VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

GEORGE W. HUGUELY V,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Civ. Case No. _____**
	:	(Crim. No. 11-102-1)
JOHN A. WOODSON, WARDEN,	:	
	:	
Respondent.	:	

PETITION FOR A WRIT OF HABEAS CORPUS SUBJECT TO AMENDMENT[1]

Introduction

1. Petitioner George Huguely asks this Court to grant a writ of habeas corpus overturning his conviction for second-degree murder.[2] These charges arose from a May 2, 2010, altercation between Mr. Huguely and Ms. Yeardley Love. It is uncontested that this case received overwhelming and highly misleading media coverage. It is also *uncontested* that Mr. Huguely had no intent to kill Ms. Love when he went to her apartment or while he was there, he was severely intoxicated at the time, he never hit her head against the wall, Ms. Love was not dead when he left the apartment, the 911 call reported that Ms. Love was suffering from alcohol poisoning not trauma, Huguely admitted the altercation to the police when questioned hours later, and he was shocked and devastated when the detective told him that Ms. Love had died. The jury was thus left to decide a very close case between second-degree murder and manslaughter. The

[1] Mr. Huguely plans on filing an amended petition within approximately thirty days.
[2] Mr. Huguely is not challenging his conviction for grand larceny.

crucial and unconstitutional errors in this case, causing a virtually inevitable tipping of the scales to murder, include the exclusion of crucial expert witness testimony regarding the cause and severity of Ms. Loves injuries, the omission of crucial language from the malice instruction that Huguely must intend "death or great bodily harm" to be convicted of second-degree murder, and the use by the jury of an impermissible external influence - a dictionary - to define "malice." For these and other constitutional errors discussed below, Mr. Huguely is asking this Court to vacate his conviction for second-degree murder.[3]

Procedural & Substantive History of the Case

2. Shortly before midnight on May 2, 2010, after a full day of heavy drinking, a severely intoxicated Huguely wandered down the street to talk to Ms. Love about problems in their relationship. He made no attempt to hide and was not furtive, stopping at and being shooed away from a friend's apartment on the way. Mr. Huguely entered Ms. Love's apartment through the unlocked exterior door and knocked on her bedroom door. When Ms. Love said something but did not let him in, Mr. Huguely kicked a hole

[3] Mr. Huguely's claims are not isolated constitutional errors in an otherwise well-tried case. There were many serious trial errors that Mr. Huguely has not briefed as state habeas claims, but that provide a context for evaluating this Court's confidence in the verdict. For example, trial counsel failed to strike or even question Juror 63, who sat on the jury, about his affirmative answer to the defense question on his juror questionnaire that he had been placed in danger of great bodily harm as a result of the actions of someone who was intoxicated; Juror 32 expressed strong bias during voir dire, but the Court of Appeals found trial counsel waived consideration of the issue because they failed to object to the Commonwealth's improper use of leading questions to rehabilitate the juror; the trial judge had an impermissible ex-parte meeting in chambers with a juror during trial without informing trial counsel; trial counsel incorrectly calculated the guidelines for manslaughter, inflating them years above what they really were, and presented them to the court as a reason to reduce Huguely's sentence; and trial counsel failed to elicit evidence that they knew or should have known that the victim's family in this case was readying a civil lawsuit in which their primary claim was that Mr. Huguely acted with negligence, not malice, in the death of Yeardley Love.

in the door. Mr. Huguely and Ms. Love talked and then argued and ended up wrestling on the floor. Mr. Huguely noticed that Ms. Love's nose was bleeding. He stopped wrestling with her, and pushed her back onto the bed and left. When he left, Ms. Love was lying on her back.

3. Approximately two hours later, Ms. Love's roommate and a friend found her lying on her bed facedown in a pillow. Although she had a black eye and an abrasion on her chin, her injuries did not appear serious, and she had no fractures. Ms. Love's roommate and the friend believed that Ms. Love was suffering from alcohol poisoning, which they reported to first responders in a 911 call. Rescue responded and performed cardiopulmonary resuscitation ("CPR") for twenty-four minutes but could not resuscitate Ms. Love. Hours later, the police asked Mr. Huguely to come to the station for questioning. Mr. Huguely's videotaped interrogation shows that he was not only cooperative, but also genuinely shocked and filled with grief to learn that Ms. Love had died. Mr. Huguely told police about their fight but maintained he had done nothing that could have resulted in Ms. Love's death. Mr. Huguely also admitted taking Ms. Love's laptop because he was angry she would not talk to him—a drunken action he described as "not reasonable logic"—and throwing the laptop in a dumpster after he left the apartment.[4]

4. Mr. Huguely was arrested and retained Mr. Francis McQ. Lawrence and Ms. Rhonda Quagliana of 416 Park Street, Charlottesville, Virginia 22902. A grand jury indicted Mr. Huguely for one count each of first degree premeditated murder and felony

[4] The laptop, which was recovered from the top of the dumpster, was the basis of the robbery charges for which Mr. Huguely was acquitted, as well as the grand larceny charge of which he was convicted. JA 2179–82, 2631–32, 3231–40, 3764–72.

murder in violation of Va. Code § 18.2-32, one count of robbery in violation of Va. Code § 18.2-58, one count of statutory burglary in violation of Va. Code § 18.2-89, one count of burglary in violation of Va. Code § 18.2-91, and one count of grand larceny in violation of Va. Code § 18.2-95(ii). JA 7–12.

5. From the beginning, Mr. Huguely's case attracted widespread, sensationalized media attention. Mr. Huguely and Ms. Love were both lacrosse players nearing graduation from the University of Virginia ("UVA"), and national news and sports outlets aired numerous reports about the allegations. The media saturated the community with false and damaging assertions that went straight to the heart of the case. *See* JA 13–143 (Defense Motion for Use of a Juror Questionnaire; for Sequestered Individual Voir Dire; and to Sequester the Jurors). These included sensational and false characterizations of Mr. Huguely—such as headlines referring to him as "an Anger Prone Scion of Prominent DC Family" and "a Man of Privilege, Rage"—and inaccurate, inadmissible reports of past violent behavior. JA 14–15. Wildly inaccurate "facts" were disseminated broadly. For example, a CBS headline falsely cried that a "Bloody T-Shirt" had been found in Mr. Huguely's apartment. JA 14.

6. Importantly, it was widely and incorrectly stated that Mr. Huguely had beat Ms. Love's head against the wall. This idea was even repeated by the then President of UVA in a high-profile vigil. JA 22–23 (noting that "Mr. Casteen then stated that he hoped Ms. Love's death would remind the crowd that no woman deserves to be 'beaten, thrown against walls . . . .'"). Forensic evidence disproved this allegation, however, and the prosecution abandoned it at trial. JA 2421–22, 2254–56, 2472, 2482, 2538–39, 3083–89, 3202. In fact, the evidence was clear that there had been no violent beating: there were

no fractures, no signs of struggle, a witness who heard the incident did not hear any yelling or hitting, and the two who found Ms. Love believed she was suffering from alcohol poisoning.

7. Mr. Huguely pled not guilty to all charges and was tried by a jury. Despite charging Mr. Huguely with premeditated murder, the prosecution acknowledged in opening that Mr. Huguely "had been drinking . . . virtually nonstop since early that Sunday morning . . . all the way up until he ends up over at Yeardley Love's apartment." JA 1497–98. A number of the prosecution's own witnesses then testified to Mr. Huguely's high level of intoxication on May 2, 2010. The truth was very different from the headlines, and showed that Ms. Love's death had been tragic but clearly not intentional.

8. Prosecution witnesses testified that May 2nd was the day of the lacrosse team's father-son golf tournament and that Mr. Huguely became drunk early in the morning. Brian Carroll, a teammate who lived across the hall, saw Mr. Huguely around 9:00 A.M. and described him as drinking, slurring, and appearing "a little bit drunk." JA 2050, 2054. Brian's twin brother, Kevin Carroll, was Mr. Huguely's roommate. Both Kevin and his girlfriend, Elizabeth McLean, testified that they saw Mr. Huguely at home that morning drinking beer. JA 2110, 3285, 3292–94. Teammate Timothy Fuchs also saw Mr. Huguely drinking around 9:00 A.M. and noticed he was acting differently. JA 2039–40. Chris Clements, a teammate who lived downstairs, testified that Mr. Huguely woke him up around 9:30 A.M. and already had been drinking. JA 3346–49, 3357–58. Around 11:00 A.M., teammate Kenneth Clausen saw Mr. Huguely drinking in the parking lot and observed that he already had "glossy eyes." JA 3315–16. Mikey Thompson, who lived

with Brian Carroll across from Mr. Huguely, rode to the golf tournament with Mr. Huguely and noticed he "was clearly still fairly drunk from the night before . . . ." JA. 3376–77. Mr. Thompson witnessed Mr. Huguely drink three or four beers while his father drove and also saw him put about six in his golf bag. JA 3377–79. Mr. Clements then golfed with Mr. Huguely and witnessed him drink throughout the round. By the last three holes, Huguely was visibly intoxicated and unable to fully participate, simply taking shots here and there. JA 3350.

9. Around 5:00 P.M., there was a reception at the golf clubhouse where Mr. Fuchs and Kevin Carroll saw Mr. Huguely being drunk, slurring, and making inappropriate jokes. JA 2040, 3295–96. Brian Carroll noticed that Huguely was significantly drunker than earlier: he was slurring, interrupting, telling a nonsensical story, and could not hold a conversation. JA 2056–57. Mr. Clausen also heard Huguely telling incoherent stories. JA 3318–19. Mr. Thompson testified that Mr. Huguely was "clearly fairly drunk" at the reception, and described him as "[n]ot walking straight, slurring his words a little bit, and saying a few things that were fairly embarrassing . . . ." JA. 3377–79.

After the reception, the Huguelys dropped Brian Carroll at home and went to dinner with Mr. Clausen and Mr. Thompson. Mr. Huguely, who was noticeably drunk, continued to drink on the drive and argued with his father about the volume of music. JA 2058, 3318–19. They then drank two bottles of wine at dinner. Mr. Huguely drunkenly dropped a bottle of wine, creating a scene, and also may have knocked over a glass of wine. Mr. Huguely then argued with his father, who told him not to drink anymore. JA 3320, 3379–80. The group ended dinner early because they did not want to be in public

with Mr. Huguely so drunk. JA 3320, 3379–80. On the way out of the restaurant, Mr. Huguely urinated in public. JA 3381.

10. When they returned home, Mr. Huguely stayed in the car with his father while Clausen and Thompson went to his apartment. When Mr. Huguely joined his teammates around 10:30 P.M., he was frustrated and nonsensical. Mr. Clausen could not understand Mr. Huguely and Mr. Thompson described him as "a little more out of it than he seemed even at dinner. He was clearly upset about something that had happened with his dad and wasn't really making any sense." JA 3320–23, 3382–83. Kevin Carroll also testified that when Mr. Huguely returned, he was drunk and irritated about some papers his father wanted him to sign. JA 3297–98.

Meanwhile, Mr. Clements had left the reception early and worked until 10:30 P.M., when he went to Huguely's apartment, saw he was visibly drunk, and returned downstairs. JA 3350–52. The other four teammates had a few beers at the apartment. Around 11:45 P.M., Kevin Carroll and Mr. Clausen left for fifteen to twenty minutes to buy beer and Mr. Thompson crossed the hall to his apartment and got in bed. JA 3297–300, 3321, 3324. Around the same time, Mr. Clements heard Mr. Huguely come to his door downstairs. Clements yelled that he was working on a paper, and Mr. Huguely said something and left. JA 3353–54. About twenty minutes later, Mr. Huguely stopped by Mr. Thompson's apartment, saw him in bed, used the bathroom, and returned to his apartment. Mr. Thompson testified that Mr. Huguely was drunk but that there was nothing unusual. JA 3383–86, 3394–95.[5]

[5] The prosecution's theory was that Mr. Huguely stopped by Mr. Thompson's on his way home from Ms. Love's apartment to wash blood off himself. Thompson's drains were tested, however, and no blood was found. From the top of the stairs, the bathrooms in

11. When Clausen and Carroll returned from the store, Mr. Huguely was gone. When Mr. Huguely reentered around 12:15 A.M., they asked what he had been doing and he said he had been downstairs with Mr. Clements and Will Bolton, and that Mr. Clements was drunk. JA 3301–02, 3324–25. Mr. Clausen asked Mr. Huguely what was wrong and he said that nothing was wrong. JA 3327–28. Kevin Carroll thought Mr. Huguely "was really, really drunk." JA 3309. He did not notice any cuts, bruises, or dishevelment; just that Mr. Huguely seemed tired and intoxicated. JA 3310–11. Mr. Huguely sat on the couch for about fifteen minutes and then went to bed around 12:30 A.M. JA 3306–07. Kevin Carroll then called Mr. Bolton and invited him over. Bolton was at his apartment and had not had contact with Mr. Clements that day. JA 3365–66.[6] When he arrived at Mr. Huguely's apartment fifteen to twenty minutes later, Mr. Huguely was drunk and using the bathroom with the door open. Mr. Huguely then went to his bedroom. JA 3324–27, 3366–72.

12. Several prosecution witnesses also testified—notably, over the defense's objection—that Mr. Huguely's drinking had developed into a serious problem by the time of the offense. In fact, Mr. Huguely's drinking had become so serious that his friends had discussed staging an intervention when lacrosse season ended. JA 3332. Brian Carroll testified that Mr. Huguely's drinking had grown more frequent and intense, with Mr. Huguely drinking four times a week and getting intoxicated every time. JA 2067. Similarly, Mr. Clausen testified that Mr. Huguely had been drinking a lot and always to

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Mr. Thompson's and Mr. Huguely's apartments were equidistant. The two apartments were often used as a single unit, however, with the doors always unlocked and people wandering in and out of them. JA 3387, 3396–97.

[6] Mr. Clements confirmed that he had had not drunk or seen Mr. Bolton that day. JA 3301–02, 3324–25.

the point of being affected. Mr. Clausen described Mr. Huguely as "sloppy, incoherent, not cohesive, not speaking clearly, just not together" when he drank. JA 3330–32, 3337.

Elizabeth McLean, who spent a lot of time at Mr. Huguely's apartment, also testified that his drinking had become an issue. Mr. Huguely was not in control of his drinking or of his behavior when he was drinking. He often drank to excess and his drinking affected his behavior and mood. JA 2094, 2096, 2111–14, 3287. Mikey Thompson testified that Mr. Huguely's drinking had become out of control and that he needed to stop. Mr. Huguely drank three or four times per week to the point of his behavior being affected. Mr. Huguely's drinking made him engage in "off-putting" behavior, and alcohol had become more important to him than other things. JA 3387–94.

13. Thus, although Mr. Huguely had been charged with premeditated murder, the evidence was clear that Mr. Huguely had no intent to kill Ms. Love, but had walked down the street to her apartment in a highly intoxicated effort to talk to her. As Mr. Clements testified, Mr. Huguely first tried to come to his apartment. Mr. Huguely then was gone only twenty minutes before drunkenly stopping by Mr. Thompson's apartment. Mr. Huguely had made no attempt to sneak in or out of Ms. Love's apartment. The neighborhood was well lit and full of activity until midnight or later. *See* JA 1639–40 (Kaitlin Duff); 1677 (Anna Lehmann); 2062 (Brian Carroll).

Anna Lehmann, a student who lived below Ms. Love, testified that the "walls were very thin" and one could hear yelling in other apartments. JA 1649–51. Ms. Lehmann heard heavy footsteps go up and into Ms. Love's apartment, and later heard a single loud noise she likened to a stereo or bookshelf falling. JA 1652. Despite the thin walls, Ms. Lehmann did not hear any voices, arguing, things hitting the floor, or banging

walls. JA 1658, 1672. Ms. Lehmann heard only some footsteps. JA 1672. At most ten minutes later, she heard heavy footsteps exit and walk downstairs. She looked out the window and saw a male student wearing a blue t-shirt, shorts, and tennis shoes walk by at a normal pace, not acting fidgety, guilty, or nervous. JA 1653, 57–60, 1678.

14. Mr. Huguely and Ms. Love had an off-and-on relationship that had disintegrated into mutual recriminations. JA 1597, 1602–03, 1636, 1684–85. In spring 2010, Ms. Love began a romantic relationship with Mike Burns, a University of North Carolina lacrosse player with whom she had hooked up in 2008. JA 1687, 1998–99. In February 2010, Mr. Burns visited UVA and attended a party held between the Huguely/Carroll and Carroll/Thompson apartments. JA 2004–05. Mr. Burns testified that he was standing in the hallway talking to Mr. Fuchs when he heard a yell, entered Mr. Huguely's apartment, and opened his bedroom door. JA 2005–06. Mr. Huguely was lying in bed with Ms. Love on top of him. Mr. Burns testified that Mr. Huguely's arm was around Ms. Love's neck, but acknowledged saying previously that his arm was around her chest. JA 2007, 2015–20. Mr. Huguely let go and Ms. Love left crying. JA 2007–08. That night, Mr. Burns hooked up with Ms. Love. JA 2014. A few days later, Mr. Burns called Ms. Love, who said that everything was okay and did not seem concerned or afraid. JA 2019.

Mr. Fuchs testified, however, that he was standing near Mr. Huguely's room and did not notice anything; he just saw Mr. Burns open the door and Ms. Love exit. Ms. Love "kind of looked like she was a little bit freaked out" and left without saying anything. JA 2029–32. Ms. McLean, Ms. Duff, and Ms. Whiteley all witnessed Ms. Love crying after this event. JA 1605–07, 1687–90, 2108. A few days later, Mr.

Huguely told Ms. Whiteley he did not really remember the incident and was angry that Ms. Love told people he had choked her. JA 1691–94. Mr. Huguely told Ms. Whiteley he would write Ms. Love a letter. JA 1694. In that letter, Mr. Huguely expressed great remorse and reflected on his struggle with alcohol:

> I cannot describe how sorry I am for what happened this past weekend. I am horrified with the way I behaved and treated you. I'm scared to know that I can get that drunk to the point where I cannot controll [sic] the way I behave or act. It is clearly an issue that I need to look deeply into and address. Alcohol is ruining my life, my relationships, and I'm hurting not only myself but the people I love and care for most and this weekend is a direct example of this. Because I don't know what happened in my room I will not even say anything but that I'm so so sorry and would never hurt you or any girl for that matter. . . .

JA 4609–10.[7]

15. The relationship continued to disintegrate over the next couple months. Mr. Burns and Ms. Love again hooked up on April 25, 2010. JA 2019. On the Wednesday before her death, however, Ms. Love angrily entered Mr. Huguely's apartment and began hitting him with her purse. Ms. Duff and Ms. Whiteley testified that earlier that day, they had been out with some friends who mentioned seeing Mr. Huguely with a woman named Stephanie Aladj. Ms. Love was surprised and upset. JA 1607–14, 1632, 1695–97. That night, two prospective students were waiting at Mr. Huguely's apartment at their escort, Kate Kamber's, request. JA 2035–36, 2076–78. When Ms. Kamber walked in, Mr. Huguely and the visitors were sitting on separate couches talking. Ms. Love then entered, raising her voice at Mr. Huguely. JA 2037–38, 2047, 2079–80. Ms. Love asked if the young women were Mr. Huguely's "new girlfriends" or if he had been texting them. JA 2081. Ms. Love then began yelling at Mr. Huguely and hitting him with her

[7] The jury specifically asked to review this letter in deliberations. JA 4259.

purse. JA 3758–59. Mr. Huguely got up from the couch and backed away from Ms. Love, asking her to leave. JA 3759–61.

Ms. McLean was in another room when this incident occurred and heard Ms. Love yelling and hitting Mr. Huguely with her purse. Ms. McLean heard Mr. Huguely tell Ms. Love to stop, and the contents of Ms. Love's purse spill onto the floor. JA 2099–2102, 2117–18. Ms. McLean helped Ms. Love pick up her belongings and walked her out of the building. Ms. Love "was angry and she had been drinking." JA 2102–03. Ms. Kamber testified that Mr. Huguely acted "[c]alm, collected . . . not confused, but startled I guess when she came in and embarrassed." JA 2082. Ms. Kamber testified that Mr. Huguely had been gentlemanly to help out and that it "was . . . almost funny how innocent it was." JA 2087, 2089. The defense presented testimony from the two prospective students, who testified that Mr. Huguely was nice, courteous, appropriate, and helpful to allow them to use his apartment and phone charger. JA 3737–63.

16. The next day, on Thursday, Ms. Love left for a game with the rest of the women's lacrosse team. Ms. Love had lost her phone but borrowed phones to call Mr. Huguely. JA 11614–18, 1698–99. They also exchanged angry emails in which both called each other names. JA 1703–05; 4621–25. The emails continued over the next couple days. In one, Mr. Huguely wrote,

> A week ago u said u would get back together with me if I stopped getting so drunk then u go fuck burns attack me and in the midst of the attack say burns is fucked me better than you. That is so so fucked up on so many levels. I should have killed you. I'm still in utter disbelief at everything that has happened recently and how u handle this.

Ms. Love responded, "you should have killed me? youre so fucked up." JA 4624.

17. The women's lacrosse team played a game Friday. On Saturday, they went to Boylan Heights, where members of the men's lacrosse team and their families were also present. JA 1618–20, 1705–07. Alina Massaro, Mr. Huguely's aunt, testified that she saw Ms. Love and Mr. Huguely interact. JA 3802–05. Ms. Massaro walked the jury through security footage, pointing out that Ms. Love approached and hugged Mr. Huguely's cousins, that Ms. Love and Mr. Huguely appeared cordial, and that they even held hands. JA 3796–3805. Still, no evidence was presented regarding Mr. Huguely's drinking that day, despite the fact that one witness testified that on Sunday, he seemed drunk from the night before.

18. On Sunday, Ms. Love and her roommates went to Boylan for about three hours. They then did schoolwork and returned to Boylan around 5:00 P.M. JA 1621–22, 1709–13. Ms. Love was drinking. JA 1635. Around 10:00 PM., Ms. Love and Ms. Whiteley went to their apartment, planning to shower and return to Boylan. When Ms. Whiteley checked to see if Ms. Love was ready, Ms. Love was in bed wearing only underwear. Ms. Love said she was tired, had a lot of work to do the next day, and would think about coming later. JA 1623, 1715–20. Ms. Whiteley left the apartment door unlocked. JA 1721. Around 2:15 A.M., Ms. Whiteley and Philippe Oudshoorn walked back to the apartment and entered Ms. Love's bedroom. Ms. Love was facedown on her pillow, under the covers. JA 1721–24, 1764. There was blood on the sheets and pillow. They thought Ms. Love might have alcohol poisoning.

19. Mr. Oudshoorn called 911, reported that Ms. Love was suffering from alcohol poisoning, and moved Ms. Love to the floor to attempt CPR. JA 1725–32, 1745–50, 1767–72. Police arrived and took over resuscitation efforts, using firm compressions. JA

1787–89, 1816–17. They noticed that Ms. Love had a bruised and swollen eye, dried blood on her nose and mouth, and an abrasion under her chin. JA 1818, 1833. Police also noticed a hole in the bedroom door and an apparent blood spot on the floor near the foot of the bed. JA 1789–90, 1817, 1945, 1951. Rescue arrived and ventilated and intubated Ms. Love, causing blood spatter on her mouth, neck, shoulder, and the bed apron. JA 1819, 1834, 1846–51, 1862, 1865–78. They attempted resuscitation for approximately twenty-five minutes with no signs of life. JA 1856–57, 1888. During CPR, they compressed Ms. Love's chest 100 times per minute to cause her sternum to touch her heart. JA 1863. The point of CPR is to perfuse blood, and because of this CPR can cause bruises to blacken and open wounds to bleed. JA 1865–67.

20. Police interviewed Ms. Whiteley, who took them to Mr. Huguely's apartment around 7:00 A.M. JA 1734–35. Detective Lisa Reeves told Mr. Huguely they were investigating a crime and asked him to accompany them to the station, and he was cooperative. JA 2293–97. In the police station, Detective Reeves noticed some bruising on Mr. Huguely's knuckles and read him his *Miranda* rights, which he waived. JA 2299–2306. Mr. Huguely was fully cooperative and grief-stricken when interviewed. JA 2306–13, 2592–620. Mr. Huguely told police that he and Ms. Love had been talking about their issues when she told him she no longer wanted to talk and to leave. Mr. Huguely then grabbed Ms. Love by the upper arms and she attempted to wriggle away from him. They eventually began wrestling on the floor, and Ms. Love's face rolled on the ground. Mr. Huguely noticed that her nose was bleeding. They stopped and stood up, and Mr. Huguely tossed Ms. Love on the bed and left. When he left, he believed she was on her back on the bed.

21. Consistent with Mr. Huguely's statement, forensic analysis did not suggest a beating, but the injuries were entirely consistent with the fall to the floor from the bed. Ms. Love's room was orderly; its contents were not overturned or ransacked. JA 2331, 2336, 2339–85. Lightweight objects—including a vase, cup, and photos on the wall and bookcase—were intact. JA 2475–81. Detectives inspected for signs of impact but found no dimples, marks, or indications of anything hitting the wall. A "small smudge above the bed" tested negative for blood or cosmetics. JA 2421–22, 2254–56, 2472, 2482, 2538–39, 3083–89, 3202. Although this contradicted the widespread story that Mr. Huguely had hit Ms. Love's head into the wall, prosecution experts were not told there was no damage to the walls. JA 2785 (Gormley); 2909 (Fuller); 3026 (Lopes).

Similarly, blood and DNA evidence did not suggest a beating. The prosecution's bloodstain pattern analyst testified that the stain on the carpet was a drip and that stains on the bedspread, sheet, and pillows were from transfer or movement. JA 3110, 3120–26, 3142–45. Angie Rainey, the prosecution's DNA analyst, testified that Mr. Huguely and Ms. Love could not be eliminated from DNA under each other's right fingernails. JA 3169, 3178. Mr. Huguely's clothes, however, had no blood but a 1 cm spot on his shorts with foreign DNA of no value. JA 3182–88, 3206–08. Neither Mr. Huguely's nor Ms. Love's blood was found on the numerous swabs and items collected from Mr. Huguely's apartment building. JA 3208–13.

22. The lack of signs of struggle or beating supported Mr. Huguely's statement that there had been an altercation but that he had done nothing that could have caused her death. Much of the trial was thus a battle of the experts regarding cause of death. The prosecution asserted that Ms. Love died of brain injuries caused by blunt force trauma to

the head. The prosecution also argued that there was an injury to Ms. Love's carotid sinus consistent with a hand on her throat, and that pressure on that artery could have caused her heart to stop. JA 1500–01.[8] The Commonwealth contradicted this theory later when it admitted during closing that Mr. Huguely did not know that Ms. Love was dead when he left her apartment.

The defense argued that Ms. Love likely died from positional asphyxia because she was injured, very intoxicated, and ended up facedown on her pillow. JA 1550–51. The defense argued that Mr. Huguely and Ms. Love had wrestled, that Mr. Huguely had tossed Ms. Love on the bed and left, and that Mr. Huguely had no reason to think his actions could cause death. The defense also argued that there was significant controversy about the amount of force required for fatal injury. While the prosecution would argue torque in the lower brain caused bleeding, the defense promised to present an expert to say that blood in Ms. Love's brain was the result of reperfusion caused by CPR. JA 1538–39, 1554.

23. The prosecution offered a number of expert witnesses who opined not only that Ms. Love's death had been caused by blunt force trauma, but also that CPR could not

[8] The prosecution received virtually no evidentiary support for this argument. Dr. Gormley testified that a small area of hemorrhage on Ms. Love's neck suggested blunt force pressure, which could cause the heart to slow or stop, but that there was no way to tell how much pressure was applied to the carotid body or what effect, if any, it had. JA 2726–30. Moreover, stimulation of the carotid body could occur due to incidental factors and Ms. Love lacked bleeding that would have suggested greater pressure. In sum, these injuries could have been unintentional or due to a quick grab. JA 2777–78. Dr. Gormley admitted that the alleged neck bruises were not documented as bruises in his first report, that he could not say they were finger marks, and that there were no injuries consistent with uniform pressure or two hands exerting force. JA 2772–73. Furthermore, he saw no bruising in the neck muscles, fractured neck bones, or damage to the windpipe or larynx. JA 2774–75.

have caused her brain injuries. Dr. William Gormley, then Assistant Chief Medical Examiner, conducted Ms. Love's autopsy. JA 2689, 2713. Dr. Gormley testified that Ms. Love's toxicology was positive for amphetamines within a therapeutic range and that her alcohol level (.14) was not consistent with causing death. JA 3044–47. He testified that Ms. Love had some bruises that could have been caused by grabbing, but no big pattern of injuries suggesting significant grabbing. He also testified that it is impossible to determine the age or amount of force from a bruise, and that he doubted every identified bruise occurred near Ms. Love's death. JA 2715–19, 2721, 2724–25, 2778–83.

Dr. Gormley testified that Ms. Love's facial injuries could be consistent with smothering, but other suggestions of asphyxia were missing. JA 2734–39. Her facial and mouth injuries were consistent, however, with a single impact event such as falling on the floor. JA 1739, 2768–72. Dr. Gormley opined that Ms. Love had subscapular bruising consistent with blunt force injury to her skull and could have died from a head injury, but that it was difficult to determine the magnitude of force. One was more likely to get a fracture with more force and Ms. Love had no skull fractures. JA 2749–50, 2757–60, 2766–67. Moreover, the lack of injury to the brain at the site of the subscapular injury suggested pressure over a relatively broad area, again consistent with falling on the floor. JA 2758, 2760–62. Additionally, all of the injuries were to the right side of Ms. Love's face, and a contusion and abrasion under her chin were consistent with carpet. JA 2763–65. Dr. Gormley ultimately opined that Ms. Love likely died from blunt force injury to the head, which caused brain injuries that resulted in cardiac arrhythmia, which then caused death. JA 3062–66. Notably, this opinion did not rule out the possibility that the

blunt force involved was a fall to the floor—in fact, Dr. Gormley allowed that this was entirely possible.

24. When Dr. Gormley examined Ms. Love's brain, he saw only a little subarachnoid hemorrhage around the base, as opposed to a massive hemorrhage that could cause death. JA 2749–53. Neuropathologist Dr. Christine Fuller then cut the brain with CME staff. JA 2735, 2803–14. Dr. Fuller noted a contusion to the left temporal lobe that she opined was caused by blunt force trauma like a fall or being punched against a wall. JA 2846–60. The contusion might not cause problems in a person without other injuries, however, and the hemorrhage did not cause problems for Ms. Love. JA 2861–62. Dr. Fuller admitted that Ms. Love had no skull fractures, brain lacerations, or subdural hematomas. JA 2902–03. She testified that a bruise to the eye would suggest a punch, but that it could occur from contact with the floor. JA 2904–08.

Dr. Fuller also noted a contusion on the opposite side of the brain and testified that this signified a rotational injury. JA 2862–64. There were small dots of hemorrhage (petechial hemorrhage) in the area connecting the pons and cerebellum and a smaller hemorrhage to the brain stem. JA 2868–70, 2874–87. Dr. Fuller testified that contusions in the brain stem could be significant, because there are vital structures there, and injury could cause death due to respiratory or cardiac arrest. Death would be immediate or within a couple hours. Dr. Fuller did not have access to a particular stain, however, so Dr. Lopes became involved in the case. JA 2872–73, 2892–94, 2917–19.

25. Dr. Maria-Beatriz Lopes, an expert neuropathologist, testified that she was asked to review the case after Dr. Fuller. JA 2939–47. Dr. Fuller had looked for evidence Ms. Love's brain contusions were associated with trauma—such as axonal

swelling and retraction balls—but needed beta-APP staining to look for axonal damage when other evidence could not be found. JA 2952, 3030–32. Notably, although axonal damage is common in trauma patients, beta-APP staining simply identifies ischemic neurons (ones that lack oxygen or blood flow and thus are not working properly). JA 2974–75, 2981–84. Thus there is no way to discriminate between axonal damage resulting from trauma or just a lack of oxygen. In other words, the exact same changes could be seen without trauma "in many situations." *See* JA 3032–34.

Dr. Lopes noted edema (swelling) in the brain caused by the cells lacking oxygen. JA 2953–57. This oxygen deficiency could be due to hemorrhage, dysfunction of other organs, or injuries to the brain, including areas of the brain stem affecting the heart. JA 2958–60. Dr. Lopes opined that contusions in the brain stem could be from rotation of the brain or the brain stem, and that the brain stem is very sensitive to axon rotation, which could cause edema. JA 2963–73. Edema could damage stimulation of the cardiac and respiratory areas and cause arrhythmia or arrest. JA 2975–79. In sum, Dr. Lopes opined that Ms. Love's lesions resulted from trauma but—like Dr. Gormley and Dr. Fuller—could not say the mechanism or degree of force needed. JA 3009, 3019–22. Dr. Lopes also admitted that edema could occur independent of trauma and that she could not rule out other causes of death such as cardiac arrhythmia or pulmonary and respiratory failure. She declined to offer an opinion as to whether Ms. Love's death was inevitable. JA 3030, 3034–35. In sum, the prosecution's neuropathologists and the medical examiner all left open the possibility that Ms. Love's death could have been caused by a fall to the floor and was not inevitable.

26. The prosecution also offered expert testimony regarding contusions in Ms. Love's heart. Dr. Gormley opined that CPR probably caused the contusions. JA 2740, 2786. Dr. Renu Virmani, a cardiac pathologist, was retained to determine if something was wrong with Ms. Love's heart that could have led to death. JA 2231–44. Dr. Virmani observed only "minor changes in the heart which could not explain her cause of death." JA 2246. Dr. Virmani testified that chest compressions force the sternum into contact with the heart and can cause injuries, especially when done aggressively, and that hemorrhage in Ms. Love's heart was due to CPR compressions and not a preexisting condition. JA 2252–63, 2270–72. Dr. Dilaawar Mistry, primary care physician for UVA athletes, testified that Ms. Love had no heart abnormalities. JA 1975, 1981–90.

27. On February 15, 2012, the prosecution presented testimony from ten witnesses and then rested. The defense began its case that afternoon with the testimony of Dr. Alphonse Polkis, a toxicology expert who opined that Ms. Love's blood alcohol content at approximately 11:45 P.M. was at least .16, and likely .17–18. Dr. Polkis testified that Ms. Love would have been drunk and had severe impairment of judgment, decision-making, reasoning, and emotional control. JA 3451–60.

28. Next, the defense presented testimony from expert neuropathologist Dr. Jan Leestma. JA 3476–91. Dr. Leestma, who had examined Ms. Love's brain, testified that most of the injuries to her head and face were caused by blunt force trauma but that the brain bleeding and swelling would have taken time to occur. JA 3502–08, 3518–24. Additionally, Ms. Love's corpus callosum was intact, despite often being lacerated and hemorrhaged in people dying from closed head trauma. Similarly, Ms. Love had no hemorrhages in white matter under the cerebral cortex, where there often would be in

persons dying from head trauma. Moreover, Dr. Leetsma noted that petechial hemorrhage in Ms. Love's brain stem appeared to be due to swelling and not a fast, concussive force. JA 3524–34. Ms. Love also lacked signs of shear force injury. JA 3534–36.

Dr. Leestma opined that none of Ms. Love's external injuries were severe enough to cause a fatal brain injury. JA 3551–52. Ms. Love lacked the pattern, extent, and typicality of intracranial pathology to explain death. Dr. Leestma opined that the changes to her brain must be due to lack of blood flow and oxygen, and the position of her body most logically contributed to that. JA 3569. Thus, he concluded that Ms. Love had died due to the deprivation of blood flow and oxygen to the brain, probably because of asphyxia. He testified that breathing in through a wet surface—like Ms. Love's pillow, which had secretions and blood—could cause asphyxia. JA 3566–67.

29. The defense had planned and promised to show that hemorrhage in Ms. Love's brain was caused not by trauma, but by reperfusion, the flow of blood back into the brain caused by CPR. As discussed in detail below, however, Dr. Leestma was the only witness to offer this theory. Dr. Leestma opined that restoring circulation into an empty and damaged blood vessel system caused hemorrhage, and that it was not true that reperfusion injuries would only show up in "watershed areas" of the brain. JA 3552–64. Moreover, beta-APP testing has no forensic value because there is no way to tell if the changes are traumatic or hypoxic, as Dr. Lopes admitted. JA 3545–48. In contrast, several prosecution experts had testified that it was impossible that Ms. Love's injuries had been caused by reperfusion. JA 2881–99, 2922–27 (Fuller); 2993–95, 3001–18 (Lopes); 1895–1920 (Dr. William Brady); 2273–75, 2283–84 (Virmani).

30. Ms. Quagliana, who was responsible for all of the medical witnesses, was sick the next morning. JA 3624–33.[9] In her absence, the parties argued jury instructions. JA 3634–3716. The following day, Mr. Lawrence took the position that he could go forward on other aspects of the case without co-counsel. Mr. Lawrence then went back on the record to state that Mr. Huguely disagreed and objected to proceeding without co-counsel. The Court overruled Mr. Huguely's objection. JA 3720–27. The defense—which had presented only two witnesses before counsel became sick—was forced to examine five of its eight witnesses without her. JA 3720–3822. Thus the majority of Mr. Huguely's defense was presented without half his legal team. This also forced defense counsel to abandon their plan to present the expert medical witnesses together.

31. In counsel's absence, the defense evidence included very limited testimony from biomechanical consultant Dr. Michael Woodhouse, who had inspected and scanned the drywall from Ms. Love's apartment. JA 3728–30. Dr. Woodhouse testified that there was no evidence of any type of impact, including contact with a head. JA 3730–34.

32. The next morning, the prosecution objected to any testimony from Dr. Ronald Uscinski, a clinical neurosurgeon, because trial counsel had violated the rule on witnesses by emailing defense experts Dr. Uscinski, Dr. Leestma, and Dr. Jack Daniel about the substance of prosecution experts' testimony. (Dr. Leestma had testified without the prosecution knowing this.) JA 3884. The defense argued that the violations were curable and not intentional, and that they were not "conscious" of the violations until the day prior, when they got an unspecified communication from a witness. JA 3885–89; *see*

[9] The defense produced affidavits attesting to counsel's sickness. JA 405–19 (affidavits).

also JA 4753–57 (relevant emails). In fact, Dr. Daniel—a planned expert witness who was then not called to testify—had notified counsel of the violation.

After voir dire and argument, the Court ruled that Dr. Uscinski would not be allowed to testify about reperfusion, reperfusion injuries caused by CPR, or the concept that cerebral-vascular damage makes someone susceptible to reperfusion injury. JA 3934–35. The Court stated, "This is very troublesome and I wouldn't have expected this from counsel and I'm incredibly disappointed with it, but this is an incredibly important issue for the parties and I'm not going to bar him from testimony generally, but I'm not going to let him testify about reperfusion . . . ." JA 3934–35.

33. The defense then presented testimony from Dr. Uscinski as their last witness. JA 3947. Dr. Uscinski testified that Ms. Love had external impact injuries, but no skull injuries and a relatively normal looking brain. JA 3959–60, 3962–67. Ms. Love had no subdural bleeding or significant bleeding around the brain's surface, nor brain contusions. Although there was certainly head trauma, there was no significant brain trauma. JA 3967–68. Dr. Uscinski testified that the hemorrhage on Ms. Love's temporal lobe was an insignificant hernia not likely caused by trauma. JA 3971–75, 3983–84. Dr. Uscinski testified that it would take a big hit to injure the pons directly, and that there was not enough evidence of external injury for the pons to have been injured by traumatic force. JA 3986–88. Dr. Uscinski further testified that none of the findings were consistent with blunt force trauma. He noted that the hemorrhages were all towards the base of the brain at or near bony structures, and that there was no bleeding inside the head. Furthermore, he pointed out that beta-APP identifies only axonal dysfunction, not necessarily injury. JA 3994, 4007, 4009–13. After Dr. Uscinski's testimony, the defense rested and made a

brief motion to strike. JA 4036–39. Later, the defense submitted a sparse proffer on Uscinski's excluded testimony. JA 4237–41, 4758.

34. In closing, the prosecution completely abandoned its theory of premeditated first-degree murder. The prosecution argued that Mr. Huguely

> had an extraordinary amount to drink that day beginning from an early hour following drinking the night before. By this time in his life, drinking to excess as many as four to five times per week, it wasn't merely noticeable. It was affecting his behavior . . . . It was such that his friends were concerned enough to know that they needed to do something about it.

JA 4081–82. The prosecution noted that there was "clear evidence that under the influence of alcohol [Mr. Huguely] can and will behave aggressively with callous disregard for the consequences," and that Mr. Huguely had personally acknowledged in a letter to Ms. Love that alcohol was ruining his life. JA 4082–83. The prosecution argued that malice could be found in the distorted logic of an abuser, and that the case was really about whether Mr. Huguely should be found guilty of felony murder or second-degree murder. JA 4118, 4128–30.

35. In response, the defense argued that Mr. Huguely's relationship with Ms. Love was volatile but not abusive. The defense's argument was disjointed and occasionally offensive. Trial counsel argued, "it's unlikely that none of us have never touched somebody that they love in a rude manner," and that "I should have killed you is just the same as my telling my child, I'm going to crush you." JA 4142–43. Counsel referred to the area where Ms. Love and Mr. Huguely lived as "the men's and women's lacrosse ghetto," and argued there is "almost a twenty-something ghetto of these young kids, and there's just lots and lots of drama going around and we've seen a bunch of really attractive people come here and you kind of wonder, I guess—maybe you don't

wonder. I mean, we were in college it was the same thing." JA 4139, 4146. The defense further argued that involuntary manslaughter was the only charge the jury should consider. JA 4196–98. The defense emphasized that Ms. Love's injuries were just as likely to have happened in a low-force event as a big-force event, and that falling off the bed would have been enough. JA 4161–66. In sum, the defense argued, it could not be inferred from the level of force that Mr. Huguely had intended to kill Ms. Love. JA 4164, 4172. Notably, in arguing cause of death, the defense pointed out that Dr. Leetsma "holds the opinion that the blood, *and this is a different than [sic] Dr. Uscinski holds*, but that the blood in the lower brain/upper brain was the result of the reperfusion." JA 4167 (emphasis added).

36. The prosecution argued in rebuttal that there was no intent requirement for second-degree murder, and the defense asked the Court to allow them to respond on the issue. The Court denied that motion but directed the jurors to the malice instruction and re-read part of it to them. JA 4211–16. During deliberations, it was clear that the jury was struggling with intent. The jury asked for a definition of reason as it pertained to instruction 21, the malice instruction. JA 4247–50. They later sent a note to the court stating that they read instruction 23 (all degrees of homicide) to contradict instructions 14 (indirect causation) and 15 (direct causation). Rather than answer, the Court asked the jury to clarify the question. The jury did not answer, and the defense later raised a concern about following up on the unanswered question. JA 4251–58, 4262–64.

37. The jury found Mr. Huguely guilty of second-degree murder and grand larceny. JA 4276. They acquitted him of first-degree premeditated and felony murder,

robbery, burglary with the intent to commit larceny, and statutory burglary with the intent to commit assault and battery. JA 4276. The jury was not polled. JA 4276.

38. Sentencing was brief and began immediately. The prosecution introduced certified convictions from a single January 2009 event for resisting arrest and drunk in public. The prosecution also offered testimony from Ms. Love's mother and sister. JA 4284–4300. Despite having substantial sentencing information available, the defense produced no evidence. JA 4300. In argument, the prosecution again argued Mr. Huguely's intoxication as aggravating, saying, "to say highly intoxicated only begins to describe it, but he's so intoxicated that he's unable to be an accurate observer of what-all he did and what-all those circumstances were but you know what the result was." JA 4308. After deliberations, the jury returned sentencing recommendations of twenty-five years on second-degree murder and one year on grand larceny. JA 4320. The jury's sentencing verdict was heavily influenced by unrebutted beliefs about the length of time it would take Mr. Huguely to overcome alcoholism.

39. On May 25, 2012, the defense filed a Motion to Set Aside the Verdict and For a New Trial. JA 234–307. The motion raised a Sixth Amendment violation for forcing Mr. Huguely to proceed without one of his lawyers, voir dire and jury selection claims, failure to sequester the jury, denial of a jury instruction on malice, the limitation of Dr. Uscinski's testimony, and sufficiency of the evidence claims regarding both charges. JA 251–52. On June 5, 2012, the defense filed a Supplemental Motion to Set Aside the Verdict and for a New Trial, raising the prosecution's failure to disclose favorable information as required by *Brady v. Maryland*, 373 U.S. 83 (1963). JA 308–12, 377–403. Prior to trial, the defense had received a letter stating only that the Loves would be

witnesses and that "a potential cause of action may be available to either or both the Loves under the circumstances." JA 310. The prosecution had not disclosed that civil attorneys had been retained and that preparations for a civil negligence suit against Mr. Huguely were being made. JA 310.

This *Brady* violation emerged when, after trial, the Loves filed a wrongful death suit against Mr. Huguely and then filed a motion requesting access to exhibits and trial materials. During the motion hearing, the Loves' attorney referred to "a longstanding relationship with the Commonwealth's Attorney's Office." JA 308. Mr. Huguely requested a hearing to develop evidence on this *Brady* issue. JA 311. On August 13, 2012, the Court denied the defense's motion for a new trial and motion for a continuance. JA 404. On August 15, 2012, the Court issued a letter opinion denying the defense's Supplemental Motion and an evidentiary hearing in support of that motion. JA 432–33.

40. On August 30, 2012, the Court sentenced Mr. Huguely to concurrent terms of twenty-three years for second-degree murder and one year for grand larceny. JA 434–36. At sentencing, the prosecution presented evidence about prior incidents in which Mr. Huguely's alcohol problem had led to altercations. In one incident, Mr. Huguely was intoxicated and swung at someone. Tr. Aug. 30, 2012 at 243–53. In another incident, Mr. Huguely assaulted a teammate because he had hooked up with Ms. Love; his teammate took responsibility for the inappropriate behavior, and both men eventually apologized to each other. *Id.* at 271–309. Ms. Claire Bordley, the daughter of Mr. Huguely's high school lacrosse coach, also testified that Mr. Huguely became angry with her because she told her father about Mr. Huguely's excessive drinking at UVA. *Id.* at 253–71. Mr. Huguely approached her at a bar while very intoxicated and put his hands

around her throat but did not choke or strangle her. *See id.* The defense presented character testimony from a family friend, an aunt and uncle, and a priest who ministered to him in jail. These witnesses testified to Mr. Huguely's loyalty, faith, honesty, talents, and caring nature. *Id.* at 313–64. The defense also presented alternative guidelines to argue at sentencing with the point of showing the court that if Mr. Huguely had been convicted of manslaughter instead of murder, his sentence would be vastly different. But trial counsel calculated those guidelines improperly as having a mid-point of three years and four months; when calculated correctly the guidelines suggest a sentence of probation. *See id.* at 309–10, 375. Again, the defense failed to present mitigating evidence of Mr. Huguely's struggle with alcoholism. And in fact, the Court noted,

> The jury heard virtually nothing in the way of mitigation. Alcohol was a complicating factor. Today the presentence report . . . there's no development of any alcohol issues, so I don't—other than seeing the evidence in the case we have very little information about what alcohol has been to Mr. Huguely. There is no mental health or substance abuse evaluation here.

Id. at 391.

41. On appeal, Mr. Huguely retained Mr. Craig S. Cooley of 3000 Idlewood Avenue, Richmond, VA 23211 and Mr. Paul D. Clement of Bancroft PLLC, 1919 M Street NW, Suite 470, Washington, D.C 20036. JA 437–38. Mr. Huguely filed a petition for appeal on January 22, 2013, raising five assignments of error. First, that the trial court "violated Mr. Huguely's right to counsel . . . by forcing him to proceed with trial in the absence of his retained counsel of choice." Pet. App. at 8, 10–11, 16–24. Second, that the trial court "violated Mr. Huguely's right to a trial by a fair and impartial jury" by refusing to order individual sequestered voir dire, limiting relevant questions in voir dire, refusing to strike jurors for cause, and declining to sequester the jury. Pet. App. at 8–9,

12–13, 24–40. Third, Mr. Huguely assigned error to the *Brady* violation. App. at 9, 13–14, 40–46. Fourth, the trial court failed to "adequately instruct the jury about the meaning of 'malice' under Virginia law." Pet. App. at 9, 14–15, 46–49. Finally, Mr. Huguely raised sufficiency of the evidence of second-degree murder. Pet. App. 9, 15–16, 49–54.

42. The Court of Appeals awarded Mr. Huguely an appeal on two assignments of error: the violation of his right to counsel, and the trial court's error in refusing to strike a single juror (Juror 32) for cause. *Huguely v. Commonwealth*, No. 1697-12-2 (Va. Ct. App. April 23, 2013). A three-judge panel then granted Mr. Huguely an appeal on his claims that the trial court refused relevant questions on voir dire, refused to strike for cause all of the jurors raised in Mr. Huguely's petition, and failed to adequately instruct the jury on the meaning of "malice." *Huguely v. Commonwealth*, No. 1697-12-2 (Va. Ct. App. June 14, 2013).

43. On March 4, 2014, the Court of Appeals issued a published opinion denying Mr. Huguely's appeal. *Huguely v. Commonwealth*, 754 S.E.2d 557 (Va. Ct. App. 2014). The Court denied a petition for rehearing on March 27, 2014. *Huguely v. Commonwealth*, No. 1697-12-2 (Va. Ct. App. March 27, 2014). Mr. Huguely then filed a petition for appeal in the Supreme Court of Virginia on April 25, 2014. The Court denied the petition on November 19, 2014. *Huguely v. Commonwealth*, No. 140678 (Va. Nov. 19, 2014). Mr. Huguely filed a petition for rehearing, which was also denied. *Huguely v. Commonwealth*, No. 140678 (Va. Jan. 15, 2014).

44. On June 12, 2015, Mr. Huguely filed a petition for a writ of certiorari in the United States Supreme Court. Mr. Clement, Mr. Jeffrey M. Harris, and Mr. C. Harker

Rhodes IV of Bancroft PLLC, 500 New Jersey Ave. NW, Washington, D.C. 20001 represented Mr. Huguely. On October 5, 2015, the United States Supreme Court declined to hear Mr. Huguely's case. This timely habeas petition follows. Mr. Huguely has not filed any other post-conviction applications.

STANDARD OF REVIEW

45. The burden is on the petitioner to prove his habeas claims by a preponderance of the evidence. *Green v. Young*, 571 S.E.2d. 135 (Va. 2002). This Court may grant discovery for good cause. Va. Code §§ 8.01-654(A) & B(4); 8.01-660.

CLAIMS

Claim I: Huguely's Rights to a Fair Trial before an Impartial Jury, Due Process, and to Confront Witnesses against Him were Violated Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Virginia Constitution Art. I § 8, when a Court Officer Gave the Jury a Dictionary During Deliberations and the Jury Consulted the Dictionary for the Meaning of Malice, the Main Issue at Trial.[10]

Without the knowledge of Mr. Huguely, the jury used a dictionary provided by a court officer to define "malice." This was a close case and the main issue was clearly malice. If malice existed, Huguely was guilty of second-degree murder; if not, manslaughter. The trial judge's jury instructions, informed by consultation with the parties, were the only permissible source of instruction on legal terms. When an external influence may have effected jury deliberations, prejudice is presumed and unless the Warden can show the error was harmless beyond a reasonable doubt, the only remedy is to grant the writ for a new trial.

[10] Huguely believes there is no evidence that could have alerted trial counsel to this claim previously. If, however, this Court finds that the issue is defaulted or that trial counsel should have raised this issue, then Huguely also contends that the failure of trial counsel to raise this claim deprived him of his Sixth Amendment right to the effective assistance of counsel.

i. The Jury Used a Dictionary Provided by a Court Officer to Define Malice

During deliberations a juror asked for and was provided a dictionary from a court officer without the knowledge of Mr. Huguely. Juror 42 Decl. ¶ 7. At least one juror used this dictionary to look up the word "malice," and then continued deliberating. *Id.* At least one juror concluded that using the dictionary to define "malice" "helped in deciding if there was malice and whether it had been shown in these charges." *Id.* The jury then convicted Huguely of second-degree murder.

ii. The Issue of Malice was the Most Hotly Contested Issue at Trial

Opening arguments of both sides focused on malice. Most of the evidence—including the expert medical evidence, Mr. Huguely's interrogation video, and much of the lay witness testimony—was elicited solely to support the Commonwealth's theory of malice or to negate Mr. Huguely's theory that he did not act with malice. During arguments on jury instructions, the longest and most heated battle was over the definition of malice. During closing argument, the defense and prosecution hotly disputed the level of intent required to show malice. JA 4190–95, 4211–16. In fact, defense counsel objected several times to the Commonwealth's interpretation of malice during closing and even asked the court to allow the defense sur-rebuttal to re-argue the malice instruction. JA 4212–14. The court took the highly unusual step of then bringing to the jurors' attention only the instruction on malice, #21, and *re-reading part of the malice instruction* to the jury after closing arguments, ensuring that the jury knew that this was the key issue for its deliberations. Jury deliberations were difficult, and took more than nine hours. During deliberations the jury asked for a "definition of reason as it pertains to" the malice instruction. JA 4247–48. The jury also asked for help because it

interpreted instruction 23 (all degrees of homicide) to contradict instructions 14 (indirect causation) and 15 (direct causation). JA 4251–57. Rather than answering, the court sent the jurors back a question asking, "Can you please clarify your question." JA 4258.

All the instruction and argument about malice was not lost on the jury. After the verdict, the jury forewoman explained that malice was the most important issue during deliberations. "'We had two big argument points in the jury room,' says [Serena] Gruia, one being the nature of the computer theft and the other being related to the difference between second-degree murder and voluntary manslaughter. The distinction the jury had to parse was between malice, which is a factor in second-degree murder, and the heat of passion. 'Part of the instructions we had were that inherent in malice are deliberate, willful, and cruel actions. With several academics on the jury, there was a lot of stress on words, at some times maybe too much.'"[11]

iii. An External Influence on Jury Deliberations Must Result in a New Trial Unless the Commonwealth Can Prove That the Error Was Harmless Beyond a Reasonable Doubt

"The right of an accused to a fair trial before an impartial jury is a fundamental precept in our jurisprudence, protected by both state and federal constitutions." *Scott v. Commonwealth*, 399 S.E.2d 648, 650 (Va. Ct. App. 1990) (en banc). "No right touches more the heart of fairness in a trial." *Id.* (quoting *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988)). "Private communications, possibly prejudicial, between jurors and third persons . . . or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id.* (quoting *Mattox v. United,* 146

[11] Cathy Harding, *Inside the Jury That Convicted UVA Student George Huguely of Murder*, SLATE (Feb. 23, 2012, 8:28 PM), http://www.slate.com/articles/news_and_politics/crime/2012/02/george_huguely_convicted_of_second_degree_murder_in_yeardley_love_case_how_the_jury_decided_.html

U.S. 140, 150 (1892) (noting that whether the influence is a court officer present in the jury room, an unauthorized communication, the reading of a newspaper about the case or other "objectionable matter" the rule is the same)).

Over fifty years later the Supreme Court again addressed the "allocation of the burden." *Scott*, 399 S.E.2d at 650. Any "tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, *but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant*." *Id.* (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)).

In *Scott*, the defendant was convicted of robbery and after conviction discovered that several jurors heard a jury officer make improper comments, jokingly referring to juries as too "lenient." 399 S.E.2d at 649. The trial judge denied Scott's motion for a new trial, stating that Scott "failed to meet the burden of proving harmful influence." *Id.* at 650. The Court of Appeals reversed, *en banc*, for a new trial, finding the trial court improperly applied the presumption of prejudice. The court found that the comment was "patently improper" and "posed a potential for prejudice that was not overcome on this record." *Id.* The court found that the potential harm was worse, because of the "official nature by which the message was conveyed" by a court officer. *Id.* at 651. Scott met his burden by "showing that the jury officer made these improper comments to the potential jurors," and so that "was sufficient to shift a heavy burden upon the Commonwealth to prove that the comments were harmless." *Id.*

The *Scott* court found irrelevant the fact that only three of the twelve jurors testified to the comments and that all stated the comments did not influence their deliberations. "Scott was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id.* at 651. The test is not "whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced." *Id.* (quoting *Evans-Smith v. Commonwealth*, 361 S.E.2d 436, 447 (Va. Ct. App. 1987) (reversing for a new trial because defendant proved that an external influence—an almanac—was used by some jurors to determine sunrise on the day of the crime and the defendant "might have been so prejudiced" because "the purpose for which the evidence, *aliunde,* was considered went to an ultimate issue in the case.")

iv. Huguely Must be Given a New Trial Because his Jury Used a Dictionary to Define Malice and thus Determine the Existence of the Ultimate Issue in his Case

In this case, Mr. Huguely's jury asked for and was given a dictionary without the knowledge of Mr. Huguely. Juror 42 declaration, filed under seal. A dictionary is an unauthorized external influence. *McNeill v. Polk*, 476 F.3d 206, 226 (4th Cir. 2007) (use of a dictionary an external influence); *United States v. Duncan*, 598 F.2d 839, 866 (4th Cir. 1979) (same). The provision of the dictionary in this case was worse than the use of the almanac in *Evans-Smith*, because here a court officer provided the dictionary, so its use carried with it the imprimatur of the court. Further, the jury used the dictionary to define the ultimate issue in the case: whether the killing of Yeardley Love was done with malice. The "concept of malice goes to the very heart of the deliberative process of a jury in a murder case." *Marino v. Vasquez*, 812 F.2d 499, 506 (9th Cir. 1987). In addition, the issue of malice in this case was more central to the issues in dispute than the

sunrise in *Evans-Smith*. The evidence, argument, and the law of malice were hotly contested.

There was much evidence suggesting that Mr. Huguely lacked the requisite intent for second degree murder, and that would have supported a finding by the jury of manslaughter. "If a killing results from negligence, however gross or culpable, and the killing is contrary to the defendant's intention, malice cannot be implied." *Essex v. Commonwealth*, 322 S.E.2d 216, 280 (Va. 1984). Mr. Huguely presented significant evidence that the killing was contrary to his intention. The tape of the interrogation reveals his shock and disbelief upon hearing of Ms. Love's death. Mr. Huguely described Ms. Love as his best friend and one of the people he loved and cared for most. The Boylan Heights video from the Saturday night prior to Yeardley Love's death showed Mr. Huguely and Ms. Love holding hands. Huguely was heavily intoxicated before his altercation with Ms. Love. The testimony of the Commonwealth's medical experts was heavily disputed at trial, and except for the forced entry to the door, Yeardley Love's bedroom did not reveal evidence of a significant violent struggle. The jury would have been easily justified in finding that Huguely lacked the requisite intent for malice, and was therefore only guilty of manslaughter. Thus the definition of "malice" was vital to the case.

Further, in the thirty-eight pages of jury instructions there is, without a doubt, no more important word than "malice" in this case. Malice is a legal term of art that no common dictionary definition would properly define. In *In re Collins' Will*, 15 A.2d 98, 99 (N.J. Cir. Ct. 1940), a court officer brought the jurors a dictionary when requested. The court explained the problem in using a dictionary for jury instructions:

> Obviously the act of the constable was stupid and unjustifiable. The dictionary was incompetent evidence and if offered in evidence at the trial to aid the jury, it would have been excluded. Here no use of the dictionary could be proper. Where an inadmissible writing, book or article improperly reaches the jury during their deliberations, the primary inquiry is whether such extraneous object was of a character likely to prejudice, influence or mislead the jurors in their deliberations. Assuredly, the use of a simplified English dictionary to explicate established principles of law as expressed in language approved by our courts is beyond the avowed scope of such a work and in such use, misguidance is more than probable.

Id. (internal citations omitted).

In this case, the jury used an improper external influence to define malice and thus determine the central issue in this case. Clearly Mr. Huguely might have been prejudiced. Under the unique and compelling facts of the importance of malice in this case, the Warden could not show that this error was harmless. Because the use of this external influence violated Huguely's rights to a fair trial before an impartial jury, due process, and to confront witnesses against him, this Court must grant the writ and provide Mr. Huguely a new trial. In the alternative, this Court should hold an evidentiary hearing at which Mr. Huguely will prove that an external influence was used to determine a matter at issue in this case.

Claim II: Trial Counsel provided ineffective assistance of counsel by inadvertently keeping expert testimony from the jurors on the key issue of cause of death when their violation of the rule on witnesses led to the exclusion of expert testimony regarding CPR and reperfusion.

The Legal Standard of Ineffective Assistance of Counsel ("IAC")

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684–86 (1984). A Sixth Amendment claim of ineffective assistance of counsel "is an attack on the fundamental fairness of the proceeding." *Id.* at 697. To establish an

ineffective-assistance claim, the defendant must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Id.* at 687.

In determining if counsel's performance was deficient, reviewing courts judge "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Thus, although "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," a court must look ultimately to the reasonableness of counsel's performance in light of contemporary professional norms. *Id.* at 689–90. "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688). In addressing the performance prong of ineffective-assistance claims, the Supreme Court of the United States has long looked to professional sources that summarize prevailing norms, such as those promulgated by the American Bar Association. *See, e.g.*, *Padilla*, 559 U.S. at 366–67 (citing to indigent defense performance guidelines, law journals, bar standards, and practice manuals to assess prevailing professional norms); *Strickland*, 466 U.S. at 688 (referring to American Bar Association ("ABA") and other standards as "guides to determining what is reasonable").

To demonstrate that counsel's deficiency caused prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court in

Strickland clarified that, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The Supreme Court has further elaborated that the reasonable probability standard is a standard *lower* than "more likely than not." *See Holland v. Jackson*, 542 U.S. 649, 654 (2004) ("The quoted language does not imply any particular standard of probability."); *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) (noting that *Strickland* "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered").

Trial counsel performed ineffectively by violating the rule on witnesses and thereby causing vital expert testimony to be excluded from trial. Cause of death was the central issue in this case and the focus of expert testimony. From the beginning, the prosecution asserted that Ms. Love had died of brain injuries caused by blunt force trauma to the head, and promised expert testimony on those brain injuries. JA 1500–01. The defense countered that Ms. Love probably had died from positional asphyxia. JA 1550–51. The defense's asphyxia theory required, however, that they be able to explain the cause of Ms. Love's brain injuries (specifically, the subarachnoid hemorrhage). Expert testimony on reperfusion injury was the defense's entire plan for doing so. Yet trial counsel violated the rule on witnesses by emailing the defense medical experts about reperfusion issues that had arisen during prosecution experts' testimony. As a sanction, the trial Court barred the defense from presenting expert testimony by Dr. Uscinski on the issue of reperfusion. Violating the rule was obviously deficient, and the resulting deprivation of evidence was clear prejudice.

i. Factual Background of the Issue

"Reperfusion" is the restoration of blood flow to a tissue or organ, and "reperfusion injury" is injury caused by the blood flow restoration process. In opening argument, the defense promised the jury expert testimony that:

> the blood that they find in the base of the brain is a result of the thirty (30) minute CPR which caused what is called reperfusion and as the body, basically, you'll know from the EMT people that CPR, and you may know it, those of you who know how to do it. CPR is incredibly forceful and I think they'll tell you an inch or an inch and a half of the chest is done and that happens a hundred (100) times a minute for thirty (30) minutes to that's not—the blood at the bottom of the brain way more likely came from that than from anything that George did and it couldn't have come from anything that George did.

JA 1553–54.

Because this was the defense's theory, the prosecution used its numerous medical experts not only to opine that blunt force trauma was the cause of death, but also to rule out reperfusion as a possible cause Ms. Love's brain injuries. This included testimony from Dr. William Brady, an expert in CPR and emergency medical services, used primarily to counter the reperfusion theory. JA 1895–1904. Dr. Brady opined that CPR had been appropriately conducted and could not have caused bleeding in Ms. Love's brain. Dr. Brady testified that chest compressions could create a blood pressure of only 80–100, which was too low to cause brain injury. JA 1905–09, 1914–17. Further, blood pressure decreases away from the place of compression, making it very unusual to achieve elevated blood pressure throughout the body. Dr. Brady stated that he had read animal studies regarding reperfusion injury, but not human studies. He explained that he had read one or two case reports noting hemorrhage or contusion in remote areas of the

body due to CPR, "but in the grand scope and landscape of international resuscitation, it is not a recognized entity." JA 1916–18.[12]

Before 9:00 A.M. on February 10, the day after Dr. Brady testified, trial counsel sent the following email about Dr. Brady's testimony to Drs. Leestma, Uscinski, and Daniel:

> They had a cardiac/er guy testify yesterday that CPR would produce blood pressures of 80 to 100, but that BP would not be that high in the extremities (meaning the brain). He acknowledged that organs would be damage by lack of blood and oxygen; brain is particularly susceptible; vascular system was possibly damaged, but he said he didn't have any experience with such a thing. Let me know your thoughts. More this afternoon re scheduling.

JA 4755. Dr. Daniel responded directly to counsel. JA 4755.

That morning, the prosecution offered testimony from Dr. Virmani, a cardiologist, to contradict the reperfusion theory. Dr. Virmani testified that if CPR had caused hemorrhage in Ms. Love's brain, one would see much more hemorrhage in her heart. JA 2273–74. Virmani also testified that she had never seen hemorrhage from CPR in remote parts of the body, but acknowledged that she is not a neuropathologist. JA 2274–75, 2283–84. Shortly before 1:00 P.M. on February 10, trial counsel sent an email to the three defense medical experts with the subject line "dr. Virmani." The email read in relevant part:

> She ended up testifying that cpr caused the small area of bleed on the heart and did not attribute the small area of bleeding to trauma (which is what I feared). They used her to say this girl's heart wasn't defective or diseased to rule out that she died of some natural cause.
>
> She said that if you had reperfusion injury anywhere, it would be in the heart and that she's never seen that kind of injury. She said that you

[12] Notably Dr. Brady did acknowledge that Ms. Love had a focal epicardial hemorrhage (a hemorrhage in one small area of the exterior muscle of her heart), and that this was an unusual effect of CPR. JA 1920.

> can have bleeding on the heart with brain injury but not the other way around. I pointed out in my cross the obvious—this isn't "her area" of expertise. *However, the jury is waiting to hear from someone with the right expertise that CPR creates enough blood pressure in the body to sufficiently perfuse the brain with blood so as to potentially cause injury.* We don't have a cardiologist or ER guy, so one of you will have to talk about this. Any volunteers?

JA 4735 (emphasis added). This time, Dr. Daniel responded to counsel and the other doctors.

On February 14, the prosecution presented testimony from their two neuropathologists, Drs. Fuller and Lopes, contradicting the reperfusion theory. Dr. Fuller testified that reperfusion injury is the controversial concept that the little blood that gets to the brain during CPR has almost no pressure. Consequently, cells lack oxygen and are on the edge. When blood returns, the injured cells can be further damaged by oxygen. JA 2894–97. Dr. Fuller opined that there was no evidence of reperfusion injury in this case because it usually causes a swollen brain and discoloration. JA 2898–99. Furthermore, petechial hemorrhages within the brain have never been associated with CPR, and the distribution of Ms. Love's hemorrhages is associated with blunt force trauma to the head. JA 2881–85. Finally, there was no evidence that Ms. Love had ever independently resumed cardiac rhythm. JA 2898. Dr. Fuller acknowledged, however, that Dr. Lopes had referred to reperfusion research at the end of her report. JA 2922–27.

Dr. Lopes testified that Dr. Gormley asked her to look for cases of patients surviving CPR with subarachnoid hemorrhage, and that she had found two. JA 2993–94, 3009–18. Like Dr. Fuller, however, she testified that reperfusion lesions tend to occur when someone is resuscitated and that there is no sign Ms. Love ever resumed cardiac rhythm. JA 2995, 3001–05. She also testified that reperfusion lesions tend to be in

boundary zones ("watershed areas") that are sensitive to low oxygen, and that Ms. Love had no lesions in those zones. JA 3001–06. That afternoon, counsel again emailed the medical experts about witness testimony on reperfusion:

> Testimony that was offered today included that all the areas of bleeding were at locations near a bony structure or a "leathery" type structure so the brain was bouncing off or being scraped by these areas, which is why they seem to be contusions. There was a lot of testimony about sheer [sic] force injury from turning or torsion. There was testimony that the fact that the lesions were at the surface of the gyrus means they were from trauma. Dorso lateral injury always means trauma. There was testimony that while there have been 2 cases documented of reperfusion injury resulting in subarachnoid hemorrhage, there are no cases involving bleeding into the interperenchymal (sp) area. *Dr. Lopes testified that true reperfusion injury involves bleeding only into "watershed" areas of the brain.* She had a picture of such an event (brain that was autopsied). There was testimony about the blood brain barrier and ostrocites (I think). Thoughts?

JA 4756 (emphasis added). Both Dr. Uscinski and Dr. Daniel replied all to the email, and Dr. Daniel later emailed counsel a separate response. JA 4756–57.

Dr. Uscinski's response made clear that he was capable of responding on the issue of reperfusion, including Dr. Lopes's assertion that reperfusion injuries tended to be present only in the "watershed zones":

> Reperfusion in the "watershed area" may lead to bleeding if that alone is the area deprived of enough oxygen for neurons to die. This case involves an individual who was found without no pulse or blood pressure, no respirations, and no evidence of any clinical brain activity. That would not be expected to involved only the watershed area, the whole brain has been deprived, else there would have been a pulse and blood pressure and therefore some form of perfusion, ie a different clinical scenario. Sounds OK in a superficial sense but not on when subjected to a little more thinking.
>
> I suspect the pathologists will agree to that (the defense ones, that is).

JA 4756.

After these email exchanges, Dr. Daniel notified counsel of his concern that they may have violated the rule on witnesses. Declaration of Dr. John S. Daniel, III, M.D. at 7. Trial counsel then brought the emails to the attention of the prosecution and provided them with copies. When the parties returned to court on February 18, the prosecution objected to Dr. Uscinski's testimony. The defense argued that the violations were curable and that they had not been "conscious" of the violations until the day prior, when they got a communication from an unspecified witness. JA 3885–89. Dr. Uscinski was subjected to voir dire on this issue and stated that he did not recall knowing about the rule on witnesses. Once shown the emails, Dr. Uscinski testified that he had received them but did not recall reading them. JA 3891–3903. Dr. Uscinski acknowledged, however, that he had replied to an email regarding prosecution evidence on reperfusion in watershed areas. Dr. Uscinski stated that he had been prepared already to talk about reperfusion, but not in watershed areas. Dr. Uscinski added that he was no more prepared to testify now about reperfusion than he would have been in the first place because this was background knowledge. JA 3908–12, 3923. Uscinski also testified that when working with a lawyer, he assumes the lawyer is acting properly. JA 3919.

After argument, the Court ruled that Dr. Uscinski would not be allowed to testify about reperfusion, reperfusion related injuries caused by CPR, or the concept that cerebral-vascular damage makes someone susceptible to reperfusion injury. JA 3934–35. The Court stated, "This is very troublesome and I wouldn't have expected this from counsel and I'm incredibly disappointed with it, but this is an incredibly important issue for the parties and I'm not going to bar him from testimony generally, but I'm not going to let him testify about reperfusion . . . ." JA 3934–35. Significantly, trial counsel failed

to offer the Court alternative sanctions that would have been less detrimental to Mr. Huguely. Thus Mr. Huguely was left without the testimony of an expert clinical neurosurgeon and forensic pathologist on the topic of reperfusion injury.

ii. Deficient Performance

An attorney performs deficiently when he or she violates the rules to his client's detriment. This is particularly true where an attorney violates the well-known rules of trial, thereby depriving the client of a willing, capable, and valuable expert. The United States Supreme Court has said that whether performance is deficient is "necessarily linked to the practice and expectations of the legal community . . . ." *Padilla*, 559 U.S. at 366 (2010). As set forth above, the legal community's expectations are assessed according to professional norms such as those promulgated by the American Bar Association. In this case, trial counsel's performance fell short of the most basic standards of defense representation. *See, e.g.*, CRIM. JUST. STANDARDS COMMITTEE, A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) ("ABA STANDARDS: DEFENSE"), Standard 4-1.2(e), at 120 ("Defense counsel . . . is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct."); *id.* at Standard 4-1.2(h), at 121 ("It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal professional applicable in defense counsel's jurisdiction.").

One of the most basic standards of professional conduct is that attorneys, who are officers of the court, will follow the rules and orders of the court. *See, e.g.*, Virginia State Bar, Professional Guidelines, at "Preamble," *available at* http://www.vsb.org/pro-guidelines/index.php/rules (last visited Jan. 9, 2016) ("A lawyer is . . . an officer of the

legal system . . . . As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system . . . . A lawyer's conduct should conform to the requirements of the law . . . ."); *id.* at Rule 3.4 ("A lawyer shall not . . . Knowingly disobey . . . a standing rule or a ruling of a tribunal . . . ."). As the Court stated, however, trial counsel's conduct in violating the rule was "very troublesome and I wouldn't have expected this from counsel and I'm incredibly disappointed with it . . . ." JA 3934–35.

Moreover, at the risk of stating the obvious, the basic standard of defense representation at trial is to provide a defense—not to get a defense barred. *See* ABA STANDARDS: DEFENSE, Standard 4-1.2(b), at 120 ("The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."); *see also Strickland*, 466 U.S. at 688 ("Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant . . . . From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause . . . ."). Thus the well-established standards are that attorneys must be aware of and follow rules and rulings, and that defense counsel must advocate the defense. In this case, trial counsel both violated the rules and deprived Mr. Huguely of a crucial part of his defense rather than advocating his defense. This constitutes deficient performance.

iii. Prejudice

Trial counsel's deficient performance was indisputably prejudicial. As noted above, prejudice "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Supreme

Court has explained that this standard is *lower* than "more likely than not." *See Woodford*, 537 U.S. at 22 (noting that *Strickland* "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered"). In this case, trial counsel's violation of the rule on witnesses eviscerated the planned and promised defense on cause of death—the key issue in the case—by barring testimony on reperfusion.

It is inarguable that one result of trial counsel's actions was that Mr. Huguely was not allowed to present testimony from Dr. Uscinski concerning reperfusion. JA 4758. But, as discussed in more detail *infra* Claim III, another result was that defense counsel failed to present testimony from Dr. Daniel, who was prepared to discuss reperfusion injury. Because the defense did not call Dr. Daniel as a witness, the Court was never asked to rule on whether he could testify about reperfusion. It seems likely from the Court's ruling on Dr. Uscinski, however, that the Court also would not have allowed Dr. Daniel to testify about reperfusion. When trial counsel emailed the medical experts concerning Dr. Virmani, she wrote, "We don't have a cardiologist or ER guy, so one of you will have to talk about this [reperfusion]. Any volunteers? We need you all to be here Wednesday; Jack, if needed, could you come over Tues. afternoon?" Dr. Daniel had replied with his thoughts on Dr. Virmani's testimony, concluding, "I do not believe there is an adequate evidence base currently available to show either generally that CPR cannot cause hemorrhages like these in persons recently deceased from asphyxia, or especially to establish that CPR did not cause the hemorrhages in this particular case." JA 4753. Similarly, Dr. Daniel had responded to emails concerning Dr. Brady's and Dr. Lopes's

testimony. JA 4755–57. Given these exchanges, Dr. Daniel likely would not have been allowed to testify about reperfusion.

Thus, the effect of trial counsel's violation of the rule was that only one of the defense's three expert witnesses testified about reperfusion. This was significant because cause of death was one of the most important issues in Mr. Huguely's case, and was the focus of the vast majority of expert testimony. In opening arguments, both sides had offered competing theories of how Ms. Love had died, and both of these theories included an explanation of what had caused her brain injuries. The prosecution pointed to blunt force trauma to the head. But for the defense, it was crucial to offer an alternate explanation, and the defense told the jury from the beginning that reperfusion injury was that explanation. Indeed, the very emails that violated the rule on witnesses made clear how important the issue was to the defense. *See* JA 4753 ("[T]he jury is waiting to hear from someone with the right expertise that CPR creates enough blood pressure in the body to sufficiently perfuse the brain with blood so as to potentially cause injury.").

Moreover, because trial counsel failed to fulfill the promise to support a reperfusion theory, the prosecution was able to argue in closing that "[t]here's no medical evidence supporting the theory that intraparenchymal, petechial hemorrhages are caused by anything else than trauma." JA 4106 (citing the testimony of Drs. Fuller, Lopes, and Brady). Before the rule on witnesses was violated, however, trial counsel planned to call Dr. Daniel to give exactly that evidence. If he had been called and allowed to testify on reperfusion, Dr. Daniel would have testified that intraparenchymal petechial hemorrhages are not specific for trauma and can certainly be caused by other things besides trauma, including increases in intracranial pressure. Dr. Daniel's Declaration at __.

The imbalance of expert opinion was particularly prejudicial given that this was a very close case in which the prosecution's experts agreed that Ms. Love was intoxicated and that her head injury could have been caused by a fall. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. "In a close case, the failure of defense counsel to present certain evidence or effectively challenge the state's evidence on important issues can be particularly prejudicial." *Dugas v. Coplan*, 428 F.3d 317, 335–36 (1st Cir. 2005). This is particularly true when viewed in light of the defense's unfulfilled promise to present a reperfusion theory. *See Miller v. Senkowski*, 268 F. Supp. 2d 296, 313–15 (E.D. N.Y. 2003) (finding cumulative prejudice in a close case where the defense attorney failed to produce expert testimony and failed to "follow[] through on the theory espoused during his opening as the key to Petitioner's defense," and noting that "[i]n a close case such as this one . . . these errors take on a special importance.").

"This case lay on a knife edge, and it would not have taken much to sway at least some jurors towards acquittal. Accordingly, the threshold for prejudice is comparatively low because less would be needed to unsettle a rational jury." *Dugas*, 428 F.3d at 336 (citing *Strickland*, 466 U.S. at 696); *see also Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir. 2005) (finding prejudice where it "was necessarily a close case at the trial level."); *Washington v. Hofbauer*, 228 F.3d 689, 705 (6th Cir. 2000) (finding prejudice in part "because this was a close case"); *Nichols v. Butler*, 953 F.2d 1550, 1554 (11th Cir. 1992) (finding prejudice because it "was a very close case"); *Baldwin v. Adams*, 899 F. Supp. 2d 899, 919 (N.D. Cal. 2012) (finding prejudice and referring to the fact that the

underlying "case was close"); *United States v. Jason*, 215 F. Supp. 2d 552, 566, 581 (E.D. Penn. 2002) (noting for purposes of assessing prejudice that the evidence presented "a close case").

In sum, trial counsel's conduct resulted in a wholly lopsided battle of the experts. Without Dr. Uscinski's and Dr. Daniels's testimony on reperfusion, counsel produced only the testimony of Dr. Leestma, a neuropathologist. In contrast, the prosecution provided testimony from a number of witnesses—including two neuropathologists, a cardiac pathologist, and an expert in CPR and emergency medicine—to contradict the defense's theory. Significantly, trial counsel's deficient performance not only deprived Mr. Huguely of Dr. Uscinski's and Dr. Daniel's testimony on reperfusion, but also undermined Dr. Leestma's testimony by suggesting that the defense's own doctors did not agree. Barred from presenting Dr. Uscinski's full testimony, the defense argued in closing that Dr. Leetsma "holds the opinion that the blood, *and this is a different than [sic] Dr. Uscinski holds*, but that the blood in the lower brain/upper brain was the result of the reperfusion." JA 4167 (emphasis added). Thus trial counsel's performance left Dr. Leestma appearing to be an outlier with whom no other expert agreed.[13] Trial counsel was ineffective in taking actions that barred the defense from presenting crucial expert testimony.

Claim III: Trial counsel provided ineffective assistance of counsel by failing to provide crucial available expert testimony on the key issue of cause of death when—either because of a failure to appropriately prepare or because of their violation of the rule on witnesses—they failed to call John S. Daniel, III, M.D.

i. Deficient Performance

[13] Of course, Dr. Uscinski *did* agree with Dr. Leestma, and there was no reason for the defense to assert otherwise in closing. Trial counsel could have simply not discussed Dr. Uscinski's views on reperfusion, since they were not in evidence. Thus the prejudice was compounded by trial counsel's ineffective closing argument.

Trial counsel also performed deficiently by failing to call Dr. Jack Daniel to testify as an expert. The defense retained Dr. Daniel, a well-respected attorney and forensic pathologist, to testify as an expert witness on the issue of cause of death. Dr. Daniel conducted a forensic analysis, prepared to testify in this case, traveled to Charlottesville for the trial, and yet was not called. This was a great surprise to Dr. Daniel, who was repeatedly informed that he would likely testify, probably as the last medical expert to give "an overview of all the forensic medical information to assist in tying the evidence together into a single coherent theory." *See* Declaration of John S. Daniel, III, M.D. at 7. Specifically, Dr. Daniel intended to testify that Ms. Love died of asphyxia rather than blunt force trauma, that bleeding on her brain was caused by reperfusion from CPR, and that there were significant issues with the medical examiner's analysis. *Id.* at 4–7.

Prior to trial, counsel informed Dr. Daniel that he was a likely witness for the defense. Dr. Daniel also testified at a pretrial hearing from which it is evident that trial counsel knew Dr. Daniel was a key defense witness. Tr. Dec. 15, 2010. As trial counsel stated at that hearing, Dr. Daniel has "a very impressive resume . . . " Furthermore, trial counsel recognized the importance of Dr. Daniel's experience, background, and perspective on cause of death, and knew that Dr. Daniel rejected the medical examiner's explanation:

> He will say based on his extensive background, training, and experience as a medical examiner he does not accept on face value that Ms. Love died of blunt force trauma to the head. He questions the finding based in part on the unusual pattern of intracranial injury is not clearly that of trauma. The intracranial injury does not have the features that we would expect in exclusive traumatic intracranial injury. He will say that he finds unusual the absence of a skull fracture, cerebral contusions in any

> areas of impact and the absence of any subdural hematoma. The absence of these findings calls into question the medical examiner's conclusion. He will say that the pattern of injury in this case does not have features that allow it to be distinguished from non-traumatic causes, Your Honor. Dr. Daniel will further state the cause of death investigation requires—and this is, sort of, helping us, this is really our final argument—requires considering aspects of Ms. Love's medical history . . . . With all due respect, the Court nor counsel, except for Dr. Daniel, who is both counsel and a doctor, are not in a position to determine their importance.

Tr. Dec. 15, 2010 at 6–7.

At that same hearing, Dr. Daniel testified to his preliminary findings regarding Ms. Love's cause of death. Dr. Daniel testified that he had been an Assistant Chief Medical Examiner, like Dr. Gormley, and that he had performed "[a] couple thousand" autopsies in his career. *Id.* at 43–44. At the time of his testimony, he had reviewed the autopsy, Fuller's report, toxicology reports, photographs, and other information. *Id.* at 44. He also had examined Ms. Love's brain with Dr. Gormley and Dr. Leestma. *Id.* at 45. Dr. Daniel testified that he was not satisfied with the conclusion of blunt force trauma because "the pattern of brain findings is unusual for a death related to blunt force trauma to the head." *Id.* at 46. Specifically, Ms. Love's external injuries "in and of themselves, would not ordinarily be expected to be lethal." *Id.* at 47. Moreover, Dr. Daniel testified that Ms. Love's brain hemorrhage and contusions "are attributable to the absence of enough oxygen getting to the brain." *Id.* at 48. This could occur because oxygen was not reaching the bloodstream or because blood, which has oxygen in it, was not reaching the brain. Dr. Daniel explained, "if it's not getting to the brain the primary reason for that is cardiac arrhythmia." *Id.* at 49.

Importantly, Dr. Daniel also testified to the possibility of reperfusion injury, showing that he was prepared to offer opinion testimony on this issue before trial counsel violated the rule on witnesses. Dr. Daniel testified that brain hemorrhage could be caused by traumatic force, but "could also be from an increase in pressure in a damaged vessel, so that you have a weak blood vessel that has a lot of . . . blood coming into it under pressure that can then leak and cause some bleeding in that local area." *Id.* at 49–50. As a result, Ms. Love's brain bleeding that had been "characterized as cortical contusions" was in fact typical of reperfusion injury. *Id.* at 50. Dr. Daniel explained that reperfusion injury was typically caused by CPR, and that CPR in this case had been conducted not only for twenty-four minutes by the rescue squad, but also for some time by a bystander. *Id.* Dr. Daniel also opined that Ms. Love's injuries were "in an atypical location to have resulted from the impact to the right side of the head . . . . But they are in the characteristic locations for reperfusion injury." *Id.* at 51–52.

Because the defense was still seeking medical records for Dr. Daniel's assessment, he did not offer a final opinion on cause of death at that time. He did, however, offer his preliminary opinion:

> That Ms. Love suffered a . . . cardiac arrhythmia that caused insufficient blood to get to her head. That during that period of time the vascular tree within the head was sustaining ongoing damage because of the lack of oxygen, to a point at which she died from a lack of oxygen, and then in the immediate perimortem period thereafter rescue efforts included vigorous CPR, which caused these reperfusion injuries, which then were interpreted by Dr. Gormley as . . . traumatic contusions.

Id. at 53. Finally, Dr. Daniel testified that it was important to review Ms. Love's medical records in part because Adderall may cause cardiac arrhythmias and it was important to know more about her prescription and response. *Id.* at 55–57.

By the time of trial, Dr. Daniel was prepared to testify "that the postmortem findings were consistent with Mr. Huguely's account to police of his final encounter with Ms. Love, and that the postmortem findings did not clearly or specifically indicate either intentionally inflicted traumatic injury or traumatic injury of any kind as the cause of death." Declaration at 3. Dr. Daniel disagreed with the medical examiner's opinion that Ms. Love had died from blunt force trauma and "concluded that the probable cause of death was asphyxiation due to airway obstruction." *Id.* As a former medical examiner, Dr. Daniel was particularly prepared to critique the medical examiner's findings in this case.

Importantly, Dr. Daniel's testimony would not have been cumulative to Dr. Leestma's and Dr. Uscinski's, as he planned to testify to matters outside the scope of neuropathology. Dr. Daniel was the only forensic pathologist retained by the defense, and his purpose was to tie together expert testimony specific to the brain with a more holistic view of Ms. Love's cause of death. For example, Dr. Daniel was prepared to testify that intoxication "is a known risk factor for asphyxia deaths of various types, and an intoxicated individual may become asphyxiated accidentally when their face and air passages become buried in a pillow or other bedclothes." *Id.* Additionally, Dr. Daniel would have tied asphyxia to reperfusion, explaining to the jury that lack of oxygen to the brain causes damage to the blood vessels, and those vessels are then at risk for reperfusion injury from CPR. *Id.* at 3–4.

Furthermore, Dr. Daniel would have testified that the risk for death from lack of oxygen is greater in persons who are "predisposed to the development of a cardiac arrhythmia such as with sensitization of heart tissue related to amphetamine usage,

including even legal and properly prescribed preparations such as the Adderall taken by Ms. Love." *Id.* at 4. Finally, Dr. Daniel's testimony would not have been cumulative because, as a former medical examiner, he was positioned to critique Dr. Gormley's overall findings, including the lack of consideration for Ms. Love's positioning, intoxication, amphetamine prescription, "extensive postmortem CPR," or the possibility "that the history provided by Mr. Huguely might in fact be true and that Ms. Love died an unconscious asphyxia death and not a traumatic death at all." *Id.* at 5.

As discussed in more detail above, trial counsel violated the rule on witnesses by emailing the defense's medical expert about the prosecution's evidence. To the extent that Dr. Daniel would have been barred from presenting any of his intended testimony, the deprivation of his testimony simply compounds the prejudice discussed *supra* Claim II. Assuming Dr. Daniel would have been allowed to testify to reperfusion issues, however, his responses to counsel's emails actually make clear that he had the expertise to counter the prosecution's most important points—points that were never countered by other witnesses. For example, when counsel emailed concerning Dr. Brady, Dr. Daniel quickly countered his testimony that CPR could not cause elevated blood pressure in the brain. Dr. Daniel pointed out that the "whole purpose of CPR is to get blood to the brain" and that CPR would be pointless if it could not achieve effective blood pressure in the brain. JA 4755.

Similarly, in response to counsel's email regarding Dr. Virmani, Dr. Daniel credibly responded that he did not "think anybody knows exactly how much BP is (or is not) enough to cause reperfusion brain injury in this context." Moreover, he pointed out that the prosecution's case depended on disproving the hypothesis that "Intracerebral

hemorrhages like these *cannot* be produced by CPR in persons recently deceased from asphyxia." In sum, Dr. Daniel opined that there is not "an adequate evidence base currently available to show either generally that CPR cannot cause hemorrhages like these in persons recently deceased from asphyxia, or especially to establish that CPR did not cause the hemorrhages in this particular case." JA 4753. To date, Dr. Daniel concludes that there are a number of reasons to believe Ms. Love's brain hemorrhage was the result of reperfusion and not blunt force injury. Declaration of John S. Daniel, III, M.D. at 4. Moreover, Dr. Daniel believes that the jury may never have learned crucial information about reperfusion. *Id.* at 8.

The United States Supreme Court has recognized that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). Although *Harrington* recognizes that an expert-focused defense might not always be desirable, that is in large part because trial attorneys are "entitled . . . to balance limited resources in accord with effective trial tactics and strategies." *See id.* at 107. Moreover, there are cases in which expert testimony is undesirable because it "could shift attention to esoteric matters of forensic science . . . or transform the case into a battle of the experts." *Id.* at 108–09. In Mr. Huguely's case, however, it cannot be argued that the defense made a tactical decision to avoid science or a battle of the experts. On the contrary, the defense developed the scientific evidence, promised to present the evidence to the jury, opened the door to extensive contradictory evidence from the prosecution, and then simply failed to produce its own best witness.

"There can be no doubt that an effective defense sometimes requires the assistance of an expert witness. This observation needs little elaboration." *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980). In *Williams*, the seminal Fourth Circuit case concerning the provision of expert witnesses for indigent defendants, the Court recognized the particular need for expert witnesses where cause of death is "an essential element of the state's case." *Id.* at 1026. In that case, the Court acknowledged that cause of death "could be established by the prosecution only through the testimony of an expert witness," and that case presented "a substantial question over the cause of death which required expert testimony for its explication." *Id.* Moreover, the Court recognized that "[j]ust as the state needed an expert to prove the cause of death, [the defendant] needed an expert to present his defense." *Id.* Although Mr. Huguely's defense team presented testimony from a neuropathologist and neurosurgeon, they failed to present a forensic pathologist and former medical examiner who would have provided context for the brain-based testimony and given additional reasons to conclude Ms. Love died of asphyxia. This was deficient performance.

ii. Prejudice

In this case, the defense intended to present testimony from three medical experts: Dr. Leestma, Dr. Uscinski, and Dr. Daniel. Each of these experts has different specialties and had distinct roles in the defense. While two of the doctors are brain specialists, Dr. Daniel is an experienced forensic pathologist who was uniquely positioned to tie together the medical testimony, critique the work of the prosecution's forensic pathologist, and testify to findings outside the brain that supported asphyxia as the cause of death. Thus Dr. Daniel would have covered important areas the other experts did not, such as analysis

of the overall scene, specific problems with the medical examiner's analysis of the overall scene, the role of intoxication in asphyxiation, and the role of amphetamines in asphyxiation.

Dr. Leestma, a neuropathologist, was retained to examine Ms. Love's brain and opine on her brain injuries. Dr. Leestma testified that Ms. Love lacked the intracranial pathology that would explain death. He also opined that reperfusion caused Ms. Love's brain hemorrhages, and that she may have died of asphyxia due to her position. He did not mention, however, her amphetamine usage or intoxication as factors in asphyxia. JA 3538–42, 3552–62, 3569. Dr. Uscinski, a clinical neurosurgeon, also focused on Ms. Love's brain. He testified that Ms. Love's injuries were not consistent with blunt force trauma, but did not offer an opinion as to an alternate cause of death. JA 3992. And, as discussed above, he was not allowed to offer testimony on reperfusion.

The testimony that Dr. Daniel was prepared to present, however, was much broader and included vital information missing from the other doctors' testimony. As a forensic pathologist, Dr. Daniel had reviewed a wide variety of sources, including the autopsy report, neuropathological report, crime scene and autopsy photos, slides, and transcripts of police interview with Mr. Huguely. Declaration at 2. He had consulted not only with Dr. Leestma and Dr. Uscinski, but also with Dr. Polkis (the defense toxicologist) and Dr. Allen Burke, a cardiovascular pathologist. *Id.*

Like Drs. Leestma and Uscinski, Dr. Daniel concluded that Ms. Love was lacking intracranial findings consistent with blunt force trauma. *Id.* at 3. But unlike the other doctors, he was able to tie that together with findings outside the brain to offer a well-

supported opinion on cause of death. Unlike Dr. Leestma, who opined that asphyxia was possible due to Ms. Love's positioning, Dr. Daniel would have testified that there were other known risk factors for asphyxiation. For example, Dr. Daniel would have testified that "[a]lcohol intoxication is a known risk factor for asphyxia deaths of various types, and an intoxicated individual may become asphyxiated accidentally when their face and air passages become buried in a pillow or other bedclothes." *Id.* at 3. Similarly, Dr. Daniel would have testified that amphetamine use such as Ms. Love's compounds the risk of asphyxia by sensitizing heart tissue and thus predisposing the person to heart arrhythmia. *Id.* at 4.

As an experienced medical examiner, Dr. Daniel also would have critiqued Dr. Gormley's analysis. Dr. Daniel would have opined that Dr. Gomley failed to "recognize or acknowledge or consider the significant mismatch between the catastrophic lethal outcome and the extremely limited volume and distribution of intracranial bleeding" and "other usual indicia of lethal head trauma . . . ." *Id.* at 5. In addition to opining that amphetamines could predispose a person to cardiac arrhythmia, he would have critiqued Dr. Gormley's "apparent failure to consider that unexpected cardiac arrhythmia might have caused or contributed to death by non-traumatic means such as asphyxia . . . ." *Id.* Finally, he would have criticized Dr. Gormley's refusal to consider the possibility that Mr. Huguely's account "might in fact be true" given Ms. Love's position, intoxication, amphetamine usage, and long period of CPR. *Id.* at 5.

Finally, if allowed to testify to reperfusion, then Dr. Daniel would have rebutted the prosecution's assertion that such bleeding was seen only in the "watershed" areas of the brain. Dr. Daniel would have critiqued Dr. Gormley's "apparent failure to consider

that the 'watershed' theory apparently propounded by one or more [] prosecution experts . . . might in fact be inapplicable in instance of global hypoxia or in the postmortem setting at all . . . ." *Id.* at 5. In fact, Dr. Daniel would have testified, there are several strong reasons to "believe that the very limited bleeding present in the brain is from reperfusion instead of from blunt force trauma:"

> (a) the intracranial hemorrhage was extremely limited both in terms of volume and distribution of bleeding; (b) the types of hemorrhage present were characteristic for reperfusion damage and for increased intracranial pressure but were unusual for trauma; (c) there were no associated scalp lacerations, no skull fractures, no epidural or subdural blood collections, no brain tissue tears, and no obvious coup or contrecoup cerebral contusions; and (d) the findings are present in the context of vigorous CPR sustained for a significant period of time during the postmortem period.

Id. at 4.

The lack of Dr. Daniel's testimony on reperfusion was particularly prejudicial in light of trial counsel's promise to the jury that they would be provided an explanation for Ms. Love's brain hemorrhages, and that the explanation would be reperfusion. Because trial counsel failed to fulfill this promise, the prosecution was able to argue that "[t]here's no medical evidence supporting the theory that intraparenchymal, petechial hemorrhages are caused by anything else than trauma." JA 4106 (citing the testimony of Drs. Fuller, Lopes, and Brady). Had Dr. Daniel been called, however, he would have testified that "[i]ntraparenchymal petechial hemorrhages are not specific for trauma and can certainly be caused by other things besides trauma, including increases in intracranial pressure." Daniel Declaration.

This was a case in which both sides focused heavily on cause of death. Both sides intended to present a forensic pathologist as well as specialists, including neurpathologists. Only the prosecution, however, presented the required breadth and depth of medical testimony, giving the jury brain-focused testimony by Drs. Fuller and Lopes, CPR-focused testimony by Dr. Brady, and a holistic perspective from Dr. Gormley. Meanwhile, the defense prepared to present Dr. Daniel's holistic perspective but completely failed to do so. Moreover, the defense promised the jury that the medical issues were very much in dispute in this case, and that they would be presented with proof that Ms. Love likely died from asphyxia. Instead, the evidence they presented was incomplete, missing several key points on both asphyxia and reperfusion.

As discussed above, the resulting imbalance of expert opinion was particularly prejudicial given that this was a very close case in which the prosecution's experts agreed that Ms. Love was intoxicated and that her head injury could have been caused by a fall. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. "In a close case, the failure of defense counsel to present certain evidence or effectively challenge the state's evidence on important issues can be particularly prejudicial." *Dugas*, 428 F.3d at 335–36. This is particularly true when viewed in light of the defense's unfulfilled promise to present reperfusion and asphyxia theories, and when viewed in light of the exclusion of Dr. Uscinski's testimony on reperfusion. *See Miller*, 268 F. Supp. 2d at 313–15 (E.D. N.Y. 2003) (finding cumulative prejudice in a close case where the defense attorney failed to produce expert testimony and failed to "follow[] through on the theory espoused during his opening as the key to Petitioner's

defense," and noting that "[i]n a close case such as this one . . . these errors take on a special importance.").

In sum, as also discussed above, this was a very close case on the issue of malice. Whether Ms. Love died of asphyxia or blunt force trauma to the head was key not only to ultimately assessing responsibility for her death, but also to evaluating Mr. Huguely's actions before and after her death. "This case lay on a knife edge, and it would not have taken much to sway at least some jurors towards acquittal. Accordingly, the threshold for prejudice is comparatively low because less would be needed to unsettle a rational jury." *Dugas*, 428 F.3d at 336 (citing *Strickland*, 466 U.S. at 696); *see also Hodge*, 426 F.3d at 386 (finding prejudice where it "was necessarily a close case at the trial level."); *Washington*, 228 F.3d at 705 (finding prejudice in part "because this was a close case"); *Nichols*, 953 F.2d at 1554 (finding prejudice because it "was a very close case"); *Baldwin*, 899 F. Supp. 2d at 919 (finding prejudice and referring to the fact that the underlying "case was close"); *Jason*, 215 F. Supp. 2d at 566, 581(noting for purposes of assessing prejudice that the evidence presented "a close case"). Under these circumstances, trial counsel's failure to call their forensic pathologist was undeniably prejudicial.

Claim IV: Mr. Huguely was denied his Sixth Amendment right to the effective assistance of counsel when his trial attorneys failed to request a jury instruction that directed the jury it must find that any wrongful conduct was "likely to cause death or great bodily harm" in order to find malice.

The appellate courts of the Commonwealth, including the Virginia Supreme Court, have repeatedly and consistently made clear that a critical aspect of showing malice, for purposes of second degree murder, is proving that the defendant's conduct

was "likely to cause death or great bodily harm." *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984); *Knight v. Commonwealth*, 733 S.E.2d 701, 705 (Va. Ct. App. 2012); *Elliott v. Commonwealth*, 517 S.E.2d 271, 274 (Va. Ct. App. 1999); Ronald Bacigal, CRIMINAL OFFENSES AND DEFENSES at 342 (2015–16). Trial counsel was well aware of this requirement prior to Mr. Huguely's trial but inexplicably failed to request an instruction that included this materially vital principle, *Jimenez v. Commonwealth*, 402 S.E.2d 678, 681 (1991), and instead asked for an instruction containing confusing and outdated language that prompted the prosecutor to ask "[w]hat century is that" from an the Court to ask, "[w]hat in the world does this mean?" JA 3677. Consequently, because the malice instruction provided by the trial court omitted this critical language and there is evidence the jury was confused about the meaning of the term "malice", and likely misunderstood the proper definition of that term during its deliberations. *See* Claim I, *suupra*. Trial counsel's failure proved fatally prejudicial.

i. Deficient Performance

It is well established that trial courts have "an affirmative duty properly to instruct a jury" about any principle of law "vital to a defendant in a criminal case." *Jimenez*, 402 S.E.2d at 681. A proper description of the elements of the offense charged is critical because the jury, which is the finder of fact, must determine whether the prosecution has satisfied its "burden of proving all elements of the offense beyond a reasonable doubt." *Stokes v. Warden*, 306 S.E.2d 882, 885 (Va. 1983). Critically, when a principle of law is "'materially vital to a defendant in a criminal case,'" it is "reversible error" for the trial court to refuse to instruct the jury about that relevant legal principle. *Jimenez*, 402 S.E.2d at 681 (quoting *Whaley v. Commonwealth*, 200 S.E.2d 556, 558 (Va. 1973)).

At the time of Mr. Huguely's criminal trial, defense counsel knew Virginia law required that to prove malice and elevate Ms. Love's killing to second degree murder, the Commonwealth was obligated to show Mr. Huguely "embarked on a course of wrongful conduct likely to cause [her] death or great bodily harm." *Essex*, 322 S.E.2d at 220. Despite this, trial counsel failed to include this language in their proposed jury instruction on malice. JA 212–16. This omission was not strategic. Nonetheless, counsel still argued in summation that proving "malice . . . involves an intent to kill and there simply was no intent to kill at all", JA 4195, and begged the jury to read the instructions repeatedly, suggesting that issues related to the culpable mental states would be clarified by a review of the written instructions. JA 4153. Subsequently, however, in their post-trial motion to set aside the verdict, trial counsel argued that Mr. Huguely's conviction could not stand because the evidence was insufficient, and their legal argument relied heavily upon *Essex*'s requirement that the Commonwealth prove Mr. Huguely engaged in "wrongful conduct likely to cause death or great bodily harm." JA 302 (quoting *Essex*, 322 S.E.2d at 220); *see also id.* (same); JA 303 (same) (citing Roger D. Groot, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA § 6, pp. 557–58 (2006)); JA 305 (same).

Where trial counsel fails to request a particular jury instruction related to an important aspect of the case, including elements of a crime or defense, and a reasonably competent attorney would have requested an instruction on that matter, deficient performance is established. *Lee v. Clarke*, 781 F.3d 114, 123–24 (4th Cir. 2015). In *Lee*, trial counsel failed to request an instruction on the issue of heat of passion in a first degree murder case where the defendant and victim had had a series of disputes over a period of days culminating in a fight where Lee stabbed the victim multiple times with a

pocket knife, and the victim tried to obtain a gun. *Id.* at 117–18. At trial the central issue was whether the crime was murder or manslaughter, but trial counsel failed to request an instruction on heat of passion. *Id.* at 120. Lee was convicted of second-degree (malice) murder.

Lee exhausted his direct appeals and unsuccessfully petitioned for habeas corpus in state and federal court alleging, among other issues, that trial counsel had been ineffective for failing to request a heat of passion instruction. *Id.* at 121. On appeal from the district court's denial of habeas corpus relief, the Fourth Circuit reversed, holding that because there was "'a question of fact whether the defendant committed the homicide before or after his passion had cooled,'" and because "trial counsel had no strategic reason for failing to request a heat of passion jury instruction," counsel's performance was deficient. *Id.* at 124–25; *see also United States v. Luck*, 611 F.3d 183, 188 (4th Cir. 2010) (finding trial counsel provided deficient performance in drug case for failing to request an "informant instruction" where government's evidence consisted only of the investigating officer and two paid informants); *Baker v. Horn*, 383 F. Supp. 2d 720, 762–71, 779–80 (E.D. Pa. 2005) (finding counsel performed deficient in murder trial by failing to object to the trial court's instructions that permitted the jury to convict the petitioner of first degree murder under an accomplice liability theory without finding that the petitioner himself possessed the specific intent to kill, a required element under Pennsylvania law).

Mr. Huguely's trial counsel provided deficient performance by failing to request a malice instruction that would have required the jury to find that he had "embarked on a course of wrongful conduct likely to cause death or great bodily harm," as required by

Essex and its progeny. Because they were well aware of this requirement before trial and admittedly had no strategic reason for omitting this critical language in their requested jury instruction, their performance was deficient.

ii. Prejudice

To determine whether trial counsel's deficient performance in failing to request a particular instruction was prejudicial, the reviewing court must answer two questions: "(1) whether the instruction, if requested, should have been given; and (2) if the instruction had been given, was there a reasonable probability that the outcome of the proceedings would have been different." *Luck*, 611 F.3d at 188. Here, the answer to both questions is "yes" because malice is "an essential element of murder and is what distinguishes it from the crime of manslaughter." *Canipe v. Commonwealth*, 491 S.E.2d 747, 753 (1997). Because that distinction is "elusive," *see* Groot, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA § 6, pp. 557, 600 (2006), and "close but crucial," to distinguishing between manslaughter and second-degree murder, *Essex*, 322 S.E.2d at 222, great care must be taken in instructing the jury on this vital principle.

In *Essex*, the Virginia Supreme Court considered whether the operation of a motor vehicle, under circumstances of intoxication and extreme recklessness, resulting in a fatal accident could support a second-degree murder conviction. While intoxicated, Essex drove his vehicle at high speed, crossing back and forth over the center line of the road for a distance of several miles, ran a red light, and eventually collided head-on with an oncoming vehicle, killing two passengers in that vehicle and a passenger in his. Finding that evidence insufficient and reversing Essex's conviction for second-degree murder, the Supreme Court held:

> Malice, a requisite element for murder of any kind, is unnecessary in manslaughter cases and is the touchstone by which murder and manslaughter cases are distinguished. Malice may be either express or implied by conduct. …"Express malice is evidenced when 'one person kills another with a sedate, deliberate mind, and formed design'…. Implied malice exists when any purposeful, cruel act is committed by one individual against another without any, or without great provocation;"
> The authorities are replete with definitions of malice, but a common theme running through them is a requirement that a wrongful act be done "wilfully or purposefully." This requirement of volitional action is inconsistent with inadvertence. Thus, if a killing results from negligence, however gross or culpable, and the killing is contrary to the defendant's intention, malice cannot be implied. In order to elevate the crime to second-degree murder, the defendant must be shown to have wilfully or purposefully, rather than negligently, *embarked upon a course of wrongful conduct likely to cause death or great bodily harm.*
>
> In the absence of express malice, *[malice] may only be implied from conduct likely to cause death or great bodily harm, wilfully or purposefully undertaken*. Thus, for example, one who deliberately drives a car into a crowd of people at a high speed, not intending to kill or injure any particular person, but rather seeking the perverse thrill of terrifying them and causing them to scatter, might be convicted of second-degree murder if death results. One who accomplishes the same result inadvertently, because of grossly negligent driving, causing him to lose control of his car, could be convicted only of involuntary manslaughter. In the first case the act was volitional; in the second it was inadvertent, however reckless and irresponsible.

322 S.E.2d at 219–20 (emphasis added). *Essex*, therefore, requires that to find malice the volitional act must coexist and be motivated by the culpable mental state and that any mere action is insufficient; it must be of the type likely to cause death or great bodily harm. *Id.*

At trial Mr. Huguely relied on evidence, including his statement to police, tending to show Ms. Love's injuries were accidental, inadvertent, and resulted from a struggle in her room, and that after seeing she was injured, he lifted or pushed her onto the bed where she suffocated. Although there was no dispute he entered her room by kicking a hole in the door, the defense strongly challenged the Commonwealth's assertion Mr.

Huguely acted maliciously toward Ms. Love. Because Mr. Huguely could only have been found guilty of second degree murder if his malicious intention existed (1) when he engaged in conduct that led to Ms. Love's death, (2) were what motivated those actions, and (3) that those actions are the type "likely to cause death or great bodily harm," *Essex*, 322 S.E.2d at 219–20, the trial court would have been required to provide an instruction that included this vitally material language in its definition of malice. *Jimenez*, 402 S.E.2d at 681.

Because the malice instruction actually provided to the jury allowed it to convict if it believed Mr. Huguely acted maliciously at any point in the chain of events—such as when he kicked in the door——or even if his conduct was not "likely to cause death or great bodily harm," there is a reasonable probability he would not have been convicted of second-degree murder if a proper instruction had been given. As discussed previously, the facts before the jury presented an extremely close case, amplifying the need for clear and accurate jury instructions. Thus, whether there was sufficient evidence to establish "malice" was the central issue confronting the jury when it retired to deliberate because evidence of first-degree murder was lacking, a point the Commonwealth essentially conceded in its summation. *See* JA 4114; *see also* 4102, 4113–14, 4121, 4129, 4210. Indeed, during closing arguments, the defense and prosecution sharply disputed the level of intent required to show malice, JA 4202–04, 4211–16, and then during deliberations, the jury asked the court to clarify the meaning of the malice instruction, making clear that the jurors found the original instructions to be confusing. JA 4247–57.

The closeness of this case and the jury's request for reinstruction on the definition of "reason", JA 4248, alone establish that the absence of the language was outcome-

determinative. That the jury was struggling with the evidence and meaning of malice is also demonstrated by what was actually happening in the jury room. Juror Serena Gruia, who was the jury forewoman, reported that the jury eliminated "first-degree murder … from the discussion fairly quickly," but reported that there "was a huge discussion" and "a really long debate" when the jury "came to malice." Samantha Koon, *Jurors discuss deciding Huguely's fate*, THE DAILY PROGRESS, Feb. 24, 2012. Ultimately, because the jury became "'hung up' on the term" "'reason' during its deliberations," it was also forced to request reinstruction on that term. *Id.* Critically, at least one of the jurors continued to be confused about the definition of "malice" and requested a dictionary from the court bailiff, which she consulted before voting to convict. See Claim I, *supra.*

iii. Conclusion

Whether the Commonwealth could establish that Mr. Huguely acted with malice was a central issue at trial and counsel knew that to prove malice the Commonwealth must establish he "embarked upon a course of wrongful conduct likely to cause death or great bodily harm" in causing Ms. Yeardley's death to prove second-degree murder. Because the competing theories presented the jury with very close questions of fact, one that they admittedly struggled with during deliberations, counsel's failure to request a jury instruction containing the critical language creates a reasonable probability that Mr. Huguely would not have been convicted if a proper instruction had been provided.

Claim V: Trial counsel's numerous evidentiary, factual and legal deficiencies with respect to the distinction between malice and manslaughter have created a reasonable probability that, had these errors not occurred, Mr. Huguely would have been convicted of a lesser charge or been found not guilty.

The cumulative effect of the above errors requires a new trial. Even if this Court were to believe that none of the above issues independently warrants a new trial, the cumulative prejudice certainly does. Each of these errors went to the heart of the case: whether Mr. Huguely had the requisite mental state for second-degree murder. The jury was deprived of necessary testimony on cause of death, improperly instructed on malice, and sought the assistance of a dictionary in understanding the crucial issue before it. In a case this close, the cumulative prejudice of these errors is great.

As noted above, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. "In a close case, the failure of defense counsel to present certain evidence or effectively challenge the state's evidence on important issues can be particularly prejudicial." *Dugas*, 428 F.3d at 335–36; *see also Miller*, 268 F. Supp. 2d at 313–15 (finding cumulative prejudice in a close case where the defense attorney failed to produce expert testimony and failed to "follow[] through on the theory espoused during his opening as the key to Petitioner's defense," and noting that "[i]n a close case such as this one . . . these errors take on a special importance.").

"This case lay on a knife edge, and it would not have taken much to sway at least some jurors towards acquittal. Accordingly, the threshold for prejudice is comparatively low because less would be needed to unsettle a rational jury." *Dugas*, 428 F.3d at 336 (citing *Strickland*, 466 U.S. at 696); *see also Hodge*, 426 F.3d at 386 (finding prejudice where it "was necessarily a close case at the trial level."); *Washington*, 228 F.3d at 705 (finding prejudice in part "because this was a close case"); *Nichols*, 953 F.2d at 1554 (finding prejudice because it "was a very close case"); *Baldwin*, 899 F. Supp. 2d at 919

(finding prejudice and referring to the fact that the underlying "case was close"); *Jason*, 215 F. Supp. 2d at 566, 581 (noting for purposes of assessing prejudice that the evidence presented "a close case").

Claim VI: Mr. Huguely was Denied his Sixth Amendment Right to the Effective Assistance of Counsel, his Fifth Amendment right against Self-Incrimination and Fourteenth Amendment Right to Due Process by the Prosecution's Impermissible Comment During Closing Argument on Mr. Huguely's Invocation of his Right to not Testify at Trial and Trial Counsel's Failure to Object.

In closing, the Commonwealth argued: "You saw Ken Clausen here testifying. You could see him. You could hear him. You could assess his credibility, his involvement, if any, and weigh his input accordingly. Ladies and gentlemen, *that's the point at which it was fair to expect some explanation for the lie that he* [Mr. Huguely] *told and you have none*, and the explanation is that . . . he sure as heck knew that he had hurt her badly. JA 4209–10 (emphasis added). This was not an accidental reference to Huguely's constitutional right not to testify; rather the Commonwealth blatantly contrasted someone who had testified (Clausen) with Mr. Huguely's decision not to testify. The Commonwealth then invited the jury to conclude that Huguely had not testified because "he sure as heck knew that he had hurt [Ms. Love] badly." This inference went to the heart of Mr. Huguely's defense strategy—that this was a case of manslaughter, not second-degree murder—and contributed to the jury's finding of malice.

Trial counsel was ineffective when they failed to object, failed to ask for a mistrial, and failed to ask for a curative instruction. These failures prejudiced Huguely, and violated his Sixth Amendment right to counsel as well as his rights under the Self-

Incrimination Clause of the Fifth Amendment, the Fourteenth Amendment, and Virginia law.[14]

The Code of Virginia provides that a defendant's "failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney."[15] In *Griffin v. California*, the Supreme Court expressly held that any comment to the jury by a prosecutor concerning the defendant's failure to testify "as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge" is constitutionally forbidden.[16] Ineffective assistance of counsel may be established where a defense counsel fails to object to the prosecutor's "very serious instances of prosecutorial misconduct," including an "argument which invited the jury to consider constitutionally protected silence as evidence of [the defendant's] guilt."[17]

In *Doyle v. Ohio*,[18] the Supreme Court recognized that a comment on a defendant's post-arrest silence violated due process of law. Therefore, when the Commonwealth's reference to the defendant's failure to testify is so blatant, it is incumbent on counsel to object. Even courts that "recognize[] . . . defense counsel may not have wished to highlight Petitioner's silence by objecting and requesting a jury instruction," still find that where there has been "significant discussion of Petitioner's

[14] *Shipwash v. Collins*, 475 F. Supp. 1000, 1003 (W.D. Va. 1979).
[15] VA. CODE ANN. § 19.2-268 (West 2015).
[16] 380 U.S. 609 (1965).
[17] *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996).
[18] 426 U.S. 610; *see also Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986).

decision to invoke his right to silence, it would have been incumbent upon a reasonably competent attorney to raise an objection."[19]

The Virginia Court of Appeals holds that the test for determining whether remarks by the prosecutor are unconstitutional referents to the defendant's right not to testify, "is whether, in the circumstances of the particular case, 'the language used was manifestly intended *or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.*'"[20] In *Kearney*, the prosecutor commented on the absence of any testimony contradicting that of a prosecution witness named Boothe. Because there was no third participant in the conversation between the defendant and Boothe, the Virginia court held that "the prosecutor's argument . . . referenced the inescapable conclusion that only defendant could 'contradict' Boothe's testimony, thereby 'naturally and necessarily' resulting in the jury 'tak[ing] it to be a comment on the failure of the accused to testify.'"[21] The statements made by the Commonwealth regarding Mr. Huguely's knowledge of the seriousness of Ms. Love's injuries invite the same unconstitutional inference from the jury. In *Kearney*, the Virginia Court of Appeals held that the Commonwealth's similar impermissible arguments to the jury warranted a mistrial.[22] The closing argument statements of the Commonwealth in Mr. Huguely's trial likewise prejudiced his right to a fair trial.

To demonstrate prejudice under *Strickland*, Mr. Huguely "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

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[19] *Prevatte v. French*, 459 F. Supp. 2d 1305, 1353 (N.D. Ga. 2006).
[20] *Kearney v. Commonwealth*, No. 1078-00-1, slip op. at 3 (Va. Ct. App. Jan. 29, 2002) (quoting *Hines v. Commonwealth*, 234 S.E.2d 262, 263 (Va. 1977) (emphasis added)).
[21] *Id.* (quoting *Hines*, 234 S.E.2d at 263).
[22] *Id.*

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[23] The prejudice inquiry does not focus on mere outcome determination; attention must be given to "whether the result of the proceeding was fundamentally unfair or unreliable."[24] The Fourth Circuit has stated, "Few mistakes by criminal defense counsel are so grave as the failure to protest evidence that the defendant exercised his right to remain silent. Such evidence plants in the mind of the jury the dark suspicion that the defendant had something to hide and that any alibi which is subsequently proffered is pure fabrication."[25]

In a similar case, the Sixth Circuit held that the failure to object was constitutionally deficient and prejudicial.[26] In *Combs*, the government solicited testimony that the defendant, when approached by a police officer pre-arrest, said, "Talk to my lawyer." In closing, the prosecutor argued that "Talk to my lawyer" demonstrated the defendant's criminal intent, and an innocent person with a story to tell of accident or self-defense would not say, "Talk to my lawyer." The attorney for the defense failed to object. The court stated that "Not only did the failure to object ensure that the jury could use Combs's protected silence against him, but it also guaranteed that both the admission of the statement and the trial court's instruction would be analyzed on review only for plain error. Counsel's performance with respect to this issue was constitutionally deficient under the *Strickland* standard."[27] The Sixth Circuit concluded that trial counsel had rendered constitutionally deficient performance, and remanded the case to the district

[23] *Strickland*, 466 U.S. at 694.
[24] *Lockhart v. Fretweel*, 506 U.S. 364, 369 (1993).
[25] *Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir. 1983).
[26] *Combs v. Coyle*, 205 F.3d 269, 286 (6th Cir. 2000).
[27] *Id*.

court with instructions to issue a writ of habeas corpus.[28] The closing argument in Mr. Huguely's case was similarly unconstitutional, and the failure of his trial counsel to object cheated him of the ability to have the issue reviewed on direct appeal under a favorable standard of review. Had this issue been subjected to direct review, the Commonwealth would have had to prove that this constitutional error was "'harmless beyond a reasonable doubt.'"[29] The failure of Mr. Huguely's attorneys to object has thus prejudiced Mr. Huguely.

Had Huguely's attorney objected, they could have then requested a mistrial. This would have afforded the trial court an opportunity to immediately assess the harm caused by the impermissible argument. Mr. Huguely was prejudiced because the trial court could have granted the mistrial.[30] Had the trial court failed to grant a mistrial, Mr. Huguely's attorneys could have requested a curative instruction, thus preventing the impermissible prejudice. In short, had defense counsel provided Huguely with the necessary assistance, there is a reasonable probability that his trial would have had a different outcome.[31]

Claim VII: Mr. Huguely was Denied his Sixth Amendment Right to the Effective Assistance of Counsel when his Counsel Moved into Evidence an Exhibit with the Label "Type of Offense: Murder."

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[28] *Id.*

[29] *Hazel v. Commonwealth*, 524 S.E.2d 134, 138 (Va. Ct. App. 2000) (quoting *Taylor v. Commonwealth*, 495 S.E.2d 522, 529 (Va. 1998) (citations omitted)).

[30] *See, e.g.*, *Sluder v. Commonwealth*, No. 2531-02-3, slip op. at 9 (Va. Ct. App. Nov. 25, 2003). The judge in *Sluder* even allowed defense counsel to draft the curative instruction. By failing to request a mistrial or even object, Mr. Huguely's attorneys prejudiced his right to a fair trial.

[31] *Hazel v. Commonwealth*, 524 S.E.2d 134, 139 (Va. Ct. App. 2000) ("Hazel was prejudiced by the Commonwealth having been allowed to call attention to his exercise of his constitutional right to remain silent.").

i. Deficient Performance.

Trial counsel also performed deficiently by entering into evidence an exhibit with the label "Type Offense: Murder." On February 17, the tenth day of trial, the defense was forced to proceed despite the fact that one of counsel was sick and absent. Mr. Huguely objected to this, telling counsel, "I don't feel comfortable. I don't feel protected." JA 3725. Counsel then objected to continuing without the "full defense team." JA 3726. The Court overruled the objection, forcing Mr. Lawrence to examine five of the defense's eight witnesses without Ms. Quagliana's assistance. The last of those witnesses was Ms. Alina Massaro, Mr. Huguely's aunt and godmother. During Ms. Massaro's testimony, the defense played a DVD marked with both defense and Commonwealth exhibit numbers, and then moved the DVD into evidence. Def. Ex. 124; JA 4752 (picture of exhibit). In doing do, trial counsel either failed to examine the exhibit or failed to notice the label, which declared "Type Offense: Murder." The exhibit was then taken back to the jury room for deliberation.

Trial counsel's performance was objectively deficient and unreasonable. Attorneys should carefully examine all exhibits before they are entered into evidence and given to the jury during deliberations. *See, e.g.*, *Virgin Islands v. Joseph*, 685 F.2d 857, 864 (3d Cir. 1982) ("It is ordinarily the responsibility of counsel to check the exhibits . . . Undoubtedly, defendant's counsel should have carefully checked each exhibit."); *United States v. Strassman*, 241 F.2d 784, 786 (2d Cir. 1957) ("But there can be no doubt that counsel for both parties have a responsibility to check over the exhibits before they are taken by the bailiff to the jury room . . . ."); *People v. Bieber*, 835 P.2d 542, 547 (Colo. Ct. App. 1992) ("The defendant has a responsibility to check exhibits and

to object to the inclusion of evidence not admitted during trial."). The Hawai'i Court of Appeals articulates this basic expectation:

> We note, first, that it is the responsibility of counsel for both sides in a trial to examine the items to be presented to the jury for their consideration to ensure that the jury is not exposed to matters not admitted into evidence . . . . In a criminal case, defense counsel may have a heavier burden to guard against such exposure, since failure to object to the inclusion of non-evidentiary material may constitute a waiver.

Hawai'i v. Joseph, 883 P.2d 657, 660-61 (Haw. Ct. App. 1994) (citing *State v. Estrada*, 738 P.2d 812, 824 (Haw. 1987)).

In this case, the exhibit declared to jurors the exact opposite ultimate conclusion from the one put forward by the defense—i.e., that the "Type of Offense" was "Murder." The ultimate issue before this jury was whether Mr. Huguely was guilty of "manslaughter" or "murder." And yet, trial counsel allowed the exhibit to be seen by the jury and taken to the jury room with a highly inflammatory label. Only two conclusions are possible: either trial counsel did not check the exhibits, or trial counsel did not check the exhibits with the appropriate level of care the task required. Either way, trial counsel performed deficiently by admitting an exhibit into evidence that declared this offense to be the exact opposite of what the defense believed and was attempting to prove.

ii. Prejudice

Prejudice is presumed whenever a jury is exposed to external information. Under the circumstances of this case, however, an exhibit with a label declaring the offense to be Murder was particularly prejudicial. Mr. Huguely's entire defense at trial was that his actions did not constitute Murder. That is, this was not a case of mistaken identity or alibi; it was a case where the crucial issue was whether Mr. Huguely was guilty of murder, a lesser degree of homicide, or not legally culpable. The exhibit thus asserted the

single most prejudicial conclusion that could be drawn about the ultimate issue in the case. Furthermore, the exhibit was delivered to the jury by the Court and had both parties' exhibits numbers. In sum, the jury in this case was given external information that indicated the Court, the prosecution, and the defense all had reached the conclusion that this was a Murder.

External influences on the jury violate a defendant's right to trial by an impartial jury. *See* U.S. CONST. amends. VI, XIV; VA. CONST. art. I, § 8; *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). Indeed, the rights to a jury trial and its many protections are completely eviscerated by the introduction of external information to jurors:

> The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury . . . . In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

Turner v. Louisiana, 379 U.S. 466, 472–73 (1965); *see also Barnes v. Joyner*, 751 F.3d 229, 240 (4th Cir. 2014) ("An impartial jury is one that arrives at its verdict 'based upon the evidence developed at trial' and without external influences." (quoting *Turner v. Louisiana*, 379 U.S. 466, 471–73 (1965))); *see also Thompson v. Commonwealth*, 70 S.E.2d 284 (Va. 1952) (citation omitted).

The exposure of a jury to external information is such a serious constitutional flaw that prejudice is presumed. The United States Supreme Court has held that "'any

private communication, contact, or tampering, *directly or indirectly*, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial . . . .* '" *Remmer v. United States*, 347 U.S. 227, 229–30 (1954) (emphasis added). A credible allegation of external influence on the jury establishes "not only a presumption of prejudice, but also a defendant's entitlement to an evidentiary hearing . . ." *Id.*

An inanimate object may be an external influence on a jury. *See Barnes*, 751 F.3d at 245 (defining external influence as "either 'extraneous prejudicial information; i.e., information that was not admitted into evidence but nevertheless bears on a fact at issue in the case,' or . . . 'an outside influence upon the partiality of the jury . . .'") (quoting *Robinson*, 438 F.3d 350, 363 (4th Cir. 2006)). In fact, many cases have involved indirect influence by inanimate objects like the exhibit in this case, requiring either a new trial or—at the very least—a hearing to determine the extent of prejudice. *See, e.g.*, *United States v. Bradshaw*, 281 F.3d 278 (1st Cir. 2002) (finding that unredacted copy of indictment containing text of severed counts accidentally left in jury room warranted hearing on degree of prejudice); *Williams v. Florida*, 448 So.2d 49 (Fla. Dist. Ct. App. 1984) (deciding that where jury discovered incriminating bloody paper in glove admitted as evidence and presence of paper was surprise to the parties, resulting jury taint required new trial); *Merritt v. Maryland*, 785 A.2d 756 (Md. 2001) (finding presumptive prejudice and remanding for new trial where jury mistakenly given search warrant affidavit that had not been admitted as evidence); *Brittle v. Commonwealth*, 281 S.E.2d 889 (Va. 1981) (finding prejudice and ordering remand where numerous photographs not entered into evidence mistakenly included among exhibits placed in jury room and examined by jury);

Gilliland v. Singleton, 129 S.E.2d 641, 646 (Va. 1963) (remanding for new trial where the jury was permitted to read pleadings and "[u]nder the circumstances the jury might well have concluded that the court believed the allegations had been proved as the court specifically told the jury they could read the motion for judgment."); *Joseph*, 883 P.2d 657 (finding prejudice had been cured by special instruction where jury found incriminating straw in defendant's wallet while examining the wallet during deliberations); *Evans-Smith v. Commonwealth*, 361 S.E.2d 436 (Va. Ct. App. 1987) (ruling that juror consultation of almanac warrants examination of jurors to determine extent of resulting prejudice).

As discussed above, the introduction of an external influence is presumptively prejudicial. Furthermore, in this case, it is probable that the "Murder" label influenced the jury. The court had instructed the jury that murder has a specific meaning distinct from manslaughter, and had given them four options—first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter. The Court then gave the jury an exhibit that had been entered into evidence *by the defense*—and approved by the Commonwealth—that characterized the offense as "Murder".[32] Under these circumstances, the jury may have been confused and erroneously concluded that the trial court believed the offense to be murder. *See Gilliland*, 204 Va. at 121–22 (holding that jury may have been confused by the court allowing them to read the pleadings, and may have erroneously concluded that the "court believed the allegations" described in the pleadings had been proven).

[32] Indeed, other exhibits were entered into evidence with "Type of Offense" labels, but most of them used numerical codes instead of the word "Murder."

Moreover, prejudice is evident from the way similar legal conclusions are handled by the courts. For example, while it is permissible for a jury to read the indictment, it is vital that they understand that it is not itself evidence of the guilt of the accused. *See, e.g.*, *United States v. Esso*, 684 F.3d 347, (2nd Cir. 2012) (permitting jury to take indictment home to read not error because court explicitly instructed jury that the "'indictment is not evidence in any way. It's just a charge by the government.'"); CRIM. JUST. STANDARDS COMMITTEE, A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996) ("ABA STANDARDS: TRIAL BY JURY"), Commentary to Standard 15-5.1, at 242 ("The federal system and most state systems permit a copy of the charges to go to the jury room, providing an appropriate cautionary instruction is given to the jury by the trial judge."). In other words, a cautionary instruction is required to cure prejudice even when the jury is given just a list of *all* the charges they are considering. In Huguely's case, however, no such curative instruction was given to the jury because the defense either did not realize that the videotape contained the "Murder" label or ignored it.

Similarly, the fact that the trial court would not have been allowed to give the jury external information or a particular instruction or conclusion is evidence of its prejudice. *See Harris v. Commonwealth*, 408 S.E.2d 599, 601–02 (Va. Ct. App. 1991) ("There was plainly a high likelihood of prejudice . . . . that evidence was inadmissible on several grounds, certainly on grounds of relevance and prejudice. Had that information been given to the jury by the trial judge, his instruction would have been ground for reversal."). Certainly in this case, the court could not have expressed an opinion that the type of offense Mr. Huguely had committed was "Murder." It thus follows that being

given an exhibit that declares the offense to be "Murder" also creates unacceptable prejudice, and creates a great deal more of it.

To the extent there is any question of prejudice, however, Mr. Huguely is entitled to develop additional evidence in a hearing. For example, in *Evans-Smith*, the Virginia Court of Appeals acknowledged the general rule against jurors impeaching their verdict, but noted that "there is strong public policy and legal precedent which mandates the interrogation of jurors to determine if an impropriety has tainted the verdict." 361 S.E.2d 446. Thus there is a longstanding "'exception to the general rule . . . when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's constitutional right to be confronted with the witnesses against him.'" *Id.* (quoting 19 MICHIE'S JURISPRUDENCE VERDICT § 34 (1979)).

When there is a probability that external evidence has influenced the jury, the court has "the affirmative duty" to investigate the matter in a hearing. *Id.* at 446; *see also Barnes*, 751 F.3d at 244–45 ("'When a trial court is apprised of the fact that an extrinsic influence may have tainted the trial, the proper remedy is a hearing to determine the circumstances of the improper contact and the extent of the prejudice, if any, to the defendant.'") (quoting *Stouffer v. Trammell*, 738 F.3d 1205, 1214 (10th Cir. 2013)). The Fourth Circuit also recognizes that without a hearing "a criminal defendant is deprived of the opportunity to uncover facts that could prove a Sixth Amendment violation." *Barnes*, 751 F.3d at 250 (citing *Remmer*, 347 U.S. at 229).

Huguely's burden is merely "a threshold or minimal showing of potential juror bias." *Barnes*, 751 F.3d at 248 ("Certainly, if defendants were required to prove juror bias before obtaining a hearing, the *Remmer* hearing requirement, which is designed to

determine 'what actually transpired, or whether the incidents that may have occurred were harmful or harmless' . . . would be utterly meaningless." (citing *Remmer*, 347 U.S. at 229)). In a criminal case, the test "'is not whether the jurors were actually prejudiced by the extraneous mater, but whether they *might* have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trail awarded.'" *Brittle*, 281 S.E.2d at 890 (quoting *Thompson*, 70 S.E.2d at 290). Thus, as the Virginia Supreme Court concluded in *Brittle*, "even though the jurors said they were not actually prejudiced against defendant by examination of the [external influence], we hold that they might have been so prejudiced, either as to the guilt of the accused or as to the grade of the offense." *Id.* at 891.

In this case, the possibility of prejudice is particularly high for several reasons. First, the fact that the external influence was an exhibit provided by the court and labeled by the parties gave it an official imprimatur and authority, distinguishing this case from those where external influence is introduced by unofficial sources. Second, the external influence here is one that went right to the heart of the case. When the jury retired to the jury room, the key question that had been posed by the parties in closing was whether Mr. Huguely committed murder, a lesser form of homicide, or no offense at all. The label "Type Offense: Murder" directly answered that question, and answered it in the way most detrimental to Mr. Huguely.

And finally, as reiterated throughout this petition, this case was exceptionally close and "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. "This case lay on a knife edge, and it would not have taken much to

sway at least some jurors towards acquittal. Accordingly, the threshold for prejudice is comparatively low because less would be needed to unsettle a rational jury." *Dugas*, 428 F.3d at 336 (citing *Strickland*, 466 U.S. at 696); *see also Hodge*, 426 F.3d at 386 (finding prejudice where it "was necessarily a close case at the trial level."); *Washington*, 228 F.3d at 705 (finding prejudice in part "because this was a close case"); *Nichols*, 953 F.2d at 1554 (finding prejudice because it "was a very close case"); *Baldwin*, 899 F. Supp. 2d at 919 (finding prejudice and referring to the fact that the underlying "case was close"); *Jason*, 215 F. Supp. 2d at 566, 581(noting for purposes of assessing prejudice that the evidence presented "a close case"). Under these circumstances, an exhibit announcing that this Offense was a "Murder" was indubitably prejudicial.

Claim VIII: Mr. Huguely Was Denied His Sixth Amendment Right to the Effective Assistance of Counsel When Trial Counsel Failed to Make use of a Lacrosse Video to Demonstrate How Mr. Huguely Received Bruises and Swelling on his Hand.

Trial counsel had available at their disposal a professionally prepared and edited video demonstrating that on May 1, 2010, Mr. Huguely was hit in the hands with a lacrosse stick during a lacrosse game. This video was prepared for trial counsel because Mr. Huguely was aware that during his interrogation, the police suspected that Mr. Huguely's injured hand could have been a result of the altercation he had with Ms. Love. It was not. Trial counsel's performance was deficient when they failed to play this video for the jury. Mr. Huguely was prejudiced because the Commonwealth was free to argue and did argue in closing argument that Huguely's injured hand, which was actually injured during the lacrosse game less than 48 hours earlier, was instead evidence that he intentionally assaulted Ms. Love.

Claim IX: Trial Counsel's Failure to Investigate and Develop Evidence of Mr. Huguely's Blood-Alcohol Content and Degree of Impairment at the Time of The

Offense Denied Him His Sixth Amendment Right to the Effective Assistance Of Counsel Because That Evidence Supported a Finding That Yeardley Love's Death Was Accidental or Negligent and a Finding of Diminished Capacity At Sentencing.

In a little over thirty hours before the crime, Mr. Huguely ingested between 44 and 54 alcoholic beverages, slept little, and became so intoxicated that his coordination and motor skills were profoundly impaired. Although trial counsel knew, in general terms, that Mr. Huguely was drunk, they failed to (1) make reasonable investigations to determine the amount that he consumed or his blood-alcohol content ("BAC") at the time of the offense, or (2) assess how his level of intoxication would have affected his ability to form specific intent or his motor skills, coordination, and reflexes. Had counsel done so, they would have discovered that Mr. Huguely's BAC was at least 0.379 g%, and likely much higher. Because a BAC at this level would have dramatically impaired Mr. Huguely's neurological and neuropsychological capacities, his motor skills and coordination, and reflexive capacity, and made it far more likely that the killing was accidental or negligent, trial counsel rendered ineffective assistance by failing to develop and present this critical information at Mr. Huguely's trial. Likewise, because the same evidence would have supported a conclusion of diminished capacity at sentencing, their failure to present it before the jury and judge was prejudicially deficient. *Strickland*, 466 U.S. 668.

i. Deficient Performance

Prior to trial, trial counsel interviewed several witnesses about the alleged crime and Mr. Huguely's state of intoxication, which became a significant issue at trial. JA 2039–40, 2050, 2058, 2110, 3285, 3292–94, 3297–98, 3299–300, 3301–02, 3306–07, 3309–11, 3315–16, 3318–25, 3327–28, 3346–54, 3357, 3365–72, 3376–87, 3394–97.

Trial counsel did not, however, make any attempt—before trial or during the trial itself—to determine with any precision just how impaired Mr. Huguely was at the time of the alleged crime, even though this information was readily available upon request.

George's aunt, Alina Massaro, was in Mr. Huguely's presence for parts of the evening on May 1, 2010, and observed him drink between eleven and thirteen alcoholic beverages from approximately 4:30 p.m., on May 1, 2010, until about 2:00 a.m., on May 2, 2010. Declaration of Alina Massaro of 1/18/16, at ¶¶ 4–11. During this same time period, Mr. Huguely's mother Marta Murphy observed him drink approximately ten additional drinks during a cocktail hour and dinner that her sister, Alina Massaro, did not attend. Declaration of Marta Murphy of 1/18/16, at ¶¶ 4–7. Mr. Huguely's father not only observed his son drinking excessively on May 1 & 2, 2010, but also was in his company the following day and noticed that he was drunk in the morning when they left his apartment and, thereafter, consumed approximately eighteen drinks during the day. Declaration of George Huguely IV of 1/11/16, at ¶¶ 2–6. Taken together, these three witnesses observed Mr. Huguely consume between 37 and 41 alcoholic beverages from about 4:30 p.m. on May 1, 2010, and 9:30 p.m. on May 2, 2010. However, there were significant time periods that they were not in Mr. Huguely's company when he was drinking additional alcoholic drinks, including between 2:00 a.m. and 10:00 a.m., and between 9:30 p.m. and 11:45 p.m. on May 2, 2010.

Counsel for Mr. Huguely has interviewed or attempted to interview many individuals who observed Mr. Huguely's on May 1, 2010, and May 2, 2010, and who testified at trial, but refused to sign declarations and/or be interviewed. Based on their trial testimony and information available to counsel, if questioned they would corroborate

that during the time periods not covered by Ms. Massaro, Ms. Murphy, and George Huguely IV, they observed Mr. Huguely drink an additional 8–14 alcoholic beverages. These witnesses included Tim Fuchs, Brian Carroll, Kevin Carroll, Ken Clausen, Mikey Thompson, William Bolton, Billy Bolton, Scott Nizolek, and Chris Clements.

According to Dr. Joseph Saady, an expert toxicologist who has testified hundreds of times in Virginia on the issue of intoxication and BAC extrapolation, Mr. Huguely's BAC would have been 0.379 g% when he arrived at Ms. Love's apartment based on a routine extrapolation that takes into account the person's height, weight, age, the amount of alcohol consumed and other relevant variables. Declaration of Joseph J. Saady, Ph.D. of 1/17/16, at ¶¶ 7–8.

Had trial counsel conducted the necessary investigation to develop these facts, Dr. Saady would have been allowed to provide this information in the form of a hypothetical question. *Fitzgerald v. Commonwealth*, 292 S.E.2d 798, 806 (Va. 1982); *see Johnson v. Commonwealth*, No. 1819-94-3, 1996 Va. App. LEXIS 585, at *13 (Va. Ct. App. 1996) (recognizing error in excluding testimony of defense toxicologist related to extrapolated BAC); *Ball Lumber Co. v. Jones*, No. 1716-94-2, 1995 Va. App. LEXIS 375, at *7 (Va. App. 1995) (noting that toxicologist provided expert opinion regarding claimant's blood alcohol level based on an extrapolation).[33] Dr. Saady's testimony would have been

[33] *See also People v. Scarlett*, 985 P.2d 36, 40–41 (Colo. App. 1998) (observing that toxicologist was permitted to testify to comparison of a defendant's actual measured BAC levels with the defendant's testimony regarding how much he drank, concluding they were inconsistent based on his calculations); *Merck v. State*, 763 So.2d 295, 297 (Fla. 2000) (noting toxicologist was permitted to testify to an estimation of a defendant's BAC at the time of a murder "based on testimony of alcohol consumption.") (internal citation omitted); *People v. Ethridge*, 610 N.E.2d 1305, 1319 (Il. Ct. App. 1993) (finding no error in allowing State's toxicologist to render opinion as to defendant's BAC based on an extrapolation); *People v. Mitchell*, No. 31147, 2014 Mich. App. LEXIS 2139, at *2

admissible to negate premeditation and deliberation, *Swisher v. Commonwealth*, 506 S.E.2d 763, 772 (1998), to explain gaps in Mr. Huguely's memory of the incident, *Johnson*, 1996 Va. App. LEXIS 585, at *13, to assess degree of negligence, *Essex*, 322 S.E.2d at 221–22, to explain how increasing levels of alcohol affect a person's judgment and coordination, *Johnson*, 1996 Va. App. LEXIS 585, at *13, and at sentencing to determine "the appropriate quantum of punishment." *Essex,* 322 S.E.2d at 222.

Because evidence tending to establish the probability or improbability of any fact in issue is relevant, *Stamper v. Commonwealth*, 257 S.E.2d 808, 815 (Va. 1979), and evidence showing the degree and impact of Mr. Huguely's intoxication would have made it more probable that his conduct arose from impaired coordination and diminished motor sensory functioning, rather than from a premeditated plan or malice, trial counsel's failure to introduce this evidence was deficient. Likewise, expert testimony showing Mr. Huguely's diminished capacity would have strongly supported a more lenient sentence. Even if diminished capacity is not a recognized guilt-phase defense in Virginia, it is clearly a factor the jury should have considered in assessing the appropriate quantum of punishment at sentencing. *Essex*, 322 S.E.2d at 222.

(Mich. Ct. App. Nov. 4, 2014) (Toxicologist on behalf of the prosecution permitted to "testif[y] that based on defendant's height and weight, if [the defendant's] report of what he drank that evening was accurate, his blood-alcohol content should have been approximately .027 around the time he was stopped and arrested.") *Village of Hartland v. Buske*, No. 93-1470-FT, 1993 Wisc. App. LEXIS 1427 (Nov. 10, 1993) (noting that toxicologist allowed to testify to an extrapolation of a defendant's blood alcohol level at the time of a crime based on later-taken breathalyzer results and computer modeling).; *State v. Thomas*, No. M2000-02440-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 203, at *7-8 (March 22, 2001) (describing how the defense was permitted to present testimony of toxicologist who extrapolated defendant's BAC based on the testimony of a witness and the defendant's description of what he drank and his physical size).

Trial counsel's failure to investigate and present this evidence was not strategic.

ii. Prejudice

With a BAC of .379 g%, Mr. Huguely would have experienced dramatic slowing in his reaction time and ability to process information, profound impairment to his balance, perception, memory and comprehension, confusion, dizziness, and poor coordination, balance and staggering issues. Declaration of Joseph J. Saady, Ph.D., of 1/17/16, at ¶ ¶ 10–11, 13; Declaration of Michael Hendricks, Ph.D., ABPP, of 1/18/16, at ¶ ¶ 10–11, 15. As Dr. Hendricks noted:

> At the approximate level of intoxication indicated by both the calculated BAC and behavioral observations as reported at trial, Mr. Huguely would have experienced a severe impairment of basic neurological and neuropsychological capacities. His ability to accurately and fully receive sensory input across sensory modalities would have begun to be impaired by the time he reached a BAC of .20% and would have become increasingly impaired as his BAC increased. Similarly, motor skills would be expected to have begun to degrade before he reached a BAC of .20%, and by the time he surpassed .30% he would have had difficulty maintaining his balance and his muscle coordination would have been very impaired. While Mr. Huguely likely would have been limited to responding to various internal and external stimuli by the time his BAC surpassed .30%, even his reflexive capacity would have been much diminished. This was evident in the behavioral observations of Mr. Huguely on 2 May 2010, when he was observed to be uncoordinated, staggering, unable to speak clearly and seemingly incapable of responding appropriately to environmental cues.

Id. at ¶ 14.

Evidence showing severe impairments to Mr. Huguely's gross motor skills and lack of coordination would have supported a conviction for involuntary manslaughter because it would have strengthened the other evidence supporting the conclusion the killing was accidental or negligent, rather than malicious. Because Mr. Huguely denied intending to harm Ms. Love and the absence of significant internal injuries raised doubts

about the amount of force that had been applied, the case presented a close one about whether the killing was volitional or inadvertent. As such, evidence showing that Mr. Huguely's motor skills and coordination were profoundly impaired is very likely to have changed the outcome of the case. This error was also prejudicial at trial because it allowed the Commonwealth to make misleading and unrebutted argument regarding the manner in which Mr. Huguely's intoxication may be considered by the jury. *See infra* Claim X.

Likewise, regardless of whether Mr. Huguely was acquitted of second-degree murder, the failure to introduce evidence of his diminished capacity at the sentencing before jury and judge was highly prejudicial. Dr. Jeffrey Aaron, Ph.D., who had been retained by the defense, was never asked to opine about whether Mr. Huguely's capacity to appreciate the nature of his conduct and consequences was diminished. Had he been asked to make this assessment, Dr. Aaron would have testified at sentencing that:

> Given the combined effects of severe intoxication, general deficits in impulse control, and immaturity, it is my professional opinion to a reasonable degree of clinical certainty that ***Mr. Huguely was significantly impaired on the night of May 2, 2010 to the degree that his ability to fully comprehend the nature of his actions or their consequences was limited***. This conclusion is based in the following factors:
>
> a. The contribution of severe alcohol intoxication, as described above, which would have affected his emotional reactivity, his information processing and problem-solving capacities, and his motor coordination and control;
>
> b. The contribution of distinct deficits in impulse control, as described above, which were identified in a prior clinical assessment and yielded a diagnosis of ADHD;
>
> c. The contribution of developmental immaturity, as described above, which included both his adolescent developmental status and behavioral indicators of emotional immaturity;

d. The specific activating circumstances, namely his distress related to the ending of or tension in a romantic relationship, which historically was among the most emotionally challenging circumstances for him;

e. The cumulative effects of (a) through (d) above; and

f. Evidence that Mr. Huguely had in fact not understood or recognized the consequences of his actions. This was most apparent in his behavioral and emotional responses in the police interview on the morning of May 3, 2010. In this interview, his responses strongly suggest he was not aware of Ms. Love's death, and in fact that for some time he appeared not to accept the fact that she had died. He appeared not to understand that his actions had led to her death – <u>*or that they could have done so*</u>.

This cumulative evidence indicates that as a result of a combination of factors, ***Mr. Huguely had significant impairment in his cognitive, emotional, behavioral, and motor responding at the time of the offense, and that these impairments precluded his full appreciation of the nature of his conduct and its consequences***.

Declaration of Jeffrey Aaron, Ph.D. of 1/17/16, at ¶¶ 22–23 (emphasis added). Dr. Hendricks, who specializes in the effects of substances on psychomotor functioning and was available as a witness at the time of Mr. Huguely's trial, reached a similar conclusion:

I would expect that around the time of Ms. Love's death Mr. Huguely's capacity for accurately taking into account a variety of environmental stimuli as well as his own emotional and cognitive motivations in the service of formulating a desire to achieve a specific outcome or goal, to employ strategic planning and decision making, and to effectuate any such plan by engaging in the requisite behaviors in a coordinated and effective manner needed to actualize that outcome or goal ***was substantially and profoundly impaired***. At best, I anticipate that Mr. Huguely may have been able to achieve only very basic goals, mostly in response to immediately felt needs. ***His capacity to effectuate a planned outcome would have been greatly reduced by impairments in his sensory perception, his ability to regulate his mood, his ability to think clearly and coherently, his executive functioning, and his lack of physical coordination***. In essence, his ability to achieve any aims would have been merely at a level of response to an immediately perceived stimulus-and

> even this would have been impaired by his ability to effect his immediate desires because of disorientation and lack of coordination.

Hendricks Decl. at ¶ 15 (emphasis added).

Had trial presented the compelling evidence of Mr. Huguely's diminished capacity at sentencing, it is highly probable that the jury would have recommended a more lenient sentence. This is not a case where the presentation of mitigation that was readily available to trial counsel "would barely have altered the sentencing profile presented to the sentencing" jury. The evidence in aggravation was not overwhelming, and yet the jury still did not impose the maximum sentence allowable – not even close. This shows that the jury readily appreciated this was not the worst kind of second-degree murder. Choosing a sentence almost exactly halfway between the minimum and the maximum strongly suggests the jury believed it was a mid-level homicide. Similarly, the trial judge remarked on the complete lack of evidence before him regarding Mr. Huguely's substance abuse issues.

In light of this, it is self-evident that had trial counsel presented *any* evidence—much less forensic proof of diminished capacity—in mitigation of the offense there is a reasonable probability that the jury would have reduced its sentencing recommendation significantly. Had the judge and jury been able to place Mr. Huguely's life history "on the mitigating side of the scale," it would have appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury—and the sentencing judge—"would have struck a different balance," *Wiggins*, 539 U.S. at 537, and it is unreasonable to conclude otherwise. The trial court's reduction of the jury recommendation, in the face of counsel's failure to present this information, confirms this truth.

Claim X: Trial Counsel Provided Ineffective Assistance Of Counsel In Failing To Object And Rebut The Commonwealth's Argument That Mr. Huguely's State Of Intoxication Could Be Used To Prove An Element Of The Murder.

Although voluntary intoxication is not a defense to crimes in the Commonwealth, except to negate premeditation and deliberation of first-degree and capital murder, it can be admissible for other purposes. *Essex*, 322 S.E.2d at 221–22; *see also Johnson*, 1996 Va. App. LEXIS 585 at *13. One permissible purpose is to rebut improper argument of opposing counsel. *Simmons v. South Carolina*, 512 U.S. 154, 170–71(1994) (recognizing a defendant's right to rebuttal where the prosecution makes improper arguments that have the effect of encouraging the jury to consider improper facts or circumstances).

In Mr. Huguely's case, the Commonwealth's attorney encouraged the jury to find Mr. Huguely guilty of second-murder because he became more aggressive when intoxicated. JA 4082–83. Although the degree of negligence is a factor in distinguishing between a conviction for involuntary intoxication and acquittal, *Essex*, 322 S.E.2d at 221, a defendant's voluntary intoxication may be used as neither a defense nor proof of volition. *Id.* When the Commonwealth made this objectionable argument, therefore, trial counsel was duty-bound to object and request an opportunity to rebut it with facts and argument to the contrary. Trial counsel's failure to object and rebut deprived Mr. Huguely of the effective assistance of counsel because the Commonwealth's argument misled the jury on the critical issue by utilizing intoxication to aggravate and elevate the homicide when in fact, it demonstrated diminished capacity and inability to form intent or volition. *Strickland*, 466 U.S. 668. The Commonwealth may not create a false assumption about the role of intoxication while, at the same time, preventing the jury

from learning that the effects of the defendant's intoxication tended to negate volition. *Simmons*, 512 U.S. at 171.

Claim XI: The cumulative prejudice caused by the many merits phase errors in this case requires a new trial.

Viewed together, the many errors in this case require a new trial. Numerous errors affected the fairness of the merits phase of Mr. Huguely's case, and the prejudice caused by these errors accumulates to require relief. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. "In a close case, the failure of defense counsel to present certain evidence or effectively challenge the state's evidence on important issues can be particularly prejudicial." *Dugas*, 428 F.3d at 335–36; *see also Miller*, 268 F. Supp. 2d at 313–15 (finding cumulative prejudice in a close case where the defense attorney failed to produce expert testimony and failed to "follow[] through on the theory espoused during his opening as the key to Petitioner's defense," and noting that "[i]n a close case such as this one . . . these errors take on a special importance.").

"This case lay on a knife edge, and it would not have taken much to sway at least some jurors towards acquittal. Accordingly, the threshold for prejudice is comparatively low because less would be needed to unsettle a rational jury." *Dugas*, 428 F.3d at 336 (citing *Strickland*, 466 U.S. at 696); *see also Hodge*, 426 F.3d at 386 (finding prejudice where it "was necessarily a close case at the trial level."); *Washington*, 228 F.3d at 705 (finding prejudice in part "because this was a close case"); *Nichols*, 953 F.2d at 1554 (finding prejudice because it "was a very close case"); *Baldwin*, 899 F. Supp. 2d at 919

(finding prejudice and referring to the fact that the underlying "case was close"); *Jason*, 215 F. Supp. 2d at 566, 581 (noting for purposes of assessing prejudice that the evidence presented "a close case").

Claim XII: Mr. Huguely was deprived of an impartial sentencing jury when a juror used her own experiences with alcohol to recommend a long sentence for Mr. Huguely, and/or trial counsel was ineffective for failing to voir dire this juror on her experiences with alcohol.

George Huguely's alcohol abuse was a huge issue for jurors, and one they were left to weigh without the benefit of any expert's training, background, education, and opinion. *See* Claim IX, *supra*. Trial counsel's ineffectiveness in that regard was only compounded by the substitution of a juror's highly inflammatory personal experience and expertise for expert testimony. Juror 17, who had significant background experience in alcohol treatment, informed other jurors that based on her expertise, Mr. Huguely needed a lengthy sentence to ensure that he could be sober upon release. Because of this external information—compounded by trial counsel's failure to present expert testimony on alcoholism—Mr. Huguely received a lengthy sentence.

Juror 17 disclosed on her jury questionnaire that she is a registered nurse who was employed by UVA Hospital. JA 4425. She also responded affirmatively to the question whether she, a relative, or close friend had "worked for, volunteered with, donated time or money to, or helped raise money for any group, organization or service provider in the field of alcohol or substance abuse and/or intervention, or sought help or assistance from such organization or service provider." JA 4430. Juror 17 denied having "any strong opinions or beliefs specific to the consumption of alcoholic beverages by college students," simply writing in, "they are young they drink." *Id.* Moreover, she denied that she, a relative, or a close friend "had a traumatic experience with a person who is under

the influence of alcohol to the extent that it still affects you at this time" or had "been placed in danger or at risk of great bodily harm as a result of the actions of someone who was drunk or intoxicated." *Id.*

Juror 17 was questioned individually on media exposure but not, oddly, asked about her experience with alcohol. JA 712–16. Specifically, she was not asked about her affirmative response regarding interactions with a group, organization, or service provider in the alcohol, substance abuse, or intervention fields. This is particularly striking for several reasons. First, alcohol use was clearly included in the questionnaire because it was a crucial issue in the case. Second, the question implicated a broad range of entities—groups, organizations, and service providers—in several fields (alcohol, substance abuse, or intervention). And third, an affirmative response could have meant any number of things, from remote involvement such as having a relative donate money to a substance abuse organization to deep involvement such as having personally both received and helped provide services for alcohol abuse in the past. Thus, Juror 17's response gave insufficient information to evaluate whether her experiences were disqualifying, yet counsel did not inquire at all.

Numerous cases establish that a jury's consideration of external information denies the defendant's right to an impartial jury. "Arguments of jurors should not be based on assertion of facts not in the evidence before them. . . . The jury should confine their consideration to the facts in evidence . . . . They must not act on the special and independent knowledge of any of their members." *Russ v. State*, 95 So. 2d 594, 600 (Fla. 1957); *see also Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991) (granting habeas relief in murder case with battering and abuse issues where juror did not acknowledge own

sexual abuse during voir dire but subsequently discussed her own experience with other jurors); *State v. Adams*, 880 P.2d 226, 233 (Haw. App. 1994), *cert. denied*, 884 P.2d 1149 (Haw. 1994) (reversing assault conviction where juror relayed own experience as sexual assault victim to explain why alleged victim did not defend herself, and also failed to reveal to court that she was victim of sexual assaults); *Cross v. State*, 627 S.W.2d 257, 257–58 (Tex. Ct. App. 1982) (reversing DUI conviction because juror informed others about prison rehabilitation facilities).

External information is particularly problematic when it is an expert opinion communicated "to the rest of the jury panel with the force of private, untested truth as though it were evidence." *People v. Maragh*, 729 N.E.2d 701, 704–05 (N.Y. 2000) (granting a new trial where a juror who was a nurse expressed opinion on material issue in the case); *see also State v. Cecil*, 655 S.E.2d 517, 526 (W. Va. 2007) (ordering new trial where juror who worked for Department of Health and Human Resources informed other jurors that based on her experience, they should "place more weight on the children's testimony than that of the adults.").

Similar situations have required reversal even in civil cases, where a criminal defendant's procedural rights are not implicated. *See, e.g.*, *Robert M. Seh Co., Inc. v. O'Donnell*, 675 S.E.2d 202, 206 (Va. 2009) (finding trial court should have granted mistrial where juror had outside information and opining that "standards regarding determinations of juror impartiality and probable prejudice are the same for civil and criminal cases."); *see also Campopiano v. Volcko*, 61 A.D.3d 1343, 1344 (N.Y. App. Div. 2009) (granting hearing on fact that juror used "her medical expertise as a respiratory therapist" to opine on the plaintiff's MRIs); *Hutchinson v. Clare Rose of*

Nassau, Inc., 40 A.D.3d 702, 704 (N.Y. App. Div. 2007) (ordering new trial on damages where one juror used own medical expertise from training and employment as physical therapist to arrive at verdict); *Cunningham v. St. Alexis Hospital Medical Center*, 758 N.E.2d 188 (Ohio App. 2001) (granting new trial where a juror who was a nurse interjected her own medical expertise in the case).

Finally, it is well established in Virginia that the injection of external information into a jury's sentencing determination is unconstitutional and that at the very least, a hearing is required. *Harris v. Commonwealth*, 408 S.E.2d 599 (Va. Ct. App. 1991) (remanding for hearing and possible resentencing). "While the law makes allowance for the fact that jurors of necessity bring to their deliberations information extraneous to trial, and while the law commits to the sound discretion of the trial judges the determination of whether such information is compatible with justice, that determination cannot be made soundly except upon inquiry." *Id.* at 602. Thus, if there is any dispute as to the effect of the jury's consideration of Juror 17's external information, Mr. Huguely is entitled to a hearing. *Id.*; *see also Downey v. Peyton*, 451 F.2d 236 (4th Cir. 1971).

In this case, however, Juror 17's outside expertise was particularly prejudicial. As discussed throughout this petition, Mr. Huguely's alcohol use was a central issue in both the merits phase of the case and at sentencing. Because trial counsel failed to provide relevant expert testimony however, they had no expert evidence for use in evaluating Mr. Huguely's condition. Thus the jury attempted to fill in the blanks with juror 17's experiences. In fact, the jury already has shared that they were influenced by Juror 17's external information and experience:

> Second-degree murder carries a sentence of five to 40 years, and jurors debated what his punishment should be, Glomski said. *He said Huguely's alcohol problem was at the center of the discussion, and the group ultimately was influenced by the professional experience of a juror who had worked with alcoholics and said Huguely needed time to grow out of his problem*.

Jenna Johnson & Mary Pat Flaherty, "George Huguely jury saw a limit to his malice," *The Washington Post* (Feb. 23, 2012), *available at* https://www.washingtonpost.com/local/crime/george-huguely-jury-saw-a-limit-to-his-malice/2012/02/23/gIQAJ3spWR_story.html (last visited Jan. 16, 2016) (emphasis added); *see also* Jessica Jaglois, "Huguely Juror Speaks Out," *WHSV* (Feb. 23, 2012), *available at* http://www.whsv.com/home/headlines/Huguely_Juror_Speaks_Out_140389593.html (last visited Jan. 16, 2016) ("If he went to prison for five years, there's a very good chance that he'd come out and still be an active alcoholic and be a danger to society. Whether it be drunk driving or whatever. One of the many factors that we considered is that we would want him to be incarcerated long enough to maximize the likelihood of him coming out of that detention and not being a menace to society. Him being a mature adult and most likely to become a recovering alcoholic rather than an alcoholic.").

Based on the information already available, a resentencing is required in this case. During trial, the jury heard great amounts of lay testimony regarding Mr. Huguely's alcohol use. By sentencing, the jury understandably was interested in assessing Mr. Huguely's alcohol abuse and taking it into account in recommending sentence. Because trial counsel provided no mitigating evidence, however, the jury did not get to hear expert testimony about Mr. Huguely's relationship with alcohol. Instead, the jury leaned on the

expertise and experience of a single juror who had experience as a treatment provider and who knew an alcoholic whom was released from prison and killed someone while drunk. This juror provided external information and expert opinion to the other jurors, advising that based on her expertise and experience, Mr. Huguely needed to be given a long enough sentence to ensure that he got sober. This outside expertise was plainly prejudicial to Mr. Huguely, who could not confront, cross-examine, or rebut it. For these reasons, Mr. Huguely is entitled to a resentencing.

CONCLUSION

WHEREFORE, on the basis of the above grounds, Mr. Huguely respectfully requests that this Court:

1. Issue a writ of habeas corpus that he may be discharged from his unconstitutional confinement and sentence.

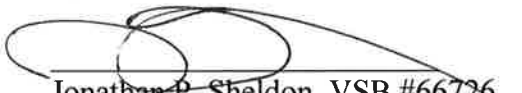
2. Grant him discovery and an evidentiary hearing at which he may present evidence in support of these claims.

3. Direct that the criminal record in Cases 11-102-1 and 11-102-5 be incorporated into this record.

4. Grant such other relief as law and justice require.

Respectfully submitted,

George Huguely V,
By Counsel



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Certificate of Service

I, Jonathan P. Sheldon, hereby certify that on this 19th day of January, 2016, a true copy of the foregoing habeas petition was:

Delivered by mail to the office of the attorney general at:

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

And emailed to:
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chapman@charlottesville.org

Jonathan P. Sheldon

VERIFICATION TO
PETITION FOR WRIT OF HABEAS CORPUS

I, George Wesley Huguely, V, being first duly sworn, do say:

1) I have read my Petition for Habeas Corpus, attached.

2) The facts stated therein are true to the best of my information and belief.

George Wesley Huguely, V

Subscribed and sworn before me under the penalty of perjury this 12th day of January, 2016.

_____
Notary Public

My commission expires: _____

My registration number is: _____