IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Jermaine Doss, DOC # 1009227	)	
Petitioner	)	
	)	
v.	)	**Case No.**
	)	
Harold W. Clarke, Director	)	
Virginia Dept. of Corrections	)	
Respondent.	)	

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

Petitioner, Jermaine Doss, by and through his attorney, Bryan J. Jones, in custody pursuant to a judgment of the Norfolk Circuit Court, pursuant to 28 U.S.C. § 2254, the Eighth Amendment to the United States Constitution, respectfully moves this Court for an order vacating his conviction and sentence in Commonwealth of Virginia v. Jermaine Doss, CR99004997-00 through 04.

II. JURISDICTION, VENUE, AND PARTIES

Jermaine Doss files this petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. He is currently in Respondent's custody at Sussex II State Prison in violation of the U.S. Constitution. *Id.* §§ 2241(c)(3), 2254(a). Venue in this court is proper because Jermaine Doss Scott was convicted in Norfolk Circuit Court, which is located within the Eastern District of Virginia. *Id.* §§ 2241(d).

III. RELEVANT FACTS AND PROCEDURAL BACKGROUND

This case has an extensive history critical to the Court's analysis of the claims raised herein. Therefore, Doss includes a comprehensive recitation of the background to his underlying criminal case.

In its order of February 22, 2007, denying Doss's post-conviction Petition for a Writ of Actual Innocence, the Court of Appeals of Virginia summarized the evidence at trial as follows:

> "On March 25, 1998, James Webb was found shot to death inside his Norfolk home. Two days before the killings, Webb, armed with a gun, went to Doss' place of business. Webb and Doss had an ongoing dispute regarding cocaine Webb had purchased through Doss. Webb threatened Doss with the gun. The police were called to the scene. Both Webb and Doss were arrested, but were released on bond that evening.
>
> "Nathaniel McGee, a previously convicted felon, worked for Doss periodically. In exchange for McGee performing odd jobs, Doss would provide McGee with money, alcohol, and cigarettes. McGee considered Doss to be 'the brother I always wanted.' Doss referred to McGee as his 'cousin.'
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> "In March of 1998, McGee possessed the gun Doss had purchased for protection. McGee testified at trial that on the night of March 24, 1998, he got into a car with Doss believing Doss was driving him home. Instead, Doss told McGee to 'go there and take the guy out.' Doss pointed out Webb's home. Doss promised to give McGee money and 'take care of his needs.' Doss told McGee that the back door of Webb's home would be unlocked.
>
> "McGee testified that he entered the home and shot Webb several times. Afterwards, McGee fled from the home. He emptied the spent cartridge cases into his pocket and reloaded the gun. He tried to phone Doss and have Doss pick him up. However, the police found McGee in the vicinity of Webb's home. Near McGee was Doss' gun, which later proved to be the murder weapon. Ten empty cartridge cases were in McGee's pocket, as well as five bullets. The police arrested McGee for possessing a firearm.
>
> "Doss arranged for a friend to post bond for McGee, and McGee was released from custody. However, McGee later was arrested for Webb's murder. McGee told his sister he had committed a murder for money, and that Doss was supposed to leave money in her mailbox." (Record No. 0303-06-1, Order 2, February 22, 2007). (Exhibit 1).[1]

a. Doss's First Trial

[1] This is the only Virginia appellate court order that recites a summary of the evidence at trial upon which Doss's convictions are based.

In October of 1998, Doss was scheduled to stand trial for capital murder for hire, statutory burglary, conspiracy, and two firearm charges before a Norfolk jury. McGee, who had already pleaded guilty to Webb's murder, was scheduled to testify against Doss as part of an agreement with the prosecution. (Exhibit 2). But McGee backed out of the deal by refusing to testify against Doss. Initially, presiding Norfolk Circuit Court Judge Jerome James ruled that McGee's confession would be admissible at Doss's trial and that the case could go forward without McGee testifying against Doss.

However, Judge James reversed his decision the day of trial, finding that McGee's confession was unreliable. Therefore, the prosecution moved to withdraw the charges against Doss and Judge James dismissed the case. Doss walked out of court a free man. (Exhibit 8).

b. McGee's New Deal

In November of 1999, the Norfolk City prosecutors secured a second deal with McGee. (Exhibit 3). As an incentive for McGee to testify against Doss, prosecutors took the death penalty off the table. McGee pleaded guilty to first-degree murder (reduced from capital murder), burglary and use of a firearm. Circuit Judge Junius P. Fulton, III immediately sentenced McGee to 13 years in prison on the burglary and gun charges. But Judge Fulton reserved sentencing on the murder charge until the conclusion of Doss's trial.

According to McGee's new plea agreement, McGee "must testify truthfully and completely ... in all trials (and re-trials) of each and every individual participating in any way in the planning, hiring and/or commission of James Webb's murder." If McGee refused to testify again, he would be subject to a capital murder conviction and face a possible death sentence. Id.

c. Doss's Second Trial

In November of 1999, Norfolk prosecutors obtained indictments against Doss charging him with capital murder for hire in the killing of James Webb, statutory burglary, conspiracy, and two counts of use of a firearm. These offenses were tried before a Norfolk jury beginning on February 14, 2000.

Circuit Judge Everett Martin presided over the trial. Prior to closing argument, prosecutors and defense attorneys discussed jury instructions in chambers. (Exhibit 7). During the discussion, Judge Martin *sua sponte* suggested an instruction, over the defense's objection, on first-degree murder as an accessory before the fact, as a lesser included offense to the murder for hire charge. Defense counsel objected and argued for, "going all or nothing on capital." Judge Martin ultimately rejected that approach, stating, "If I instruct them on first-degree and he's convicted on first-degree murder, and it goes up to the Court of Appeals and the Court of Appeals says there's no evidence of either capital or nothing, the Court of Appeals can reverse me and dismiss the indictments and let him go and it's all over with." Id.

The jury found Doss guilty of first-degree murder as an accessory before the fact in the killing of James Webb, statutory burglary, conspiracy, and two counts of use of a firearm and recommended a total sentence of life plus 38 years in prison. (CR99004997-00 through 04). On May 9, 2000, Judge Martin sentenced Doss in accordance with the jury's recommendation. Trial attorneys for Doss were Curtis T. Brown and Michael L. Hockaday (retained). (Exhibit 10).

d. McGee's Post-Trial Recantation

In October of 2000, approximately six months after Doss's trial was over, he received a letter from Nathaniel McGee. In it, McGee wrote:

> "I had no choice but to lie and say that you hired me to kill Webb because the prosecutor [sic] and the detectives kept wanting me to say. I know you did not know what I was planning on doing to Webb but I had to use you to get the plea or they would have killed me." (Exhibit 4).

After being advised by his appellate counsel James Broccoletti that McGee's letter could not be used on appeal, Broccoletti placed the letter in Doss's case file. The letter was discovered in 2002 by attorney Andrew Shilling whom Doss hired to file a state habeas corpus petition.

e. Doss's Direct Appeal

Meanwhile, Doss appealed his convictions to the Court of Appeals of Virginia, assigning as error, *inter alia*, Judge Martin's jury instruction regarding first-degree murder as a lesser included offense to capital murder for hire. On December 8, 2000, the appeals court denied this assignment of error, pursuant to Rule 5A:18, because the argument was not preserved in the trial court. The remaining assignments of error were denied by the court in an unpublished opinion dated October 16, 2001. A petition for rehearing was denied on February 2, 2001. (Record No. 1319-00-1). Doss then appealed to the Supreme Court of Virginia, which refused his petition for appeal on April 12, 2002. (Record No. 012668). Attorney James O. Broccoletti was court-appointed to represent Doss on direct appeal.

f. Doss's State Habeas Petition

Doss sought habeas relief in the Norfolk City Circuit Court asserting a number of ineffective assistance of counsel and trial court error claims. (Case No. CL03000883-00). (Exhibit 12). In addition, Doss asserted that he was entitled to habeas relief because his convictions were obtained by the use of the alleged perjured and now recanted testimony of Nathaniel McGee, a claim based on McGee's letter which Doss received in October of 2000. Doss also claimed that he was entitled to a belated appeal related to Judge Martin's jury instruction on first-degree murder as a lesser included offense to capital murder for hire because the clerk failed to timely file the relevant transcript.

Doss also filed a motion to recuse or disqualify Judge Martin from hearing the habeas case. In the hearing held on the motion, Doss argued, *inter alia*, the habeas included an allegation that there was error in Judge Martin's *sua sponte* jury instruction. Doss requested a different judge be assigned the habeas petition because ruling on the habeas petition would require the judge to make a decision about the *sua sponte* jury instruction. Judge Martin denied the motion stating, "I have no bias or animus in favor of him or against Mr. Doss that would prevent me from hearing the case..." (Exhibit (9).

In a letter opinion dated December 9, 2003, Judge Martin dismissed the habeas petition simply "for the reasons and arguments stated in the motion to dismiss," which had been submitted by counsel for the respondent. On December 12, 2003, Judge Martin reversed his decision to dismiss the case based on Doss's motion to reconsider.

On January 7, 2004, counsel appeared for oral argument on the habeas corpus petition. Judge Martin did not announce his decision in court, but later that day he entered an order denying and dismissing the habeas petition. In the order, Judge Martin held that Doss's trial court error claims were not cognizable on habeas corpus, and therefore, procedurally barred under the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (2003). Martin denied Doss's ineffective assistance claims finding that Doss failed to satisfy the performance and prejudice prongs of the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Martin also found that McGee's recantation was not credible in light of the affidavit of Michael Fasanaro (McGee's trial attorney) indicating McGee was afraid of Doss and the "wealth of evidence to corroborate McGee's testimony." With regard to the belated appeal claim concerning the jury instruction, Judge Martin found that Doss failed to establish prejudice because the issue of whether accessory before the fact is a lesser included offense to capital murder for hire was not

properly preserved. He further held that "pursuant to Code § 19.2-286, for purposes of jury instructions, accessory before the fact is considered a lesser included offense." (CL03000833). (Exhibit 11).

On June 24, 2004, the Supreme Court of Virginia refused Doss's petition for appeal because the petition "was not perfected in the manner provided by law because the petition for appeal does not contain sufficient assignments of error that comply with the requirements of Rule 5:17(c) ..." Doss filed a petition for rehearing and argued: "This counsel is at a loss as to what changed in 2004 that would call for procedural defaults for what had for all those years been acceptable satisfaction of Rule 5:17." On October 1, 2004, the court summarily dismissed the petition for rehearing. (Record No. 040787). Attorney Andrew G. Wiggins (retained) represented Doss in these habeas proceedings before the circuit court and Supreme Court of Virginia.

g. Doss's Petition to Virginia Governor for Absolute Pardon

In 2005, attorney Andrew T. Shilling decided to follow up on the McGee letter and made visiting arrangements with the warden of Keene Mountain Correctional Center in Grundy, Virginia, where Shilling obtained a sworn statement from McGee. (Exhibit 5). Shilling at that time intended to use the sworn statement as the basis for a petition for an absolute pardon from the governor. But after the enactment of Va. Code § 19.2-327.10, et. seq., the governor's office advised that Doss file a petition for a writ of actual innocence.

h. Doss's State Petition for Writ of Actual Innocence

On February 6, 2006, Doss filed a petition for a writ of actual innocence in the Court of Appeals, pursuant to Va. Code § 19.2-327.10, et. seq. The petition was based on newly discovered evidence (i.e., McGee's sworn statement recanting his trial testimony obtained by

attorney Andrew T. Shilling, in addition to McGee's letter which Doss received in October of 2000). The Virginia Court of Appeals entered an order on June 30, 2006 directing the Norfolk City Circuit Court to hold a hearing to determine, among other things, whether Doss proved by clear and convincing evidence that McGee is credible in his assertion that he testified falsely at Doss's trial. The hearing was held on October 17, 2006. Judge Martin presided over the proceeding and heard evidence.

On December 13, 2006, Judge Martin submitted his findings of fact in which he determined that McGee's assertion of Doss's innocence was not credible. (Exhibit 6). Martin concluded that McGee's assertion was motivated by his close ties with and a desire to help Doss, McGee's fear of being known in prison as a snitch, his fear of Doss, and his hope that Doss would help him in some manner. By order dated February 22, 2007, the Court of Appeals upheld Judge Martin's findings of fact and dismissed the petition. (Record No. 0303-06-1). The Supreme Court of Virginia refused the appeal of the denial of the denial of the writ of actual innocence by order entered on September 6, 2007. (Record No. 070615). Doss was represented by James Broccoletti (retained) in these actual innocence proceedings.

i. Doss's State Collateral Attack Proceedings

On February 9, 2009, Doss, by counsel, filed a "Petition to Declare Void the Circuit Court Final Orders of Conviction and Sentence" in the Norfolk City Circuit Court. In the petition, Doss argued that his convictions were obtained through extrinsic fraud and/or without subject matter jurisdiction based on Judge Martin's erroneous jury instruction on first-degree murder as a lesser included offense to capital murder for hire. In addition, Doss filed a motion to recuse Judge Martin from this matter. By Final Order entered on June 1, 2009, Judge Martin denied the motion to recuse and the petition, finding that Doss failed to satisfy his burden to

demonstrate either evidence of extrinsic fraud or the absence of subject matter jurisdiction. (CL09-0811). On December 21, 2009, the Supreme Court of Virginia refused Doss's appeal of Judge Martin's denial of his petition. Doss then sought a rehearing, which the court denied on March 4, 2010. (Record No. 091794). Doss was represented in these collateral attack proceedings by Andrew G. Wiggins (retained).

On or about October 17, 2011, Doss filed a *pro se* motion to vacate with the Norfolk City Circuit Court, on the ground that the court's final order under the original criminal docket number, was void ab initio "for want of indictment and/or constitutionally defective indictment, in violation of Virginia Code § 19.2-277." By order dated November 1, 2011, Judge Martin denied the motion. Doss retained David B. Hargett to appeal the denial of his *pro se* collateral attack motion to the Supreme Court of Virginia. However, on April 13, 2012, the Supreme Court refused the appeal of Judge Martin's denial of the motion. (Record No. 120197).

On April 9, 2014, Doss filed, *pro se*, a final motion to vacate with the Norfolk City Circuit Court collaterally attacking his convictions under the original criminal docket number. In the motion, Doss argued that the trial court exceeded its authority to enter the final order, under prevailing Virginia law, when it employed an "unlawful mode of procedure" to convict him of first-degree murder as an accessory before the fact based on Judge Martin's erroneous *sua sponte* jury instruction. On April 16, 2014, Judge Martin denied the motion. Martin determined that Doss was seeking relief on the same previously adjudicated grounds and found that the motion was "not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is interposed for an improper purpose, that is, the harassment of the Commonwealth and wasting of the Court's time." Judge Martin also imposed a sanction of

$500 against Doss. The Supreme Court of Virginia refused Doss's *pro se* petition for appeal of the denial of his motion by order entered on January 14, 2015. (Record No. 140863).

On March 12, 2018, the Mid-Atlantic Innocence Project's longstanding investigation of Doss's case came to an end when it sent him a letter advising that it was unable to help him at this time. This federal habeas petition follows.

II. GROUNDS FOR RELIEF

Doss asserts that he was denied the right to effective assistance of counsel at his 2000 criminal trial in the Norfolk City Circuit Court, in violation of the Sixth Amendment to the U.S. Constitution, and as defined by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), when:

1. Trial counsel failed to raise the specific objection to Judge Martin's *sua sponte* instruction on the ground that first-degree murder as an accessory before the fact is not a lesser included offense of capital murder for hire.

2. Trial counsel failed to secure Doss's presence during a critical stage of the proceedings, to wit: the in-chambers arguments where Judge Martin gave the *sua sponte* erroneous jury murder instruction.

3. Trial counsel failed to argue that Doss's charges for capital murder by another for hire and conspiracy were barred by his charge for capital murder for hire under the Wharton Rule.

IV. DISCUSSION

A. Exhaustion and Timelines

As a preliminary matter, Doss concedes that the ineffective assistance claims were not exhausted in the state courts and that the petition is time-barred. 28 U.S.C. § 2254(b)(1)(A) provides that a "writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the

remedies available in the courts of the State . . ." Moreover, according to 28 U.S.C. § 2244(d)(1), the petition must be filed within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review of 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. Id.

As a defense to the exhaustion requirement and the running of the statute of limitations, however, Doss asserts that he is actually innocent of the crimes for which he was convicted. "Generally, a federal court may not consider claims that a petitioner failed to raise at the time and in the manner required under state law." *Teleguz v. Zook*, 806 F.3d 803, 807 (4th Cir. 2015) (citation omitted). However, the "actual innocence gateway" under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995) and *McQuiggin v. Perkins*, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed. 2d 1019 (2013) enables a federal court to review otherwise defaulted or time-barred claims when a petitioner makes a "compelling showing of actual innocence." *Teleguz*, 806 F.3d at 807. For a petitioner to claim actual innocence, "[new] evidence must establish sufficient doubt about [a petitioner's] guilt to justify the conclusion that his [incarceration] would be a miscarriage of justice unless his conviction was the product of a fair trial." *Schlup*, 513 U.S. at 316 (emphasis in original). Actual innocence "does not by itself provide a basis for relief. Instead, [the petitioner's] claim for relief depends critically on the validity of his [procedurally defaulted and time-barred claims]." Id. at 315 (citing *Herrera v. Collins*, 506 U.S. 390, 403, 113 S.Ct. 853, 122 L.Ed. 2d 203 (1993)). Doss's actual innocence claim is discussed more fully later.

B. Ineffective Assistance of Counsel

The Sixth Amendment to the U.S. Constitution guarantees that in all criminal prosecutions, the accused has the right to the assistance of counsel for his defense. See U.S. Const. Amend. VI. In *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), the Supreme Court set forth a two-part test for assessing claims of ineffective assistance. First, a petitioner must demonstrate that counsel made errors "so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." 466 U.S. at 687. To establish deficient performance under this prong of *Strickland*, a petitioner must show that his attorney's representation "fell below an objective standard of reasonableness." Id., at 688. The second prong of *Strickland* requires a petitioner establish that the deficient performance prejudiced him. To meet the prejudice standard, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

V. CLAIM I

In this claim, Doss asserts that his trial counsel Curtis T. Brown and Michael Hockaday rendered constitutionally deficient performance under *Strickland* by failing to raise the specific objection to Judge Martin's *sua sponte* murder instruction on the specific ground that first-degree murder as an accessory before the fact is not a lesser included offense of capital murder by another for hire. Counsels' failure was prejudicial because the erroneous instruction violated Doss's constitutional right to Due Process. Doss was not given notice of the nature and cause of the accusation nor an opportunity to defend against the first-degree murder as an accessory before the fact charge.

At the February 23, 2000 hearing in Judge Martin's chambers, Martin inquired whether the jury should be instructed on first-degree murder as well as capital murder. Martin asked counsel, "Does the defense propose going all or nothing on capital?" Attorney Brown responded, "Yes, sir." Judge Martin then expressed:

> "[I]f I do not instruct them on first-degree murder [and] he gets convicted of capital murder, then he starts filing habeas corpuses years from now and some federal judge years from now sets it aside and the witnesses are scattered all over, we have to try it all over again.
>
> "If I instruct them on first-degree murder and he's convicted on first-degree murder, and it goes up to the Court of Appeals and the Court of Appeals says there's no evidence of either capital or nothing, the Court of Appeals can reverse me and dismiss the indictments and let him go and it's all over with." (Exhibit 7).[2]

Attorney Brown disagreed, stating that the Commonwealth "brought this capital murder case. It was a capital murder case dated . . . That's what this case is. That man hired him to kill somebody . . . To me, I think it's a capital murder case. This is . . . the road that they took and I don't think they should be able to veer from the road at this point." Id. Judge Martin overruled Attorney Brown's objection and offered the instruction on first-degree murder as an accessory before the fact. Id.

Doss now claims ineffective assistance of counsel in connection with Judge Martin's instruction on first-degree murder as an accessory before the fact. For this Court to determine whether or not a particular crime is a lesser included offense of a charged crime, it must look to state law. See *Hopkins v. Reeves*, 524 U.S. 88, 95-99, 118 S.Ct. 1895, 141 L.Ed. 2d 76 (1998) (Court looked to state law to determine whether offenses were lesser included offenses of

[2] As noted in the background of the case, Judge Martin's jury instruction was never reviewed by the state appellate courts due to the state trial and habeas attorneys' neglect in properly preserving and raising the issue on the direct and habeas corpus appeals.

charged crime and noted the various tests states employed to determine whether one offense was a lesser included of another).

In Virginia, the governing common-law principle on this matter is that "an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged." *Commonwealth v. Dalton*, 259 Va. 249, 253, 524 S.E.2d 860, 862 (2000). In *Dalton*, the Virginia Supreme Court also articulated the rule that "neither the Commonwealth nor any accused is entitled to a jury instruction on an offense not charged, unless the offense is a lesser-included offense of the charged offense." Id. Moreover, Virginia defines a "lesser-included offense" as "an offense which is composed entirely of elements that are also elements of the greater offense." *Kauffmann v. Commonwealth*, 8 Va. App. 400, 409, 382 S.E.2d 279, 283, 6 Va. Law Rep. 42 (1989); see also *Ansell v. Commonwealth*, 219 Va. 759, 762, 250 S.E.2d 760, 762 (1979).

Doss was charged with capital murder by another for hire in violation of Va. Code § 18.2-31. Only the capital murder by another for hire charge, was tried before the jury. The capital murder charge was the only murder charge for which Doss was given notice. Judge Martin correctly instructed the jury on the elements of capital murder by another for hire (granted jury instruction #13). (Exhibit 13). The jury instruction listed the elements for capital murder by another for hire as:

"(1) That the defendant hired Nathaniel McGee to kill James M. Webb; and

(2) That Nathaniel McGee killed James Webb for hire; and

(3) That the killing was willful, deliberate and premeditated."

However, in that same written instruction, over trial counsel's mild objection and without the Commonwealth requesting it, Judge Martin instructed the jury that if they did not find

beyond a reasonable doubt "that the defendant hired Nathaniel McGee to kill James M. Webb," they could find defendant Doss guilty of first-degree murder "as an accessory before the fact to the killing."

The elements listed for first-degree murder as an accessory before the fact were:

"(1) That Nathaniel McGee killed James M. Webb; and

(2) That the killing was maliciously; and

(3) That the killing was willful, deliberate and premeditated; and

(4) That the defendant acted as an accessory before the fact to the killing."

The previous jury instruction (granted jury instruction #12) set forth the elements of an accessory before the fact. Those elements were:

> "One who was *not present at the time* of the commission of the crime, but who before the commission of the crime, in some way *planned, advised or assisted* in the commission of the crime, *knowing or having reason to know of the intent of the principal to commit the crime*. The principal is the person who actually commits the crime. An accessory before the fact is guilty of the same crime liable for the same punishment as the person who actually commits the crime." (emphasis added).

Doss contends that this alternative finding crime instruction by Judge Martin was not lawfully permissible under the law and methods for charging in this case. In failing to object to first-degree murder as an accessory before the fact on the specific ground that it is not a lesser-included offense to capital murder by another for hire under Virginia law, Doss's trial counsel were "not functioning as the counsel[s] guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Had counsel made the specific objection, Judge Martin would have been bound by law to sustain it.

Competent counsel would have argued that first-degree murder as an accessory before the fact is not a lesser-included offense to capital murder by another for hire. That is demonstrated

most simply by noting that the lesser offense has four elements and the greater offense has only three.

Competent counsel would also have pointed out that the fourth listed element of the allegedly lesser offense actually contains three required proofs, none of which are in the allegedly greater offense. For instance, to obtain a conviction for capital murder by another for hire, the person who did the hiring could be present when the triggerman does the killing. To obtain a conviction for first-degree murder as an accessory before the fact, however, the accessory cannot have been present at the killing.

The second element of accessory before the fact can be either planned, advised or assisted the actual killer. To have hired is not necessarily any of those options.

The third element of accessory before the fact requires the actual killer to be the person who has the intent to do the killing. This is not only not an element of being the one who hires someone to kill another person, but it distinguishes an accessory before the fact as an entirely different theory of guilt. As charged, Doss was supposedly the person who had the idea and desire to kill James Webb, and then sought out Nathaniel McGee to do his dirty work for him. Jury instruction #12 requires that the theory of guilt of an accessory before the fact to McGee's first-degree murder would have been that McGee had the idea and desire to kill Webb, and that Doss stepped into McGee's plan by helping him to plan, advise or assist McGee's endeavor.

This alternative theory of guilt would have required the Commonwealth to call their own key witness a liar, and to obtain a charge (i.e., an indictment) which reflected that contrary theory of guilt. The Commonwealth chose an exclusive theory of guilt, for which they may have gained an air of integrity before the jury for appearing to follow a consistent theory of guilt. Va. Code §

18.2-18 specifically excludes "an accessory before the fact" in "case of a killing for hire" from being able to be "indicted, tried, convicted and punished" under "murder in the first degree."

It is true that in the state habeas proceeding Judge Martin held that "pursuant to Code § 19.2-286, for purposes of jury instructions, accessory before the fact is considered a lesser included offense." (CL03000833). But trial counsel could have successfully argued that Va. Code § 19.2-286 does not permit an alternative finding of accessory before the fact to a crime not charged.

In the *Dalton* case, the Virginia Supreme Court ruled upon the effect of the 1975 amendment to Va. Code § 19.2-286. The court noted that one effect of the 1975 amendment was "limiting the statute's application . . ." Ibid. *Dalton* dealt with whether an alternative finding of accessory after the fact was permitted by the new (and current) version of § 19.2-286. Our situation is whether § 19.2-286 somehow permits an alternative finding of accessory before the fact to a crime not charged.

Trial counsel could have argued that § 19.2-286 is also limited from authorizing such a finding of accessory before the fact. Under Va. Code § 18.2-18, the Commonwealth was entitled to have an alternative instruction for accessory before the fact to capital murder by another for hire. However, as a matter of law, the alternative finding instruction which Judge Martin gave to the jury was not acceptable under § 18.2-18.

For Doss to have been an accessory before the fact to someone who hired McGee to murder Webb, Doss would have had to have helped (e.g., by planning, advising or assisting) that "someone" (i.e., the middleman between Doss and McGee) hire McGee. The middleman would have had to already have the intent to kill Webb. Thus, Doss would have been the helper to this (imaginary) middleman who hired McGee.

No party is entitled to a jury instruction if there is not a "scintilla" of evidence to support an alternative instruction. See *Holmes v. Levine*, 273 Va. 150, 159 (2007). If there was no evidence of an additional person necessarily required to support the scenario of a certain finding instruction, that finding cannot be offered to the jury. *Stewart v. Commonwealth*, 225 Va. 473, 474-75 (1983). Even if Va. Code § 18.2-18 is deemed to entitle the Commonwealth to such a jury instruction without actual proof of any third person, Judge Martin would only have had the authority to add a finding instruction for Doss as helper to someone who did the hiring of McGee, not a helper to McGee.

Counsel could have also successfully argued that Judge Martin's jury instruction on first-degree murder as a lesser-included offense amounted to a constructive amendment of the capital murder by another for hire indictment . "A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994).

A broadening of the capital murder by another for hire indictment and, in effect, the Commonwealth's theory of guilt, is precisely what occurred in this case when Judge Martin instructed the jury on first-degree murder as an accessory before the fact as a lesser-included offense. By indicting Doss with capital murder by another for hire, the Commonwealth chose an exclusive theory of guilt. But the jury instruction broadened the alleged theory that Doss hired McGee to that of Doss being someone who, instead, helped (e.g., by planning, advising or assisting) someone else (i.e., an imaginary middleman between Doss and McGee) to do the hiring of McGee, and then McGee to go and do what the middleman hired him to do. Such a

broadening of the indictment "destroy[ed Doss's] substantial right to be tried only on [the] charge[ ] presented in [the] indictment returned by [the] grand jury." *Floresca*, 38 F.3d at 712 (quoting *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960)).

"An indictment is a written accusation of a crime and is intended to inform the accused of the nature and cause of the accusation against him." *Hairston v. Commonwealth*, 2 Va. App. 211, 213, 343 S.E.2d 355, 357 (1986)." An accused has the right to be clearly informed of the charges he faces." *Williams v. Commonwealth*, 8 Va. App. 336, 341 S.E.2d 361, 364 (1989). "The accused cannot be convicted unless the evidence brings him within the offense charged in his indictment . . . . [T]he indictment must charge the very offense for which a conviction is asked." *Scott v. Commonwealth*, 49 Va. App. 68, 73, 636 S.E.2d 893, 895 (2006) (quoting *Williams*, 8 Va. App. at 341, 381 S.E.2d at 364). "'When a defendant is convicted of charges not included in the indictment, [either expressly or as a lesser included offense,] . . . per se reversible error [has occurred],' and no showing of actual prejudice is required." Id. at 74, 636 S.E.2d at 896 (quoting *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996)).

In *Strickland v. Washington*, 466 U.S. 668, 689 (1984), the Supreme Court held that the "purpose of the effective assistance guarantee of the Sixth Amendment is . . . to ensure that criminal defendants receive a fair trial." Id. at 689. *Strickland* went further to state that a court must:

> ". . . judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identity the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The Court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance." 466 U.S. at 690, id.

Doss contends that trial counsels' failure to specifically object on the ground that first-degree murder as an accessory before the fact is not a lesser-included offense fell below an objective standard of reasonableness.

The Court in *Strickland* stated that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688-89, id. Thus, the "performance prong is highly deferential to counsel's choices, and informed strategic decisions are virtually unchallengeable." See *Wiggins v. Corcoran*, 288 F.3d 629, 640 (4th Cir. 2002).

Viewed from this perspective, trial counsels' conduct was unreasonable. Even viewing the facts from counsels' position at the time, reasonable professional judgment dictated that, in light of the fact that jeopardy attached, failing to raise the specific objection to Judge Martin's murder instruction on the specific ground that it was not a lesser-included offense of capital murder by another for hire would be outside the wide range of professionally competent assistance. Failing to properly object and preserve the objection could not have been a reasonable strategy.

Doss also contends that trial counsels' deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Whenever counsel's deficient performance results in an unreliable or fundamentally unfair outcome in the proceeding, such as the inability to obtain a defense dismissal motion in the instant case, *Strickland's* prejudice requirement has been met. See *Glover v. United States*, 531 U.S. 198, 204 (2001); *United States v. Russell*, 221 F.3d 615, 621-22 (4th Cir. 2000).

At the time Doss's attorney objected to Judge Martin's jury instruction, jeopardy had already attached. Had the objection been more specific and if Judge Martin agreed that the instruction on accessory before the fact to first-degree murder is not a lesser-included offense, the charge would not have gone to the jury, and the Commonwealth could not have charged Doss with that offense at a later time. Without the specificity of the objection, Doss was prejudiced because the evidence was insufficient (as evident by the jury's verdict on accessory before the fact to first-degree murder) to prove beyond a reasonable doubt that Doss was guilty of capital murder by another for hire. The jury simply did not believe McGee's testimony on that crucial element of the charged offense.

To obtain reversal of a conviction under the *Strickland* standard, Doss must prove that his trial attorneys' performance fell below an objective standard of reasonableness and that the attorneys' performance prejudiced Doss, resulting in an unreliable or fundamentally unfair outcome in the proceedings. See *Strickland v. Washington*, 466 U.S. 668 (1984). Failure to satisfy one prong of *Strickland*'s two-prong test negates this Court's need to consider the other. Id. Doss argues that - even considering the totality of the circumstances - he has satisfied both prongs and this Court should thus hold that counsels' performance was ineffective.

This case is not one where counsel was acting according to Doss's restrictions, nor did Doss fail to provide counsel with complete and accurate information. Hence, even granting the "strong presumption" that counsels' strategy and tactics in general fall "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, no strategic or tactical decision can be attributed to failing to make a very specific objection.

Therefore, counsels' error was prejudicial and deprived Doss of a "fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 689.

Accordingly, Claim 1 should be GRANTED.

VI. CLAIM II

In this claim, Doss asserts that his trial counsel rendered deficient performance when they failed to object to Judge Martin's refusal to allow Doss to be present in-chambers when Judge Martin *sua sponte* proposed the erroneous jury instruction on first-degree murder. This in-chambers proceeding was a critical stage of the case. Doss's absence had an adverse effect on his ability to fully defend himself.

After both parties rested, the jury was excused. Judge Martin expressed his preference in open court of doing jury instructions in his chambers "since it's going to be a long recess and jurors may be walking in and out the courtroom." Without objection, attorney Curtis Brown then made a motion to strike, which the judge denied before the proceedings continued in the judge's chambers. Judge Martin did not allow Doss to be present in chambers. (Exhibit 14). Trial counsel did not object.

During the in-chambers proceeding, Judge Martin proposed the erroneous jury instruction that was addressed in Claim 1, which Doss incorporates by reference in support hereof. As stated in that claim, trial counsel did not make the specific objection on the specific ground that first-degree murder as an accessory before the fact is not a lesser included offense of capital murder by another for hire.

It is well-settled that a defendant has a constitutional right to be "present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed. 2d 631 (1987). This right, however, "is not absolute, but exists only when 'his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'"

United States v. Henderson, 626 F.3d 326, 343 (6th Cir. 2010) (quoting *United States v. Brika*, 416 F.3d 514, 526 (6th Cir. 2005) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed. 2d 631)). "In other words, defendant's presence is not guaranteed when it would be 'useless,' but only 'to the extent that a fair and just hearing would be thwarted by his absence.'" Id. (quoting *Brika*, 416 F.3d at 526).

Doss actively played a role in preparing and prosecuting his defense, assisting his trial counsel throughout the trial by providing relevant information and giving input. As it turned out, the one proceeding that he was excluded from (i.e., the in-chambers arguments on instructions) ended up being one of the most critical stages of the proceedings.

Doss asserts that his trial counsel's failure to object to Judge Martin's refusal to allow him to be present at the in-chambers instruction arguments "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Under the circumstances of this case, the giving of the jury instructions was a critical stage of the proceeding. Attorney Brown correctly stated, in-chambers, that this was an all or nothing capital murder for hire case. That is what trial counsel told Doss when they explained the charges to him at the beginning of the case. Both attorneys understood that this is what Doss had expected in the guilt phase of the proceedings. Yet, counsel did not insist that Doss be present in-chambers nor did they object to the judge's refusal to allow Doss to be present.

As such, counsel's deficient performance prejudiced Doss because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Had Doss been allowed to attend the in-chambers proceeding, he would have insisted that counsel request a brief recess so they could research and prepare an objection the judge's proposed jury instruction. The law, readily accessible to the

judge and all counsel present, would have demonstrated what Doss has argued under Claim 1--- accessory before the fact to first-degree murder was not a lesser-included offense. Therefore, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Accordingly, habeas relief should be GRANTED on Claim 2.

VII. CLAIM III

In this claim, Doss asserts that trial counsel rendered deficient performance when they failed to argue that Doss's conspiracy charge was barred by his charge for capital murder by another for hire under the Wharton Rule.

The Commonwealth charged and tried Doss with capital murder by another for hire and conspiracy to commit murder. The jury returned guilty verdicts on the conspiracy charge, and the reduced charge of first-degree murder as an accessory before the fact as a lesser-included offense, pursuant to Judge Martin's jury instruction. Doss was sentenced to life on the murder charge and 10 years for the conspiracy charge. Both the capital murder for hire and conspiracy charges that were put before the jury carried the element of an agreement. Therefore, the conspiracy charge was prohibited under the Wharton Rule and trial counsel should have moved to dismiss it.

Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law identified the doctrine and its fundamental rationale:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. . . . In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense---e.g., adultery--- shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by

> indicting the offense as conspiracy." 2 F. Wharton, Criminal Law Sec. 1604, p. 1862 (12th end. 1932).

The more current edition of Wharton's treatise states the Rule more simply:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." 1 R. Anderson, Wharton's Criminal Law and Procedure, Sec. 89, p. 191 (1957).

Capital murder for hire is one of the "classic Wharton's Rule offenses" cited by the Virginia Court of Appeals in *Ramsey v. Commonwealth*, 2 Va. App. 265, 272, 342 S.E.2d 465, ___ (1986), "which necessarily involve at least two people." Id. "Conspiracy is 'an agreement between two or more persons by some concerted action to commit an offense.'" Id. at 270, 342 S.E.2d at ___ (citing *Falden v. Commonwealth*, 167 Va. 542, 544, 189 S.E.2d 326, 327 (1937) (quoting J.B. Minor, Exposition of the Law of Crimes and Punishments 160 (1894)). There is a "third-party exception" to Wharton's Rule allowing "a conspiracy charge [to] be brought where the agreement which is the basis for the conspiracy involved more participants than were necessary for the commission of the substantive offense." *Stewart v. Commonwealth*, 225 Va. 473, 479, 303 S.E.2d 877, ___ (1983). However, this exception is inapplicable here because the only alleged parties by the Commonwealth to any alleged agreement were Doss and McGee.

When Doss's trial counsel failed to seek dismissal of the conspiracy charge before trial, they were "not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Wharton's Rule is settled law. Yet counsel remained silent and allowed the conspiracy charge to go to the jury. "The classic formulation of Wharton's Rule requires that the conspiracy indictment be dismissed before trial." *Iannelli v. United States*, 420 U.S. 770, 774 (1975). Therefore, counsels' representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

As for *Strickland*'s prejudice prong, Doss was prejudiced because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Doss was convicted on the conspiracy charge and sentenced to 10 years. Had counsel made a simple motion to dismiss the conspiracy charge based on the Wharton Rule, the court would have been bound by law to grant the motion.

Accordingly, habeas relief should be granted on Claim 3.

VIII. Actual Innocence Gateway Claim

a. *Schlup v. Delo*

To overcome the procedural default on his ineffective assistance claims for failure to exhaust and timely file, Doss asserts an "actual innocence gateway" claim under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995) and *McQuiggin v. Perkins*, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed. 2d 1019 (2013). A "credible showing of actual innocence" requires a petitioner to "persuade [ ] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin*, 133 S.Ct. at 1928 (quoting *Schlup*, 513 U.S. at 324) (internal quotation marks omitted). "To be credible, such a claim requires [the] petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324.

Doss's actual innocence claim is based on Nathaniel McGee's post-trial recantation of his testimony against Doss and his admission that he acted alone in the killing of James Webb. Doss presented this claim before the Virginia Court of Appeals in a Writ of Actual Innocence, pursuant to Va. Code § 19.2-327.10, et. seq. The Court of Appeals remanded the matter to the trial court to determine whether McGee's recantation was credible. Judge Martin, who presided

over the hearing, determined that McGee's recantation was not credible. Martin concluded that McGee's recantation was motivated by his close ties with and a desire to help Doss, McGee's fear of being known in prison as a snitch, his fear of Doss, and his hope that Doss would help him in some manner. The Court of Appeals denied Doss relief, finding no error in Judge Martin's determination. The court stated:

> "Upon seeing and hearing McGee testify, and considering the surrounding facts and circumstances, [Judge Martin] found that McGee was not credible in his assertion that he lied at Doss' trial. We find no basis to conclude [Judge Martin's] credibility determination was incorrect.
>
> "Moreover, McGee's trial testimony was corroborated by other evidence. McGee was arrested on the night of March 23, 1998 in the vicinity of Webb's home after neighbors reported hearing gunshots. The murder weapon, a gun Doss had purchased, was near McGee when he was arrested that night. In McGee's pocket were spent cartridge casings from the weapon. Doss was responsible for bonding McGee out of jail. Subsequent to his arrest for murdering Webb, McGee told his sister he had committed a murder for hire. He said he was expecting Doss to leave money in her mailbox. There was ample evidence of discord between Doss and Webb regarding a drug deal that had gone sour." See February 22, 2007 Va. App. Opinion, pages 5-6. (Record No. 0303-06-1).

On September 6, 2007, the Virginia Supreme Court refused Doss's appeal of the denial of the writ of actual innocence. (Record No. 070615).

Where a state court adjudicates a petitioner's claims on their merits, federal courts must apply 28 U.S.C. § 2254(d)'s deferential standard of review to such claims. Under that statute, a federal court may not grant habeas relief unless the underlying state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(1)(2); see *Williams v. Taylor*, 529 U.S. 362, 398 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410. Moreover, the state court's factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The decision in question here is the state court's determination that McGee's recantation was not credible. Doss asserts that judgment is based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding. As such, the state court judgment is not entitled to deference under § 2254(d)(1)(2).

b. McGee's Testimony

Doss was convicted as an accessory to the shooting death of James Webb. On March 25, 1998, Webb was found murdered in his home. Nathaniel McGee was found near the murder scene with the murder weapon in his possession. McGee ultimately confessed to the killing.

McGee testified at trial that he killed Webb because Doss hired him to do so. He further testified that Doss supplied him with the murder weapon and drove him to Webb's home. McGee received a sentence of sixteen years as a result of his cooperation in Doss's prosecution. The jury found Doss "Not Guilty" on the charge of capital murder by another for hire, but found Doss "Guilty" of first-degree murder as an accessory before the fact. Doss was sentenced to life imprisonment plus a total of thirty-eight years. Doss has always maintained his innocence and still does. Doss was completely unaware of McGee's plan to kill Webb and was not involved in the killing in any way.

The only direct evidence linking Doss to the killing of James Webb was the testimony of Nathaniel McGee. The first time that the Commonwealth of Virginia charged Doss with murder as a result of McGee's story, the charges had to be dropped when McGee changed his mind and

refused to testify against Doss and the judge determined he was not a credible witness. This demonstrates the significance of McGee's testimony to the Commonwealth's case. Without McGee's testimony, the Commonwealth was simply unable to prosecute Doss on the charges. After 13 months of failed attempts to pressure McGee, the Commonwealth re-charged McGee with capital murder. After the Commonwealth again brought capital murder charges against McGee, he changed his mind again and decided to testify against Doss. As a result, the Commonwealth reindicted Doss 13 months after he had been released.

In October of 2000, approximately six months after Doss's trial was over, he received a letter from Nathaniel McGee. In it, McGee wrote:

> "I had no choice but to lie and say that you hired me to kill Webb because the prosecutor [sic] and the detectives kept wanting me to say. I know you did not know what I was planning on doing to Webb but I had to use you to get the plea or they would have killed me."

After seeing the letter, Doss's appellate counsel James Broccoletti informed him that the letter could not be used in the appeal. Broccoletti placed the letter in Doss's case file. Attorney Andrew Shilling, who Doss hired to file a state habeas corpus petition on his behalf, discovered the letter and made visiting arrangements with the warden of Keene Mountain Correctional Center in Grundy, Virginia to visit McGee. McGee was given no prior indication that the attorney was coming or what the two might be talking about. The attorney arrived accompanied by a Court Reporter. McGee arrived to the meeting room and was sworn in by the Court Reporter and confronted with the letter. He verified that he wrote the letter and that he had, indeed, lied when he testified against Doss. In addition, McGee confirmed that Doss was not aware of his plans to kill Webb, had not provided him with the murder weapon and was not with him on the night of the murder. The examination of McGee was recorded and transcribed by the Court Reporter with McGee's consent. Exhibit 5. McGee reiterated his recantation and

admissions at the hearing before Judge Martin on Doss's state actual innocence proceeding. See Exhibit 15.

This newly discovered evidence was the primary basis of Doss's actual innocence claim in state court and is now the basis for his *Schlup* innocence claim. Specifically, this evidence consists of four parts: (1) the letter from McGee; (2) the sworn statement made by McGee to the attorney at Keene Mountain; (3) the sworn testimony McGee gave at the state actual innocence hearing; and (4) Tony Warren's sworn affidavit corroborating McGee's testimony that he told Warren he was being forced to lie. (Exhibit 16). These four pieces of evidence not only demonstrate that the Commonwealth's key witness was lying at trial, but also affirmatively show that Doss was not involved in the killing of James Webb.

Doss asserts that this evidence is "credible" and that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin*, 133 S.Ct. at 1928 (quoting *Schlup*, 513 U.S. at 324) (internal quotation marks omitted). This is so because, contrary to the state court's findings, McGee's trial testimony was not sufficiently corroborated by other evidence. No rational trier of fact could convict Doss without relying on McGee's testimony. Although there was some circumstantial evidence which the Commonwealth introduced at trial, there were no witnesses to the killing. There was no physical evidence which placed Doss at the scene of the crime at the time that the crime was committed. There was no fingerprint or DNA evidence to connect Doss to the murder. The jury's acquittal of Doss on the capital murder by another for hire charge shows that the jury did not believe McGee's testimony that Doss hired him to murder Webb. Without McGee's testimony, the Commonwealth has already conceded once before that there was insufficient evidence to carry its burden of proof of guilt beyond a reasonable doubt.

If this case were tried today, based on the newly discovered evidence, the jury would not hear McGee testify that Doss had asked him to kill Webb or that Doss had provided him with the weapon or that Doss had driven him to Webb's house. Indeed, the jury would hear just the opposite. The testimony which the jury would hear from the confessed killer of James Webb would be that Doss did not ask McGee to kill him with the murder weapon, and that Doss did not drive him to Webb's house.

Doss further argues even if McGee---fearing a change in the reduced sentence he received for cooperating in Doss's prosecution---again changed his story and decided to implicate Doss in the killing, no rational trier of fact would, at that point, give any weight to his testimony. McGee's story would have changed so many times that it would be impossible to believe him. Moreover, he would have even more of a motive to lie now to protect his reduced sentence, just as he had a motivation to lie at trial. By lying about Doss's involvement, McGee was able to avoid a charge of capital murder and a possible death sentence. At the time McGee wrote to Doss in October of 2000, however, McGee had no reason to lie. Only a guilty conscience about what he had done motivated him to write the letter to Doss. Nor did McGee have any reason to lie when Doss's attorney met with him and McGee knew that his statement was being recorded and transcribed. McGee could gain nothing by admitting that he had perjured himself. In fact, by providing his sworn statement admitting that he had perjured himself, McGee was placing himself in jeopardy of having the deal he received being declared void and facing the original capital murder charge with a possible death sentence. Therefore, McGee could gain nothing by admitting that he had perjured himself, yet he admitted doing so out of guilt over what happened to Doss.

The state court found that McGee's recantation was not credible. Specifically, the state court concluded that McGee was motivated by his close ties with and a desire to help Doss, his fear of being known in prison as a snitch, his fear of Doss based on alleged threats by Doss, and his hope that Doss will help him in some manner. These things are simply not true and a review of the facts demonstrates that these findings are without merit.

First, McGee's closeness to Doss did not stop McGee from testifying at Doss's capital murder trial. The state court's finding that McGee's closeness to Doss makes his recantation less credible is not a reasonable or credible basis to discredit McGee's recantation. Second, McGee's desire to help exonerate Doss is explained by his expressed guilt over falsely testifying at trial and sending an innocent man to prison. Third, it is surely true that nobody in prison wants to be known as a snitch. However, McGee knew this would be the case the moment he implicated Doss in this crime and took the stand against Doss. McGee's recantation would do nothing to extinguish his fear of being labeled as such because that bell cannot be un-rung. Therefore, this is not a credible consideration in determining McGee's motivation and veracity in recanting.

Fourth, the only evidence the judge had to support his position that McGee feared Doss is an affidavit from Michael Fasanaro, where Fasanaro indicated that McGee told him that Doss had threatened him back in May of 2000. Doss is serving a life sentence in another prison and is in no position to threaten McGee. In fact, there have been no actions or threats of any kind made against McGee. When he gave his sworn statement in September of 2002, more than two years had gone by since Doss had been sentenced, and more than two years had passed since Doss had been moved to another facility. McGee specifically states in his sworn statement that he had no contact of any kind with Doss or with anyone on Doss's behalf prior to the time that McGee made the statement. If McGee was being threatened by Doss, he was in the perfect position to

complain about it as both he and Doss were in two of the most secure facilities available. These facilities would assure McGee that Doss was not a threat and that he was not in danger. Moreover, Fasanaro would have notified the prosecution and there would have been some record of the matter. There is none. Thus, Doss firmly asserts that, free from any possibility of retaliation or threats from Doss, McGee felt compelled by his pressing conscience to tell the truth.

In addition, the letter from McGee was written to Doss at a time when Doss could not have obtained a new trial, so it would have been pointless to threaten McGee to obtain the letter. In the letter, which Doss received in October of 2000, McGee asks Doss to forgive him for what he (McGee) has done and to loan him some money. These are not the actions of a person who is frightened or threatened by someone.

So where is the evidence of threats? Fasanaro testified that McGee told him about the threats, and that notes sent by Doss were given to him by McGee. Fasanaro was asked for these notes but he could not produce them. Doss was never charged or subjected to any disciplinary action for threatening anybody. Fasanaro also testified that he communicated McGee's concerns to a Mr. Thomas who took care of them. Yet, the two Commonwealth exhibits attached to Fasanaro's (state habeas) affidavit contradict that. In one, the jail is concerned because inmates know, through the media, that McGee is testifying against Doss. The only action taken was to house them separately. There was no evidence of any administrative action. Certainly not the type of evidence one would expect to find that could substantiate the dire nature of the situation as asserted by the Commonwealth. McGee was not threatened by Doss. That claim is a red herring.

Even assuming for the sake of argument that Doss did threaten McGee in some way, McGee would gain nothing be seeking to exonerate Doss in response to an alleged threat. By doing so, McGee would be putting in jeopardy his cooperation agreement with the Commonwealth and placing himself at risk of a capital murder conviction and possible death sentence for killing Webb.

Accordingly, given the significance of McGee's testimony to the case against Doss, no rational trier of fact could possibly find Doss guilty beyond a reasonable doubt if that same trier of fact had in its possession McGee's sworn statement in which he admits to perjuring himself at Doss's trial and where he exonerates Doss from any culpability in the killing of James Webb.

Doss admits that to be credible, claims of actual innocence require Doss to support his allegations of constitutional error "with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. But this case is far from typical. Short of being on Death Row, Doss has received the harshest possible penalty for a crime he was neither present at or responsible for.

McGee was credible in testifying at the state actual innocence hearing that Doss was not involved in Webb's death. Hence, no rational trier of fact could not now find Doss guilty with the introduction of this new evidence.

This new evidence first came to light in October of 2000, long after the conclusion of Doss's trial, when McGee wrote a letter to him asking for forgiveness. It was McGee's conscience that motivated him to write the letter. McGee's letter was corroborated by the very facts contained therein; that unless McGee testified against Doss, "they would have killed me."

These were the stark facts of the case and the dark cloud that hung over McGee as he made the life and death decision. His apology in October of 2000 was consistent with his earlier behavior and consistent with the chronological development of the case.

As so aptly pointed out by the Attorney General at the state actual innocence hearing in their cross-examination of McGee, he has told at least seven different version of the event. Their point, Doss assumes, was that McGee is not a credible witness because of the many inconsistencies. Yet, it was McGee's credibility that the prosecutor relied on to convict Doss. Their central witness who they asked a jury to believe, despite the inconsistencies, they later asked a state court to disbelieve because of the same inconsistencies. That the state court ultimately did so, is why its decision is based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(1)(2).

McGee's testimony at the state actual innocence hearing is further corroborated by his words to Tony Warren during the time of the trial preparation. Warren wrote an affidavit long after Doss's conviction and testified at the state actual innocence hearing. Warren stated that McGee told him that he testified the way he did at Doss's trial solely to avoid the death penalty. Warren also testified that he drafted the affidavit to support his contention that McGee had lied in his trial testimony. Why would McGee say those things to Warren if they were not true? Warren's testimony is truthful, and it was never impeached by the Commonwealth.

Simply put, McGee's recantation is credible. When McGee testified against Doss at trial, he had life and death motivation. There can be no greater motivation than self-preservation. But now, haunted by his conscience, McGee is willing to risk his deal with the Commonwealth in order to correct a grave injustice that is within his power to correct. As demonstrated by McGee,

a guilty conscience can greatly outweigh any motivation of self-preservation. McGee would rather now face a death sentence than be responsible for placing an innocent man in prison.

Further, McGee's recantation is credible because the facts of the case support his recantation and explain discrepancies that were used to inculpate Doss.

McGee's Arrest

When arrested, McGee was by a telephone booth. He testified at trial that he was to call Doss to pick him up after the murder. However, McGee did not have Doss's telephone number or any coins or calling card for the payphone in his possession at the time of his arrest.

The Gun

David Kelly, an alleged drug dealer, claimed at trial to have sold Doss a .38 caliber revolver. McGee testified at trial that Doss gave him a .38 caliber gun, which he used to kill Webb.[3]

The actual gun McGee used to kill Webb is in evidence, a Brazilian manufactured Rossi brand .38 caliber. If McGee's trial testimony is truthful, it must be the same gun that he said Doss gave him. However, David Kelly testified that it was not the same gun when it was exhibited to him by the Commonwealth, the murder weapon McGee said was given to him by Doss, which the Commonwealth claimed Doss purchased from Kelly. Kelly said the gun he sold Doss was bigger than the one McGee used to shoot Webb.

According to McGee's testimony at the state actual innocence hearing, he met Webb on two previous occasions prior to the murder. McGee stated that Webb threatened him while

[3] McGee is on record as having previously claimed that he obtained the gun from Doss's office and also out of Doss's car. But Doss did not have an office and his car had been thoroughly searched by authorities just prior to when McGee claimed to have gotten the gun in connection with a domestic violence charge. Thus at trial McGee changed his account as to how he obtained the gun yet again.

looking for Doss. McGee justified his killing of Webb by saying that he "got to him [Webb] before he got to me," as Norfolk Sheriff Deputy George Obelen testified in the first trial. Obelen also testified that McGee told him Doss had nothing to do with Webb's murder and how McGee explained how and why he killed Webb. This not only shows that McGee acted alone in obtaining the gun, but that he acted alone in killing Webb as well and lied about it at trial.

Doss's Alleged Statement In Bonding Out McGee

Following McGee's arrest on the felon in possession of a firearm charge, Rogers made arrangements to post McGee's bail. Doss rode with Rogers down to the jail. When McGee met Doss and Rogers outside after his release, Doss asked McGee, "Did you do it?" Doss denies making this statement and maintains that his statement was more of something to the effect, "What did they said you did?" In any event, neither statement conclusively relates to Webb's murder, which had yet to be connected to McGee.

Cell Phone Records

At trial, the Commonwealth introduced Doss's cell phone records into evidence to show that he changed his number after the murder. While it is true that the number was changed, no evidence was ever presented as to who changed it. Also, the cell service continued until October 2, 1998, long after Doss had been arrested and incarcerated for the offense. The evidence proved that others had access to and used Doss's cell phone.

McGee's Alleged Statement to His Sister

McGee's sister testified that McGee explained to her that he was being held on a murder charge. When trial counsel Curtis Brown asked her whether McGee ever said that he killed the victim because he was hired to do so, she answered, "No." To the extent that the state court held otherwise, Doss assets that the state court's factual determinations is not entitled to the

presumption of correctness based on the clear and convincing evidence of the actual trial court transcript containing her entire testimony. 28 U.S.C. § 2254(e)(1).

In addition, when McGee first confessed to killing Webb, he expressed that he would probably spend the rest of his life in prison. Tellingly, however, McGee never mentioned anything about being hired to do so by anybody. It was only later after being threatened with the death penalty and securing a deal to spare his life that he reluctantly implicated Doss.

Doss's Pre-Arrest Denials

Prior to being arrested and charged in connection with McGee's murder of Webb, Doss made several regretful denials. He denied ever knowing where Webb lived or ever being in his home; he denied ever possessing a firearm; he stated that he had minimal involvement with McGee and barely knew him; and he denied bonding McGee out of jail. These denials were based on the investigating detective's line of questioning implying criminal wrongdoing by Doss. One of those detectives and arresting officers was the now disgraced and imprisoned Robert G. Ford, who told Doss that drugs were found in bags and a weapon with Doss's fingerprints inside Webb's house. Doss knew this to be untrue and regrettably denied everything they were asking of him, including knowing McGee or Webb, even though McGee worked for him and he had obtained a protective order against Webb.

Yes, Doss knew McGee more than he initially led on. Yes, Doss knew Webb and had an apparent history with him. Yes, Doss was known to have a firearm. But these things, which Doss denied simply because of the nature of the detective's questioning, do not lead to the conclusion that he hired McGee to kill Webb or assisted McGee in anyway or was present when McGee killed Webb.

McGee Had Transportation From Other Sources

A major reason Judge Martin found McGee's recantation testimony incredible at the state actual innocence hearing concerned how McGee arrived at Webb's house. At trial McGee testified that Doss drove him there, which he now admits was a lie. But McGee's sister, Gloria Gray, testified at trial that McGee had transportation from other sources. For example, Adrian Hunter testified at the trial that on the night that Doss was arrested (on an alleged outstanding warrant prior to Webb's murder when Webb came to Doss's place of business and threatened him with a gun), she dropped McGee off at the home she shared with Gray. Moreover, McGee lived in Norfolk but also worked in Virginia Beach besides the work he did for Doss at the salon.

McGee had a personal encounter with Webb during which he felt threatened and the need to "g[e]t to him [Webb] before he got to me." McGee had obtained a gun differently than the one he initially claimed Doss gave him from Kelly. McGee apparently knew where Webb lived and had other means of transportation for someone to drop him off at Webb's residence or at a nearby location. More importantly, McGee now admits, to the possible detriment of his plea deal, that he lied at trial and acted alone in killing Webb.

In sum, when distilled to its essence, McGee's recantation testimony is credible. Doss was convicted based solely on McGee's testimony, which McGee now admits was a lie. The remaining evidence can be interpreted in different ways and does not conclusively establish McGee's trial testimony. The state court's judgment that McGee is not credible is not entitled to deference under § 2254(d)(1)(2) because it was based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding.

Doss is actually innocent of the charges he was convicted of. McGee represents the quintessential question posed by *Schlup*: Could any factual trier of fact find Doss guilty with McGee's recantation testimony? The answer is no. If McGee's testimony, as the linchpin to the

Commonwealth's case against Doss, was good enough to convict, then his recantation of that testimony and admission that he acted alone is good enough to acquit.

Under *Schlup*, a credible showing of actual innocence requires "new reliable evidence . . . that was not presented at trial" sufficient such that "it is more likely than not that no reasonable juror would have convicted [Doss] in light of the new evidence." 513 U.S. at 324. In *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court found the actual innocence exception to procedural default was established where evidence that the victim's husband, and not the petitioner, had committed the crime was not pursued or presented to the jury.

Accordingly, petitioner has satisfied the actual innocence exception to the procedural default because Doss has "present[ed] evidence of innocence so strong that [this] court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error . . . ." *Schlup*, 513 U.S. at 316. The combination of trial counsels' deficient performance in failing to object to Judge Martin's jury instruction on first-degree murder; failing to object to Doss not being present during the giving of that instruction; and failing to argue that conspiracy charge was barred by the Wharton Rule; McGee's recantation of his trial testimony and admission that he acted alone, when weighed against the lack of any other evidence conclusively linking Doss to this crime, it is clear that Doss has satisfied Schlup's actual innocence standard.

IX. CONCLUSION

Doss submits that the merits of his habeas claims cannot be fully determined based on recorded matters and therefore requests this Honorable Court to grant an evidentiary hearing, or alternatively, grant habeas corpus relief.

PRAYER FOR RELIEF

Doss asks that this Court:

1. Issue a writ of habeas corpus that he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence.
2. Grant him further discovery and an evidentiary hearing at which he may present evidence in support of his claim, and allow him a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of fact and of law raised by this petition or such hearing.
3. Direct that under Habeas Corpus Rule 7 the record in this case be expanded to include any "additional materials relevant to the determination of the merits of the petition" which are submitted.
4. Grant other relief as law and justice require.

Respectfully submitted,

Jermaine Doss

By Counsel

/s/_____

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Certificate of Service

I, Bryan Jones, hereby certify that on this 3rd day of July, 2019, a true copy of the foregoing habeas petition was:

Mailed to counsel for the Warden, the office of the attorney general, at:

Office of the Attorney General
202 North Ninth Street
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/s/_____
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Jermaine Doss, DOC # 1009227	)	
Petitioner	)	
	)	
v.	)	**Case No.**
	)	
Harold W. Clarke, Director	)	
Virginia Dept. of Corrections	)	
Respondent.	)	

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS

APPENDIX

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Exhibit 14: Trial counsel affidavit

Exhibit 15: October 17, 2004—Proceedings before Norfolk Circuit Court

Exhibit 16: Affidavit of Tony Warren