified circumstances which permitted the inference of malice from the postmortem mutilation and dismemberment, deviating from centuries of precedent requiring that malice accompany the wrongful act. "Malice is presumed from the act of killing." Hill v. Commonwealth, 43 Va. (2 Gratt.) 594 (1845). The Black's Law Dictionary entry for malice dates the term to the 14th Century, and each of the four definitions for malice aforethought reference the act that leads to the death. App.WW.

The Commonwealth argued that "there was no evidence presented to the jury of any provocation on the part of Brianna that led to her death," citing Brown

v. Commonwealth, "where the killing is without any or upon very slight provocation, malice may be inferred from the mere fact of killing." App.XX.15; 138 Va. 807, 809, 122 S.E.2d 421, 423 (1924)(respectively). Such a statement was fitting for a case where Brown and another man brawled over a craps game, engaging in mutual combat with bottles and pistols, and the killing was a proved fact. Yet, in the current case it is inappropriate as there was no evidence of a struggle or conflict of any kind, and the 'fact of killing' has not been established.

A 1982 SCOVA case, Epperly v. Commonwealth, where a woman's body was never recovered, highlighted the evidence and circumstances that "would readily support a finding of malice requisite for a conviction of second-degree murder." 224 Va. 214, 231 (1982). "'Malice is implied by law from any willful, deliberate, and cruel act against another, however sudden.' The spattering of tiny droplets of blood through two rooms, the blood stained clothing, the broken ankle bracelet, the large blood stain on the carpet, and the disparity of size and strength between the decedent and [defendant] are all circumstances from which the jury could properly infer that she was subjected to a savage beating, resulting in death." Ibid (citation omitted).

This differs significantly from the case at bar. Primarily, Brianna's body was recovered and showed no signs of a struggle, no injuries likely to cause death, and no cruel acts to a living person. Also, the deceased in Epperly had never been to that house before, making finding her blood splatter in multiple rooms a clear indication of a beating. Brianna, on the other hand, had been in Cornell's apartment frequently, more than weekly for over seven months. Cooking, bathing, eating, and drinking, which makes finding a small spot of her blood rather insignificant. Lastly, the dismemberment and disposal are proof of another's involvement, but as they happened after death they

cannot be classified as 'conduct likely to cause death.'

By law, there is no malice as there is no evidence of a wilfull, deliberate, or cruel act against a living person. The evidence is insufficient to find malice or to infer malice of a homicide from the basic fact of postmortem defilement.

III. Insufficient Evidence to Substantiate Finding Criminal Ageny and Guilt. The writ should be G/V/R ilo U.S. v. Russell, and Warren v. State, because the Court of Appeals decision is not in keeping with decisions of this Court, U.S. Circuit Courts of Appeals, or other states' highest courts on the sufficiency of evidence to establish criminal agency and guilt, in violation of U.S. Supreme Court Rules 10(b) and (c). VACOA ignores, or worse, joins the jury's bias by allowing the socially dispicable act of defilement to stand in the place of proof beyond a reasonable doubt of criminal agency in the act of a homicide.

There is insufficient evidence to support finding, or inferring, criminal agency because no correlation was proved between the death and the postmortem defilement. That she died is irrefragable. At some later point, someone else dismembered her body.

No evidence was entered to show why, how, or how much time passed between those two events. It could have been hours, days, or weeks. It could have been to hide her suicide, to make the body easier to transport, to harvest organs, or any other of a number of reasons. No corroborating evidence was entered to support the inference that a homicide was concealed. "The Supreme Court has never squarely held that the inference standing alone will support a guilty verdict without the existence of corroborating evidence or circumstances." Cosby v. Jones, 682 F.2d 1373, 1380 (11th Cir. 1982).

Obscuring a suicide out of shame or in an attempt to defraud a life in-

surance policy is very much within the "normal course of human affairs." Epperly, supra at 229. Especially in the proximity of a known perpetuator of frauds, such behavior is almost cliche. Masking who was responsible for the defilement is simply prudent.

The SCOVA in Vaughan, where a teenage mother hid her deceased baby in a dumpster, held that, "[d]isposing of the baby's body is behavior that is as consistent with shame, an attempt to avoid embarrassment, and fear of incurring the anger of one's parents as it is consistent with an attempt to conceal a murder." Supra at 676. In the case at bar, the same influences are present, only instead of fearing one's parents, the fear is being implicated in a crime. The court in Vaughan concluded that, "the evidence was inadequate to prove beyond a reasonable doubt that [petitioner] acted with malice, [or] willfullness," citing Massie v. Commonwealth, "[w]here the evidence leaves it indefinite which of several hypotheses is true, or establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof [beyond a reasonable doubt], however great the probability may be." 140 Va. 557, 565, 125 S.E. 146, 148 (1924). The ruling in Vaughan, as well as the argument here, is that there is reason to doubt the criminal agency of another in causing the death of the deceased. Thus the evidence was insufficient as a matter of law to prove an essential element beyond a reasonable doubt.

The disposal of the body was as likely, or more so, to conceal suicide as it was accident, manslaughter, or murder. The placement of the body suggested an intent to be found. If we must presume that a man "intends that which he does," and we must, then the act of leaving the body in clear view from the road was done with the intent of it being found. 2 Stark. Evi. 738.

The VACOA noted that there were no signs of natural causes of death, disease, and yet they ignored suicide, and accident entirely. No one had hypo-

thesized that she died of natural causes. The evidence showed her to be in good physical health, but of poor mental health. Depression, anxiety, hoarding, frequenting a cemetary, pathological lying, drug and alcohol abuse are all behaviors consistent with mental illness or a suicidal person. The evidence supports the hypotheses that Brianna died either ás a result of her own intentional actions or accidental actions.

The VACOA then points to "the condition of Armstrong's body with multiple cuts and bruising, also proved criminal actions." App.A.5. However, the cuts were proved all to be done postmortem, and therefore have no bearing on the crime of murder. No time or date was established to determine if she got the bruises before or after leaving Peak Court. No evidence supports finding the bruising to be criminal in nature, caused by Mr. Cornell, or in any way connected to her death. This finding is plainly wrong, without evidence to support it.

No evidence supports finding Mr. Cornell responsible for the postmortem defilement either. The 'natural inference' is that the cuts were done by a very angry person. Multiple witnesses from both the defense and the prosecution testified that there was no anger, hostility, or violence between Justin and Brianna. The opposite is true of Corey Creek and the deceased.

Petitioner does not here imply that Creek murdered Armstrong. The evidence does not support a homicide by Creek either. Petitioner agrees with Sir Matthew Hale, "I would never convict any person of murder or manslaughter, unless the fact were proven to be done." Epperly, supra at 228 (citation omitted).

The worst thing that can be said about Mr. Cornell from the evidence is that it is suspicious that his trash was found with the deceased. However, Mr. Cornell never saw the trash again after it left his house around the date

on the receipt, several months before Armstrong went missing. The Commonwealth tried to strengthen their case by picking apart the trash and proving each piece of floss, paper, or Christmas tree belonged to Mr. Cornell.

In actuality, the bits of Christmas tree are further proof that the trash was from Christmas time. None of the trash linked to Cornell had Brianna's DNA or blood on it. Forensic technician Pittman testified to having placed the 'Target' bag in the body bag. That the medical examiner unpacked the bag during the autopsy does not imbue this trash with any special relevance.

Looking to the Georgia Supreme Court, Warren v. State, says, "the criminal agency is sufficiently established where a dead body is found with injuries apparently sufficient to cause death, under circumstances which exclude the inference of accident or suicide." Supra at 358. Stokes found no injuries sufficient to cause death. The circumstances invite, rather than exclude, the inference of suicide or accidental suicide.

And the cause of death is the crux of the criminal agency. Not the exact mechanism, that does not have to be proved, but some course of conduct embarked upon wilfully or purposefully likely to result in death, or cause great bodily harm must be shown. It is not. Defilement of a dead body does not, cannot suffice.

The Fourth Circuit Court quoted the California Court of Appeals in U.S. v. Russell, "the issue is 'whether from all the evidence it can reasonably be inferred that death occurred and that it was caused by a criminal agency.'" 971 F.2d 1098, 1110 (4th Cir. 1992)(citation omitted). Russell used Harris, and the same evidentiary criteria mentioned earlier - confession, inculpatory statements, good mental health of the deceased, the defendant's conduct before and after - to establish that the cause of death was due to the criminal agency of another, through reasonable, permissible inferences. Id. 1111.

Again, none of these criteria exist in the evidence against Mr. Cornell.

IV. Impermissible Inferences, Suspicion, and Speculation. The VACOA decision was not in keeping with decisions of this Court, nor the Circuit Courts regarding the permissibility of inferences, in violation of due process, and the Rules of the SCOTUS 10(b) and (c). In light of West v. Wright, and Jackson v. Virginia, this writ should be Granted/Vacated/Remanded. West points out, "[w]hile the general 'run-of-cases,' rationality of inferences may seem pretty clear on an intuitive basis, even that is not as clear today as it was." Supra at 267. This was not a "run-of-the-mill case." Tr. 1049. App.DD.

Petitioner is specifically challenging the sufficiency of evidence to follow the Jackson standard in proving that the corpus delicti, malice, criminal agency, and guilt of second-degree murder can be inferred from the basic fact of defilement. After viewing all of the evidence in the light most favorable to the Commonwealth, and granting all reasonable inferences supported by the evidence, it "could be deemed a 'mere modicum.' But it could not be seriously argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond reasonable doubt." Jackson, supra at 320.

The Commonwealth argued, and VACOA agreed, "[m]ost notably, appellant's phone...showed that appellant had accessed the precise location of Armstrong's body on Google Maps hours before the bicyclist discovered Armstrong's body." App.A.9. Ignoring the many shortcomings of this evidence, the reported bug affecting the date field listed in the AT&T record, the fact that the accused was never shown to be the one to enter the search on his phone, and that the entomologist proved the body to be on Douglas Road at least three days before the searches appeared on the phone, (App.ZZ), ignoring all of that, the best of their evidence only supports alleging disposal of the remains. It does not prove defilement, and certainly not murder.

Mr. Cornell made a motion at sentencing to set aside the verdict and for a new trial, alleging the verdict was not supported by sufficient substantial evidence. Judge O'Brien, unreasonably, found for the non-moving party even though their case relied on "inferences upon inferences," and "mere speculation," amounting to no more than a scintilla. Al-Ami'n v. Allen, 2006 U.S. Dist.Lexis 96073. Al-Ami'n explains that the non-moving party must rely on more than that to be considered "substantial evidence." Ibid.

"In sum, the state relies on an inference that does not have great strength even in the best of circumstances, and the best of circumstances were not present here." Cosby v. Jones, 682 F.2d 1373, 1383 (11th Cir. 1982). Mr. Cornell denies having disposed of Brianna's murdered body. The evidence and circumstances do not support the inference that disposal makes one culpable of murder. There was no weapon, no homicide determination, no cause, place, date, or time of death, and no motive.

"The Government's evidence, resting as it does only upon a chain of inferences, requires us to determine whether the proved facts logically support the inference." U.S. v. Bycer, supra at 551. This is as true for Mr. Cornell's case as it was for Bycer. "That the inference was properly drawn in other circumstances does not obviate our need to examine its justification here." Ibid. "If the reviewing court can only say that the ultimate fact is more likely than not," a standard petitioner argues has not been reached, but should this Court disagree, "then the Jackson v. Virginia standard has not been met." Cosby, supra at 1383.

To infer otherwise is "to engage in speculation that is beyond the scope of the evidence," and not the jury's, nor the Virginia Court of Appeals' duty. U.S. v. An Article of Device, 731 F.2d 1253, 1263 (7th Cir. 1984).

Therefore, the Supreme Court of Virginia, and the Virginia Court of Appeals decision is unconstitutional as determined by this Court in

Jackson v. Virginia, that every element of an offense must be proved with sufficient evidence beyond a reasonable doubt to sustain a conviction. 443 U.S. 307 (1979).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, or grant/vacate/remand in light of Jackson v. Virginia, 443 U.S. 307 (1979) to best serve the ends of justice.

Respectfully submitted,

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