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No.21-\_\_\_\_\_

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In The  
Supreme Court Of The  
United States

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BRIAN DAVID HILL,  
*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,  
*Respondent,*

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On Petition for a Writ of Certiorari to  
the Supreme Court of Virginia

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PETITION FOR A WRIT OF  
CERTIORARI

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## **I. Questions Presented**

Where the Virginia Supreme Court didn't think that the Petition for Writ of Habeas Corpus should apply to the case of Brian David Hill being convicted of Indecent Exposure under Virginia Code § 18.2-387 because he was not under State Custody even though he asserted "Actual Innocence" as one of the grounds for his Petition which could constitute cruel and unusual punishment inflicted and deprived Petitioner of Due Process of Law?

Where the Virginia Supreme Court had failed to recognize that Petitioner was in fact serving an additional sentence of 9 months of imprisonment and additional years of Federal Supervised Release as a repercussion or result of his wrongful conviction of Indecent Exposure under Virginia Code § 18.2-387 but only kept its focus on whether he was serving a State Sentence for a wrongful conviction that he was challenging on at least one ground of "Actual Innocence" that is not supposed to be procedurally

barred according to past Supreme Court decisions on Habeas Corpus decisions on Federal and State cases?

Where the Virginia Supreme Court dismissed the Petition for Appeal over appealing the Circuit Court of Martinsville's denial of the Petition for the Writ of Habeas Corpus even though Petitioner had a strong showing that he may be factually innocent of his charge of Indecent Exposure under Virginia Code § 18.2-387 and that had the Virginia Supreme Court provided such relief by granting the Petition for Appeal then it could have led to an evidentiary hearing in the Circuit Court which may have led to an actual innocence verdict?

Where case law precedent in this very Court contradicts the Supreme Court of Virginia's opinion and decision on December 21, 2020, that the Supreme Court's job is to keep in uniformity with other top Appeals Courts decisions and State Supreme Court decisions under the Supremacy Clause of the U.S. Constitution?

Where the "due process of law" clause of the U.S. Constitution, Amendment XIV, regarding the

State's obligation to follow the United States Constitution including the Due Process Clause is being deprived by the Commonwealth of Virginia and by the Circuit Court of Martinsville and where judgments/orders that may not even have valid jurisdiction to have ever been entered is being allowed and actual innocence is completely being overlooked which deprives Petitioner of being allowed to prove Factual Innocence to his State charge and Conviction which ultimately caused a revocation of Petitioner's Supervised Release on September 12, 2019, in the U.S. District Court for the Middle District of North Carolina?

Where the Virginia Supreme Court had failed to recognize the U.S. Constitution's miscarriage of justice exception for habeas corpus procedural defects and that actual innocence claim to a wrongful conviction in a state court should be an exception to a state procedural or jurisdictional defect?

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#### IV. Petition for Writ Of Certiorari

Brian David Hill (“Petitioner”, “Appellant”, “Mr. Hill”), an criminal defendant in a State Charge (September 21, 2018), Conviction (December 21, 2018) in the General District Court, and reaffirmed Conviction (November 18, 2019) in the Circuit Court of Indecent Exposure under Virginia Code § 18.2-387 in the Circuit Court of Martinsville (“Circuit Court”) while currently serving a sentence of supervised release by and through the United States Probation Office for the Western District of Virginia by order of the Middle District of North Carolina, respectfully petitions this court for a writ of certiorari to review the judgment of the Supreme Court of Virginia, denying and refusing the Petition for Appeal of requesting that the Supreme Court of Virginia grant full appellate review over a judge of the Circuit Court of Martinsville denying and dismissing a Virginia Petition for Writ of Habeas Corpus under the statutory clauses in Virginia Code Article 3. Habeas

Corpus, Title 8.01. Civil Remedies and Procedure in the very petition asking for relief, and the Circuit Court as well as the Supreme Court of Virginia had overlooked the ground of Actual Innocence and had overlooked the authoritative case law of this very Court which had ruled that actual innocence can overcome any procedural default/defect but the Habeas Corpus petition was before the Circuit Court. Pursuant to Rule 13, paragraph 1 of the Supreme Court rules, The Supreme Court of Virginia ("SCV") under case no. #200267, is the highest State Court of last resort of making a final decision over the originating case under Circuit Court case no. CL19000331-00 where the Petition for Writ of Habeas Corpus, was originally filed and the Supreme Court's final decision is very case that is being appealed to the United States Supreme Court to undo a miscarriage of justice, protect the Actual Innocence rights of Petitioner under the United States Constitution requesting relief. Petition for Appeal was filed on February 19, 2020. Reply to Brief in Opposition was filed on March 30, 2020. SCV conducted an oral

argument in front of a panel of Justices on December 1, 2020. The SCV had refused the Petition for Appeal on December 21, 2020, with an opinion that Petitioner was not in State Custody and was procedurally barred from filing Writ of Habeas Corpus and therefore there had no jurisdiction for an appeal of that decision. Petitioner felt that the decision of the State's/Commonwealth's Supreme Court had conflicted with the U.S. Supreme Court on Habeas Corpus decisions regarding actual innocence and filed a "Petition for Rehearing" on December 30, 2020. Petition was considered and was refused on February 5, 2021. So, the petition for rehearing was denied on February 5, 2021. Under this Court's rules of 90-days of the final decision of the Court of last resort, Petitioner believes this was timely filed since the petition for rehearing denial was the last final decision of the court of last resort.

#### **IV. Opinions Below**

The decision by the SCV denying/refusing Mr. Hill's petition for appeal asking for review over the

Circuit Court denying and dismissing Mr. Hill's petition for Writ of Habeas Corpus based on at least one ground asserting "actual innocence" is reported in an unpublished opinion as Brian David Hill v. Commonwealth of Virginia, SCV record case No. 200267 (December 21, 2020) by the panel of three Justices after hearing oral argument on December 1, 2020. Mr. Hill filed a petition for rehearing dated December 20, 2020. The SCV refused Mr. Hill's petition for rehearing on February 5, 2021. That order was unpublished and stated that "On consideration of the petition of the appellant to set aside the judgment rendered herein on December 21, 2020 and grant a rehearing thereof, the prayer of the said petition is denied."

The order on December 21, 2020 had stated that "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. Brian David Hill challenges the judgment of the Circuit Court of the City of Martinsville dismissing his petition for a writ of

habeas corpus. On November 18, 2019, Hill filed a petition for a writ of habeas corpus in the circuit court challenging his misdemeanor conviction for indecent exposure. In his petition, Hill indicated that on November 15, 2019, he received a sentence of 30 days in jail and that, at the time of filing, he was not in custody or under any type of probation or suspended sentence from his indecent exposure conviction. Because Hill had fully served his sentence at the time when he filed his petition, the circuit court lacked jurisdiction to award habeas relief under Code § 8.01-654. See *Escamilla v. Superintendent*, 290 Va. 374, 380-81 (2015) (holding that detention is jurisdictional in habeas corpus, and jurisdiction must exist at the time the petition is filed). Accordingly, the Court is of the opinion there is no reversible error in the judgment below.”

**V. Jurisdiction**

Mr. Hill’s petition for re hearing to the SCV was denied on February 5, 2021. Mr. Hill invokes this Court’s jurisdiction under 28 U.S. Code § 1257 and Rule

13(1), having timely filed this petition for a writ of certiorari within ninety days after entry of the final judgment of the Supreme Court of Virginia's under 28 U.S.C. § 2101. The SCV is the court of last resort in the State/Commonwealth of Virginia. The petition for Certiorari affects the Constitutional right and Constitutional issues of the U.S. Constitution.

**VI. Constitutional Provisions Involved**

United States Constitution, Amendment XIV:

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

United States Constitution, Amendment VIII:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

## VIII. Statement of the Case

Decades ago, this Court held in Sawyer v. Whitley, 505 U.S. 333 (1992) that “*Generally, a habeas petitioner must show cause and prejudice before a court will reach the merits of a successive, abusive, or defaulted claim. Even if he cannot meet this standard, a court may hear the merits of such claims if failure to hear them would result in a miscarriage of justice. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436. The miscarriage of justice exception applies where a petitioner is “actually innocent” of the crime of which he was convicted or the penalty which was imposed.*” Murray v. Carrier, 477 U.S. 478, 479-80 (1986) (“However, in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”).

*Kuhlmann v. Wilson*, 477 U.S. 436, 438 (1986)  
 (“Balancing the State's interests in finality of



convictions and the prisoner's interest in access to a forum compels the conclusion that the "ends of justice" are served by successive review only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence. The prisoner must make his evidentiary showing even though — as argued in this case — the evidence of guilt may have been unlawfully admitted.”)

*In re Davis*, 130 S. Ct. 1, 2 (2009) (“Justice SCALIA would pretermitt all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this.”)

Different sets of case rulings from this Supreme Court all make different legal opinions over the same issues regarding the Constitution of the United States of America and Habeas Corpus relief. That actual innocence claims, especially a

colorable showing of actual innocence should overcome any minor procedural bar or jurisdictional bar/defect. Actual innocence is legal innocence where no law was broken and no crime was committed under the law as charged.

There were a lot of authoritative decisions by the same U.S. Supreme Court ruling time and time again that actual innocence claim in a Habeas Corpus petition is such an exception to a procedurally defaulted petition or claim through writ of habeas corpus. The petition filed by Petitioner was timely filed, around the same time after the criminal conviction was entered by the Circuit Court of Martinsville. The only reason it was procedurally barred was because the SCV had decided that Petitioner was not in State Custody and was not on State Probation or State Imprisonment at the time such petition was filed and therefore the SCV invoked that there was no jurisdiction to entertain any Writs of Habeas Corpus filed by Petitioner or entertain such appeals. However, Petitioner had asserted in his Writ of

Habeas Corpus that at the time the petition was filed, Petitioner was ordered to spend nine months of Federal Imprisonment as a result of his State Charge of Indecent Exposure under Virginia Code § 18.2-387 on September 21, 2018, and had used his conviction in General District Court of Martinsville on December 21, 2018, as reason to revoke his Federal Supervised Release in the Middle District of North Carolina in the U.S. District Court. See Document #200, Oct 7, 2019, "JUDGMENT ON REVOCATION OF PROBATION/SUPERVISED RELEASE.", Case no. 1:13-cr-435-1. That imprisonment order was brought up in a photocopy of that judgment in the Petition for Writ of Habeas Corpus timely filed in the Circuit Court of the City of Martinsville. Also, the Supervised Release was extended (*"IT IS FURTHER ORDERED that supervised, release of nine (9) years is re-imposed under the same terms and conditions as previously imposed."*), See Document #200, Case no. 1:13-cr-435-1) and thus Petitioner had directly been given an imprisonment directly caused by the State

Charge and criminal conviction and Petitioner was mandated to report to Federal Prison on December 6, 2019, at the time that the Writ of Habeas Corpus was filed directly caused by the State Charge and Conviction in General District Court which was appealed to trial de novo in the Circuit Court.

This case presents very important questions of exceptional circumstances as to whether the Supreme Court of Virginia ("SCV") should have denied or refused the Petition for Appeal of Petitioner seeking Judicial review of the SCV over Petitioner's timely filed Writ of Habeas Corpus ("WHC") being considered but denied and dismissed on November 20, 2019, not giving the Commonwealth Attorney Glen Andrew Hall, Esq. an opportunity to file their response to the actual innocence claims and other claims made by Petitioner in his WHC petition filed on November 18, 2019, and yet the Circuit Court had quickly decided within a few days to dismiss the WHC petition while overlooking the case law authorities from this Supreme Court as well as the other case law and evidence cited regarding Petitioner's legal innocence to his charge and conviction of Indecent Exposure under Virginia Code § 18.2-387. Should Courts be allowed to quickly dismiss the

Petition for the Writ of Habeas Corpus without any evidentiary hearing and without reviewing over any evidence or claims when such quick and rash decision would create a miscarriage of justice regarding an innocent man/woman when it asks for appropriate relief to prevent a Court from wrongfully convicting an innocent man who had been given additional imprisonment and additional Federal Supervised Release sentence as a result of being wrongfully convicted in State Court when Petitioner had asserted that he was actually innocent of his charge and conviction?

## 1. The Writ of Habeas Corpus by Mr. Hill

On November 18, 2019, in case no. CL19000331-00 in the Circuit Court of the City of Martinsville in Virginia, Brian Hill filed a 201 page "PETITION FOR WRIT OF HABEAS CORPUS" filed by Brian David Hill. No response was entered as of yet by the Commonwealth's Attorney Glen Andrew Hall, Esquire. That petition had directly cited this Court's ruling under *Bousley v. United States*, 523 US. 614, 622-23 (1998). Even asserted in such petition the miscarriage of justice argument that "It is a cruel and unusual punishment to inflict any penalties against an innocent man or woman." That right there invoked the Eighth Amendment of the U.S. Constitution in the petition for WHC in the Circuit Court.

On November 20, 2019, the Judicial Officer, Hon. Giles Carter Greer of the Circuit Court had filed a quick judgment without an opinion dismissing the Writ of Habeas Corpus petition without explanation as to why it was dismissed and without an evidentiary hearing. It was dismissed very quickly and would not have given a Court a reasonable amount of time to determine if a petition did have jurisdiction, merit,

and whether the actual innocence claim and newly discovered evidence could overcome any procedural defects and jurisdictional defects which may result. The order had said "UPON CONSIDERATION of the petitioner's Petition for Writ of Habeas Corpus, it is ORDERED that said petition be, and the same is hereby, DISMISSED."

On November 20, 2019, Brian Hill filed a timely Notice of Appeal to appeal the decision to dismiss Petitioner's petition for Writ of Habeas Corpus. The "NOTICE OF APPEAL" was transmitted to the Court of Appeals of Virginia. Case was opened up under Record No. 0079-20-3.

On February 14, 2020, the Court of Appeals of Virginia had entered an order that they didn't have the jurisdiction to hear Writ of Habeas Corpus appeal and had transferred the Notice of Appeal and Mr. Hill's Petition for Appeal to the SCV. It said "It appears that this Court does not have jurisdiction over this case. Accordingly, the case hereby is transferred to the Supreme Court of Virginia pursuant to Code § 8.01-677.1."

**2. The Supreme Court of Virginia receives the Petition for Appeal, brief or letter in opposition, and then a reply to the opposition filing**

On February 19, 2020, the Supreme Court of Virginia had received the Petition for Appeal, and opened up case no. 200267. Record was received on February 14, 2020.

The "Reply to Brief in Opposition" was filed on March 30, 2020. The opposition letter was that the Attorney General of Virginia had asserted that Petitioner cannot challenge his conviction on actual innocence because he was no longer in State Custody. The reply was meant to assert that actual innocence overcomes such procedural defects and again asserted the U.S. Supreme Court's case law on "actual Innocence" and the miscarriage of justice exception under the U.S. Constitution to defective Habeas petitions.

On December 1, 2020, a panel of Justices in the Supreme Court of Virginia held an oral argument of Petitioner to present his oral arguments about why his petition should be granted by the panel of three Justices of SCV.



On December 21, 2020, the Supreme Court of Virginia had refused the Petition for Appeal.

On December 30, 2020, Brian Hill filed a Petition for Rehearing again asserting that it's decision and opinion contradicts the authoritative case laws of the U.S. Supreme Court concerning actual innocence and writs of habeas corpus and the eighth Amendment's prohibition on cruel and unusual punishments inflicted where any punishment of an innocent man or woman is cruel and unusual punishment and that Habeas Corpus should not be procedurally closed on somebody making a colorable showing of factual innocence/actual innocence.

On February 5, 2021, the Supreme Court of Virginia had refused the petition for rehearing. That creates the final decision and thus Petitioner is respectfully requesting that the U.S. Supreme Court grants Certiorari and conducts a review of that erroneous decision. That decision of the highest appellate Court of Virginia, a State Supreme Court, conflicts with the case law decisions of this Court.

Again, see this Court's decisions under *Bousley v. United States*, 523 U.S. 614, 622-23 (1998), *Sawyer v. Whitley*, 505 U.S. 333 (1992), *Murray v. Carrier*; 477 U.S.

478, 479-80 (1986), *Kuhlmann v. Wilson*, 477 U.S. 436, 438 (1986), and *In re Davis*, 130 S. Ct. 1, 2 (2009). This Court had placed a very large emphasis on the “actual innocence” claim and “miscarriage of justice” exception to defaulted Habeas Corpus petitions under the Eighth Amendment’s prohibition on cruel and unusual punishments inflicted and/or under the Due Process Clause of the Fourteenth Amendment. The Amendment XIV of the Constitution requires that States also have Due Process of Law when a criminal defendant’s liberty and/or property is being taken away as a result of an adverse decision in a criminal charge and wrongful conviction, especially an innocent person.

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## IX. REASONS FOR GRANTING THE WRIT

- A. To avoid erroneous deprivations of the right to due process by the Circuit Court's duty under Amendment XIV of the U.S. Constitution to not deprive a person of liberty, property, and life without due process of law.

In Bousley v. United States, 523 U.S. 614, 622-23 (1998), Sawyer v. Whitley, 505 U.S. 333 (1992), Murray v. Carrier, 477 U.S. 478, 479-80 (1986), Kuhlmann v. Wilson, 477 U.S. 436, 438 (1986), and In re Davis, 130 S. Ct. 1, 2 (2009), this Court adopted the usage of the "actual innocence" and "miscarriage of justice" exceptions to any procedurally defaulted or defective Petitions for Writ of Habeas Corpus.

*Herrera v. Collins*, 506 U.S. 390, 432 n.2 (1993) ("It also may violate the Eighth Amendment to imprison someone who is actually innocent. See *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the crime of having a common cold").") This Court had reasoned in that decision with the argument "It also may violate the Eighth Amendment to imprison someone who is actually innocent."

Punishing somebody who is innocent of a crime is cruel and unusual punishment and is contrary to what a Court of Law should be doing, only punishing the guilty who have been found guilty of violating a law.

The Eighth Amendment prohibits cruel and unusual punishments. The amendment was originally drafted to prohibit torture and other barbaric methods of punishment. *Gregg v. Georgia*, 428 U.S. 153, 169-170 (1976) (plurality opinion). However, the Eighth Amendment has been “interpreted in a flexible and dynamic manner” to reflect evolving standards of decency. *Id.* at 171. The penalty “must accord with ‘the dignity of man,’ which is the basic concept underlying the Eighth Amendment.” *Id.* at 173, quoting *Trop v. Dulles*, 356 U.S. 86,100 (1958) (plurality opinion). There can hardly be a punishment more violative of the dignity of man than the execution of an innocent person.

*Herrera v. Collins*, 506 U.S. 390, 427 (1993) (“We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be “actually innocent.””)

- B. To keep in uniformity with the past opinions of this Supreme Court and making sure that the Supreme Court of Virginia's Habeas Corpus decisions keep in uniformity with the "Actual Innocence" and miscarriage of justice exception to prevent cruel and unusual punishment inflicted upon an innocent man/woman in violation of the Amendments VIII and XIV of the U.S. Constitution.

This Court has the ability to use its authority to grant the Petition for Writ of Certiorari to keep the uniformity of not just this Court's decisions regarding usage of the "actual innocence" and "miscarriage of justice" exception to a procedurally defaulted petition for writ of habeas corpus to prevent a criminal conviction from causing a deprivation of Due Process rights and protections under Amendment XIV and Amendment VIII's prohibition on cruel and unusual punishments inflicted upon an innocent person who had made a colorable showing of actual innocence to a crime charged and wrongfully convicted, especially when all States/Commonwealths of the Union, Federal Supremacy Clause of the U.S. Constitution, have to abide by the U.S. Constitution pursuant to the

Amendment XIV requiring all States to not deprive a U.S. citizen of life, liberty, or property without Due Process of Law, and that a State may not “deny to any person within its jurisdiction the equal protection of the laws.” (citation partly omitted and reformatted). The Commonwealth of Virginia, the Circuit Court of Martinsville, and the decision of the Supreme Court of Virginia throwing out Habeas Corpus relief requested on the ground of actual innocence is unequal, discriminatory, and creates criminal conviction consequences that Virginia claims cannot be challenged in any way, shape, or form simply because he technically is not under State Custody as they have claimed while being made aware that he faced Revocation of his Federal Sentence of Supervised Release if he is not found actually innocent of his state charge and Conviction, which is a miscarriage of justice and deprived an innocent man of permanent acquittal for his conviction of the Virginia charge of Indecent Exposure under Virginia Code § 18.2-387.

This Court made multiple important decisions regarding the usage of actual innocence, factual

innocence, and a colorable showing of innocence, as well as the miscarriage of justice exception to a procedurally defaulted Habeas Corpus petition. Again, see *Bousley v. United States*, 523 US. 614, 622-23 (1998), *Sawyer v. Whitley*, 505 U.S. 333 (1992), *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986), *Kuhlmann v. Wilson*, 477 U.S. 436, 438 (1986), and *In re Davis*, 130 S. Ct. 1, 2 (2009). The decision on December 21, 2020, and the refusal of Petition for Rehearing on February 5, 2021, shows a conflict creating a permanent miscarriage of justice against an innocent man when the original criminal judgment entered on November 18, 2019, in the Circuit Court of Martinsville (“Case no. CR19000009-00 (11/18/2019 ORDER)”) had shown that Petitioner never plead guilty to his charge but had simply withdrawn his appeal but had asked the Circuit Court to retain allowing him to overturn his criminal conviction in another way because of ineffective assistance of trial counsel refusing to file anything showing the actual innocence of Petitioner. Petitioner never plead guilty to his charge, that is a fact in his criminal case. The Supreme Court of Virginia should have picked up on that in the Record of his Criminal Case for his Writ of Habeas Corpus challenging that conviction and one such ground asserted was

his Actual Innocence aka Legal Innocence. He never violated Virginia Code § 18.2-387. That SCV should have taken special notice of the actual innocence claim and should not have dismissed the appeal.

Petitioner had made a clear demonstration that he can prove factual innocence and make a colorable showing of actual innocence. He provided legal arguments that in order to be convicted of Indecent Exposure under Virginia Code § 18.2-387, the Petitioner must have acted intentionally to conduct such unlawful behavior. No such evidence of intent exists. Petitioner had explained about the case laws and what is legally required to be guilty of violating criminal Code § 18.2-387.

“The ‘obscenity’ element of Code § 18.2-387 may be satisfied when: (1) the accused admits to possessing such intent, *Moses v. Commonwealth*, 611 S.E.2d 607, 608 (Va. App. 2005)(en banc); (2) the defendant is visibly aroused, *Morales v. Commonwealth*, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. App. 2000); or (4) in other



circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex, Hart, 441 S.E.2d at 707–08. The mere exposure of a naked body is not obscene. See Price v. Commonwealth, 201 S.E.2d 798, 800 (Va. 1974) (finding that “[a] portrayal of nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene’.” Romick v. Commonwealth, No. 1580-12-4, 2013 WL 6094240, at \*2 (Va. Ct. App. Nov. 19, 2013)(unpublished)(internal citations reformatted).

While the evidence may show that Appellant was naked in public at night, as stated why he was charged, nudity, without more, is not obscene under Virginia law. Rather, “[t]he word ‘obscene’ where it appears in this article shall mean that which, **considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex**, that is a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a

whole, does not have serious literary, artistic, political or scientific value.” Va. Code § 18.2-372 (emphasis added). While Virginia does not appear to have established a clean definition of criminal intent, Black’s Law Dictionary defines it as “[a]n intent to commit an actus reus without any justification, excuse, or other defense.”

In summary, in order to show that Appellant violated Va. Code § 18.2-372 by committing the offense of indecent exposure under Virginia law, the Commonwealth was required to prove, among other things, that Appellant had the intent to display or expose himself in a way which has, as its dominant theme or purpose, appeal to the prurient interest in sex, as further defined above, without any justification, excuse, or other defense.<sup>1</sup> The Commonwealth failed to do so. Rather, the Commonwealth’s evidence, presented through its own witnesses, showed Appellant as someone who was running around naked between

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<sup>1</sup> For the reasons stated above, the Commonwealth’s burden was to prove every element of the offense, including the mens rea, beyond a reasonable doubt. However, even if, arguendo, this Court were to find that the Commonwealth’s burden was only a preponderance of the evidence, the Commonwealth has still failed to carry its burden.

midnight and 3:00 a.m. and taking pictures of himself because he believed that someone was going to hurt his family if he did not do so.

The General District Court did not hear, however, any evidence of Appellant having his dominant theme, or purpose being an appeal to the prurient interest in sex. For example, there was no evidence of Appellant making any sexual remarks, being aroused, masturbating, or enjoying his conduct, sexually or otherwise. If a person was purposing to expose himself in public because he or she found it sexually arousing, it would be logical that he or she would pick a place and time where he or she would expect to encounter lots of members of the public. Appellant did not do that. Rather, he was running around between midnight and 3:00 a.m. and the witnesses to his nudity were few. Hence, the statements Appellant made to police and his conduct both indicate that, in the light most favorable to the Commonwealth, he was naked in public while having a psychiatric episode, but without the intent necessary to commit indecent exposure under Virginia law. Consequently, the General District Court erred, as

a matter of law, when it found that Appellant had violated Virginia Code § 18.2-387 by committing the Virginia state law offense of indecent exposure as per Virginia Code § 18.2-387.

Appellant never actually plead guilty when he filed his "Motion to Withdraw Appeal" and the Judge marked out any notion of it, no guilty plea at all and any note of such was stricken from the final conviction. Petitioner still retained the right to overturn his criminal conviction on the ground of actual innocence and any newly discovered evidence. A strong showing of actual innocence warrants granting of the Writ of Habeas Corpus in the Circuit Court or an evidentiary hearing before making a decision on granting or denying the Petition. The Supreme Court of Virginia should have clearly taken that into consideration before making such erroneous decision to refuse the Petition for Appeal and the Petition for Rehearing.

- C. To avoid a miscarriage of justice and cruel and unusual punishment inflicted by the Circuit Court of Martinsville by convicting an innocent man and giving him no opportunity to demonstrate factual innocence and blocking him from being allowed relief upon showing a colorable claim of actual innocence.

This Court has the ability to use its authority to grant the Petition for Writ of Certiorari to review over an erroneous decision which had caused a permanent miscarriage of justice against Petitioner Brian David Hill, permanently convicting him of his charge of Indecent Exposure under Virginia Code § 18.2-387, despite never pleading guilty. Petitioner for a fact never actually plead guilty which led to such a criminal conviction on November 18, 2019. The Judge even marked out any such note and allowed Petitioner to retain that he could later challenge his criminal conviction by other methods such as a Writ of Actual Innocence but that form of relief mainly applies to felony convictions and the charge of Indecent Exposure under Virginia Code § 18.2-387 is only a misdemeanor but that misdemeanor had caused severe consequences for his Federal Supervised Release sentence in the Middle District of North Carolina. Severe consequences such as 9 months of imprisonment, additional years of Supervised Release with the Federal Judge ordering “supervised, release of nine (9) years is re-imposed under the same terms and conditions as previously imposed”.

Then there is another repercussion caused by such miscarriage of justice such as having the Petitioner owe a legal debt to the Circuit Court of Martinsville for in the thousands of dollars not for restitution but for legal costs throughout his State criminal case billed by both the Prosecutor's legal costs and court appointed lawyer's legal costs accrued throughout the entire criminal prosecution of the State case knowing that his only source of income is his Supplemental Security Income disability disbursement under 42 U.S. Code § 407. His SSI should have been protected from any such demand to pay legal fees or legal debts to a State Court. So, he is risking his SSI being garnished or taken by order of the Circuit Court upon not being acquitted of his wrongful conviction. That can deprive him of paying rent and deprive him of life and liberty as he suffers under a permanent disability or disabilities to even receive SSI. So, he suffers three or more times even after serving his State Sentence, so he is being punished over and over again as a result of his wrongful conviction on November 18, 2019 in the Circuit Court. All of that was included on Record in the Writ of Habeas Corpus in the Circuit

Court. So, the miscarriage of justice and wrongful repercussions and his actual innocence were all brought up in his petition. The Supreme Court of Virginia should have recognized all of this together to protect Petitioner from cruel and unusual punishment and being deprived of Due Process of Law as an innocent man. The Supreme Court of Virginia should have ordered the Circuit Court to have conducted an evidentiary hearing to determine if Petitioner can demonstrate a colorable showing of actual innocence as he had claimed under oath/affidavit in his Petition for Writ of Habeas Corpus on November 18, 2019, as well as show evidence attachments/Exhibits.

## X. CONCLUSION

For the foregoing reasons, Mr. Hill respectfully requests that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Virginia refusing and dismissing Mr. Hill's petition for Appeal on the Circuit Court dismissing Petitioner's petition for Writ of Habeas Corpus and the Supreme Court of Virginia's refusal of Petition for Rehearing.

*II*

DATED this 2nd day of April, 2021.

Respectfully submitted,

*Brian D. Hill*  
*Signed*

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