

✓ Ellis (A)

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DEC 13 2010

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		Eastern/Western (circle one) District of Virginia	
Name (under which you were convicted): Corey Pernell McNeil		Docket or Case No.: 1:10CV1400 TSE/TCB	
Place of Confinement: Sussex I Prison		Prisoner No.: 1073295	
Petitioner (include the name under which you were convicted) Corey Pernell McNeil		Respondent (authorized person having custody of petitioner) Loretta K. Kelly, warden	
The Attorney General of the State of Virginia		Harri B. Atwood	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Circuit Court for the City of Newport News

(b) Criminal docket or case number (if you know): 49118-02; 49119-02

2. (a) Date of the judgment of conviction (if you know): Nov 18, 2002

(b) Date of sentencing: Jan 31st 2003

3. Length of sentence: 35 yrs

4. In this case, were you convicted on more than one count or of more than one crime? Yes  No

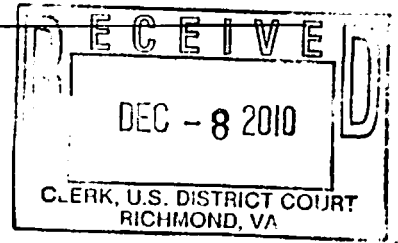
5. Identify all crimes of which you were convicted and sentenced in this case: Second-degree murder Va. Code § 18.2-32  
use of a firearm during the commission of a felony Va. Code § 18.2-53.1

6. (a) What was your plea? (Check one)

- (1) Not guilty
- (2) Guilty
- (3) Nolo contendere (no contest)
- (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

N/A



(c) If you went to trial, what kind of trial did you have? (Check one)

Jury  Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes  No

8. Did you appeal from the judgment of conviction?

Yes  No

9. If you did appeal, answer the following:

(a) Name of court: Court of Appeals of Va.

(b) Docket or case number (if you know): Record No. 0300-03-1

(c) Result: Denied

(d) Date of result (if you know): Dec 23, 2003

(e) Citation to the case (if you know): N/A

(f) Grounds raised: Commonwealth's evidence wasn't competent, was inherently incredible, totally inconsistent and wasn't sufficient to prove that the appellant was guilty of 2nd degree murder and use of a firearm

(g) Did you seek further review by a higher state court? Yes  No

If yes, answer the following:

(1) Name of court: Supreme Court of Va

(2) Docket or case number (if you know): Record No. 0300-03-1

(3) Result: Court refuses petition for appeal

(4) Date of result (if you know): July 24 2004

(5) Citation to the case (if you know): N/A

(6) Grounds raised: Evidence adduced at trial by Commonwealth wasn't sufficient to support the verdict of the jury

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes  No

If yes, answer the following:

(1) Docket or case number (if you know): NO .07-5173

(2) Result: Denied

(3) Date of result (if you know): Oct 1, 2007

(4) Citation to the case (if you know): N/A

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes  No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Circuit Court of City of Newport News

(2) Docket or case number (if you know): CR 70433942

(3) Date of filing (if you know): July 7, 2005

(4) Nature of the proceeding: Writ of Habeas Corpus

(5) Grounds raised:

Ineffective Assistance of Counsel

① Counsel failed to request jury instruction

② Counsel failed to procure witness testimony

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes  No

(7) Result: Dismissed

(8) Date of result (if you know): Aug 24, 2005

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: U.S. District eastern (Alexandria)

(2) Docket or case number (if you know): 1:06-cv-00632-TSE-TCB

(3) Date of filing (if you know): May 31, 2006

(4) Nature of the proceeding: (Federal) Habeas Corpus

(5) Grounds raised: Ineffective Assistant of Counsel; Counsel

Failed to request jury instruction and procure witness testimony; Evidence was ineffective to support verdict of guilt beyond a reasonable doubt; defense Counsel's failure to object or to request

a third verdict form or finding instruction form for not guilty by reason of justifiable homicide in self defense, constituted ineffective assistance

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes  No

(7) Result: DISMISSED

(8) Date of result (if you know): Nov 27, 2006

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Court of Appeals of Va.

(2) Docket or case number (if you know): Record No. 1728-09-1

(3) Date of filing (if you know): March 21, 2008

(4) Nature of the proceeding: Writ of Actual Innocence (Non-Biological)

(5) Grounds raised:

see ground one attached

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes  No

(7) Result: Dismissed

(8) Date of result (if you know): Aug 18th 2009

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes  No

(2) Second petition: Yes  No

(3) Third petition: Yes  No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts and law supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Actual Innocence

(a) Supporting facts and law (State the specific facts and law that support your claim.):

See attached pages 1-12 &  
exhibit F

(b) If you did not exhaust your state remedies on Ground One, explain why:

N/A

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Appeal

Name and location of the court where the motion or petition was filed: Court of Appeals of Va.

Docket or case number (if you know): Record No. 1728-09-1

Date of the court's decision: Aug 18 2009

Result (attach a copy of the court's opinion or order, if available): Dismissed  
see attached Exhibit A

(3) Did you receive a hearing on your motion or petition?

Yes  No

(4) Did you appeal from the denial of your motion or petition?

Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court  
of Va. held at the Supreme Court building city of Richmond

Docket or case number (if you know): Record No 091847

Date of the court's decision: Dec 9, 2009

Result (attach a copy of the court's opinion or order, if available): Dismissed  
see attached Exhibit B

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: \_\_\_\_\_

N/A

GROUND TWO: Violation of due process guaranteed by  
14th amendment, trial Court evidence is insufficient

(a) Supporting facts and law (State the specific facts and law that support your claim.):

see attached pages (13-18)

(b) If you did not exhaust your state remedies on Ground Two, explain why: \_\_\_\_\_

N/A

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Certificate of appealability

Name and location of the court where the motion or petition was filed: U.S. Court of Appeals 4th Circuit

Docket or case number (if you know): 06-8015 1:06-CV-00632

Date of the court's decision: March 30 2007

Result (attach a copy of the court's opinion or order, if available): Denied see attached Exhibit C & C(1)

(3) Did you receive a hearing on your motion or petition?

Yes  No

(4) Did you appeal from the denial of your motion or petition?

Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeals 4th Circuit

Docket or case number (if you know): 06-8015

Date of the court's decision: May 1, 2007

Result (attach a copy of the court's opinion or order, if available): Denied  
untimely filed  
see attached Exhibit D

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

\_\_\_\_\_ N/A \_\_\_\_\_

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: \_\_\_\_\_

\_\_\_\_\_ N/A \_\_\_\_\_

**GROUND THREE:** Denied effective assistance of Counsel

(a) Supporting facts and law (State the specific facts and law that support your claim.):

\_\_\_\_\_ see attached pages (19-28) \_\_\_\_\_  
and Exhibits E, E(1), H, H(1), I, & J \_\_\_\_\_

(b) If you did not exhaust your state remedies on Ground Three, explain why: \_\_\_\_\_

\_\_\_\_\_

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

\_\_\_\_\_



(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Certificate of Appealability

Name and location of the court where the motion or petition was filed: U.S. Court of Appeals 4th Circuit

Docket or case number (if you know): 06-8015 1:06-cr-00632

Date of the court's decision: March 30, 2007

Result (attach a copy of the court's opinion or order, if available): Denied

see attached Exhibit C & C(1)

(3) Did you receive a hearing on your motion or petition?

Yes  No

(4) Did you appeal from the denial of your motion or petition?

Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeals 4th Circuit

Docket or case number (if you know): 06-8015

Date of the court's decision: May 1, 2007

Result (attach a copy of the court's opinion or order, if available): Denied

untimely filed  
see attached Exhibit D

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

N/A

GROUND FOUR: Counsel's Failure to object to or request a third verdict form or finding instruction

(a) Supporting facts and law (State the specific facts and law that support your claim.):

see attached pages (29-44)

(b) If you did not exhaust your state remedies on Ground Four, explain why:

N/A

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Certificate of Appealability

Name and location of the court where the motion or petition was filed: U.S. Court of Appeals 4th Circuit

Docket or case number (if you know): 06-8015 | 06-CV-00632

Date of the court's decision: March 30, 2007

Result (attach a copy of the court's opinion or order, if available): Denied

see attached Exhibit C & C(1)

(3) Did you receive a hearing on your motion or petition?

Yes  No

(4) Did you appeal from the denial of your motion or petition?

Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of appeals  
4th Circuit

Docket or case number (if you know): 06-8015

Date of the court's decision: May 1, 2007

Result (attach a copy of the court's opinion or order, if available): Denied

untimely filed

see attached Exhibit D

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes  No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

N/A

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

U.S. District Court Eastern District  
(Alexandria)

see attached Exhibit E, C, C(1)  
& D

- 15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

N/A

- 16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: J.H. Weaver, Jr. VSB#15871, 615  
Drumblade St. P.O. Box 543 Portsmouth, Va. 23705

(b) At arraignment and plea: SAME

(c) At trial: SAME

(d) At sentencing: SAME

(e) On appeal: SAME

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

- 17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: \_\_\_\_\_

N/A

(b) Give the date the other sentence was imposed: \_\_\_\_\_

N/A

(c) Give the length of the other sentence: \_\_\_\_\_

N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes  No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition. \_\_\_\_\_

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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Therefore, petitioner asks that the Court grant the following relief: Habeas Corpus  
petition filed in U.S. District Court

or any other relief to which petitioner may be entitled.

\_\_\_\_\_  
 Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct  
 and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on  
Dec 8, 2010 (month, date, year).

Executed (signed) on 12/8/10 (date).

C. P. M. D. O.  
 Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is  
 not signing this petition. \_\_\_\_\_

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## Statement of facts

Petitioner testified that Avent asked him for a ride, and petitioner said he could not give him one because it's not his car. Petitioner testified Avent got angry and threatened to hurt petitioner. Petitioner turned away, got into the car and went to a nearby location to talk to, Nyema, his girlfriend. (Tr. Nov 15, 2002, VII., pp. 140-144)

Petitioner testified Avent came to the location, yelled at him, cursed at him and punched him in his face. Avent kept coming towards petitioner and hitting petitioner in the face and threatening petitioner as petitioner was backing away from Avent.

Petitioner testified Avent threatened to kill petitioner and "was fidgeting around by his jack area as if he was getting a weapon." Petitioner testified that he "was so afraid that he went for his firearm which was holstered and shot the guy" as petitioner was backing up, then turned and ran to get away from him."

2)

(Tr., Nov 15, 2002, vol. II, Tr. Pp. 146-151).

Karone Argo testified that Avent and petitioner were two car lengths away about 25 or 30 ft. away. Argo testified that Avent was pushing petitioner in the face with his hands and petitioner was backing up going to his side of his pocket, and pulled a gun and started shooting. (Tr. Nov. 2002 VII, Tr. Pp. 13-16). Argo testified it was lots of people out there in the parking lot and because of the commotion going on out there Argo couldn't say if Avent or petitioner were doing any talking. (Tr. Nov 15, 2002 VII, Tr. Pp. 24-27).

Officer Jeremy Harris testified that he was 45 yards away from Avent and petitioner. Harris heard people talking and yelling, but Harris "could not distinguish any words and could not tell who was yelling. Harris



3)

testified that there were a lot of cars and lots of people, about 20 right in this area between his vantage point and Avent and petitioner. (Tr. Nov 14, 2002 Vol. I, Tr. P. 102-103, 125-126). As Harris approached, he saw petitioner to be two ft. away from Avent, turn his body towards him a little bit as to where Harris could see the front of petitioner's body, petitioner discharged a black semi-automatic handgun and Avent fell from his view.

Officer Eugene Kempt testified that there was a "Big" crowd of about (200) people in the parking lot. (Tr. Nov 14 2002, Vol I, Tr. P 158)

Reginald Macrimmon testified Avent was mad, passing, walked up to petitioner kept tapping petitioner in the face, cursing and threatening to beat up petitioner. (Tr., Nov 14 2002, Vol. I, Tr. P. 252-254)

Attorney Sterling H. Weaver, Sir,

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was retained to represent petitioner on the charges of "first degree murder and use of a firearm during the commission of a felony." Doctor Wendy M. Gunther, assistant deputy medical examiner, prepared an autopsy report of Derrick Avent that begins "blood smear and drip noted across left hand. Pattern blood drip on palm of left hand suggestive of trigger guard but not definitive." The Commonwealth's attorney filed a motion in limine objecting to the admissibility of the statement. (Motion in Limine Hearing, Nov 8, 2002; Tr. pp. 5-9).

The court granted the prosecution's motion in limine to not allow that in the autopsy report or by the testimony of Doctor Gunther because it invades the privacy of the jury. However the court also held that counsel Weaver can ask Gunther about the pattern depicted in the picture and then argue anything he wants, that it is a pattern suggestive of a trigger

5)

guard. (Motion Hearing Nov 8, 2002; Tr. Pp. 11, 29-30, 32).

Defense Counsel contended that he would ask Doctor Gunther about the pattern of blood on the hand in order to argue that it is suggestive of a trigger guard. (Motion in Limine Hearing Transcript Nov 8, 2002 Tr. Pp. 33-34). Counsel Weaver contended that he would argue that Avert went for a gun, and that the palm of Avert's hand is suggestive of a trigger guard of a gun.

After investigating the case defense Counsel Weaver informed petitioner that the evidence was sufficient to support a claim of self-defense. Weaver never consulted, or advised, or discussed with petitioner the defense of voluntary manslaughter or any voluntary manslaughter jury instruction. Weaver concluded that the evidence was insufficient to support an instruction of voluntary manslaughter. Weaver made the

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tactical decision not to argue the defense of voluntary manslaughter or offer a voluntary manslaughter jury instruction, and decided to pursue self-defense as the affirmative defense and theory of the case alone when other evidence supported the instruction.

During trial, Weaver failed to question Dr. Gunther about the pattern of the blood on the hand or in the picture, or call Dr. Gunther as a defense witness to testify about the pattern in order to argue that Avent went for a gun, and that the palm of Avent's hand is suggestive of a grip of a gun. Weaver completely abandoned that theory of the defense during the trial.

At the conclusion of all the evidence at the guilt phase of the trial, the court only gave two findings instructions. The first is indicating that if you, the jury, finds the defendant guilty of first degree murder as charged in the indictments, then the fore person

signs under that finding.

If the jury, however, finds that the defendant is guilty of second-degree murder, the foreperson signs under that finding.

Or if the jury finds the defendant not guilty, then the foreperson signs under that finding. (Tr., Nov 16 2002, VIII, Tr. Pp. 17-18).

The court failed to give a finding instruction for justifiable homicide in self-defense.

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## Ground One: Argument

Due process Unavailable Exculpatory Evidence Sufficient to justify the issuance of the writ.

This evidence was previously unknown and unavailable to either me or my attorney at the time the conviction(s) became final in the Circuit Court.

This evidence became available to me on March 13<sup>th</sup> 2008.

The circumstances under which the evidence was discovered were: Unavailable witness at trial, affidavit of the witness who actually witnessed the incident, and was not present during trial in the Circuit Court proceedings and who's testimonial evidence was not considered by the trial court nor the appellate courts.

This evidence could not have been discovered or obtained by the exercise of diligence before

a)

the expiration of (21) days following entry of the final order(s) of conviction by the court.

The evidence upon which I base my claim is material and when considered with all of the other evidence in the record, will prove that no rational trier of fact could have found me to be guilty beyond a reasonable doubt of the charge(s): and degree murder, Use of a fire arm in the commission of a felony. The record does not reflect which statement or statements of the (6) Commonwealth's witnesses opinion formed the basis of the jury verdict, and a determination of whether a statement is a statement of fact or opinion is an issue of law, and a de novo review of the (6) witnesses statements are in question.

I understand that I am responsible for all statements

Contained in this petition, I am not challenging the fact that I may not be guilty of any wrong on my behalf. I am not guilty of 2nd degree murder. The testimony of Commonwealth's Witness Reginald McCrimmon and Karone Aree, are credible testimony, and the affidavits filed with this petition is additional "unavailable" evidence under its original jurisdiction" to grant the writ and vacate the conviction upon clear and convincing evidence satisfying the designated statutory requirements, and find the petitioner guilty of a lesser included offense and remand the case to the circuit court for resentencing. "Petitioner does not have a criminal record prior to this first felony offense," his prior record is that of not (i) felony.

A final judgment of the court of appeals disposing of a petition for a writ of actual innocence



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based on non-biological evidence is based partly on factual findings certified by the circuit court, which are similar to circuit court findings made under Code § 8.01-654 (c) in habeas corpus cases. A standard of review similar to that which is applied to factual findings entered in original jurisdiction habeas proceedings will be applied to the factual findings contained in the record of the court of appeals. Standard of review, conclusions of law and its conclusions based on mixed questions of law and fact, in accordance with general principles of appellate review, are subject to de novo consideration.

Because determination of whether a statement is a statement of fact or opinion is an issue of law, a de novo review of the (6) statements in question should be conducted, "actionable statements are expressions of opinion, not fact, and therefore, should not have

12)

been submitted to the jury. Because the record does not reflect which statement or statements formed the basis of the jury verdict and the other grounds for reversal raised by the defendant are not dispositive in the posture of this case, the verdict should be set aside and the case should be remanded for resentencing of a less included offense.

13)

## Ground Two: Argument.

The evidence in support of petitioner's state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt, in violation of the due process guaranteed by the fourteenth amendment.

McNeil (petitioner) is entitled to relief because the Va. Supreme Court's decision that the evidence is sufficient to convict him ~~of~~ of second-degree murder is both "contrary to, and" involved an unreasonable application of *In re Winship*, 397 U.S. 358, 363 (1970), *Jackson v. Virginia*, 443 U.S. 307 (1979), and unreasonable determination of the facts.

Petitioner's claim that evidence is insufficient to support his conviction of second-degree murder as a matter of due process depends on "Whether, after viewing the evidence in the light most favorable to the prosecution,

14)

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, at 319 (1979).

To prove that the petitioner was guilty of the charge of second-degree murder, the Commonwealth must have proved beyond a reasonable doubt that the petitioner did kill Derrick Avent and the killing was done with malice.

Where the plea of self-defense was the sole defense relied on by the accused to justify the shooting on the trial of a prosecution for homicide, a consideration of the sufficiency of the evidence to support the verdict and judgement must be confined to a consideration of the evidence as bearing upon that defense. Pendleton v. Commonwealth, 131 Va. 676, 109 (1921)

"Justifiable self-defense occurs [when] a person, without any fault on his part in provoking

15)

or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself." Barley v. Commonwealth, 200 Va. 92 (1958). A person assaulted while in discharge of a lawful act, and reasonably apprehending that his assailant will do him bodily harm, has the right to repel the assault by all force he deems necessary and is not compelled to retreat from his assailant, but may in turn become the assailant, inflicting bodily wounds until his person is out of danger. Jackson v. Commonwealth, 96 Va. 107 (1898); McCoy v. Commonwealth, 125 Va. 771 (1919)

Under Virginia law, self-defense is an affirmative defense which the accused must prove by introducing sufficient evidence to raise a reasonable doubt about his guilt. Smith v. Commonwealth, 17 Va. app. 68 (1993)

16)

Viewing the evidence and all reasonable inferences therefrom in the light most favorable to the Commonwealth, it must be concluded that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Killing with malice but without premeditation and deliberation is murder of second-degree, Painter v. Commonwealth, 210 Va. 360 (1969). The jury was instructed as to what must be proved to convict petitioner of murder of the first-degree, and murder of the second-degree. The jury also was instructed that malice might be inferred from the deliberate use of a deadly weapon, unless the jury had a reasonable doubt whether malice existed. Compton v. Commonwealth, 219 Va. 716, 730 (1979).

The uncontradicted evidence shows that Avent was killed by a deadly weapon fired by petitioner. If the jury believed McCrimmon's

17)

testimony, Argo's testimony, and petitioner's testimony, Avent pushed, cursed, pushed, and hit petitioner in the face and threatened to beat him up when he fired the first shot and had turned completely around to face Harris to run when he lowered the firearm and continued to fire backwards as he ran away to flee away from Avent conclusively established that such circumstances would constitute a justifiable self-defense.

The record does not contain a scintilla of evidence that the pushing, cursing, and threatening to beat up petitioner by Avent was an argument. For an argument to take place, it must have been voluntarily and mutually entered into by both or all parties to the encounter. One who is verbally and physically attacked may and usually does defend himself, but the ensuing attack cannot be accurately described as an argument. Moreover, there is not

18)

a scintilla of evidence that petitioner actually said one word to provoke a confrontation.



19)

## Ground Three: Argument

Petitioner was denied his right to effective assistance of counsel guaranteed under the Sixth Amendment, and enforceable through the Fourteenth Amendment to the Constitution of the United States.

McNeil (petitioner) is entitled to relief because the Va. Supreme Court's decision rejecting his ineffective assistance claim is both "contrary to, and [ ] involved an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984), and unreasonable determination of the facts.

(A)

Counsel's performance was deficient

The state court held that petitioner failed to satisfy both the performance and prejudice prongs of the Strickland test in the claim that "counsel was ineffective for failing to request a jury instruction on

voluntary manslaughter," and in the claim that "Counsel was ineffective in failing to elicit testimony from Dr. Wendy Gunther and argue that the blood drip pattern noticed on the victim's hand was suggestive of a trigger guard."

Under the first prong of the Strickland test, the "performance" inquiry, petitioner must show that counsel's "representation" fell below an objective standard of reasonableness," *id.*, 688. In making his showing of deficiency, petitioner must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S. Ct. 2052. The strategic choices about which lines of defense(s) to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based.

A defendant is entitled to have the jury instructed on those theories

21)

of the case that are supported by evidence. Connell v. Commonwealth, 34 Va. App. 429 (2001). "If any credible evidence in the record supports a proffered instruction on a lesser included offense, failure to give the instruction is reversible error."

Brandon v. Commonwealth, 16 Va. App. 408 (1993); Morse v. Commonwealth, 17 Va. App. 627 (1994)

The Supreme Court has held that "where the accused embarks in a quarrel with no felonious intent or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is [manslaughter] not murder." Wallace v. United States, 162 U.S. 466, 471 (1896).

Granting that the jury would of been justified in inferring malice from the deliberate use of a deadly weapon, still the inference was not an irrebuttable one, and it was for the jury to say whether

22)

petitioner's statement that "he told Avent he could not give him a ride because the car was not his and that he was so afraid that he went for his firearm and shot Avent after he had yelled and cursed at him, punched him in the face and threatened to beat him up and kill him and he was fidgeting around by his yack area as if he was getting a weapon" was or was not true, it was not true, it was for a jury to decide. And if they believed from the evidence that this was true, and that the killing was under reasonable apprehension of imminent peril, then it was for the jury to determine under all the facts and circumstances whether petitioner had committed the offense of manslaughter, rather than that of murder if he could not be excused altogether, and not a determination for the attorney.

Petitioner requested to be tried by a jury. Any reasonably competent attorney would have known it was

23)

incumbent upon him to allow the jury to decide whether or not petitioner had committed the offense of manslaughter. Here, petitioner was not only assaulted, but Avent threatened to beat him up, fuck him up, to kill him. This was sufficient provocation for petitioner to reasonably apprehend that Avent was about to commit a felony or would do him bodily harm. Jackson v. Commonwealth 96 Va. 107 (1898); McCoy v. Commonwealth 125 Va. 771 (1919).

Next, counsel successfully argued and the court held counsel Weaver can ask Dr. Gunther about the blood pattern depicted in the picture, and then argue anything he wanted. Counsel argued to the court and petitioner agreed that counsel would argue that the pattern depicted in the picture on Avent's hand is a pattern suggestive of a trigger guard. This evidence would conceivably benefit petitioner's claim of self defence. The court ruled this

84)

evidence and argument was admissible. The weight accorded the evidence are matters solely for the fact finder. Sandova v. Commonwealth, 20 Va. App 133 (1951)

Here, however the general rule governing "the standards governing decision" is that "whether credible evidence of provocation is sufficient to rebut the presumption of malice arising from a homicide is a question of fact, and the jury is the fact finder." McKung v. Commonwealth, 215 Va. 654 (1975)

However, Counsel Weaver improperly made into a tactical decision the question whether the evidence was sufficient to support an instruction of voluntary manslaughter. Any strategic choices about the sufficiency of the evidence are owed deference, commensurate with the reasonableness of the professional judgments on which they are based. Among the factors relevant to deciding whether particular strategic choices are

25)

reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense and the potential for prejudice from taking an unpursued line of defense. Id. 446 U.S. at 682. Here, Counsel made errors so serious that Counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Strickland, 446 U.S. at 687.

(B)

Counsel's Deficient performance prejudiced petitioner

Petitioner must show that "the deficient performance prejudiced the defense." That is to say "Counsel's errors were so serious it deprived the defendant of a fair trial [.]". Id. Unless petitioner established both prongs of this two-part test his claim of ineffective assistance of Counsel will fail. Id.

In articulating the prejudice

26)

Component of the Strickland analysis, the Supreme Court provided that in certain circumstances the requisite showing of prejudice may be presumed due to the nature of the deficient performance. 466 U.S. 692; United States v Cronin, 466 U.S. 648 (1984). A presumption of prejudice is appropriate where the trial errors constitute "structural defects in the ~~constitutional~~ Constitution of the trial mechanism," which so "affect [ ] the frame work within which the trial proceeds" that they require automatic reversal. Arizona v Fulminate 499 U.S. 279 (1991). Brecht v Abrahamson 507 U.S. 619 (1993) (ruling that "structural errors" requires [ ] automatic reversal... because they infect the entire trial process.")

In Duncan v Louisiana, 391 U.S. 145 (1968), the Supreme Court held that trial by jury in serious criminal cases is "fundamental to the American scheme of justice" and thereby applicable in state proceedings). Here, petitioner



27)

was denied the opportunity to be tried before a jury of his peers on the question of the sufficiency of the evidence to support a voluntary manslaughter defense because defense counsel improperly took it upon him self to decide whether the evidence was "insufficient to support an instruction of voluntary manslaughter."

There is evidence that petitioner acted upon "heat of passion" and "reasonable provocation" arising from provocation or the threat of great bodily harm or death that reasonably produced an emotional state of mind such as "fear" as to demonstrate an absence of deliberate design to kill, or to cause one to act on impulse without conscious reflection. 508 U.S. 275, 279

In Sullivan v Louisiana, 508 U.S. 275 (1993), Scalia for a unanimous court held that utilization of harmless error analysis in

28)

reviewing an invalid jury instruction on reasonable doubt violated the defendants Sixth and Fourteenth Amendments right to trial by jury. 508 U.S. 275, 279

29)

Four

Ground ~~Three~~: Argument.

Defense Counsel's failure to object or to request a third verdict form or a finding instruction form for not guilty by reason of justifiable homicide in self-defense, constituted ineffective assistance of Counsel.

The fact that McNeil (petitioner) killed Arent was not in dispute. Petitioner put on evidence alleging that he shot and killed Arent in self-defense. Case law in Va. holds that justifiable homicide in self-defense occurs when a person without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself.

The court gave the jury instruction of the law in first-degree murder, second-degree

30)

murder, use of a firearm, and justifiable homicide in self-defense (Tr., Nov. 16, 2002, Vol. III, Tr. Pp. 12-14, 16-17). However, the court only gave two finding instructions, one for guilty and the other one for not guilty. (Tr. Nov. 16, 2002, Vol. III, Tr. Pp. 17-18).

Based on the court's instructions of the law given to the jury, the two finding instructions alone are an incomplete and inconsistent statement of the law that violated the due process clause because the jury was only allowed to find petitioner either guilty or not guilty. The jury was not allowed to enter a finding of "not guilty by the reason of justifiable homicide in self-defense." Once petitioner admitted that he committed the offense, but in justifiable self-defense, and accordingly the jury found that he committed homicide, then the jury was obligated to follow the

31)

instructions of the law saying he is guilty of something even though the jury may have felt that petitioner proved he was not guilty by reason of justifiable homicide in self-defense.

Without a third verdict form or a finding instruction form saying that the jury may find petitioner "not guilty by reason of justifiable homicide," then no jury could return such a verdict. Moreover, the jury could not find petitioner not guilty either, because both his evidence and the Commonwealth's evidence showed that he committed the homicide. The defense of "justifiable homicide in self-defense" is based on the predicate that a defendant committed the offense, but the killing was justified because, "the person is ~~not~~ without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great

32)

bodily harm to himself."  
Bailey v. Commonwealth, 200 Va. 92 (1958)

(A)  
Performance Prong

Since the court's action of failing to provide a third verdict form or a finding instruction form of not guilty by reason of justifiable homicide, without question, violated petitioners fundamental due process right to present a defense under Washington v. Texas, 388 U.S. 14 (1967); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) and violated a basic procedural safeguard required by the due process clause, e.g., that the prosecution prove beyond a reasonable doubt every element of the charged offense Sullivan v. Louisiana, 508 U.S. 275, 277-278 (1993); In re Winship, 397 U.S. 358, 363 (1970); Dobson v. Commonwealth, 260 Va. 71, 74 (2000); Green v. Young, 264 Va. 604 (2002);

Stokes v. Warden, 226 Va. 111, 117 (1983), any reasonably competent attorney would have known that it was incumbent upon him or her to object or to request a third verdict form or a finding instruction form for not guilty by reason of justifiable homicide, in self-defense. Thus, petitioners' counsels' performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688

(B)

### Prejudice Prong

Next, petitioner must also establish that his counsels' deficient performance prejudiced his defense. To demonstrate prejudice, petitioner "must show that there is a reasonable probability that, but for counsels' unprofessional errors, the result of proceeding would have been different." Id. at 694. In this particular case, our prejudice analysis must be guided by the Supreme Court's decision in

34)

Washington v. Texas, Valenzuela-Bernal, and Sullivan, Supra. First, petitioner had a right under Washington and Valenzuela-Bernal to present his defense of not guilty by reason of justifiable homicide in self-defense.

Here the jury was not allowed to enter a finding for such a defense because the court failed to give a third finding instruction, one for "not guilty by reason of justifiable homicide in self-defense." Second, petitioner had a right that the prosecution prove beyond a reasonable doubt every element of the charged offense. Such a verdict was not returned in petitioner's case because the two finding instructions given by the court restricted the jury's verdict or findings to guilty even though the evidence proved he was not guilty by reason of justifiable homicide.

Further more, had a third



35)

finding instruction form or verdict form been presented to the jury, then there is a reasonable probability that this would have resulted in a different outcome in the proceeding because now the jury would have been allowed to enter a finding or verdict of not guilty by reason of justifiable homicide beyond a reasonable doubt of every element of the charged offense. Moreover, there being no jury verdict of guilty beyond a reasonable doubt, the question whether the same verdict or finding would have been rendered absent the constitutional errors is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most a court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional errors. That is not enough. Sullivan, I.d.

36)

at 279-280.

While petitioner recognizes that the court gave the jury instructions of the law in first-degree murder, second-degree murder, use of a firearm, and justifiable homicide in self-defense, ~~that~~ the fact remains that without a third verdict form or finding instruction form allowing the jury to find petitioner "not guilty by reason of justifiable homicide in self-defense," the jury received inconsistent directions with regard to that defense of self-defense.

The jury in this case could not have followed instructions of the law in their entirety because of the internal inconsistency between the jury instructions and the lack of a finding instruction for not guilty by reason of justifiable homicide in self-defense. It would be pure speculation to assume that the jury ignored the

37)

inconsistency of the law between the jury instructions and the finding instructions. Guilty, not guilty, and not guilty by reason of justifiable homicide in self-defense are separate and distinct principles. Since the jury in this case could have found petitioner guilty of second-degree murder without finding that the Commonwealth had proved the elements of the offense beyond a reasonable doubt, we have the same situation here as the Supreme Court dealt with in *Sullivan*, the absence of a verdict of guilty - beyond - a - reasonable - doubt. Just as the jury instruction in *Sullivan* was a "structural defect [ ] in the constitution of the trial mechanism," the lack of proper finding instructions in this case also qualifies as a "structural error." *Sullivan*, 508 U.S. at 281-282.

(c)

Exhaustion of state remedies

38)

28 U.S.C. § 2254(B)(1) places a new constraint on the power of a federal habeas court to grant relief to a state prisoner. The habeas writ may issue only if the applicant has exhausted the remedies available in the courts of the state, or there is an absence of available state corrective process or circumstance exist that render such process ineffective to protect the rights of the applicant.

Here, petitioner's failure to exhaust the remedies available in the courts of the state of Va. on this claim that "defense counsel's failure to object or to request a third verdict form or a finding instruction form for not guilty by reason of justifiable homicide in self-defense, is due to ineffective assistance of counsel." Petitioner failed to present this claim at trial and on direct appeal because of ineffective assistance of counsel.

39)

Moreover, at the present time there is an absence of available state corrective process, or circumstances exist that render such process ineffective to protect the rights of this applicant because more than one-year has passed since the Supreme Court of VA. affirmed petitioner's convictions on direct appeal on July 14, 2004, and state one-year statutory time limitations now prevent the courts of the State of VA. from considering this claim on habeas corpus review. § 8.01-654 (A) (2), of the Code of VA, 1950, as amended.

(D)

New Constitutional rule of criminal procedure

Petitioner seeks to create a new Constitutional rule of criminal procedure requiring state court to give a third "finding instruction form of verdict form" "not guilty by reason of ~~just~~ justifiable homicide in

40)

self-defense." The current rule of criminal procedure in Va. Courts is that the court will give two finding instructions in criminal cases, one for "guilty" and the other one for "not guilty." (Tr., Nov. 16, 2002, Vol III, Tr. Pp. 17-18).

New Constitutional rules of criminal procedure will not be applied to petitioner in this case and to all others similarly situated unless: (1) It places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) it requires the observance of those procedures that are implicit in the concept of ordered liberty.

Teague v. Lane, 489 U.S. 288, at 693 (1989).

Petitioner contends that he has established a violation of the due process clause under Washington v. Texas, 388 U.S. 14 (1967) and Sullivan v. Louisiana, 508 U.S. 358, 363 (1970).

41)

Recognizing that the new rule urged by petitioner was not dictated by precedent existing at the time his conviction became final, petitioner contends that its origin is rooted in Washington v. Texas. When a court gives instructions of the law of the affirmative defense of "not guilty by reason of justifiable homicide," the fundamental fairness and even handed justice requires that a third finding instruction form for "not guilty by reason of justifiable homicide in self-defense" be given to the jury along with the two finding instructions of "guilty" and "not guilty."

Moreover, the defense of "not guilty by reason of justifiable homicide in self-defense" cannot be realized unless there is a finding instruction allowing a jury to return such a verdict. "A person's right to a reasonable opportunity to be heard in his defense —"

42)

A right to his day in court - is basic in our system of jurisprudence. The right to a finding instruction on the defendant's affirmative defense, if necessary, is in plain terms the right to present a defense, the right to allow the jury to enter a finding on the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. The right is a fundamental element of due process. Washington v. Texas.

Furthermore, the basic purpose of a "finding instruction" allowing a jury to return a verdict of "not guilty by reason of justifiable homicide in self defense" is related to protecting the innocent from conviction. This new finding instruction will be an adjunct to the ascertainment of truth. Guided by the decision in Washington dealing with the defendant's right to establish a defense -



43)

the court's purpose was to provide for a broader implementation of its core concern for improving the reliability of the results reached at criminal trials. The short of the matter is that the two "finding instructions" alone, of just "guilty" and "not guilty" where the court instructs the jury in the law of "justifiable homicide in self-defense" but gives no such finding instruction allowing the jury to return such a verdict raise grave doubt about the accuracy of the verdict of guilty returned here.

The court's closing instructions of the law and finding instructions given to the jury are like no other instructions. They are the structural frame work in the constitution of the trial mechanism. The jury relies on it in reaching its decision. The jury's assessment of the finding instructions depended on the assessment of the instructions of the law given to the jury also.

44)

Without that third finding instruction, the jury might have believed that there is no middle ground between "guilty" and "not guilty," such as "not guilty by reason of justifiable homicide in self-defense." Also, it is impossible to say beyond a reasonable doubt that the jury during its deliberation considered or relied on only evidence that could only be found in the two finding instructions, would have reached the same verdict with a third finding instruction.

**VIRGINIA:**

*In the Court of Appeals of Virginia on Tuesday the 18th  
day of August, 2009.*

Corey Pernell McNeil, Petitioner,  
against Record No. 1728-09-1  
Commonwealth of Virginia, Respondent.

Upon a Petition for a Writ of Actual Innocence

Before Judges Humphreys, Powell and Senior Judge Clements

Corey Pernell McNeil petitions this Court for a Writ of Actual Innocence pursuant to Chapter 19.3 of Title 19.2 of the Code of Virginia. He contends he is innocent of second-degree murder and using a firearm in the commission of a felony, of which he was convicted in the Circuit Court of Newport News on January 31, 2003.

In support of his petition, McNeil supplies an affidavit of Thomas Ross, dated July 31, 2008. In the affidavit, Ross asserts he witnessed the incident that resulted in the shooting death of Derrick Avent on May 9, 2002. Ross states that Avent approached McNeil "with a handgun in a threatening and intimidating manner." Ross further states that he was not called as a witness at McNeil's trial and that he "recently [and] unexpectedly" learned of McNeil's "unfortunate situation." Ross supplies his present address as 4326 Lacy Cove Lane and states he is available to provide testimony on McNeil's behalf.

With his petition, McNeil provided this Court with portions of the transcript of his trial. The transcript reveals that Sterling Weaver, McNeil's attorney, stated he wanted to call Ross, who resided at 4326 Lacy Cove Lane, as a witness at trial. Weaver said he had talked with Ross "two or three times yesterday at the number that's for this address." In addition, Weaver had Ross' friend talk to Ross the night before trial and the morning of trial. However, Ross did not appear at trial, and a deputy sheriff was unable to locate him at his listed address on the day of trial. Weaver and the trial court agreed that a

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on Wednesday the 9th day of December, 2009.*

Corey Pernell McNeil, Appellant,

against Record No. 091847  
Court of Appeals No. 1728-09-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

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

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

  
Deputy Clerk

EXHIBIT  
C

JUDGMENT

FILED: March 30, 2007

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 06-8015  
1:06-cv-00632

COREY PERNELL MCNEIL

Petitioner - Appellant

v.

EDWARD WRIGHT, Warden

Respondent - Appellee

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Appeal from the United States District Court for the  
Eastern District of Virginia at Alexandria  
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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

\_\_\_\_\_  
CLERK

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

EXHIBIT  
C (1)

FILED  
April 23, 2007

No. 06-8015  
1:06-cv-00632

COREY PERNELL MCNEIL

Petitioner - Appellant

v.

EDWARD WRIGHT, Warden

Respondent - Appellee

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M A N D A T E  
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The judgment of this Court, entered 3/30/07, takes effect  
this date.

A certified copy of this Court's judgment and a copy of its  
decision are issued to the district court and constitute the  
mandate of this Court.

/s/ Patricia S. Connor  
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CLERK

EXHIBIT-D

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

FILED  
May 1, 2007

No. 06-8015  
1:06-cv-00632

COREY PERNELL MCNEIL

Petitioner - Appellant

v.

EDWARD WRIGHT, Warden

Respondent - Appellee

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O R D E R  
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Appellant has filed an untimely petition for rehearing and rehearing en banc. This Court strictly enforces the time limits for filing petitions for rehearing and rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc as untimely filed.

For the Court,

/s/ Patricia S. Connor

\_\_\_\_\_  
CLERK

APPEAL, CLOSED, HABEAS

**U.S. District Court  
Eastern District of Virginia (Alexandria)  
CIVIL DOCKET FOR CASE #: 1:06-cv-00632-TSE-TCB**

McNeil v. Wright  
Assigned to: District Judge T. S. Ellis, III  
Referred to: Magistrate Judge Theresa Carroll  
Buchanan  
Cause: 28:2254 Petition for Writ of Habeas Corpus  
(State)

Date Filed: 05/31/2006  
Date Terminated: 11/27/2006  
Jury Demand: None  
Nature of Suit: 530 Habeas  
Corpus (General)  
Jurisdiction: Federal Question

**Petitioner****Corey Pernell McNeil**

represented by **Corey Pernell McNeil**  
#320001  
Lawrenceville Correctional  
Center  
1607 Planters Road  
Lawrenceville, VA 23868  
PRO SE

V.

**Respondent**

**Edward Wright**  
*Warden*

represented by **Karri Byers Seaman Atwood**  
Office of the Attorney General  
900 E Main St  
Richmond, VA 23219  
(804) 786-4803  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
05/31/2006	①	PETITION for Writ of Habeas Corpus ( Filing fee \$5 receipt number 100 188287.), filed by Corey Pernell McNeil.(ctat, ) (Entered: 05/31/2006)
05/31/2006	②	Memorandum of Law in Support of the [1] Petition for Writ of Habeas Corpus filed by Corey Pernell McNeil. (ctat, )



		(Entered: 05/31/2006)
06/12/2006	03	ORDERED that this action is FILED; and it is further ORDERED that respondent show cause why the writ should not be granted within 60 days of the date of this Order. Respondent is to treat this Order as a request that the records of the state criminal trial and habeas corpus proceedings, if pertinent and available, be forwarded to the Clerk's office in Alexandria, Virginia. (See Order For Details) Signed by Judge T. S. Ellis III on 6/12/06. (nhall) (Entered: 06/14/2006)
07/26/2006	04	Rule 5 Answer to Petition for Writ of Habeas Corpus by Edward Wright.(nhall) (Entered: 07/31/2006)
07/26/2006	05	MOTION to Dismiss Petition for Writ of Habeas Corpus by Edward Wright. (nhall) (Entered: 07/31/2006)
07/26/2006	06	Brief in support of [5] MOTION to Dismiss Petition for Writ of Habeas Corpus, [4]Rule 5 Answer to Habeas Petition filed by Edward Wright. (Large Pleading) (nhall) (Entered: 07/31/2006)
07/26/2006	07	Roseboro Notice for Edward Wright. (nhall) (Entered: 07/31/2006)
08/29/2006	08	RESPONSE to Respondent's [5] MOTION to Dismiss Petition for Writ of Habeas Corpus filed by Corey Pernell McNeil. (nhall) (Entered: 08/30/2006)
09/05/2006	09	Record of Circuit Court Of Newport News Received (2 Manila Folders Bound By Rubber Band) (nhall) (Entered: 09/11/2006)
11/27/2006	09	MEMORANDUM OPINION re: Motion to Dismiss. Signed by Judge T. S. Ellis III on 11/27/06. (nhall) (Entered: 11/30/2006)
11/27/2006	10	ORDER for the reasons stated in the accompanying Memorandum Opinion, granting [5] Motion to Dismiss. This Court expressly declines to issue a certificate of appealability. (See Order For Details). Signed by Judge T. S. Ellis III on 11/27/06. (nhall) (Entered: 11/30/2006)
12/06/2006	11	NOTICE OF APPEAL as to [10] Order on Motion to Dismiss dated 11/27/06, by Corey Pernell McNeil. Copy sent to USCA. Copy sent to parties. Appeal fee not paid. (bhav, ) (Entered: 12/07/2006)



TRIAL TRANSCRIPT

1. Thomas Ross, ("new evidence"), witness for petitioner could not have been discovered or obtained by the exercise of diligence before the expiration of 21 days following entry of the final order(s) of conviction by the court. See 11/14/02, Trial Transcript. at. p#:325 and 326.

original

EXHIBIT

G

DEPARTMENT OF HEALTH  
OFFICE OF THE CHIEF MEDICAL EXAMINER  
830 SOUTHAMPTON AVENUE  
SUITE 100  
NORFOLK, VIRGINIA 23510  
(757) 683-8366

AUTOPSY No: T-200-02  
DAY/DATE: 5-9-02/THURSDAY  
TIME: 9:40 AM

REPORT OF AUTOPSY

DECEDENT: DERRICK LORENZO AVENT  
AUTOPSY AUTHORIZED BY: Dr. Jerome Provenzano, Medical Examiner, Newport News

BODY IDENTIFIED BY: Newport News Police Department band, hospital band and tag  
PERSONS PRESENT AT AUTOPSY: A. Ward, J. Seyler, Dr. Ruffin (EVMS), Dr. Bush, NNPD personnel

Rigor: Complete Livor: Blanching Distribution: Posterior  
Age: 33 Race: Black Sex: Male Length: 70" Weight: 165 Eyes: Brown  
Hair: Shaven Mustache: Black Beard: Stubble Circumcised: Yes Body Heat: Room temperature

CLOTHING, PERSONAL EFFECTS, EXTERNAL WOUNDS, SCARS, TATTOOS, OTHER IDENTIFYING FEATURES:

GENERAL EXTERNAL EXAMINATION: Slim, muscular adult male with an appearance consistent with stated age. Extensive blood drip and smear from chest, abdomen, arm, penis and leg gunshot wounds. Trace of arcus senilis; no jaundice or petechiae. Natural teeth in good condition. Chest, abdomen, and legs hirsute. Slight costal margin flaring, but no increased anteroposterior diameter of chest. Abdomen scaphoid, without scars. Fingernails long, fairly even, and dirty, without fresh chips or tears. No visible gunshot wound fouling or residue. Blood smear and drip noted across left hand; patterned blood drip on palm of left hand suggestive of trigger guard, but not definitive. (See photographs). Extremities free of atrophic changes or pitting edema. Long, radiating superficial scar over dorsum of left foot and ankle, consistent with remote burn injury.

CLOTHING: The body is received from Suburban Removal Service in a sealed body bag, wrapped in blue hospital sheet, otherwise nude. Sheet is heavily blood-stained; blood smells of alcohol. Note: Newport News Police personnel bring in the pants and two layers of underwear for examination. The gunshot wound perforations found on the body through the penis and leg correspond to perforations through the pants, zipper, inner and outer pairs of underwear, and the same layers on the opposite side. There is no evidence of fouling or stippling on any layer of clothing, although it is noted that the outer layer is black.

PERSONAL EFFECTS: None.

EVIDENCE OF INJURY: Four gunshot wounds, described below. No bullets recovered.

MARKS OF THERAPY: Endotracheal tube, two intravenous catheters in right arm, dermal puncture of left antecubital fossa.

SCARS: The scar of the left foot and ankle has been described above. An addition linear scar is noted over the back of the right upper arm, just above the elbow. A small scar is noted on the back of the neck, close to the occiput, within the shaved area.

X-RAY: No bullets are noted.

HISTORY: On probation for cocaine use. Supposedly drinking at nightclub. Entered verbal altercation with assailant. Assailant described him as reaching into his pants. Shot by assailant.

PATHOLOGICAL DIAGNOSIS:

1. Multiple gunshot wounds.

(a) Gunshot wound #1 of chest, consisting of a 1/4" perforation in the right upper chest. The entrance is a 1/4", neat, punched-out oval hole, with a 1/16"-1/8" black marginal abrasion, without powder or stippling on the skin (clothing of upper body not received). The wound is located approximately 13" below the top of the head, 2-1/2" right of midline. The bullet travels front to back, right to left, downward. It passes through the right second intercostal space, the anterior edge of the right upper lobe of the lung, the pericardium, the heart, the pericardium again, creates a keyhole through the diaphragm with spleen injury, and exits the thorax via the tenth rib and left tenth intercostal space, and exits the body on the left side of the back. No bullet is retrieved. The exit is an irregular 1/4" perforation without abrasion ring in the left side of the back, located at approximately 23" below the top of the head, 6" left of the posterior midline.

- (1) Right hemothorax, 800 cc.
- (2) Left hemothorax, 1100 cc.
- (3) Hemopericardium, less than 100 cc.
- (4) Hemoperitoneum, approximately 200 cc.
- (5) Evidence of exsanguination (renal cortical, thyroid, and liver pallor).

PATHOLOGICAL DIAGNOSES CONTINUED ON PAGE 2.

JUL 8 2002

ACOPY  
*[Signature]*  
ASSISTANT CHIEF MEDICAL EXAMINER

Cause of death: Gunshot wounds of chest and abdomen.

Provisional Report:

Final Report: xx7 pages total 6-19-02

The facts stated herein are true and correct to the best of my knowledge and belief.

May 13, 2002  
Date Signed

OCME Norfolk, Va.  
Place of Autopsy

*[Signature]*  
Signature of Pathologist  
Wendy M. Gunther, M.D.

redacted

Exhibit G(1)

DEPARTMENT OF HEALTH  
OFFICE OF THE CHIEF MEDICAL EXAMINER  
830 SOUTHAMPTON AVENUE  
SUITE 100  
NORFOLK, VIRGINIA 23510  
(757) 683-8366

AUTOPSY No: T-200-02  
DAY/DATE: 5-9-02/THURSDAY  
TIME: 9:40 AM

REPORT OF AUTOPSY

DECEDENT: DERRICK LORENZO AVENT  
AUTOPSY AUTHORIZED BY: Dr. Jerome Provenzano, Medical Examiner, Newport News

BODY IDENTIFIED BY: Newport News Police Department band, hospital band and tag  
PERSONS PRESENT AT AUTOPSY: A. Ward, J. Seyler, Dr. Ruffin (EVMS), Dr. Bush, NNPD personnel

Rigor: Complete Livor: Blanching Distribution: Posterior  
Age: 33 Race: Black Sex: Male Length: 70" Weight: 165 Eyes: Brown  
Hair: Shaven Mustache: Black Beard: Stubble Circumcised: Yes Body Heat: Room temperature

CLOTHING, PERSONAL EFFECTS, EXTERNAL WOUNDS, SCARS, TATTOOS, OTHER IDENTIFYING FEATURES:

GENERAL EXTERNAL EXAMINATION: Slim, muscular adult male with an appearance consistent with stated age. Extensive blood drip and smear from chest, abdomen, arm, penis and leg gunshot wounds. Trace of arcus senilis; no jaundice or petechiae. Natural teeth in good condition. Chest, abdomen, and legs hirsute. Slight costal margin flaring, but no increased anteroposterior diameter of chest. Abdomen scaphoid, without scars. Fingernails long, fairly even, and dirty, without fresh chips or tears. No visible gunshot wound fouling or residue. Blood smear and drip noted across left hand; patterned blood drip on palm of left hand (See photographs). Extremities free of atrophic changes or pitting edema. Long, radiating superficial scar over dorsum of left foot and ankle, consistent with remote burn injury.

CLOTHING: The body is received from Suburban Removal Service in a sealed body bag, wrapped in blue hospital sheet, otherwise nude. Sheet is heavily blood-stained; blood smells of alcohol. Note: Newport News Police personnel bring in the pants and two layers of underwear for examination. The gunshot wound perforations found on the body through the penis and leg correspond to perforations through the pants, zipper, inner and outer pairs of underwear, and the same layers on the opposite side. There is no evidence of fouling or stippling on any layer of clothing, although it is noted that the outer layer is black.

PERSONAL EFFECTS: None.  
EVIDENCE OF INJURY: Four gunshot wounds, described below. No bullets recovered.

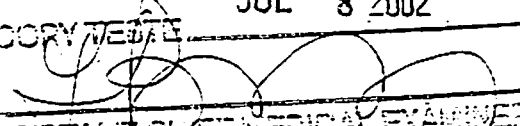
MARKS OF THERAPY: Endotracheal tube, two intravenous catheters in right arm, dermal puncture of left antecubital fossa.  
SCARS: The scar of the left foot and ankle has been described above. An additional linear scar is noted over the back of the right upper arm, just above the elbow. A small scar is noted on the back of the neck, close to the occiput, within the shaved area.

REMARKS: No bullets are noted.

PATHOLOGICAL DIAGNOSIS:

- 1. Multiple gunshot wounds.
  - (a) Gunshot wound #1 of chest, consisting of a 1/4" perforation in the right upper chest. The entrance is a 1/4", neat, punched-out oval hole, with a 1/16"-1/8" black marginal abrasion, without powder or stippling on the skin (clothing of upper body not received). The wound is located approximately 13" below the top of the head, 2-1/2" right of midline. The bullet travels front to back, right to left, downward. It passes through the right second intercostal space, the anterior edge of the right upper lobe of the lung, the pericardium, the heart, the pericardium again, creates a keyhole through the diaphragm with spleen injury, and exits the thorax via the tenth rib and left tenth intercostal space, and exits the body on the left side of the back. No bullet is retrieved. The exit is an irregular 1/4" perforation without abrasion ring in the left side of the back, located at approximately 23" below the top of the head, 6" left of the posterior midline.
    - (1) Right hemothorax, 800 cc.
    - (2) Left hemothorax, 1100 cc.
    - (3) Hemopericardium, less than 100 cc.
    - (4) Hemoperitoneum, approximately 200 cc.
    - (5) Evidence of exsanguination (renal cortical, thyroid, and liver pallor).

PATHOLOGICAL DIAGNOSES CONTINUED ON PAGE 2.

JUL 8 2002  
A COPY WENT TO  
  
ASSISTANT CHIEF MEDICAL EXAMINER

Cause of death: Gunshot wounds of chest and abdomen.

Provisional Report: Final Report: xx7 pages total 6-19-02

The facts stated herein are true and correct to the best of my knowledge and belief.

EXHIBIT  
H

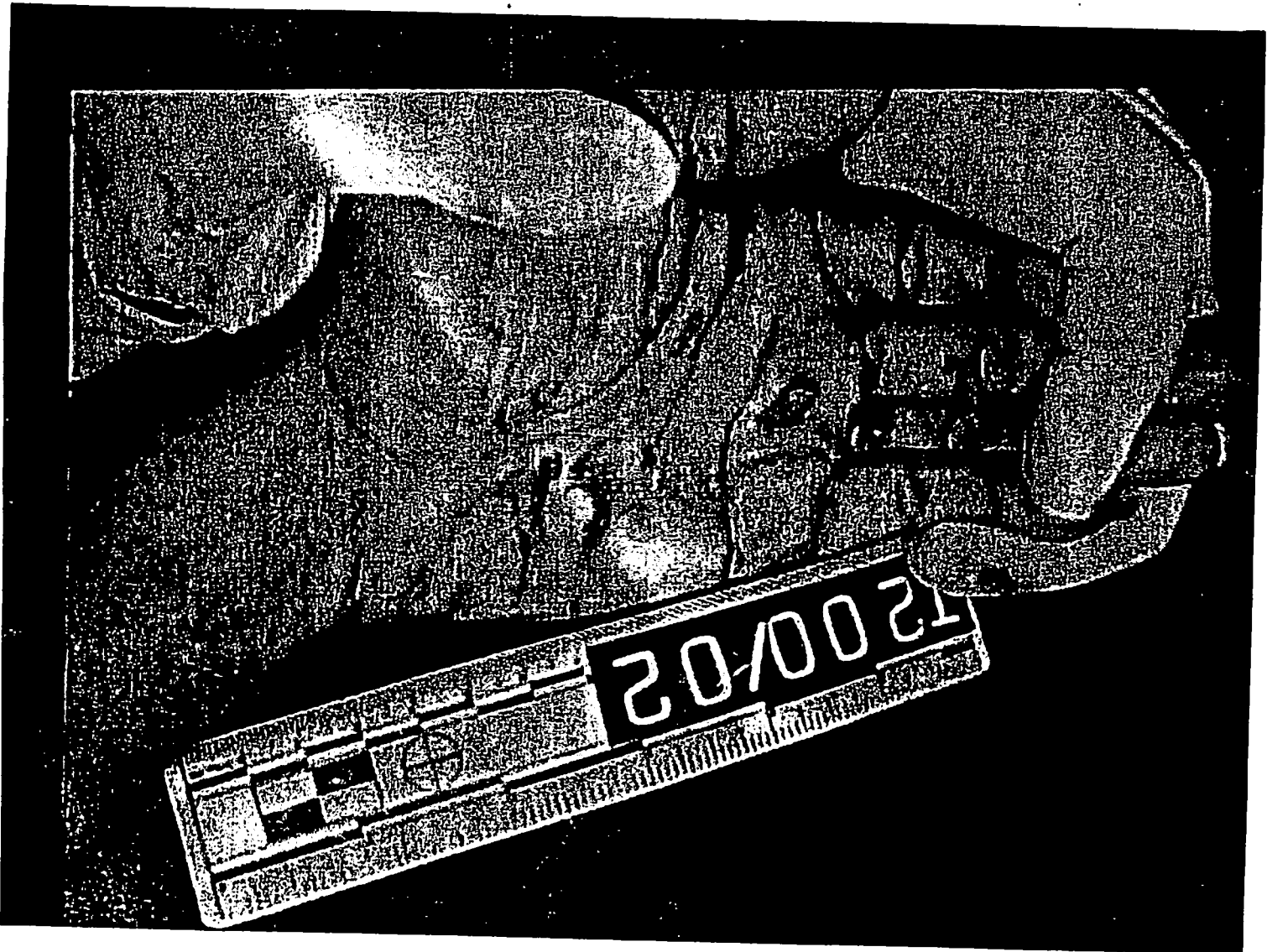


Exhibit  
H (1)





Commonwealth of Virginia  
Department of Criminal Justice Services  
DIVISION OF FORENSIC SCIENCE

Exhibit I  
ORIGINAL

CERTIFICATE OF ANALYSIS

Central Laboratory  
P.O. Box 999  
Richmond, VA 23218

August 14, 2002

Telephone: (804) 786-4707  
Fax: (804) 786-6857

TO: L. P. RILEE  
NEWPORT NEWS POLICE DEPARTMENT  
2600 WASHINGTON AVENUE  
NEWPORT NEWS VA 23607

FS Lab #: T02-5206

Your Case #: 2002-54864  
Victim(s): AVENT, Derrick Lorenzo  
Suspect(s): MCNEIL, Corey Pernell  
Evidence Submitted By: L. A. Dibble

Received: 06/04/02

Item 22 One (1) GSR kit from Derrick Lorenzo AVENT  
Item 29 One (1) GSR kit from Corey Parnell McNeil

RESULTS:

Particles found on the sample in Item 22 marked left hand were identified as primer residue.

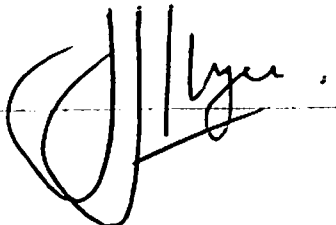
~~Particles found on the sample in Item 29 marked right hand were identified as primer residue.~~

No primer residue particles were found on the sample in Item 22 marked right hand or on the sample in Item 29 marked left hand.

The evidence will be available at the Eastern Laboratory after you have received the results of all requested examinations.

Attest:

I certify that I performed the above analysis or examination as an employee of and in a laboratory operated by the Division of Forensic Science, and that the above is an accurate record of the results of that analysis or examination.

Joshua J. Kruger  
Forensic Scientist 

JJK

