RECORD NO. _____

In The
Court of Appeals
Of Virginia

Brian David Hill,

Petitioner,

v.

Commonwealth of Virginia,
City of Martinsville, ***Respondent.***

AN ORIGINAL ACTION
IN THE COURT OF APPEALS OF VIRGINIA

BRIEF IN SUPPORT OF BRIAN DAVID HILL'S PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE

Brian David Hill – Ally of Q
Founder of USWGO Alternative News
310 Forest Street, Apt. 2
Martinsville, Virginia 24112
(276) 790-3505

Pro Se Petitioner **– JusticeForUSWGO.wordpress.com**

TABLE OF CONTENTS

Page

I. INTRODUCTION

1. Brian David Hill, (the "Petitioner") files this Brief / Memorandum of Law in support of Petitioner's Petition for the Writ of Actual Innocence ("The Writ" and "Petition") pursuant to Chapter 19.3 of Title 19.2 of the Code of Virginia; the Amendment XIV of the United states Constitution; Article I, Section 9 of the Virginia Constitution, and in the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishments inflicted. It is a cruel and unusual punishment for any Virginia Court to convict an innocent person of any crime including a misdemeanor and to make an innocent person pay any legal fees for a crime he/she is not guilty of. The following pleadings that Petitioner is filing with The Writ are of the following:

1. The Writ Petition (notarized);
2. AFFIDAVIT OF INDIGENCE (notarized);
3. Joint Appendixes Volumes I through VI;
4. Exhibits 1-27;
5. CAV-104 FORM and LETTER and photocopy of Certified Mailing receipts;
6. This Brief / Memorandum of Law.

2. The Petitioner files Exhibits 1-27 of evidence warranting an evidentiary hearing and for demonstrating Actual Innocence pursuant to Virginia Code § 19.2-

271.6; the Amendment XIV of the United states Constitution; Article I, Section 9 of the Virginia Constitution, and in the Eighth Amendment of the United States Constitution. The conviction on November 18, 2019 is not final due to the ongoing timely appeal process and the appeal is still pending at the stage of the Supreme Court of Virginia. No procedural default or defect should prevent Petitioner from being allowed to prove his Actual Innocence before this Court or even the Circuit Court. It is a miscarriage of justice to block Petitioner from being allowed to demonstrate factual innocence and requesting relief should be allowed to Petitioner. This Court has jurisdiction over the Virginia Constitution's prohibitions against cruel and unusual punishments inflicted clause.

3. The JOINT APPENDIX VOLUME I OF VI (Pages 1 – 958) will be known as "Joint Appendix 1" or "JA 1". This appendix concerns the original criminal case being challenged by Petitioner's Petition for the Writ of Actual Innocence.

4. The JOINT APPENDIX VOLUME II OF VI (Pages 1 – 347) will be known as "Joint Appendix 2" or "JA 2". This appendix concerns the original civil case of Petitioner's filing of his Petition for a Writ of Habeas Corpus. It had failed on the reasoning that Petitioner had not been in State Custody at the time of filing.

5. The JOINT APPENDIX VOLUME III OF VI (Pages 1 – 227) will be known as "Joint Appendix 3" or "JA 3". This appendix concerns the original civil case of Petitioner's filing of his Petition for a Writ of Error Coram Nobis/Vobis.

6. The JOINT APPENDIX VOLUME IV OF VI (Pages 1 – 336) will be known as "Joint Appendix 4" or "JA 4". This appendix concerns the direct criminal

case appeal (CAV Appeal no.1294-20-3) of Petitioner's "Motion to Vacate a Fraudulent Begotten Judgment" being denied. The appeal is still pending before the Supreme Court of Virginia and has not been made final. Entitled the case name of BRIAN DAVID HILL v. COMMONWEALTH OF VIRGINIA; and CITY OF MARTINSVILLE.

7. The JOINT APPENDIX VOLUME V OF VI (Pages 1 – 302) will be known as "Joint Appendix 5" or "JA 5". This appendix concerns the direct criminal case appeal (CAV Appeal no.1295-20-3) of Petitioner's criminal conviction. The appeal is still pending before the Supreme Court of Virginia and has not been made final. Entitled the case name of BRIAN DAVID HILL v. COMMONWEALTH OF VIRGINIA; and CITY OF MARTINSVILLE.8.

8. The JOINT APPENDIX VOLUME VI OF VI (Pages 1 – 354) will be known as "Joint Appendix 6" or "JA 6". This appendix contains a new Motion filed in the Circuit Court in the City of Martinsville; as well as additional exhibits; filings and memorandum which is challenging the criminal conviction. The evidence has not been acted upon yet by the Judge so it is still new evidence when filed in the Court of Appeals of Virginia. Petitioner planned on filing the evidence in both Courts.

9. Due to Petitioner not being an officer of the Court and the complexity of the entire case and other cases involved with the case; Petitioner's joint appendixes may not be entirely complete; or Petitioner's joint appendixes are is as closest to complete to the best of the abilities of Petitioner as possible. Petitioner had

completed the Joint Appendixes as best as he could. If there are any issues raised regarding the issue, Petitioner requests that the appointment of counsel be conducted so that counsel can complete any deficiencies.

10. Petitioner requests the appointment of counsel dealing with discovery, any fact finding, and for any evidentiary hearings conducted as a result of Petitioner's Petition for the Writ of Actual Innocence.

II. STATEMENT OF SUBJECT MATTER AND JURISDICTION

11. Brian David Hill, (the "Petitioner") petitions for the Court of Appeals of Virginia to issue a Writ of Actual Innocence on the Circuit Court for the City of Martinsville in Virginia to vacate and overturn the final judgment in a criminal case that had entered a final Judgment (See JA 1, Pages 431-432; ORDER IN MISDEMEANOR OR TRAFFIC INFRACTION PROCEEDING), which such final judgment was filed or entered on November 18, 2019, by the Honorable Judge Giles Carter Greer. Petitioner requests such a writ because Petitioner is legally innocent of his conviction, and Petitioner is factually innocent of the "intent" element due to a new Virginia Law making previously inadmissible evidence as now admissible evidence. A Court can entertain such evidence when previously was barred from doing such. See Virginia Code § 19.2-271.6. Evidence of defendant's mental condition admissible; notice to Commonwealth. See paragraphs 78 through 87 as to why Petitioner asserts that the Court of Appeals does have jurisdiction to entertain

such Petition for the Writ of Actual Innocence since the conviction directly involves a felony supervised release sentence in Federal Court. The misdemeanor acquittal for Actual Innocence will affect directly the felony supervised release sentence including the imprisonment in the Federal Court system. It is a **proxy felony** with the misdemeanor case working with the felony together to give Petitioner additional punishment, therefore this court has a jurisdiction to act on this Petition since it affects the felony supervised release sentence.

12. The Petitioner had timely filed a Petition for the Writ of Habeas Corpus on November 18, 2019 (See JA 2, Pages 1-201) and one such ground was "Actual Innocence" and/or "Legal Innocence". Petition was denied and dismissed on November 20, 2019 (See JA 2, Pages 202-202). Notice of Appeal filed on November 20, 2019 (See JA 2, Pages 203-203). A Motion to Reconsider was filed on November 25, 2019 (See JA 2, Pages 204-212) and was denied on November 25, 2019 (See JA 2, Pages 213-213). On February 5, 2021, the Supreme Court of Virginia had denied the Petition for Appeal due to the Petitioner not being in State custody at the time that Petition was filed. (See JA 2, Pages 347-347) It was not due to any lack of merit in the grounds or claims but merely a technicality of Petitioner not being in a State Prison or on State Probation at the time of filing. It was appealed to the Supreme Court of the United States ("SCOTUS") on the basis that Actual Innocence should overcome any procedural defaults/defects but the Petition for Writ of Certiorari in SCOTUS was denied.

13. The Petitioner had timely filed a Petition for the Writ of Error Coram

Nobis/Vobis on March 16, 2020 (See JA 3, Pages 1-70); as well as additional evidence or memorandum under **Joint Appendix 3**, pages 71-96.. Petition was denied and dismissed on April 10, 2020 (See JA 3, Pages 227-227). Notice of Appeal filed on April 21, 2020 (See JA 3, Pages 213-220). The Court of Appeals transferred the appeal to the Supreme Court of Virginia on July 27, 2021. The appeal had not yet been concluded. Petitioner is still waiting for the Supreme Court of Virginia to issue any kind of case number and requesting for any Petition for Appeal or briefing or oral argument. So the appeal is still pending and there is no final judgment over the matter until all appeals have been fully exhausted.

14. The Petitioner had timely filed a direct appeal to the criminal conviction on November 27, 2019 (See JA 5, Pages 1-13). A Petition for Appeal pro se was filed (See JA 5, Pages 53-107; 162-170); and counsel's Petition for Appeal was filed (See JA 5, Pages 148-157). An opposition brief was filed by the Respondent (See JA 5, Pages 173-183). Petition for Appeal was denied and dismissed by a three-judge panel on September 2, 2021 (See JA 5, Pages 186-191; 194-199). Petition for Rehearing was filed on September 6, 2021 (See JA 5, Pages 212-292). The Petition for Rehearing was denied on September 9, 2021 (See JA 5, Pages 295-296). A Notice of Appeal was filed by Petitioner to the Supreme Court of Virginia (See JA 5, Pages 297-300). The Court of Appeals then had transferred the appeal to the Supreme Court of Virginia on September 9, 2021. The appeal had not yet been concluded. The Supreme Court of Virginia had not given any order as Petitioner is aware of regarding the Notice of Appeal filed timely with the Court of Appeals and

is awaiting for the process to begin in that Court. Therefore Petitioner had demonstrated that the final judgment of conviction of a misdemeanor in a criminal case is not yet final until the appeals timely filed had been fully exhausted.

15. This Court has jurisdiction over Petitions for a Writ of Actual Innocence pursuant to Rule 5A:5(a) of the Rules of the Supreme Court of Virginia; pursuant to Virginia Code Chapter 19.2. **§ 19.2-327.2**; and pursuant to the Amendment XIV of the United states Constitution; Article I, Section 9 of the Virginia Constitution, and in the Eighth Amendment of the United States. Therefore Petitioner proceeds pro se until Counsel is appointed as per Petitioner's request in paragraph "17. Request for counsel." and had filed his initial "AFFIDAVIT OF INDIGENCE" along with answering the question in "16. Exemption from filing fee." so Petitioner requests for appointment of counsel. This Court of Appeals has jurisdiction over the foregoing Petition for the Writ of Actual Innocence because an innocent man or woman is entitled to relief from a miscarriage of justice of convicting an innocent person of a crime. The U.S. Constitution and Virginia Constitution requires that a conviction can only be sustained after a person had been found guilty of all elements of a charged crime including the element of "intent". Actual Innocence can overcome any procedural bar or technicality because the conviction and criminal penalties against an innocent person, even over a misdemeanor which carries up to one year in state prison not including revocation of a federal felony supervised release sentence; is cruel and unusual punishment inflicted. The U.S. Constitution requires that this Court of Appeals let Petitioner prove his innocence and be given relief after

proving factual innocence.

16. Under the Due Process clause of the United States Constitution, AMENDMENT XIV; This Court has jurisdiction to hear a case involving an innocent person; when depriving a Petitioner of such right to prove actual innocence and bar a Petitioner from obtaining relief for proving actual innocence would create a permanent miscarriage of justice. See Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (holding that in order to collaterally attack a conviction or sentence based on errors that could have been but were not pursued on direct appeal, the petitioner must show cause and actual prejudice resulting from the errors); Murray v. Carrier, 477 U.S. 486, 495-96 (1986) (holding that if a petitioner cannot demonstrate cause-and-prejudice, his or her claim may still be heard if the failure to do so would result in a fundamental miscarriage of justice). Carrier, 477 U.S. at 496. Carrier noted that the conviction of one who is actually innocent is a fundamental miscarriage of justice. Id. This miscarriage of justice exception is commonly called the actual innocence exception, which is how this comment will hereinafter refer to it

III. STATEMENT OF THE FACTS

17. The Commonwealth will have their own "Statement of the Facts" as is their right, but the Petitioner will present its own Statement of the Facts based upon evidence that was previously barred from being admitted as evidence in 2019 but now is admissible due to a new statute by Virginia Code § 19.2-271.6 (See Exhibit #23, pages 202-205). The evidence was not admissible at the time of final criminal conviction. Even the appeals cannot resolve the matter due to the evidence being

inadmissible at the time of the Record on Appeal. Therefore new evidence and Statement of Facts is being submitted to this Court.

18. The facts that were presented to the Court of Appeals supportive of the Legal Innocence of Brian David Hill are as follows:

19. The Petitioner suffers from a permanent neurological mental condition/illness and disorder since childhood known as Autism Spectrum Disorder (See Exhibit #10, pages 131-137, AUTISM TEACCH PAPER MEDICAL), this disorder is in The Diagnostic and Statistical Manual of Mental Disorders (DSM). It is a highly diagnosed disorder on many kids with unusual behavior issues in schools and daycares, and is a known disorder. Autism follows the child into adulthood and is considered a permanent neurological disability (See Page 1-3 of EXHIBITS; EXHIBIT 1; DMV DISABLED HANDICAP APP.). Petitioner had suffered from such disorder before the time of the alleged incident on September 21, 2018, during the time of the alleged incident on September 21, 2018, and after the time of the alleged incident on September 21, 2018. This new Virginia Law and the evidence presented by Petitioner plays a role in proving that there was NO INTENT to violate Virginia Code, citing Mens Rea, in regards to the charge of Virginia Code § 18.2-387. Indecent exposure, on September 21, 2018. See EXHIBIT 1 (EXHIBIT PAGES 1-3), EXHIBIT 10 (EXHIBIT PAGES 131-137), EXHIBIT 11 (EXHIBIT PAGES 138-139), EXHIBIT 15 (EXHIBIT PAGES 166-176), EXHIBIT 16 (EXHIBIT PAGES 177-181), EXHIBIT 17 (EXHIBIT PAGES 182-190), EXHIBIT 21 (EXHIBIT PAGES 198-199), EXHIBIT 24 (EXHIBIT PAGES 206-217),

EXHIBIT 25 (EXHIBIT PAGES 218-228), EXHIBIT 26 (EXHIBIT PAGES 229-234), EXHIBIT 27 (EXHIBIT PAGES 235-247), AND EXHIBIT 12 (EXHIBIT PAGES 140-147).

20. Petitioner was diagnosed on October 24, 2018, as to suffer from a psychosis after making statements about a guy wearing a hoodie threatening to kill Petitioner's mother if he had not gotten naked and taken photos of himself. See **EXHIBIT 12** (EXHIBIT PAGES 140-146). Psychosis Disorder was given to Brian David Hill by Psychiatrist Dr. Conrad Daum, a forensic psychiatrist. See **EXHIBIT 13** (EXHIBIT PAGES 148-153). Psychosis was found in relevance to and material to the alleged incident on September 21, 2018, regarding the alleged indecent exposure allegations against Brian David Hill. That diagnosis was given before the mental evaluation as ordered by the General District Court, and that diagnosis was given a month earlier than the mental evaluation ordered by the General District Court. One month closer to September 21, 2018, the date of the alleged incident.

21. Only in 2019, when the Jury Trial was scheduled for December 2, 2019, Petitioner's only best viable option at the time was to attempt to plead not guilty by reason of INSANITY (See Joint Appendix 1, pages 282-292; "MOTION - INSANITY DEF-FILED BY DEF"), as at the time was Petitioner's only option, but that option was not available to Petitioner due to lack of sufficient evidence for the Circuit Court to find Petitioner not guilty by reason of insanity. Not just lack of sufficient evidence but Petitioner's pro se motions were ignored because at that time Petitioner was represented by an ineffective lawyer (ineffective assistance of

counsel) who refused to do anything except constantly find ways to badger Brian David Hill to withdraw his appeal or he might lose and face up to a year in State Prison. The lawyer wouldn't file anything to acquit or do anything to acquit Brian David Hill. Now with the Legislature's 2021st passage of Virginia Code § 19.2-271.6, Petitioner now can FILE A POST-CONVICTION NOTICE to the Commonwealth Attorney himself and argue with new evidence that Petitioner is not guilty by the help of evidence of his mental disorders/illnesses/disabilities and no intent by reason of Autism Spectrum Disorder, Psychosis (**EXHIBIT 12**, EXHIBIT PAGES 140-146), and Obsessive Compulsive Disorder. In regards to INTENT, the intent element of his charge, Brian David Hill is innocent of the intent element and the intent element purported by the Commonwealth is disproven by the 2021 to 2022 admissible evidence which was not admissible in 2019. See all evidence filed in the Circuit court under Joint Appendix #6, pages 1-354)

22. The STATEMENT OF FACTS paragraphs 19 through 21; and EXHIBITS #1, #10, #11, #12, #15, #16, #17, #21, #24, #25, #26, #27; could not have been used for the Jury Trial prior to Petitioner withdrawing his appeal, filed on November 12, 2019. That is because the statute/law of Virginia Code § 19.2-271.6 had not existed until 2021 after the General Assembly passed such bill into law and the Governor's approval by signing the legislation in 2021. In 2019, during the pendency of his Trial De Novo, Petitioner was only permitted to try for mental insanity plea but that is a very high bar with ghastly consequences of indefinite detention in a State Mental Hospital if it had succeeded; until the defendant was

cured of the mental condition which they believed had caused the alleged offense. Now thanks to the new 2021 law, now the Petitioner has another admissible and legal defense and that is his defense of Autism (See EXHIBITS #1, #10, #11, #12, #15, #16, #17, #21, #24, #25, #26, #27, as argued in Paragraphs 19 through 21), Obsessive Compulsive Disorder, and Psychosis (**EXHIBIT 12**, EXHIBIT PAGES 140-146). Psychosis Disorder) at the time of the incident proving that Petitioner had no intent of violating Virginia Code § 18.2-387; and intent is required to be proven to convict Petitioner of the charge of violating Virginia Code § 18.2-387. All elements of a criminal charge and allegations must be proven beyond a reasonable doubt to convict, otherwise the Court must acquit.

23. The STATEMENT OF FACTS paragraphs 19 through 21; and EXHIBITS #1, #10, #11, #12, #15, #16, #17, #21, #24, #25, #26, #27; and other FACTS could not have been used in the Jury Trial scheduled for December 2, 2019, even if the Petitioner had not withdrawn his appeal, filed on November 12, 2019, because the statute/law of Virginia Code § 19.2-271.6 had not existed until 2021 after the General Assembly passed such bill into law and the Governor's approval by signing the legislation. With the law in effect, Petitioner can now have a statutory legal defense of "no intent" or "lack of intent" at the time of the incident on September 21, 2018, for when he takes the matter back to Trial, or uses this new defense as proof of his innocence in a Petition for the Writ of Actual Innocence, or request for a Judgment of Acquittal in the Circuit Court to save scare judicial resources by FACTS of Innocence. A criminal defendant's "legal defense" is

considered actual innocence, upon proving with evidence and that the evidence with any expert witness testimony demonstrates meeting the criteria necessary for a fact of innocence. Having a defense means that you did not break the law, and the legal defense shows that the law was not violated.

24. Now that the statute/law of Virginia Code § 19.2-271.6, had been codified as the law, it nullifies Virginia Supreme Court verdict and case law authority of Stamper v. Commonwealth, 228 Va. 707 (1985). Prior to that 2021st law, during the authority of that Virginia Supreme Court decision, normally the Courts bar usage of mental disorders and mental disabilities as any defense of NO INTENT or helps prove innocence; and it was caused by that case law authority in the year of 1985. That was prior to the new law in the year of 2021. However the passage of this new LAW by the Legislature nullifies that case law, nullifies Stamper v. Commonwealth, 228 Va. 707 (1985) and modifies existing law or creates new law to permit usage of Developmental disability, Intellectual disability, and mental illness or condition at the time of the alleged offense as a legal defense to a criminal charge in regard to INTENT. That such evidence would be admissible when normally it would be barred by the Courts in Virginia. Therefore it is codified as LAW that mental disorders and mental illnesses be considered as part of the evidence, facts, and elements of a charged crime. Not as an ultimate issue of fact however, but would disprove the essential element or elements necessary to convict a criminal defendant of violating a Virginia criminal law. Mental disorders can disprove one or multiple elements of a charged crime and thus a Defendant cannot be held culpable as

previously held under previous law. The element of intent.

25. THEREFORE, Petitioner requests with the Court of Appeals of Virginia in his Petition for the Writ of Actual Innocence to modify and/or extend any existing law or create new case law of any criteria necessary for the usage of legal defense under Virginia Code § 19.2-271.6 with the nullification of Stamper v. Commonwealth, 228 Va. 707 (1985); to hold or find that Petitioner Brian David Hill is entitled to a new criminal defense upon a post-conviction Motion or Petition; and thus is either entitled to a New Trial, or Judgment of Acquittal or the Circuit Court issue a Writ of Actual Innocence by establishing proof of his mental illnesses/disabilities/disorders. That those mental issues are material to the charge and the elements of that charge, and thus prove that Petitioner had no INTENT to violate any Virginia Law on the night of September 21, 2018. It was actually in the way early in the morning but was still nighttime. That is what Petitioner means by night, it was nighttime. Petitioner requests that the law in this Court must be extended or modified from the passage of Virginia Code § 19.2-271.6, or newly created case law with interpretations of the new law Virginia Code § 19.2-271.6 to extend to the criminal case of Brian David Hill, and to the wrongful conviction of Brian David Hill on November 18, 2019.

26. Under the United States and Virginia Constitutions you must be guilty of every element of a crime to be convicted. The Government bears the burden of proving every element of your crime beyond a reasonable doubt. Like in the OJ Simpson Trial case for example, if the glove doesn't fit, the Jury must acquit.

27. Petitioner Brian David Hill never plead guilty when he had filed a motion to withdraw appeal (Joint Appendix 1, pages 431-432; "ORDER IN MISDEMEANOR OR TRAFFIC INFRACTION PROCEEDING"). He had a defense with proof of evidence backing such criminal defense which had not existed (as it was inadmissible in 2019) in the year of 2019 but now existed after the year of 2021. The judge recognized that Brian David Hill never plead guilty, such notion was marked out of the record by permanent black marker pen ink. On the Judgment entered by Hon. Giles Carter Greer on November 18, 2019: he or his Law Clerk had stricken from the record any notion of such. Therefore, it is a fact that Petitioner never plead guilty to this charge in any Court of Law.

28. If the Commonwealth and Martinsville Police Department were so confident that they had the evidence to prove Petitioner guilty of every element of the offense, then why did they destroy the body-camera footage and not verify Brian's health to determine whether Brian was under any substances, narcotics or drugs, gases, or anything prior to declaring him medically cleared by fiat which is perjury to make such a statement under oath without knowing for a fact whether Brian David Hill was medically and/or psychologically cleared or not. Why was blood drawn from Brian's arm and then tossed away and the laboratory tests which were previously ordered were then cancelled?

29. The Virginia Code § 19.2-271.6 provides that a Petitioner can file and assert evidence to support his defense now that he had "no intent" to commit any criminal act on September 21, 2018. The law says "…and shall be admitted if such

evidence (i) tends to show the defendant did not have the intent required for the offense charged…" (Citations omitted).

30. The photographs in the original case used by the Commonwealth of Virginia are questionable as to whether they are obscene or not. One judge's viewpoint of what is obscene may differ from another as each human's viewpoint is different as an individual in the entire legal system as a whole. It isn't clear cut whether Brian was obscene or not upon an individual judge's viewpoint with a judge presiding over making that determination. However, this Court and/or the Supreme Court of Virginia had made the criteria that obscenity element would have been met if the totality of circumstances would appeal to the prurient interest in sex. "The 'obscenity' element of Code § 18.2–387 may be satisfied when: (1) the accused admits to possessing such intent, Moses v. Commonwealth, 611 S.E.2d 607, 608 (Va. App. 2005)(en banc); (2) the defendant is visibly aroused, Morales v. Commonwealth, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, Copeland v. Commonwealth, 525 S.E.2d 9, 10 (Va. App. 2000); or (4) in other circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex, Hart, 441 S.E.2d at 707–08. The mere exposure of a naked body is not obscene. See Price v. Commonwealth, 201 S.E.2d 798, 800 (Va. 1974) (finding that `[a] portrayal of nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene')." Romick v. Commonwealth, No. 1580-12-4, 2013 WL 6094240, at *2 (Va. Ct. App. Nov. 19, 2013)(unpublished)(internal citations reformatted).

31. The photographs presented to the General District Court on December 21, 2018, and likely transferred to the Circuit Court after timely appeal; those photographs of Brian David Hill naked were never made public and was never made for public viewing, the photographs were not taken with the intention of spreading them around. The only people who viewed the photographs were of Law Enforcement and the Commonwealth's Attorney, defense lawyer, Defendant at the Trial, as well as the Judges. For example: Attorney Renorda Pryor had asked in Petitioner's federal case of Supervised Release Violation to SEAL the naked photos of Petitioner; because Petitioner did not want those photos to be made public. The photographs alone as evidence do not determine why they were taken that night. The photographs alone do not determine for what purpose they were taken for. The photographs alone as evidence do not prove intent of a crime. The photographs themselves are not illegal.

32. Were the photographs taken with any intent to share them with the public, or with any intent to cause sexual arousal of others? If a photo is private and not being shared with others, then there is no intent of Petitioner to have such an inference that the accused had as his dominant purpose a prurient interest in sex. Petitioner never masturbated, was never aroused. The key witness Officer Robert Jones never thought that Petitioner was obscene. If the Court of Appeals can ask key witness Officer Robert Jones under oath before this Court in response to the Petitioner's contentions whether he believed Petitioner had shown sexual arousal or sexual interest in what had happened on September 21, 2018, and the Officer does

not feel that Petitioner had been obscene, then the obscenity element or intent to act with obscenity had not been proven by the Commonwealth. Unless the Commonwealth of Virginia can prove that element to this Court of Appeals, and to the Circuit Court in response to Brian's motion for Judgment of Acquittal, the photographs themselves do not constitute obscenity or intent of obscenity. What would a photograph intend to do when Petitioner never shared the photographs with anybody; and only the Law Enforcement and the Court officer(s) as well as the Petitioner at trial have reviewed over the photos. Unless a photo is shared with others outside of a demand or request by a Law Enforcement Officer; it is a private photograph, subject to privacy, regardless of whoever had taken such a photo. A photograph of a naked man is not illegal, a portrayal of a naked body does not constitute obscenity. A naked body in a photograph is not illegal. If a photo was sexual, it would be subject to the regulations and laws regulating pornography and obscenity materials. However, a naked photo of an adult itself is not illegal. It was treated by the U.S. Supreme Court as an act of "Nudism", and nudity is protected under the First Amendment of the U.S. Constitution. A naked photo alone with nobody appearing around the Petitioner in the photo looking shocked or surprised or disgusted (nobody else appearing in the photo) does not prove the intent of why or for what purpose the photo was taken. Does not show who had taken the photo. Nudity and nudism is legal. See Sunshine Book Co. v. Summerfield, Postmaster General, 355 U.S. 372 (1958).

33. For example since the photographs had been used to manufacture intent

out of thin air to try to paint Petitioner as guilty; it is a known fact in the U.S. Supreme Court case of Sunshine Book Co. v. Summerfield, Postmaster General; that a naturist photo is legal in every city, every state and every county inside the United States. They are protected by the First Amendment and are not subject to local obscenity laws or ordinances. The depiction of adults' nude in visual media has enjoyed constitutional protection in the United States since 1958. Again even the case law of Virginia had said that a portrayal of nudity alone is not obscene. Even the Commonwealth case laws complied with the case laws of the U.S. Supreme Court regarding a portrayal of nudity and nothing more.

34. There is a reason why the higher Courts in the Commonwealth of Virginia regard nudity and nothing more as not violating Virginia Code § 18.2-387. As to why the totality of the circumstances of such nudity must be an appeal to the prurient interest in sex as to violate Virginia Code § 18.2-387. If we must arrest and convict somebody for simply just "being naked" and alone in a photograph somewhere, maybe at the wrong place at the wrong time without even a warning from the police, we can then arrest people at gyms, bathhouses, hot springs in Japan like in onsens; communal showers including those at a local YMCA with a pool and changing areas. With the existence of gay and lesbian people, even men might feel offended or aroused to see another naked man at a communal bathing or showering area; same argument with women at a communal bathing or showering area. So are we going to call the police at a gym shower, changing area, or sauna and arrest other men or other women because a gay man or

lesbian woman might be offended or aroused at seeing another man at the men's only area naked, or might be offended or aroused at seeing another woman at the women's only area naked aka offended at the same sex? What about Nudists? Should cops go busting Nudist Resorts and Nudist Clubs and Beaches because one clothed person might try to sneak in there and start feeling offended or sexual about it and demand the club or resort be arrested for indecent exposure? What about the Virginia Museum of Fine Arts, a Government operated or Government funded Museum?

35. Hey, Glen Andrew Hall and the judges of this Court of Appeals in Richmond, Virginia, let's look at the Commonwealth's Museum of Fine Arts (a state Museum) in Richmond, Virginia with naked statues, naked people in paintings, and naked people in artwork. Petitioner's family has the time marks of the specific artworks in certain sections of the video footage. See https://www.youtube.com/watch?v=mQpWQD_m7_A. They did the research and recorded the time stamp markings for these examples. See how in 2 minutes and 59 seconds of the video, a nude statue. 3 minutes and 6 seconds into the video and more nudity. 3 minutes and 17 and 18 seconds into the video. 7 minutes straight into the video show two women naked with their breasts exposed. I bet there was more nudity artwork and statues not shown in the video. How would I know, I cannot use the internet, however I had visited that Museum years ago personally and saw the artwork there, but my family can research online and they are determined to show the contradictions of the Commonwealth if they want to

continue dragging this needless case out.

36. With the new evidence presented along with the STATEMENT OF FACTS paragraphs 19 through 21, and EXHIBITS #1, #10, #11, #12, #15, #16, #17, #21, #24, #25, #26, #27; on December 21, 2018, the General District Court erred in finding that the evidence before it was sufficient to find that Petitioner had violated Virginia Code § 18.2-387 because the evidence failed to show that the Petitioner acted intentionally to make an obscene display or exposure of his person. That means the Circuit Court also erred in affirming the judgment of the General District Court on November 18, 2019. Both were erroneous. Petitioner is innocent.

37. That criminal law statute provides, in relevant part, that "[e]very person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor." Va. Code § 18.2-387 (emphases added).

38. "The 'obscenity' element of Code § 18.2–387 may be satisfied when: (1) the accused admits to possessing such intent, Moses v. Commonwealth, 611 S.E.2d 607, 608 (Va. App. 2005)(en banc); (2) the defendant is visibly aroused, Morales v. Commonwealth, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, Copeland v. Commonwealth, 525 S.E.2d 9, 10 (Va. App. 2000); or (4) in other circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex, Hart, 441 S.E.2d at 707–08. The mere exposure of a naked body is not obscene. See

Price v. Commonwealth, 201 S.E.2d 798, 800 (Va. 1974) (finding that `[a] portrayal of nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene')." Romick v. Commonwealth, No. 1580-12-4, 2013 WL 6094240, at *2 (Va. Ct. App. Nov. 19, 2013)(unpublished)(internal citations reformatted).

39. While the evidence may show that Petitioner was naked in public at night, as stated in the original Criminal Complaint Affidavit filed on September 21, 2018 by Officer Robert Jones of Martinsville Police Department; nudity, without more, is not obscene under Virginia law. Rather, "[t]he word `obscene' where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value." Va. Code § 18.2-372 (emphasis added). While Virginia does not appear to have established a clean definition of criminal intent, Black's Law Dictionary defines it as "[a]n intent to commit an actus reus without any justification, excuse, or other defense."

40. In summary, in order to show that the Petitioner committed the offense of indecent exposure under Virginia law, the Commonwealth was required to prove, among other things, that the Petitioner had the intent to display or expose himself in a way which has, as its dominant theme or purpose, appeal to the prurient interest in

sex, as further defined above, without any justification, excuse, or other defense.[1] The Commonwealth failed to do so. Rather, the Commonwealth's evidence, presented through its own witnesses, showed the Petitioner as someone who was running around naked between midnight and 3:00 a.m. and taking pictures of himself because he believed that someone was going to hurt his family if he did not do so. See **EXHIBIT 4**. See EXHIBIT PAGES INDEX PAGES 45-46.

41. The General District Court on the Trial of December 21, 2018 and the Circuit Court while pending a Trial De Novo did not hear of Virginia Code § 19.2-271.6; and any evidence admissible pursuant to Virginia Code § 19.2-271.6 (2021, law) could not be admissible at the time of General District Court on the Trial of December 21, 2018; and not to be at the time of the Jury Trial set for the date of December 2, 2019, in the Circuit Court for the City of Martinsville. Now new evidence can be heard and be admitted for the Jury Trial or Judgment of Acquittal or Writ of Actual Innocence by a rational trier of fact.

42. Had the passage of Virginia Code § 19.2-271.6 been made into law prior to the Jury Trial set for December 2, 2019, the Petitioner never would have filed a motion to withdraw appeal. The passage of Virginia Code § 19.2-271.6 gives the Petitioner a laser-focused defense which had not been allowed previously at the time of both Trials in both the General District Court and in the Circuit Court. The cause

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

and passage of Virginia Code § 19.2-271.6 had caused the Petitioner to want to pursue either a New Trial, a Writ of Actual Innocence, or Judgment of Acquittal. Since evidence that Petitioner could not have been allowed to use in both Trials is now permissible to be used and is admissible. This gives the Petitioner, a laser-focused legal defense which can be used to be found not-guilty by any rational trier of fact. A laser-focused legal defense which was not afforded to him in 2019 due to the previous law or laws regarding inadmissibility of mental illness, mental disability, and mental disorders as evidence for his/her defense to a criminal charge.

43. The General District Court and the Circuit Court did not hear, however, any evidence of Petitioner having his dominant theme, or purpose being an appeal to the prurient interest in sex. For example, there was no evidence of Petitioner making any sexual remarks, being aroused, masturbating, or enjoying his conduct, sexually or otherwise. If a person was purposing to expose himself in public because he or she found it sexually arousing, it would be logical that he or she would pick a place and time where he or she would expect to encounter lots of members of the public. Petitioner did not do that. Rather, he was running around between midnight and 3:00 a.m. and the witnesses to his nudity were few. Hence, the statements Petitioner made to police and his conduct both indicate that, in the light most favorable to the Commonwealth, he was naked in public while having a psychiatric episode or mental breakdown, but without the intent necessary to commit indecent exposure under Virginia law. Therefore, the Circuit Court and General District Court erred, as a matter of law, when it found that Petitioner had violated Virginia Code § 18.2-387.

The conviction must be vacated as soon as possible if the Court determines that Petitioner does have elements of actual innocence. Elements such as having no intent, therefore is innocent of the intent element. The criminal statute said as codified in part that "whoever intentionally…" was going to be doing the activity which violated the Virginia Code. Requirement of intent is part of the statute. So if there was no intent, then Petitioner is factually innocent of his charge.

44. There was only one Mental Evaluation ordered by the General District Court regarding the time of the alleged incident on September 21, 2018, and at the time it was only regarding Mental Insanity or Competency. That evaluation was conducted for the original case in the General District Court, before it was appealed as a Trial De Novo review. Despite it being only for "Competency to Stand Trial", that evaluation is relevant and material to what had happened on September 21, 2018. For GC18-3138. Evaluation Report is sealed so I am referring to the entire SEALED EVALUATION CASE FILES. Anyways, that evaluation was not pursuant to Virginia Code § 19.2-271.6, but nevertheless that mental evaluation by Dr. Rebecca K. Lochrer, PhD, shall constitute material evidence in support of Petitioner's defense in his criminal case pursuant to Virginia Code § 19.2-271.6. Therefore Petitioner did push for such mental evaluation, even though in 2018 it was only permitted to be an evaluation for competency and/or insanity. Some of the diagnoses are: "Autism Spectrum Disorder" and "Obsessive Compulsive Disorder". Both of those are evidence pursuant to Virginia Code § 19.2-271.6, and prove that Petitioner had such disorders at the time of the alleged incident as charged on

September 21, 2018.

45. There was an issue of non-compliance with one element of the Court Order for a Mental Evaluation where Attorney Scott Albrecht of the Public Defender Office in 2018 was supposed to provide all mental health records known to him and medical records known to him to Dr. Rebecca K. Lochrer, PhD, for the mental evaluation. Scott Albrecht did not provide a documented diagnosis from forensic psychiatrist Dr. Conrad Daum in October 24, 2018 from Piedmont Community Services, where he had diagnosed Petitioner as having "Psychosis" referring to Psychosis Disorder and "Autistic Disorder" referring to Autism Spectrum Disorder. See Exhibit 12 (EXHIBIT PAGES 140-147, EXHIBIT 12) for the diagnosis on October 24, 2018. That was omitted from her PSYCHOLOGICAL EVALUATION and never introduced to Dr. Rebecca K. Lochrer, PhD, so she was in the dark in regards to the psychosis diagnosis. She, the psychological evaluator for the criminal case did not know about that past diagnosis which means her report was premature, erroneous (by lack of all knowledge of all mental reports) and incomplete due to lack of her access to all relevant and material mental health records that Attorney Scott Albrecht may have been aware of but failed to give her a copy of as asked by the Court. See Exhibit 13 (EXHIBIT PAGES 148-153), for the information on Dr. Conrad Daum being an "American Board of Forensic Psychiatry Certification in Forensic Psychiatry". So he is a certified forensic psychiatrist, which means his evaluations and expertise is admissible in Federal and/or State Courts. Also now admissible under Virginia Code § 19.2-271.6.

46. The evaluation referenced and cited in STATEMENT OF FACTS paragraphs 19 through 21 and EXHIBITS #1, #10, #11, #12, #15, #16, #17, #21, #24, #25, #26, #27; prove for a fact that Petitioner Brian David Hill suffers from Autism Spectrum Disorder, Obsessive Compulsive disorder, and a Psychosis around the time of the charge of Brian David Hill for the allegation/claim that Brian David Hill committed indecent exposure and was charged with violating Virginia Code § 18.2-387.

47. It is a fact that Brian David Hill has Autism Spectrum Disorder and had this disorder/illness since he was a child. See Exhibit 1 (EXHIBIT PAGES 1-3). Exhibit 1 is the "DISABLED PARKING PLACARDS OR LICENSE PLATES APPLICATION" with a Doctor's medical certification in the year 2016 that Brian David Hill is permanently limited or impaired, because of his Autism Spectrum Disorder. See Exhibit 10 (EXHIBIT PAGES 131-137). Exhibit 10 is the "DIVISION FOR TREATMENT AND EDUCATION OF AUTISTIC AND RELATED COMMUNICATION HANDICAPPED CHILDREN, Department of Psychiatry, University of North Carolina, DIAGNOSTIC EVALUATION". Known as the TEACCH papers. This proves to the Court of Appeals of Virginia as well as to the Circuit Court of the City of Martinsville, that Brian David Hill's claim of being autistic is not some new claim and is not to attempt to make Brian appear to be Autistic, but he is IN FACT autistic for many years, for decades, well since he was four years old. He is Autistic and has always been Autistic since the age of 4 as documented by the Exhibit 10 diagnostic report. If the Commonwealth still doesn't

want to accept those medical records either as enough proof of Autism, Petitioner's mother has medical records from different institutions in North Carolina with the same basic diagnosis of Autism of Petitioner. Brian David Hill establishes a STATEMENT OF FACT that Brian David Hill has been autistic since childhood, and thus this is a real disorder and he had this disorder in the 1990s even before 2018. This makes this FACT an undeniable FACT. Prima Facie evidence.

48. It is a fact that Brian David Hill has Autism Spectrum Disorder and had this disorder/illness in 2017 as well. See Exhibit 11 (EXHIBIT PAGES 138-139), Letter from "Dr. Shyam E. Balakrishnan, MD". The DMV record referenced in paragraph 20 and the letter both demonstrate the prima facie evidence that Brian David Hill has Autism Spectrum Disorder and Obsessive Compulsive Disorder. Demonstrates that it is a permanent disorder.

49. There is an expert witness documented report (a whitepaper) from a Law Enforcement trainer regarding Autism Spectrum Disorder and interactions with Law Enforcement Officers. That would include an Autistic person's interactions with people like for example: Commonwealth witness and Police Officer Robert R. Jones, a law enforcement officer, who interacted with Brian David Hill on September 21, 2018, and when Brian David Hill had Autism Spectrum Disorder. I submit to this Court, a relevant and material whitepaper and expert witness testimony, 3-page report from Dennis Debbaudt. The Commonwealth of Virginia and the Circuit Court may contact this expert witness and subpoena him or depose him, expert named Dennis Debbaudt, at the address of 2338 SE Holland Street, Port

St. Lucie, Florida 34953. His email is DDPI@flash.net. Phone: (772) 398-9756. The expert witness report applies to Brian David Hill on the situation with Petitioner's interactions with Officer Robert Jones, the charging Officer on September 21, 2018. The report is titled: "Interview and Interrogation of people with autism (including Asperger syndrome)" This shall be a STATEMENT OF FACT regarding any oral or written statements obtained from Brian David Hill by Officer Robert Jones can be part of his Autism Spectrum Disorder. Brian David Hill warned Officer Robert Jones that he had Autism and can give misleading statements when questioned. The officer refused to take heed of Brian's advice of his mental disability, of his communications issues, and totally treated it as if it weren't true, despite the medical records and DMV record proving that Brian had Autism and has Autism. Brian didn't lie to the officer. Officer Jones did not take any of Brian's statements about Autism into account or into consideration when Officer Jones had charged the Petitioner. See Exhibit 14 (EXHIBIT PAGES 154-165).

50. According to Exhibit 14 (EXHIBIT PAGES 154-165), a Federal Court Declaration Brian David Hill had filed notifying the U.S. District Court about the incident and his charge which had occurred on September 21, 2018. It is titled: "STATUS REPORT OF PETITIONER SEPTEMBER 27, 2018". Six (6) days after his arrest and charge. The reason it was filed on the date of October 17, 2018, was because Petitioner had mailed the legal pleading to the wrong address: "324 West Market Street," "Martinsville, Virginia 24112". The mailing got returned to him (RETURN TO SENDER) for no such address and Brian David Hill later realized

that he mailed the wrong city and State, and mailed it to the correct address of the Federal Courthouse at 324 West Market Street, Greensboro, North Carolina 27401. The Exhibit 14 document is his statements about what he personally believed had happened on September 21, 2018, and what led up to it. He even said he thought he was "drugged" or may have been "drugged" (EXHIBIT PAGE 157), and yet the Commonwealth of Virginia never mandated any drug test DESPITE Defendant's claims that he may have been "drugged" along with his erratic behavior, and it is their fault, it is the fault of Martinsville Police Department and Martinsville City Jail for not drug testing him when he is making statements in Federal Court, in writing, claiming that he thought he was drugged or may have been drugged. Those written statements can be proven with the permanent Federal Court records, forever preserved in time. I bet Petitioner also told his attorney and/or the Officer and Brian's family during visitation that Petitioner thought he was drugged and had blackouts. The Commonwealth never requested any drug test or Carboxyhemoglobin test because they were afraid that it would prove Brian Hill's statements to be true, referring to any statements he made to Officer Robert Jones when being questioned about why he was naked.

(b) <u>This evidence was not subject to scientific testing because it was destroyed by Sovah Hospital in Martinsville, VA, Martinsville Police Department.</u>

i. Argument

51. This STATEMENT OF FACT shall present evidence that Petitioner was

deprived of Brady evidence material from the Commonwealth of Virginia in violation of multiple Court Orders, in violation of his Constitutional rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Not just deprived of evidence, but evidence was destroyed by the Commonwealth of Virginia; referring to Martinsville Police Department and Sovah Hospital knowing that Brian David Hill was in the custody of the police and would be charged after being discharged. They knew a charge is a pending litigation of a criminal nature, and thus evidence should not be subject to spoliation by either party. Destruction of evidence is Obstruction of Justice and is considered fabrication of evidence or fabrication of facts in the presentation of a case in Court. Evidence such as: (#1) body-camera footage recorded by Officer Robert Jones and body-camera footage of any other police officers involved on September 21, 2018, regarding the arrest and interview/interrogation of Brian David Hill on September 21, 2018. Evidence such as: (#2) Blood vials drawn from Brian David Hill's arm at the Hospital after police detained Brian David Hill and handcuffed him and taken him to the Hospital. Technically Petitioner was in Law Enforcement custody, in the custody of Martinsville Police Department after he was detained, and was at the Hospital with the officers present with the Petitioner handcuffed. They were responsible for collection of any evidence and preservation of any evidence including biological evidence, concerning a pending criminal case matter before a Court, a pending litigation. By law and common sense, evidence is supposed to be retained or preserved during a pending litigation. Biological evidence including blood samples

and blood drawn from the Petitioner after being detained near a creek and had been taken to the Hospital by Martinsville Police and being driven there in an ambulance but still was under police custody. Blood vials were destroyed and laboratory tests which were supposed to be conducted including any drug or alcohol tests were then cancelled and blood vials destroyed (See Joint Appendix 1, pages 201-202; CORRESPONDENCE). Martinsville Police Department was represented by the Commonwealth of Virginia, and Martinsville Police Department had committed two acts of spoliation of evidence. Therefore, the Commonwealth of Virginia destroyed evidence in violation of Court Orders and therefore, have violated multiple Court Orders which is CONTEMPT OF COURT, multiple times. Not only has the Commonwealth of Virginia through its counsel Glen Andrew Hall, Esquire, committed the offenses of CONTEMPT OF COURT by omission of the body-camera footage and the blood vials drawn from Brian's arm, but had destroyed evidence while under detainment by Martinsville Police Department and the Circuit Court should sanction Glen Andrew Hall, Esquire for destruction of biological evidence and destruction of video footage by a police body-camera recorded on September 21, 2018 of Brian David Hill.

52. If the Commonwealth and Martinsville Police Department were so confident that they had the evidence to prove Petitioner guilty of every element of the offense, then why did they destroy the body-camera footage, and refused to provide a copy to the Petitioner or his defense counsel after the Court Ordered the discovery materials from the Commonwealth's Attorney, and not verify Brian's

health to determine whether Brian was under any substances, narcotics or drugs, gases, or anything prior to declaring him medically cleared by fiat which is perjury to make such a statement under oath without knowing for a fact whether Brian David Hill was medically and/or psychologically cleared or not. Why was blood drawn from Brian's arm and then tossed away and the laboratory tests which were previously ordered were then cancelled afterwards?

53. Spoliation of Evidence is considered a FACT, a FACT which can be presented before a Jury and is admissible under the Rules of Evidence if spoliation can be proven, and can be part of the STATEMENT OF FACTS because any spoliation of evidence by the Plaintiff/Prosecutor of a criminal or civil case means that his/her case was a weak or unfounded one from the very beginning no matter what alleged facts are filed of his/her cause. The Intent element of the criminal charge against Brian David Hill cannot be fabricated or manufactured by the Commonwealth Attorney when evidence of spoliation exists. The spoliation proves that any perceived intent was fabricated by the Commonwealth Attorney, that the destroyed evidence would have made the prosecution more difficult to attempt to even sustain a conviction instead of a not guilty verdict. When evidence is destroyed by party A, it usually means that party A which destroyed the evidence had feared that the evidence would not be favorable to that party A in a case.

54. For purposes of this Petition, "destruction of evidence" means rendering discoverable matter permanently unavailable to the court and the opposing party. Such a broad definition is necessary because of the great many contexts in which

courts and commentators have considered destruction of evidence. It has two components: destruction and evidence.

55. See 2 J. WIGMORE (John Henry Wigmore), EVIDENCES § 278, at 133 James Harmon Chadborn ed., Little, Brown 1979) (1940) (emphasis added). See Federal Rules of Evidence 401.; 32 C.J.S. Evidence § 535 (2008); Evidence—Admissibility of Attempts by a Party to Suppress Evidence, 9 TEX. L. REV. 79, 100 (1930) (stating that it has "long been recognized" that a party's misconduct in manipulating evidence is admissible as indicating a "consciousness of the weakness of his case,'" and citing cases from the 1800s that applied the inference to the fabrication, suppression, or destruction of evidence).

56. See United Medical Supply Company, Inc. v. U.S., No. 03-289C, 8 (Fed. Cl. Jun. 27, 2007) ("'Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (citing Black's Law Dictionary 1401 (6th ed. 1990)); see also Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 457 (2d Cir. 2007). It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by "that favourite maxim of the law, omnia presumuntur contra spoliatorem," 1 Sir T. Willes Chitty, et al., Smith's Leading Cases, 404 (13th ed. 1929). Spoliation may result in a variety of sanctions, with "the oldest and most venerable remedy" being an "adverse inference," under which the finder of fact may infer that the destroyed evidence would have been favorable to the opposing side.

Jonathan Judge, "Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort," 2001 Wis. L.Rev. 441, 444 (2001); see also Jamie S. Gorelick, Stephen Marzen Lawrence Solum, Destruction of Evidence § 1.3 (1989) (hereinafter "Gorelick").")

57. If you catch the other side engaged in falsification of evidence or falsification of facts including destruction of evidence, you can use that to argue that the other side's entire position lacks merit. It's been that way in Courts for many decades if not centuries. And even more fundamentally, judges and juries do not like being tricked. If the criminal case prosecutor or the Police Officer which charged the criminal defendant ever engaged in any destruction of evidence or refused to protect material evidence from destruction during a pending criminal investigation, then they have something to hide and a jury needs to know that the criminal prosecutor had something to hide in its faulty prosecution. If a judge or jury agrees that your opponent has engaged in falsification—even falsification relating only to one of several issues in the case—it will hold this quite strongly against your opponent and will come to doubt the validity of everything your opponent says and claims.

58. See 501 U.S. at 56–57; see also Synanon Found., Inc. v. Bernstein, 517 A.2d 28, 43 (D.C. 1986) (once a party embarks on a "pattern of fraud," and "[r]egardless of the relevance of these [fraudulent] materials to the substantive legal issue in the case," this is enough to "completely taint [the party's] entire litigation strategy from the date on which the abuse actually began").

59. See Some examples are: Breezevale Ltd. v. Dickinson, 879 A.2d 957, 964

(D.C. 2005) (affirming sanction of dismissal where top executives of plaintiff company engaged in scheme to forge documents and subsequently denied the forgery in pleadings and sworn testimony); Synanon Found., Inc. v. Bernstein, 503 A.2d 1254, 1263 (D.C. 1986) (affirming sanction of dismissal where plaintiff, inter alia, destroyed audiotapes and made false statements to the court "that no responsive documents could be found" in order "to deceive the court, and to improperly influence the court in its decision on the defendants' motions to compel, with the ultimate aim of preventing the judicial process from operating in an impartial fashion"); Cox v. Burke, 706 So. 2d 43 (Fla. Dist. Ct. App. 1998) (affirming sanction of dismissal where plaintiff gave false answers to interrogatories and deceptive deposition testimony); Pope v. Fed. Express Corp., 974 F.2d 982, 984 (8th Cir. 1992) (affirming sanction of dismissal for plaintiff 's forgery of, and reliance on, a single document); Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989) (affirming dismissal where plaintiff concocted a single document); Tramel v. Bass, 672 So. 2d 78, 82 (Fla. Dist. Ct. App. 1996) (affirming default judgment against defendant who excised damaging six-second portion of videotape before producing it during discovery).

60. See Va. Code § 8.01-379.2:1 ("A. A party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. In determining whether and at what point such a duty to preserve arose, the court shall include in its consideration the totality of the circumstances, including the extent to which the party or potential litigant was on notice that specific and identifiable

litigation was likely and that the evidence would be relevant. B. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice, or (ii) only upon finding that the party acted recklessly or with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.")

61. The Commonwealth of Virginia did purposefully destroy evidence favorable to the Petitioner Brian David Hill. They knew that Martinsville Police Department has an evidence retention period including a retention period for body-camera footage recording any incidents requiring a Police Report such as any evidence of a crime or incident of a crime. Petitioner had asked repeatedly in writing for the police body-camera footage. (See EXHIBIT 2, EXHIBIT PAGES 4-27; MOTION FOR DISCOVERY COPY) Even Kenneth and Stella Forinash which is Petitioner's grandparents asked for the police body-camera footage (See EXHIBIT 26, EXHIBIT PAGES 229-234; PHOTOCOPY LETTER POLICE CHF). Also see the Exhibit 21 video evidence (See EXHIBIT 21, EXHIBIT PAGES 198-199;

VIDEO EVIDENCE). Petitioner kept asking for the police body-camera footage. The General District Court and the Circuit Court both asked for the discovery evidence materials which includes the police body-camera footage as it fits the description of what was in those Court Orders. See EXHIBIT 5, EXHIBIT PAGES 112-114; EXHIBIT 6, EXHIBIT PAGES 115-118; and EXHIBIT 7, EXHIBIT PAGES 119-122.

(a) <u>This evidence was previously unknown or unavailable to either me or my attorney at the time the conviction(s) or adjudication(s) of delinquency became final in the circuit court; and/or</u>

ii. Argument

62. After 2021, Evidence previously inadmissible in criminal cases is now admissible in the Circuit Court, General District Court, and the Court of Appeals of Virginia after the General Assembly created new law under Virginia Code § 19.2-271.6 **Exhibit #23** (See Page 202-205 of EXHIBITS). Exhibit #23 is a printout of the statute which can also be reviewed by the Court of Appeals of Virginia to verify the statute had been updated in 2021.

63. The evidence in support of the Petition and in support of Section (7) paragraph (a) in the "Form 10. Petition for a Writ of Actual Innocence Based on Nonbiological Evidence" is in **Exhibit #1** (See Page 1-3 of EXHIBITS), **Exhibit #2** (See Page 4-27 of EXHIBITS), **Exhibit #3** (See Page 28-29 of EXHIBITS), **Exhibit #4** (See Page 30-111 of EXHIBITS), **Exhibit #5** (See Page 112-114 of EXHIBITS),

Exhibit #6 (See Page 115-118 of EXHIBITS), **Exhibit #7** (See Page 119-122 of EXHIBITS), **Exhibit #8** (See Page 123-126 of EXHIBITS), **Exhibit #9** (See Page 127-130 of EXHIBITS), **Exhibit #10** (See Page 131-137 of EXHIBITS), **Exhibit #11** (See Page 138-139 of EXHIBITS), **Exhibit #12** (See Page 140-147 of EXHIBITS), **Exhibit #13** (See Page 148-153 of EXHIBITS), **Exhibit #14** (See Page 154-165 of EXHIBITS), **Exhibit #15** (See Page 166-176 of EXHIBITS), **Exhibit #16** (See Page 177-181 of EXHIBITS), **Exhibit #17** (See Page 182-190 of EXHIBITS), **Exhibit #18** (See Page 191-192 of EXHIBITS), **Exhibit #19** (See Page 193-194 of EXHIBITS), **Exhibit #20** (See Page 195-197 of EXHIBITS), **Exhibit #21** (See Page 198-199 of EXHIBITS), **Exhibit #22** (See Page 200-201 of EXHIBITS), **Exhibit #23** (See Page 202-205 of EXHIBITS), **Exhibit #24** (See Page 206-217 of EXHIBITS), **Exhibit #25** (See Page 218-228 of EXHIBITS), **Exhibit #26** (See Page 229-234 of EXHIBITS), and **Exhibit #27** (See Page 235-247 of EXHIBITS).

64. Also evidence and expert witness in support of Section (7) paragraph (a) in the "Form 10. Petition for a Writ of Actual Innocence Based on Nonbiological Evidence" is in a SEALED MENTAL EVALUATION study which was ordered by the General District Court, and such SEALED records would need to be transmitted by the Clerk of the Circuit Court of the City of Martinsville. See **Joint Appendix 1, pages 61-67**; SEALED RECORDS SECTION.

65. This evidence of Autism Spectrum Disorder and Psychosis Disorder was not available or not allowed to be used at the time of conviction on November 18,

2019 (**Joint Appendix 1, pages 431-432**; ORDER IN MISDEMEANOR OR TRAFFIC INFRACTION PROCEEDING), and was not available in 2020, because a new law was created by the lawmakers of the General Assembly for the Commonwealth of Virginia, in the year of 2021. This new law of Virginia Code § 19.2-271.6 **Exhibit #23** (See Page 202-205 of EXHIBITS) made evidence available for all Courts of Law in the Commonwealth of Virginia which was previously barred by older law including Supreme Court of Virginia case law of **Stamper v. Commonwealth, 228 Va. 707 (1985)**. It nullifies that older Supreme Court decision and requires a new case law in the Courts of Virginia regarding admissibility of evidence concerning an "autism spectrum disorder" and "psychosis" in regard to "intent". Today is that day to create new case law or modify existing case law after the passage of the new law causing admissibility of evidence previously inadmissible in a Virginia Court of Law.

(a) This evidence 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 or adjudication of delinquency by the court; and/or -- Autism was not admissible at the time. Direct Appeal still in VA Supreme Court.

i. Argument

66. The evidence could not have been used in the year of 2019; so it cannot be obtained or discovered to be admissible in the Court in the year of 2019. After the passage of Virginia code § 19.2-271.6. in the year of 2021, now the evidence is now admissible, and so it can be discovered or obtained. So prior to that law, it would not be

considered admissible evidence in a Court of Law in Virginia.

67. Also Petitioner had filed a timely NOTICE OF APPEAL (See Joint Appendix 1, pages 461-463; 885-887)(See Joint Appendix 5, pages 11-11) of the criminal conviction so there may be no final judgment of conviction until the timely appeals have been exhausted. The appeal is still pending in the Supreme Court of Virginia after filing a timely NOTICE OF APPEAL (See Joint Appendix 5, pages 297-300) to the Supreme Court of Virginia after denial of Petition for Appeal. Petitioner does not have the case number as that appeal in the Supreme Court of Virginia. So Petitioner does not know when the final order of conviction will be. The conviction would have to be either affirmed or vacated. So the date of the final decision from the Supreme Court of Virginia is likely when the conviction becomes final after review over the conviction and a final decision over whether to affirm, modify, or remand or vacate the order.

I. ARGUMENTS

68. Prior to the passage of Virginia Code § 19.2-271.6. Evidence of defendant's mental condition admissible; notice to Commonwealth. (2021 updated section); Virginia Courts would not accept a mental condition defense of Autism Spectrum Disorder and even of Psychosis to a criminal charge in proving a fact that the criminal Defendant did not have the intent necessary to violate a Virginia criminal law.

69. Prior to the passage of Virginia Code § 19.2-271.6; the issue of intent

was up to the trier of fact as argued by this Court of Appeals. See Smith v. Commonwealth, 72 Va. App. 523, 523 (2020) (noting that "[w]hether the required intent exists is generally a question of fact for the trier of fact") (emphasis added) (quoting Brown v. Commonwealth, 68 Va. App. 746, 787 (2018) (alteration in original)) (Joint Appendix 5, pages 189-189; "09-02-2021 Order | Denied")

70. Prior to the passage of Virginia Code § 19.2-271.6, in the year of 2021; the issue of Autism Spectrum Disorder or a mental condition in a criminal defense of proving "no intent" or "lack of intent" was barred by the Supreme Court of Virginia in its case law of Stamper v. Commonwealth, 228 Va. 707 (1985). Prior to that law's passage, the only way a criminal Defendant could be found not guilty was a high bar with a mental evaluation determining that the defendant was not guilty by reason of insanity. That would require indefinite detainment in a Mental Health facility until that person was deemed cured of the insanity which had caused the alleged criminal offense.

71. Let us examine the new law of Virginia Code § 19.2-271.6 (See Page 202-205 of EXHIBITS; **EXHIBIT 23**).

Virginia Code § 19.2-271.6. Evidence of defendant's mental condition admissible; notice to Commonwealth.

A. For the purposes of this section:

"Developmental disability" means the same as that term is defined in § 37.2-100.

"Intellectual disability" means the same as that term is defined in § 37.2-100.

"Mental illness" means a disorder of thought, mood, perception, or orientation that significantly impairs judgment or capacity to recognize reality.

B. In any criminal case, evidence offered by the defendant concerning the defendant's mental condition at the time of the alleged offense, including expert testimony, is relevant, is not evidence concerning an ultimate issue of fact, and shall be admitted if such evidence (i) tends to show the defendant did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence. For purposes of this section, to establish the underlying mental condition the defendant must show that his condition existed at the time of the offense and that the condition satisfies the diagnostic criteria for (i) a mental illness, (ii) a developmental disability or intellectual disability, or (iii) autism spectrum disorder as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.

If a defendant intends to introduce evidence pursuant to this section, he, or his counsel, shall give notice in writing to the attorney for the Commonwealth, at least 60 days prior to his trial in circuit court, or at least 21 days prior to trial in general district court or juvenile and domestic relations district court, or at least 14 days if the trial date is set within 21 days of last court appearance, of his intention to present such evidence. In the event that such notice is not given, and the person proffers such evidence at his trial as a defense, then the court may in its discretion either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243.

If a defendant intends to introduce expert testimony pursuant to this section, the defendant shall provide the Commonwealth with (a) any written report of the expert witness setting forth the witness's opinions and the bases and reasons for those opinions, or, if there is no such report, a written summary of the expected expert testimony setting forth the witness's opinions and bases and reasons for those opinions, and (b) the witness's qualifications and contact information.

C. The defendant, when introducing evidence pursuant to this section, shall permit the Commonwealth to inspect, copy, or photograph any written reports of any physical or mental examination of the accused made in connection with the case, provided that no statement made by the accused in the course of such an examination disclosed pursuant to this subsection shall be used by the Commonwealth in its case in chief,

whether the examination was conducted with or without the consent of the accused.

D. Nothing in this section shall prevent the Commonwealth from introducing relevant, admissible evidence, including expert testimony, in rebuttal to evidence introduced by the defendant pursuant to this section.

E. Nothing in this section shall be construed as limiting the authority of the court from entering an emergency custody order pursuant to subsection A of § 37.2-808.

F. Nothing in this section shall be construed to affect the requirements for a defense of insanity pursuant to Chapter 11 (§ 19.2-167 et seq.).

G. Nothing in this section shall be construed as permitting the introduction of evidence of voluntary intoxication.

2021, Sp. Sess. I, cc. 523, 540.

72. The Petitioner in this case had already given NOTICE in the Circuit Court as to the usage of such a defense. On January 20, 2022, Petitioner had filed the post-conviction motion entitled: "MOTION FOR JUDGMENT OF ACQUITTAL BASED UPON NEW EVIDENCE WHICH COULD NOT BE ADMISSIBLE AT THE TIME OF CONVICTION; NEW EVIDENCE OF SPOLIATION OF EVIDENCE COMMITTED BY COMMONWEALTH OF VIRGINIA; REQUEST FOR SANCTIONS AGAINST COUNSEL GLEN ANDREW HALL, ESQUIRE (OFFICER OF THE COURT) FOR VIOLATING COURT ORDERS FOR NOT TURNING OVER BODY-CAMERA FOOTAGE AND IT IS LIKELY DESTROYED AND BIOLOGICAL EVIDENCE OF BLOOD VIALS OBTAINED ON DAY OF CHARGE, ALSO LIKELY DESTROYED". See Joint Appendix 6, pages 5-213; MOTION FOR JUDGMENT OF ACQUITTAL. It was filed on January 20, 2022, and served on the Attorney

for the Commonwealth that same day (See Joint Appendix 6, pages 4-4; EMAIL RECEIPT CONFIRMATION FROM CA ATTY). Also on the day that the foregoing Petition and it's attachments is served with the Commonwealth Attorney and Attorney General, that shall also be considered as providing NOTICE to the attorney of the Commonwealth regarding the usage of the defense of Autism Spectrum Disorder.

73. Also it should be known to this Court that the United States Constitution prohibits cruel and unusual punishments inflicted under the Eighth Amendment of the United States Constitution. Convicting an innocent person is a violation of the Eighth Amendment. It doesn't matter that Petitioner's criminal conviction isn't a felony conviction but is only a misdemeanor conviction. This wrongful conviction of innocent man Brian David Hill is more than some misdemeanor.

74. For example, the noted misdemeanor conviction on November 18, 2019 had triggered a Supervised Release Violation charge then created a Federal Detainer against Brian David Hill (See EXHIBITS, pages 193-194; EXHIBIT 19 FEDERAL DETAINER NOV15-2018) and had caused the revocation of Brian David Hill's supervised release (See EXHIBITS, pages 195-197; EXHIBIT 120 JUDGMENT COMMITMENT SRV). It created a large sum of legal debt against Brian David Hill in the thousands upon thousands of dollars. The more Brian David Hill fights to prove his innocence and overturn his wrongful "misdemeanor" conviction, the more legal fees are racked up against Petitioner. Unless Petitioner is acquitted or found actually innocent, he will likely owe thousands to tens of

thousands of dollars by the finale of all cases and appeals fighting this "misdemeanor". It has caused more years of supervised release to be added onto the ten (10) years of Supervised Release already imposed on Petitioner prior to the State/Commonwealth charge on September 21, 2018, and conviction on November 18, 2019. The conviction may have also raised the risk tier for Petitioner's supervised release making him appear to be more of a "danger to the community" when Petitioner is a virgin, never had sex with a person in his life. Petitioner never raped, never molested, and never murdered. Petitioner never was charged with assault. Petitioner was never charged with a violent crime in his life, and Petitioner is 31 years old at the time of this Petition.

75. Petitioner asserts based on paragraphs 73-74, the last two paragraphs above, that he has a Constitutional right to file a Petition for a Writ of Actual Innocence in the Court of Appeals of Virginia. Petitioner cannot be blocked by any procedural defects or procedural defaults. This Court has no right to block this Petition for a Writ of Actual Innocence under any technicality of law. The Supreme Court of the United States had issued a legal opinion that covers all criminal convictions, where it is a cruel and unusual punishment to convict an innocent person and a miscarriage of justice to convict an innocent person with a crime. We have such constitutional protections otherwise we are doomed to rack up false charges and false convictions. It creates a world where Courts condone fraud and would no longer hold any integrity. We must acquit innocent people when there is enough evidence proving innocence to one or more elements of a crime. A court

forcing a criminal defendant to suffer any penalty including paying of legal fees for even a misdemeanor charge where he or she is innocent of the charge is cruel and unusual punishment inflicted. It violates due process of law, to take somebody's property or money or anything without due process of law including procedural due process rights and the right to a fair trial.

76. See McQuiggin v. Perkins, 569 U.S. 383, (2013) ("The Court has applied this "fundamental miscarriage of justice exception" to overcome various procedural defaults, including, as most relevant here, failure to observe state procedural rules, such as filing deadlines. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640. The exception, the Court's decisions bear out, survived AEDPA's passage. See , e.g., Calderon v. Thompson, 523 U.S. 538, 558, 118 S. Ct. 1489, 140 L. Ed. 2d 728; House, 547 U.S., at 537-538, 126 S. Ct. 2064, 165 L. Ed. 2d 1. These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." Schlup, 513 U.S., at 324, 115 S. Ct. 851, 130 L. Ed. 2d 808. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations. Pp. 391-394, 185 L. Ed. 2d, at 1030-1031."). See Herrera v. Collins, 506 U.S. 390, 404 (1993) ("we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is

grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.")

77. See Sawyer v. Whitley, 505 U.S. 333, (1992) ("Even if he cannot meet this standard, a court may hear the merits of such claims if failure to hear them would result in a miscarriage of justice. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436. The miscarriage of justice exception applies where a petitioner is "actually innocent" of the crime of which he was convicted or the penalty which was imposed.").

THE UNCONSTITUTIONAL IRREPARABLE HARM OF PETITIONER UPON NOT GRANTING THIS WRIT; REQUESTING THAT THE COURT OF APPEALS OF VIRGINIA EXTEND OR MODIFY EXISTING LAW TO PERMIT A MISDEMEANOR PETITIONER TO BE ALLOWED TO PETITION FOR WRIT OF ACTUAL INNOCENCE

78. Petitioner is entitled to Due Process of Law. It doesn't matter whether the case is a misdemeanor or a felony case. The Commonwealth of Virginia needs to EXTEND or MODIFY existing law to hold that criminal defendants of misdemeanor cases also be allowed to Petition for a Writ of Actual Innocence. As it is cruel and unusual punishment to inflict any financial penalty, criminal adjudication of guilt, and/or supervised release violation for a crime that a Petitioner is factually innocent of.

79. Petitioner isn't just convicted of a regular misdemeanor (See EXHIBITS, pages 195-197; EXHIBIT 120 JUDGMENT COMMITMENT SRV). This misdemeanor led to a Supervised Release Violation conviction as well. That

conviction can be overturned if Petitioner is found legally innocent of his charge and wrongful conviction of a misdemeanor in the Circuit Court. This Writ may be Petitioner's only means to overturn his Supervised Release Violation conviction by making a showing of legal innocence. Actual Innocence can overturn that Federal felony case Supervised Release Violation.

80. Petitioner asks the Court of Appeals of Virginia to EXTEND OR MODIFY existing case law under interpretation of Chapter 19.3 of Title 19.2; to hold that the Writ of Actual Innocence should apply to misdemeanor convictions when a Writ Petitioner is serving a federal sentence of Supervised Release under a felony conviction where even a misdemeanor crime could double or severely increase the imprisonment such as both the imprisonment for the misdemeanor and imprisonment for the revocation of supervised release. The U.S. Supreme Court had recently held that Supervised Release Violations are the same as criminal prosecutions. See United States v. Haymond, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019). The misdemeanor created two charges, one in the State and one in the Federal Court. So this misdemeanor is not the only conviction at issue in this Petition for a Writ of Actual Innocence. Under the U.S. Constitution, Petitioner asserts that the Court of Appeals has jurisdiction over the Petition for the Writ of Actual Innocence over misdemeanors if the misdemeanant can prove that he is under a felony sentence of Supervised Release and that the misdemeanor directly affects or impacts that felony sentence of Supervised Release. Petitioner asserts that the Commonwealth of Virginia had proven to the Circuit Court that Petitioner

is serving a sentence of Supervised Release (Joint Appendix 1, pages 384-390; NOTICE - PRIOR CONVICTIONS). Petitioner is double punished over a simple misdemeanor. So this misdemeanor also concerns a felony supervised release sentence and worsens that sentence as a result of this one misdemeanor.

81. Therefore the Court of Appeals of Virginia needs to consider that the circumstances in this Petition for a Writ of Actual Innocence differs from other petitions from a misdemeanant because Petitioner is serving a federal felony sentence of Supervised Release while he was charged with the misdemeanor. By not being allowed to prove his innocence for this misdemeanor will create double punishments, double jeopardy which is supposed to be unconstitutional, and worsening of his felony federal Supervised Release including additional imprisonment and an additional term of supervised release. Then imposing payment of legal fees out of federally protected SSI money with the risk that being unable to pay that amount to the Court, that the Court may try to push for another penalty. It is cruel and unusual punishment inflicted against an innocent man.

82. By dismissing this Petition for the conviction challenged only being a misdemeanor when this directly impacts a felony supervised release sentence in the Federal Court system will create unconstitutional and cruel and unusual punishments inflicted upon an innocent man here in this case.

83. Again, the noted misdemeanor conviction on November 18, 2019 triggered the revocation of Brian David Hill's supervised release. It created a large sum of legal debt against Brian David Hill in the thousands upon thousands of

dollars. Petitioner's only source of income is his SSI disability disbursement as authorized to be protected from any garnishment by Title 42 U.S.C. § 407. The more Brian David Hill fights to prove his innocence and overturn his wrongful "misdemeanor" conviction, the more legal fees are racked up against Petitioner. Unless Petitioner is acquitted or found actually innocent, he will likely owe thousands to tens of thousands of dollars by the finale of all cases and appeals fighting this "misdemeanor". It has caused more years of supervised release to be added onto the ten (10) years of Supervised Release already imposed on Petitioner prior to the State/Commonwealth charge on September 21, 2018, and conviction on November 18, 2019. Petitioner had to serve an unnecessary 9 months of federal imprisonment in addition to the three months of state imprisonment served from September 21, 2018 to December 21, 2018, released to the Feds on December 22, 2018. That amounts to a total of 12 months of imprisonment ordered.

84. Petitioner contends that this Petition does have jurisdiction and that the Court of Appeals of Virginia has jurisdiction to entertain such a Petition for a Writ of Actual Innocence because Petitioner's misdemeanor conviction which Petitioner is claiming innocence of affects his felony supervised release. That Petitioner must prove his innocence in order to be acquitted of his felony Supervised Release Violation. The supervised release cases are the same as regular criminal prosecutions as outlined in the Haymond decision in 2019 in SCOTUS. The state misdemeanor could be construed as a proxy felony case. Brian had filed a new Federal Habeas Corpus Petition under a Section 2255 Motion in the Middle

District of North Carolina, and promising the Federal Court that he would file a Petition for the Writ of Actual Innocence in the Court of Appeals of Virginia to try to demonstrate actual innocence to his Supervised Release Violation. He must be allowed to be found innocent of the conviction in Martinsville Circuit Court in order to overturn his Federal his Supervised Release Violation for a felony sentence imposed in 2014 after Petitioner's imprisonment by the Feds.

THE ARGUMENT OF PROXY FELONY CASES DISGUISED AS MISDEMEANORS

85. Proxy felony cases are when a misdemeanor case is the cause of a more serious felony case or worsens a felony case. For example, when somebody is serving a felony criminal sentence of supervised release, a person is normally under the condition not to violate a federal, state, or local law. Even a misdemeanor case triggers a violation of Supervised Release for a felony conviction and felony sentence. The misdemeanor acts as a proxy to double punish a criminal defendant in a felony case. So it is not the same as a regular misdemeanor charge and conviction. Even if Petitioner cannot succeed on arguing that it is double jeopardy to be double punished by two Courts; it is double jeopardy to punish Petitioner twice for a crime he is innocent of. Petitioner is being punished twice for a crime he is innocent of.

86. Petitioner terms this as a "proxy felony case" a new definition created by Petitioner demonstrating to this Court, that the felony case acted as a proxy in punishing Petitioner for the misdemeanor case. So a felony is involved here, even

if the Commonwealth of Virginia never charged Petitioner with a felony. It worsens his felony sentence and multiplies his imprisonment. So if this were a regular misdemeanor case, then maybe the Court of Appeals can argue that it doesn't have jurisdiction over misdemeanor cases. However this misdemeanor case is also part of a felony case in Federal court. They are not separate cases because they take Trial De Novo into consideration. A Federal Court considering revocation of felony supervised release sentences also takes the position of the Circuit Court or General District Court into consideration. Like if they find that Petitioner does have a fact or multiple facts concerning innocence, this will affect the felony supervised release sentence. It may even be used to overturn that revocation. So it doesn't just overturn the misdemeanor case because it is directly connected with the felony supervised release sentence. You know, a proxy felony case.

87. The irreparable harm Petitioner faces if this Petition does not succeed will mean (1) not being legally allowed to prove Actual Innocence of his wrongful conviction in Circuit Court which is a miscarriage of justice; (2) will subject Petitioner to exorbitant legal fees and not have any right to challenge the cause of it when the person may be innocent, and (3) creates more criminal records and convictions against Petitioner and a double jeopardy of punishments inflicted when the Petitioner is innocent but is not being allowed legally to challenge any of it when he/she is innocent. It holds Petitioner hostage indefinitely and makes Petitioner suffer criminal records, penalties, and other repercussions for a crime he

or she is innocent of. It is permanent and unwarranted damage. Unconstitutional damage and infliction of unwarranted and unnecessary damage and violations of Constitutional rights permanently inflicted. Damage so bad that only the Governor of Virginia could undo this damage and miscarriages of justice permanently inflicted by the Commonwealth of Virginia against an innocent man Brian David Hill forevermore, damage so bad that the Founding Fathers of America former U.S. President Thomas Jefferson and Benjamin Franklin would weep in sorrow, but there is no Constitutional right to a Pardon of Innocence, as it is at the Governor's sole discretion. This violates Article I, Section 9 of the Virginia Constitution, and in the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishments inflicted. It is a cruel and unusual punishment to not allow a criminal defendant to prove his innocence with what all is at stake here.

CONCLUSION

For the foregoing reasons stated above, the Petitioner urges this Court to grant his Petition for the Writ of Actual Innocence; issue a Writ of Actual Innocence in the Circuit Court of Virginia in regard to criminal conviction entered on November 18, 2019, and vacate the final order/judgment of the criminal conviction entered on November 18, 2019 (**Joint Appendix 1, pages 431-432**; ORDER IN MISDEMEANOR OR TRAFFIC INFRACTION PROCEEDING).

REQUEST FOR ORAL ARGUMENT AND/OR AN EVIDENTIARY HEARING

As this Petition raises important facts and evidence of actual innocence aka legal innocence, the Petitioner requests oral argument and/or an evidentiary hearing. Petitioner also requests the appointment of counsel to represent Petitioner in his Petition for the Writ of Actual Innocence.

Respectfully Filed/Submitted on February 3, 2021,

BRIAN DAVID HILL
Pro Se

Brian D. Hill
Signed
Brian D. Hill

Brian David Hill – Ally of Q
Founder of USWGO Alternative News
310 Forest Street, Apt. 2
Martinsville, Virginia 24112
(276) 790-3505
Pro Se Appellant