IN THE

Supreme Court of Virginia

RECORD NO. 090518

MELONI THOMAS,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Jerry E. Waldrop, Esq.
Virginia State Bar No. 31435
WALDROP LAW OFFICE, PLLC
318 South Main Street
Emporia, VA 23847
(434) 634-5729
(434) 634-5729 (Fax)
Email: jwald567@gmail.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

SUBJECT INDEX

		PAGE NO.
I.	TABLE OF CITATIONS	ii
II.	NATURE OF CASE - MATERIAL PROCEEDINGS IN TRIAL COURT	1
III.	QUESTIONS PRESENTED	2
IV.	ASSIGNMENTS OF ERROR	4
V.	STATEMENT OF FACTS	7
VI.	PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES	14
VII.	CONCLUSION	36
VIII.	CERTIFICATE	vi

TABLE OF CITATIONS

- Constitutions
  - U. S.
    - 5th, 6th, and 14th Amendments
  - Virginia
    - Article 1 §§8, 11 (All references to the 5th, 6th, and 14th Amendments of the U.S. Constitution shall also include reference to these sections of the Virginia Constitution).
- Statutes
  - State
    - §8.01-357, Code of Virginia
    - §8.01-358, Code of Virginia
    - §10.2-163, Code of Virginia
    - §18.2-10, Code of Virginia
    - §18.2-32, Code of Virginia
    - §18.2-53.1, Code of Virginia
    - §19.2-286, Code of Virginia
    - §19.2-389, Code of Virginia
- Cases
  - Federal

- Ake v. Oklahoma, 470 U. S. 68 (1985)
- Brady v. Maryland, 373 U.S. 83 (1963)
- Bruton v. U.S., 391 U. S. 123 (1968)
- Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983)
- Hope v Peyton, 340 F. Supp. 197 (W.D. Va. 1972)
- Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997)
- Sandstrom v. Montana, 442 U. S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1970)
- Smith v. Phillips, 455 U.S. 209, 222 (1982)
- U. S. v. Evans, 917 F.2d 800 (4th Cir. 1990)
- U. S. v. Sheppard, 559 F. Supp. 571 (E.D. Va. 1983)
- U.S. v. Thompson, 744 F.2d 1065 (4th Cir. 1984)
- United States v. Hawkes, 753 F.2d 355 (4th Cir. 1985)

- State
  - Banks v. Commonwealth, 16 Va. App. 959, 434 S.E.2d 681 (1993)
  - Barker v. Commonwealth, 230 Va. 370, 337 S.E.2d 729 (1985)
  - Berkeley v. Commonwealth, 19 Va. App. 279, 283, 451 S.E.2d 41, 43 (1994)
  - Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985)

- Breeden v. Commonwealth, 217 Va. 297, 227 S.E.2d 734 (1976)

- Briley v. Commonwealth, 222 Va. 180, 279 S.E.2d 151 (1981)

- Cirios v. Commonwealth, 7 Va. App. 292, 298, 373 S.E.2d 164, 167 (1988)

- Commonwealth v. Dalton, 259 Va. 249, 524 S.E.2d 860, (2000).

- Dalton v. Commonwealth, 27 Va. App. 381, 499 S.E.2d 22 (1998)

- Dalton v. Commonwealth, 29 Va. App. 316, 512 S.E.2d 142 (1999), *en banc*

- Dehart v. Commonwealth, 20 Va. App. 213, 456 S.E.2d 133 (1995)

- Educational Books, Inc. v. Commonwealth, 3 Va. App. 384, 349 S.E.2d 903 (1986)

- Gosling v. Commonwealth, 7 Va. App. 642, 376 S.E.2d 541 (1989)

- Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996)

- Lambert v. Commonwealth, 9 Va. App. 67, 383 S.E.2d 752 (1989)

- McGhee v Commonwealth, 221 Va. 422, 427, 270 S.E.2d 729, 732 (1980)

- McGill v. Commonwealth, 10 Va. App. 237, 391 S.E.2d 597 (1990)

- McMorris v. Commonwealth, 276 Va. 500, 666 S.E.2d 348 (2008)

- Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981)

- Rollston v. Commonwealth, 11 Va. App. 535, 399 S.E.2d 823 (1991)

- Scott v. Commonwealth, 25 Va. App. 651, 486 S.E.2d 120 (1997)
- Smith v. Commonwealth, 220 Va. 696, 261 S.E.2d 550 (1980)
- Stokes v. Warden, 226 Va. 111, 306 S.E.2d 882 (1983)
- Turman v. Commonwealth, Record No. 072174 (S.Ct. Va., October 31, 2008)
- Tweed v. Commonwealth, 36 Va. App. 363, 550 S.E.2d 345 (2001), aff'd in part, rev'd in part, 264 Va. 524, 570 S.E.2d 797 (2002)
- Walker v. Commonwealth, 28 Va. (1 Leigh) 574 (1829)
- Williams v. Commonwealth, 14 Va. App. 208, 415 S.E.2d 856 (1992)
- Wright v. Kelly, 203 Va. 135, 122 S.E.2d 670 (1961)

- Virginia Model Jury Instructions - Criminal
  - Instruction No. 33.220
  - Instruction No. 33.240
  - Instruction No. 33.300
  - Instruction No. 2.300
  - Instruction No. 2.600
- Rules of the Supreme Court of Virginia
  - Rule 3A:14
  - Rule 3A:17(c)
- Legal Treatises
  - Bacigal, Criminal Offenses and Defenses - Virginia, 2007 Ed., Principal and Accessory

NATURE OF CASE - MATERIAL PROCEEDINGS IN TRIAL COURT

1. On 20 December 2005, Defendant was indicted by the Brunswick County, Va., Grand Jury on charges of armed statutory burglary (direct indictment), Va. Code §§18.2-90, 18.2-10; use of a firearm in the commission of a felony (direct indictment), Va. Code §18.2-53.1; and with murder, Va. Code §§18.2-32, 18.2-10 ("on or about August 9, 2005, did kill and murder William David Thomas, Jr., her father, in violation of ...").

2. The murder indictment was subsequently amended to that of first degree murder ("on or about August 9, 2005, did willfully, deliberately, and with premeditation, kill and murder in the first degree William David Thomas, Jr., her father, in violation of §18.2-32 of the Code of Va. (1950), as amended").

3. On 17 September 2007, at the trial of the case, the armed burglary charge was *nolle prossed* by the Commonwealth.

4. Pretrial motions hearings were conducted on 5/3/2007 and 8/28/2007.

5. A four day jury trial was conducted on 17-20 September 2007, Honorable W. Allan Sharrett, presiding Judge. Defendant was found guilty by said jury as charged of first degree murder and use of firearm/murder. A Defense Motion to Strike at the Conclusion of the Commonwealth's Case-in-Chief and a Defense Motion to Strike at the Conclusion of All the Evidence were denied by the Trial Court. A Defense Motion to Set Aside the Verdict was taken under advisement. Upon the conclusion of the sentencing hearing, the jury recommended thirty-five years imprisonment on the first degree murder

conviction and three years imprisonment on the use of firearm/murder conviction. The Defense request for a Pre-Sentence Report was granted and the case was continued for sentencing.

6. On 20 December 2007, Defendant was sentenced by the Circuit Court of Brunswick County, Va., Judge W. Allan Sharrett, to thirty-five years imprisonment and three years imprisonment, respectively, imposing the jury's recommended sentences. On said date, the Defense Motion to Set Aside Verdict, which had been taken under advisement, was denied.

7. On 18 January 2008, Defendant and Appellant filed a Notice of Appeal to the Court of Appeals of Virginia of the two convictions (final written Order was subsequently entered on 28 March 2008, App. 61).

8. On 17 February 2009, Appellant's Petition for Appeal was denied by the Court of Appeals of Virginia.

QUESTIONS PRESENTED

1. Whether the Trial Court erred in denying Defense Motions in Limine numbered nine and ten, and the Defense Ex Parte Motion pursuant to §19.2-389, Code of Va., regarding criminal record checks, including juvenile criminal records, of prospective Commonwealth witnesses being furnished to the Defense? (Question preserved in written Motions in Limine, App. 7; written Ex Parte Motion pursuant to §19.2-389, App. 13; verbal Order of the Trial Court of 5-3-07, App.81; subsequent written Order of the Trial Court of 5-24-07, App. 15; and at App. 108-110, 127-142).

2. Whether the Trial Court erred in overruling the Defense Motion to Strike at the Conclusion of the Commonwealth's Case-in-Chief, the Defense Motion to Strike at the Conclusion of All the Evidence, and the Defense Motion to Set Aside the Verdict, and whether the evidence was sufficient to convict Defendant of first degree murder under §18.2-32 and of use of firearm/murder under §18.2-53.1, Code of Va., and in granting principal in the second degree

and concert of action jury instructions over Defense objection? (Question preserved at App. 692-694, 819-821, 834-835; App. 961-962, 965; App. 974; Memorandum in Support of Defense Motion to Set Aside Verdict, App. 57).

3. Whether the Trial Court erred in overruling the Defense Motion at the Conclusion of the Commonwealth's Case-in-Chief to allow the case to proceed on an accessory after the fact to murder theory and in refusing to grant a requested Defense instruction on that theory? (Question preserved at App. 693-694, 733-734, 820, 823-826).

4. Whether the Trial Court erred in denying the Defense Motion to Quash or Dismiss Indictment and in granting, over Defense objection, jury instructions permitting an inference of malice? (Question preserved in written Motion to Quash or Dismiss Indictment, App. 5; App. 87; App. 834-835).

5. Whether the Trial Court erred in disallowing Defense proposed *voir dire* questions numbered 17 and 28? (Question preserved at App. 264-266; written proposed *voir dire* questions of Defense, App. 32).

6. Whether the Trial Court erred in overruling the Defense Motions to Strike for Cause prospective jurors David Heizer and Lois Finch? (Question preserved at App. 294-307, 316-318).

7. Whether the Trial Court erred in denying the Defense to refer to punishment ranges as to offenses in *voir dire* questioning of prospective jurors or in opening or closing argument? (Question preserved in written Motion in Limine number three, App. 7; App. 91-92; Order dated 5-24-07, App. 15).

8. Whether the Trial Court erred in overruling the Defense objection to the jury instruction regarding natural and probable consequences of one's acts? (Question preserved at App. 834-835).

9. Whether the Trial Court erred in overruling the Defense objection to the flight instruction and, after deciding to give that instruction, in denying the proffered flight instruction from the Defense? (Question preserved at App. 831-832).

10. Whether the Trial Court erred in overruling the Defense objection to the testimony of Officer Brian Roberts as to incriminating statements allegedly made by Defendant not within the three written statements or two audio recorded statements furnished by Defendant to the police authorities? (Question preserved in Motions in Limine number four, App. 7; App. 92-93; Reply of Defense dated 8-21-07, App. 25; App. 384-385).

11. Whether the Trial Court erred in denying the Defense request for the assistance of a private investigator? (Question preserved in Motions in Limine number fourteen, App. 10; App. 152-163; Order dated 5-24-07, App. 15).

12. Whether the use of the word "murder" by a Commonwealth witness

resulted in fundamental unfairness and a denial of due process? (Question preserved in Motions in Limine number two, App. 7; App. 88-90; written Order entered 5-24-07, App. 15).

13. Whether the Trial Court erred in allowing the Commonwealth to display to the jury and introduce into evidence autopsy photographs of the deceased and photographs portraying the condition of the body of the deceased? (Question preserved in Motions in Limine number five, App. 7; App. 99-104; Reply of Defense dated 8-21-07, App. 25; App. 220-228; App. 404, 406; App. 687).

14. Whether due process was violated by the introduction into evidence in the Commonwealth's Case-in-Chief of statements attributed to co-defendant Cardell Avent? (Question preserved in Motions in Limine number sixteen, App. 11; App. 147-151; App. 386-389; Written Order dated 5-24-07, App. 15).

15. Whether due process of law was violated by the introduction into evidence by the Commonwealth in its Case-in-Chief and in its first closing argument of an alleged previous assault or assault and battery by defendant against the deceased? (Question preserved in Motions in Limine nos. 12 and 15, App. 9 and 11; App. 163-212; App. 230-244, 243; Memorandum of Defense dated 5-30-07, App. 20; Reply of Defense dated 8-21-07, App. 25; App. 779; letter ruling dated 9-7-07, App. 27).

ASSIGNMENTS OF ERROR

The numbering assigned to Questions Presented and Assignments of Error is identical.

1. The Court of Appeals and the Trial Court erred in ruling that Defense Motions in Limine numbered nine and ten, and the Defense Ex Parte Motion pursuant to §19.2-389, Code of Va., regarding criminal record checks, including juvenile criminal records, of prospective Commonwealth witnesses were not required to be furnished to the Defense by the Commonwealth and also in denying the Defense the ability to question such witnesses as to juvenile convictions of felonies or moral turpitude misdemeanors for general impeachment purposes because the 5th Amendment due process guarantee, 6th Amendment right of confrontation and effective assistance of counsel guarantees, and 14th Amendment, as well as similar provisions of the Virginia Constitution, trump any preference for confidentiality of juvenile records. (Preserved in written Motions in Limine, App. 7; written Ex Parte Motion pursuant to §19.2-389, App. 13; verbal Order of the Trial Court of 5-3-07, App.81; subsequent written Order of the Trial Court of 5-24-07, App. 15; and at App. 108-110, 127-142).

2. The Court of Appeals and the Trial Court erred in overruling the Defense Motion to Strike at the conclusion of the Commonwealth's Case-in-Chief, the Defense Motion to Strike at the conclusion of all the evidence, the Defense Motion to Set Aside the Verdict, and in granting principal in the second degree and concert of action jury instructions over Defense objection, because the evidence was insufficient to convict Defendant of first degree murder under §18.2-32, and of use of firearm/murder under §18.2-53.1, Code of Va. (Preserved at App. 692-694, 819-821, 834-835; App. 961-962, 965; App. 974; Memorandum in Support of Defense Motion to Set Aside Verdict, App. 57).

3. The Court of Appeals and the Trial Court erred in overruling the Defense Motion at the conclusion of the Commonwealth's Case-in-Chief to allow the case to proceed on an accessory after the fact murder theory and in refusing to grant a requested Defense instruction on that theory because the plain language of Va. Code §19.2-286 and Supreme Court of Virginia Rule 3A:17(c), as well as the legislative history behind Code §19.2-286, would plainly require a submission in the instant case to the jury on an accessory after the fact theory of liability and because the end result was inconsistent with Appellant's right to a fair trial. (Preserved at App. 693-694, 733-734, 820, 823-826).

4. The Court of Appeals and the Trial Court erred in denying the Defense Motion to Quash or Dismiss Indictment and in granting, over Defense objection, jury instructions permitting an inference of malice because the law as stated in these jury instructions unlawfully permits a conviction to be had based upon a presumption rather than proof and unlawfully shifts the burden of proof to an accused and are unconstitutional. (Preserved in written Motion to Quash or Dismiss Indictment, App. 5; App. 87; App. 834-835).

5. The Court of Appeals and the Trial Court erred in disallowing Defense proposed *voir dire* questions numbered 17 and 28 because the same were within Code of Va. §8.01-358, Virginia Supreme Court Rule 3A:14, and resulted in a denial of due process, equal protection, effective assistance of counsel, and trial by impartial jury in violation of the 5th, 6th, and 14th Amendments of the U. S. Constitution and the equivalent guarantees of the Virginia Constitution. (Preserved at App. 264-266; written proposed *voir dire* questions of Defense, App. 32).

6. The Court of Appeals and the Trial Court erred in overruling the Defense Motions to Strike for Cause prospective jurors David Heizer and Lois Finch because bias in favor of a government witness is grounds for a challenge for cause; and juror bias, whether presumed or proven, requires automatic reversal; and for the same grounds as set forth in number 5, *supra*. (Preserved at App. 294-307, 316-318).

7. The Court of Appeals and the Trial Court erred in denying the Defense to refer to punishment ranges as to offenses in *voir dire* questioning of prospective jurors or in opening or closing argument because neither the Defense nor Prosecution could effectively screen prospective jurors for peremptory or for cause challenges and for the same constitutional grounds as set forth in numbers 5 and 6, *supra*. (Preserved in written Motion in Limine number three, App. 7; App. 91-92; Order dated 5-24-07, App. 15).

8. The Court of Appeals and the Trial Court erred in overruling the Defense objection to the jury instruction regarding natural and probable consequences of one's acts. The inference in such jury instruction eliminates the burden of proof on the Commonwealth to prove every element of an offense beyond a reasonable doubt, and unconstitutionally shifts the burden of proof regarding a defendant's criminal intent. (Preserved at App. 834-835).

9. The Court of Appeals and the Trial Court erred in overruling the Defense objection to the flight instruction and, after deciding to give that instruction, in denying the proffered flight instruction from the Defense because the granting of the proposed Commonwealth flight jury instruction was an improper comment on the evidence, drew specific attention to something in evidence, amounted to the functional equivalent of a directed verdict, and unconstitutionally shifted the burden of proof regarding a defendant's criminal intent. (Preserved at App. 831-832).

10. The Court of Appeals and the Trial Court erred in overruling the Defense objection to the testimony of Officer Brian Roberts as to incriminating statements allegedly made by defendant not within the three written statements or two audio recorded statements furnished by defendant to the police authorities because mitigating or exculpatory portions of statements made by defendant outside the three written statements and two recorded statements did not come into evidence along with the selected portions of such statements being testified to by Officer Roberts, the end result being a fundamental unfairness in the trial. (Preserved in Motions in Limine number four, App. 7; App. 92-93; Reply of Defense dated 8-21-07, App. 25; App. 384-385).

11. The Court of Appeals and the Trial Court erred in denying the Defense request for the assistance of a private investigator because the same resulted in a denial of the 5th, 6th, and 14th Amendments guarantees of the U. S. Constitution and equivalent guarantees of the Virginia Constitution and Va. Code §10.2-163. (Preserved in Motions in Limine number fourteen, App. 10; App. 152-163; Order dated 5-24-07, App. 15).

12. The Court of Appeals and the Trial Court erred in not sustaining the Defense request for a pre-trial ruling prohibiting the Commonwealth from using

in the jury's presence the word "murder" other than in argument, as the same is conclusive, argumentative, should be properly restricted to only opening or closing arguments, was the ultimate issue with such testimony invading the province of the jury, resulting in fundamental unfairness of the trial. (Preserved in Motions in Limine number two, App. 7; App. 88-90; written Order entered 5-24-07, App. 15).

13. The Court of Appeals and the Trial Court erred in allowing the Commonwealth to display to the jury and introduce into evidence autopsy photographs of the deceased and photographs portraying the condition of the body of the deceased because the prejudicial effect of displaying such photographs outweighed the probative value. (Preserved in Motions in Limine number five, App. 7; App. 99-104; Reply of Defense dated 8-21-07, App. 25; App. 220-228; App. 404, 406; App. 687).

14. The Court of Appeals and the Trial Court erred by allowing statements attributed to the co-defendant, Cardell Avent, into evidence over Defense objection which tended to incriminate or inculpate defendant because the same violated the pre-trial ruling regarding same and resulted in a violation of 5th Amendment due process, 6th Amendment right of confrontation, 14th Amendment, and the equivalent guarantees of the Virginia Constitution. (Preserved in Motions in Limine number sixteen, App. 11; App. 147-151; App. 386-389; Written Order dated 5-24-07, App. 15).

15. The Court of Appeals and the Trial Court erred in allowing the introduction into evidence by the Commonwealth in its Case-in-Chief and in its first closing argument of an alleged previous assault or assault and battery by appellant against the deceased because the prejudicial effect of this testimony and this argument outweighed its probative value and the same resulted in a violation of 5th Amendment due process, 6th Amendment right of confrontation and effective assistance of counsel, 14th Amendment, and the equivalent guarantees of the Virginia Constitution. (Preserved in Motions in Limine nos. 12 and 15, App. 9 and 11; App. 163-212; App. 230-244, 243; Memorandum of Defense dated 5-30-07, App. 20; Reply of Defense dated 8-21-07, App. 25; App. 779; letter ruling dated 9-7-07, App. 27).

STATEMENT OF FACTS

The facts in this case are contested in some particulars. Appellant's version of the facts is as follows (direct examination of Appellant, App. 740-777):

On 9 August 2005, Meloni Thomas, Defendant and Appellant, drove to her

father's house in Brunswick County, Va., in mid-day for the purpose of receiving from him child support checks of hers that her father was holding. Cardell Avent, co-defendant, who was dating Meloni Thomas at the time, accompanied her, as well as her three minor children. Avent and Meloni Thomas had a bi-racial relationship which was not approved by Meloni Thomas' father, William David Thomas, the deceased. Meloni Thomas' three children were also bi-racial, but none were the children of Avent. The three minor children were seated in the back seat of Meloni Thomas' vehicle with Avent seated in the front passenger seat.

Immediately prior to their arrival at the house of William David Thomas, Meloni Thomas and her children had picked up Avent from the residence of his mother, also located in Brunswick County. As Avent left his mother's house, he placed a large duffle bag in the trunk of Meloni Thomas' vehicle. Avent shut the trunk of the vehicle and at no time did Meloni Thomas observe what was inside the large duffle bag, believing it to contain clothes of Avent. Upon Avent entering Meloni Thomas' vehicle and on the trip from his mother's residence to her father's residence, Meloni Thomas at no time observed any weapon in Avent's possession.

Meloni Thomas parked her vehicle behind her father's house, leaving Avent and the children seated in the vehicle with the car air conditioner running. Meloni Thomas went to the back door of her father's house, knocked on the door, but her father did not answer. The door was not locked, she opened it,

and went inside the house. As she proceeded into the house, her father was coming down the steps of the two-level house. Her father met her at the bottom of the steps and his behavior toward her was threatening and included profanity and racial remarks directed at her. She also smelled alcohol about the person of her father. She was frightened by this behavior of her father.

As this was occurring, Avent then entered the house through the same back door. Avent was dressed in a pair of baggy blue jeans and a black hooded cotton sweatshirt, both very loose fitting. The deceased immediately commenced with threatening remarks toward Avent, also using profanity and racial slurs. Avent produced a sawed-off shotgun, which he pulled from inside the waistband of his blue jeans and which was also covered by the hooded sweatshirt. During the delay of approximately two minutes between defendant's entrance into the house and the subsequent entrance of Avent, Avent had opened the trunk of the vehicle and retrieved the sawed-off shotgun from the duffle bag he had placed there earlier. In approximately March 2005, the deceased had made racial slurs to Avent during the time Avent was dating his daughter and had expressed his disapproval to both his daughter and Avent of their dating relationship. In June 2005, approximately two months prior to the demise of William David Thomas, one George Hicks was present with Avent during target practice by Avent with this sawed-off shotgun. Meloni Thomas had no knowledge of such target practice and was not present during same (App. 735-738 -- testimony of George Hicks; App. 776-777 -- testimony

of Meloni Thomas).

As Avent entered the deceased's house, the deceased was refusing to give Meloni Thomas the child support checks she had requested. With the gun produced, Avent directed the deceased to give his daughter the checks and followed the deceased, with the gun still drawn, up the steps to the deceased's bedroom on the second level. Avent directed Meloni Thomas to follow him, Avent, up the steps with her father and the three proceeded in the order of William David Thomas, Avent, and then Meloni Thomas.

Once upstairs, the deceased proceeded into his bedroom to retrieve the checks. Avent followed the deceased into the bedroom, still holding the gun, and Meloni Thomas was located at the top of the steps in the hallway just outside the bedroom. The bedroom door was open, allowing defendant to see into the bedroom. The deceased handed the child support checks to Avent, who then handed them to Meloni Thomas. Meloni Thomas started to leave the residence to go back to her vehicle and as she proceeded just a few steps down the stairway, she heard a shot fired. Caught by surprise, defendant ran back to the bedroom entrance where she observed her father lying on the floor with Avent repeatedly striking her father in the head with the sawed-off shotgun. On seeing this, defendant became hysterical, began crying, and questioned Avent as to what he was doing and to stop. Avent then cursed defendant and ordered her back to the vehicle, threatening her that she would be next if she did not comply. Avent also directed defendant to move her car.

Defendant took Avent's threats seriously, exited the residence, got in the parked car, and moved the car behind a shed, located approximately forty yards behind the deceased's house. The body of the deceased was subsequently located by the authorities inside the shed.

Once inside her vehicle, defendant remained hysterical and was crying and was questioned by her oldest son as to why she was crying. After a period of several minutes, defendant went back inside her father's house, at which time she noticed that her father's body was absent. Avent, at that point, continued to make threats toward defendant and her children and directed defendant to assist him in cleaning up the scene and not to report the matter to the police or she and her children would be next.

After an attempt to clean up the scene and upon discarding items into the well located beside the house, defendant and Avent left the scene. Avent directed defendant to drive and to cash the child support checks so that they could leave the state of Virginia. Appellant drove to a Food Lion store just across the state line into North Carolina, which took about thirty minutes to reach, in an attempt to cash the checks, as she had cashed checks there previously and store personnel were familiar with her. Appellant changed her clothing behind the Food Lion Store in North Carolina before entering the store due to blood on her clothing from the attempted clean-up of the scene. Defendant was allowed to cash only one of the checks in the store due to store policy. Defendant then, at Avent's direction, telephoned one John Bass, whom

she had previously dated, for his assistance in cashing the remainder of the checks. Bass drove to defendant's location and accompanied defendant to the drive-through of a nearby bank where Bass maintained an account in order to deposit the checks into his account and then give defendant the proceeds. Defendant's youngest child accompanied Bass and defendant to the bank while Avent remained in defendant's vehicle with her older two children, as he continued to place defendant under threats and duress (it is noted Bass' testimony in the Commonwealth's Case-in-Chief differed as to this youngest of defendant's children accompanying him and defendant to the bank). As the bank was closing as they arrived, Bass was unable to deposit the checks into his account. Accordingly, he advised defendant he would deposit them the following day, advanced defendant $200.00 at that time, and defendant advised him she would follow-up with him as to receiving the remaining proceeds.

Defendant then proceeded, at Avent's direction, to Kayenta, Arizona, to reside with a friend of defendant, Tami Rose, and one Sharon Parrish. Rose was a nanny to Parrish's children. Rose was relocating to California and it was agreed that defendant, defendant's children, and Avent would reside with Sharon Parrish, where defendant would assume responsibility for care of Parrish's children.

Defendant and Avent were then arrested while residing in the Parrish residence. Brunswick County officers Brian Roberts and Kent Washburn

traveled to Arizona, where defendant and Avent were subjected to separate custodial interrogations. Both defendant and Avent gave statements to the police. Defendant signed three written statements, and two additional statements of defendant were recorded (audio). However, defendant's custodial interrogations occurred off and on for a period of at least thirteen hours on the first day and subsequent interrogation followed the next three days. As acknowledged by Officer Brian Roberts during cross-examination at trial, the three written statements and two recorded statements obtained from defendant did not contain all that was said and done during the lengthy custodial interrogations of defendant. Other than the two brief audio recorded statements of defendant, the remaining custodial interrogation of defendant was not video or audio recorded. Defendant acknowledged at trial that the first three statements she gave to Officers Roberts and Washburn were not correct. She testified the same were not correct because she gave those statements remaining under threats and duress from Avent and they were, in essence, statements Avent had directed her to give to authorities upon being arrested. Defendant testified at trial that the last two of her statements given the police more accurately described what had transpired at the time of the incident in question.

At trial, the Defense did not contest the manner of death of William David Thomas; the Defense did contest any premeditated murder of the deceased on the part of the defendant and any principal in the second degree or concert of

action liability on the part of defendant, and acknowledged sufficient evidence for accessory after the fact to murder liability.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

1. Question No. 1 and Assignment of Error No. 1: Commonwealth witnesses testified as to incriminating statements allegedly made by Defendant (see, e.g., Freedom Bottoms, App. 480-486; Page Barham, juvenile, App. 487-493; Tara Jackson, App. 498-499).

In pre-trial rulings, the Defense was denied to be furnished pursuant to Va. Code §19.2-389 with any juvenile convictions of Commonwealth witnesses and further denied the opportunity to question such witnesses at trial as to whether they had been convicted as juveniles of any felonies or moral turpitude misdemeanors. Apparently, existing Virginia law prohibits either the Prosecution or the Defense from such questioning of witnesses as to juvenile felony or moral turpitude misdemeanor convictions for general impeachment purposes. A modification of such law is necessary to ensure fairness and reliability in our criminal justice system and will be of benefit to prosecutors, defense attorneys, trial judges, and juries. In any criminal trial, the trier of fact needs to be aware of any such convictions in its determination of an appropriate verdict. For example, in a case like the instant case, if any witness attributing alleged incriminating statements to the accused had any felony, dishonest misdemeanor, or perjury convictions as a juvenile (there being no independent eyewitness testimony to the alleged event), it is essential that the

trier of fact be made aware of same in its consideration of the weight to be given to the testimony of such witness. Similarly, by way of example, in a homicide case where there is no eyewitness testimony and the defense utilizes the testimony of an alibi witness who had felony, dishonest misdemeanor, or perjury convictions as a juvenile, the trier of fact should be made aware of that information in its determination of the appropriate verdict to render. The 5th Amendment due process guarantee, 6th Amendment right of confrontation and effective assistance of counsel guarantees, and 14th Amendment, as well as similar provisions of the Virginia Constitution, trump any preference for confidentiality of juvenile records.

The pre-trial Defense Ex Parte Motion pursuant to Va. Code §19.2-389 is a part of the record and for purposes of conciseness is not recited in this Brief. There apparently is little Appellate guidance as to the operation of Code §19.2-389 regarding the production of the prior criminal records of prospective Commonwealth witnesses to the Defense. In the instant case, the Trial Court denied Defense Limine Motion numbers 9 and 10 and Defendant's separately filed Ex Parte Motion for Criminal Record Checks pursuant to §19.2-389 on the basis that "a threshold showing of relevance is necessary under §19.2-389." The Defense asserted that, as in the case of any witness, any such prospective Commonwealth witness' credibility is in issue once he/she testifies and may be impeached by any felony or moral turpitude misdemeanor convictions. Further, the criminal records of such prospective Commonwealth witnesses may reflect

exculpatory information guaranteed a defendant by several U. S. Supreme Court decisions (Brady v. Maryland, 373 U.S. 83 (1963) and related cases) and any such felony or moral turpitude misdemeanor convictions of prospective state witnesses are in and of themselves exculpatory information. Additional bases in support of the Defense being able to obtain any such prior criminal records of prospective Commonwealth witnesses are set forth in the Ex Parte Motion made a part of the record and, accordingly, are not further cited herein for purposes of conciseness. Taking into consideration all the foregoing, any and all such prospective witnesses' criminal records may be relevant, which is the statutory language, resulting in error in the Trial Court's ruling.

The Defense Motions in Limine are also a part of the record in this case and numbers 9 and 10 of same are relied on for purposes of this Brief and are not set forth herein in detail for purposes of conciseness. The Trial Court denied the Defense request under Limine Motion numbered 10 requesting the results pursuant to §19.2-389 of any juvenile criminal records of any and all prospective witnesses expected to testify for the Commonwealth at the trial of this matter, ruling that the same was not allowed under existing Virginia case law. In its ruling, the Trial Court also prohibited the Defense at trial from questioning such witnesses as to juvenile felony or moral turpitude misdemeanor convictions for impeachment purposes. This Court is being requested to modify such existing Virginia case law and to find error in this case. As a result of the rulings in this case, the jury did not receive the

standard instruction (which may have been applicable) regarding a witness' prior conviction of a felony or moral turpitude misdemeanor as affecting his/her credibility.

2. Question No. 2 and Assignment of Error No. 2:

(a) Presence and consent alone are not sufficient to make a person a principal in the second degree. There must be proof of words or acts by such person to encourage or incite the principal in the first degree to commit the charged offense and proof of a shared criminal intent with the principal in the first degree. "The Commonwealth must prove that the defendant consented to the felonious purpose and the defendant contributed to its execution. ...It is essential that the Commonwealth establish that the defendant shared in the criminal intent of the principal who committed the crime. ...A defendant is guilty as a principal in the second degree if he is guilty of some overt act done knowingly in furtherance of the commission of the crime, or if he shared in the criminal intent of the principal committing the crime. ...This rule cannot be interpreted to mean that any overt act that is advantageous to the principal's criminal plan is sufficient; the defendant must also share in the principal's criminal intent. The overt act must be 'knowingly in furtherance of the commission of the crime.' Therefore, lack of intent is usually a defense to a conviction as a principal in the second degree. ...the one exception exists when there was concert of action and the resulting crime, whether such crime was originally contemplated or not, is a natural and probable consequence of the

intended wrongful act." (McMorris v. Comm., (Supreme Court of Virginia, decided September 12, 2008, Record No. 072247). When the Commonwealth's case is based on premeditation, as in this case, intent to kill (express malice) must also be present. To premeditate means to adopt a specific intent to kill. Smith v. Comm., 220 Va. 696, 261 S.E.2d 550 (1980). The evidence in this case, which came from the Defendant's statements to the police, Defendant's testimony at trial, and the testimony of other witnesses, was insufficient to establish proof of overt acts by the Defendant to encourage or incite the principal in the first degree to commit the charged offense of first degree willful, deliberate, and premeditated murder. That evidence was also insufficient to establish proof of a specific intent to kill on the part of the Defendant and if the proof is insufficient of such specific intent to kill on the part of Defendant, then the Defendant cannot be convicted as a principal in the second degree unless there is also shared criminal intent with the principal in the first degree. Rollston v. Comm., 11 Va. App. 535, 399 S.E.2d 823 (1991). "Share the criminal intent" has been interpreted to mean that "the accused must either know or have reason to know of the principal's criminal intention and must intend to encourage, incite, or aid the principal's commission of the crime", Rollston v. Comm., *supra*, citing McGhee v Comm., 221 Va. 422, 427, 270 S.E.2d 729, 732 (1980) and Cirios v. Comm., 7 Va. App. 292, 298, 373 S.E.2d 164, 167 (1988). Again, the evidence produced in this case in the form of Defendant's statements to the police, Defendant's testimony at trial, and the

testimony of other witnesses, failed to establish a shared criminal intent on the part of Defendant with the principal in the first degree. **There was no evidence of any previous communication by Defendant to the perpetrator that Defendant shared the perpetrator's criminal purpose, no evidence contradicted Defendant's assertion that she was unaware the perpetrator possessed a gun before he produced the same at the time of the homicide**; the evidence was that at the time of the commission of the homicide, Defendant made known by her words to the perpetrator that she disapproved of his actions, and that immediately after the homicide, she acted under duress and threats from the perpetrator as to herself and her children in complying with the perpetrator's directions to assist in cleaning up the scene and departing the state of Virginia. The evidence failed to establish that Defendant gave encouragement to the perpetrator knowing that the perpetrator had the intent to kill. Rollston v. Comm., *supra*, citing Perkins, Parties to Crime.

(b) Concert of action has been defined as "action that has been planned, arranged, adjusted, agreed on and settled between the parties acting together pursuant to some design or scheme." Berkeley v. Comm., 19 Va. App. 279, 283, 451 S.E.2d 41, 43 (1994). The evidence produced in this case failed to establish any such planned, agreed on, or settled action between the Defendant and the principal in the first degree acting together pursuant to a design or scheme to commit first degree murder of the Defendant's father.

Similarly, the evidence produced in this case failed to establish any such planned, agreed on, or settled action between Defendant and the principal in the first degree acting together pursuant to a design or scheme for a wrongful purpose with the resulting crime of homicide being one of its incidental, probable consequences. The evidence established that Defendant had gone to her father's residence on the date in question for the purpose of obtaining child support checks and not upon any conspiracy to commit an illegal act. Accordingly, the question of whether the offense of homicide was the natural and probable result of an intended wrongful act would not be necessary for determination. If there is no intended crime, but one member of a group commits a crime for reasons of his own, the other members of the group have no criminal liability under a concert of action theory (Bacigal, Criminal Offenses and Defenses in Virginia, 2007 Edition, page 499, citing Tweed v. Comm., 36 Va. App. 363, 550 S.E.2d 345 (2001), aff'd in part, rev'd in part, 264 Va. 524, 570 S.E.2d 797 (2002)).

(c) With respect to the charge of use of a firearm by Defendant to commit first degree murder, the evidence produced at trial was clear that the Defendant did not possess a firearm, and there was insufficient proof of principal in the second degree liability or concert of action theory liability to establish the Defendant as being guilty of first degree murder as charged (the underlying, substantive offense), such that the use of firearm charge alleged in connection with that substantive offense should be dismissed.

(d) The evidence produced in this case did not exclude every reasonable hypothesis of innocence.

The Defense also incorporates herein its argument presented at the trial of this matter (App. 692-694, 819-821, 834-835; App. 961-962, 965; App. 974).

3. Question No. 3 and Assignment of Error No. 3: At the conclusion of the Commonwealth's Case-in-Chief, the Defense moved that the case proceed at that point on the theory of accessory after the fact to murder and subsequently submitted a proposed jury instruction regarding that theory which was refused. The Defense acknowledged to the Court that existing Virginia law in the Dalton case appeared contra to the Defense's position although the Court of Appeals of Virginia, as well as two dissenting justices in the Supreme Court of Virginia decision, supported the Defense's position (Dalton v. Comm., 27 Va. App. 381, 499 S.E.2d 22 (1998); Dalton v. Comm., 29 Va. App. 316, 512 S.E.2d 142 (1999), *(en banc)*; Comm. v. Dalton, 259 Va. 249, 524 S.E.2d 860 (2000)). The Court of Appeals held that a defendant, who has not been charged with the crime of being an accessory after the fact to a charged offense, has a right to an accessory after the fact jury instruction if it is supported by the evidence. The Supreme Court of Virginia held that before a defendant can be tried and convicted of being an accessory after the fact, he must be charged with that offense. Unless such a charge is specifically made, neither the Commonwealth nor an accused is entitled to an accessory after the fact instruction. The Defense's position in the instant case, as presented to the

Trial Court and in this Appeal, was/is as noted by the Court of Appeals and the dissent in the Supreme Court decision: the plain language of Va. Code §19.2-286 and Supreme Court of Virginia Rule 3A:17(c), as well as the legislative history behind §19.2-286, would plainly require a submission of that theory to the jury and a jury instruction on same, if there is evidence in the record to support a finding of accessory after the fact to murder. During the instant case, evidence was presented through the statements of the Defendant to police authorities, as well as defendant's testimony at trial, which if believed by the jury, established that she was not guilty of the alleged murder, rather, that she was guilty of the crime of being an accessory after the fact to murder (the jury could find from defendant's last written statement to the police (9-6-05, page seven, App. 1004), as well as her trial testimony (App. 773), that she had an opportunity to escape from the co-defendant, Cardell Avent, and that she had an opportunity to report Avent to the authorities, yet did not do either). The majority opinion in the Supreme Court of Virginia Dalton case appeared to be based upon reasoning that the crime of being an accessory after the fact is not a lesser included offense of the crime of murder. As noted, the plain language of Va. Code §19.2-286 and Supreme Court of Virginia Rule 3A:17(c), as well as the legislative history behind Code §19.2-286, would plainly require a submission in the instant case to the jury on an accessory after the fact theory of liability, and the defendant was thus denied a jury instruction on her theory of the case, which was supported by credible evidence. As noted by the

dissent in the Supreme Court of Virginia Dalton decision, the end result is inconsistent with Appellant's right to a fair trial. (Right to due process of law, equal protection of law, effective assistance of counsel -- 5th, 6th, and 14th Amendments of the U. S. Constitution).

4. Question No. 4 and Assignment of Error No. 4: Existing Virginia law entitles the Commonwealth to the following inferences:

(a) "Malice may be inferred from any deliberate, willful, and cruel act against another, however sudden." (Virginia Model Jury Instructions - Criminal, Instruction No. 33.220).

(b) "You may infer malice from the deliberate use of a deadly weapon unless, from all the evidence, you have a reasonable doubt whether malice existed." (Instruction No. 33.240).

(c) "Once the Commonwealth has proved there was an unlawful killing, then you are entitled to infer there was malice and that the act was murder in the second degree unless, from all the evidence, you have a reasonable doubt as to whether malice existed." (Instruction No. 33.300).

Virginia law as stated in these jury instructions tends to cause the jury to ignore contrary evidence, unlawfully permits a conviction to be had based upon a presumption rather than proof, and unlawfully shifts the burden of proof to an accused, and are unconstitutional. Sandstrom v. Montana, 442 U. S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1970); Stokes v. Warden, 226 Va. 111, 306 S.E.2d 882 (1983) -- regarding constitutionality of presumptions/inferences (U.S.

Constitution, 5th, 6th, and 14th Amendments).

5. Question No. 5 and Assignment of Error No. 5: The Defense submitted proposed *voir dire* questions prior to trial. Proposed question no. 17 read as follows: Meloni Thomas has been indicted, which indictment was based on evidence presented by the Commonwealth alone and none by the Defense. Does the existence of that indictment have any effect on anyone's opinion of the guilt or innocence of Meloni Thomas? Would it cause anyone, in any way, to doubt the presumption of innocence the accused is afforded? Proposed Defense *voir dire* question no. 28 read as follows: If anyone of you were my client, would there be any reason you would not want yourself on this jury? The Trial Court disallowed the second sentence of number 17 and number 28, and the Defense noted exceptions to that ruling, advising the Trial Court that those questions were within Code of Va., §8.01-358, as they pertained to interest, opinion, or bias of a prospective juror. A corollary of the right to an impartial jury is the requirement of a *voir dire* sufficient to permit identification of unqualified jurors because without an adequate *voir dire*, a Trial Judge will not be able to remove unqualified jurors and the Defendant will not be able to exercise challenges for cause, Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997). "A *voir dire* that has the effect of impairing a Defendant's ability to exercise intelligently his challenges, whether for cause or peremptory, is a ground for reversal, irrespective of prejudice", U. S. v. Evans, 917 F.2d 800 (4th Cir. 1990). Answers to these two questions would have assisted the Defense

with peremptory or for cause challenges in that answers to same would be revealing of any bias, prejudice, interest, or preconceived opinion of prospective jurors regarding guilt/innocence or punishment. The inability of the Defense to conduct this *voir dire* resulted in a denial of due process, equal protection, effective assistance of counsel, and trial by impartial jury in violation of the 5th, 6th, and 14th Amendments of the U. S. Constitution and the equivalent guarantees of the Virginia Constitution, §8.01-358 of the Code of Va., Virginia Supreme Court Rule 3A:14, and the aforementioned 4th Circuit Cases of Mackall and Evans. A prospective juror may have been seated in this case who would otherwise be statutorily disqualified under Va. Code §8.01-358. The purpose of voir dire examination is to determine whether a prospective juror is free from partiality and prejudice. Breeden v. Comm., 217 Va. 297, 227 S.E.2d 734 (1976).

6. Question No. 6 and Assignment of Error No. 6: Prospective jurors were questioned on *voir dire* as follows: Is there anyone who would give greater weight to the testimony of a police officer than to that of another witness or the accused simply because of the officer's official status? Three prospective jurors answered affirmatively. After individual voir dire by the Court, Commonwealth Attorney, and Defense Counsel, one of the three was struck for cause (prospective juror Dettre). Defense Motions to Strike prospective jurors Heizer and Finch were overruled. The last comment made by prospective juror Heizer was as follows: "the only thing I was saying is that all

other things being equal, and you have two people that have different testimonies, I would probably lean toward the police officer simply because I would hope that most police officers, it's their job to be impartial." Prospective juror Finch answered affirmatively to the identical question posed by the Court as previously posed by Defense Counsel. In addition to being equivocal in her answers, prospective juror Finch also had answered earlier in *voir dire* of the entire venire that she had a relative who had been a victim of a violent crime.

Bias in favor of a government witness is grounds for a challenge for cause. Gosling v. Comm., 7 Va. App. 642, 376 S.E.2d 541 (1989). "The right of an accused to trial by 'an impartial jury' is a constitutional right (6th Amendment, U.S. Constitution; Virginia Constitution, Article 1, Section 8). The Constitutional guarantee is reinforced by legislative mandate (Va. Code §8.01-358) and by the rules of this Court (Supreme Court Rule 3A:14): Veniremen 'must stand indifferent in the cause.'" The purpose *of voir dire* examination is to determine whether a prospective juror is free from partiality and prejudice. Breeden v. Comm., 217 Va. 297, 227 S.E.2d 734 (1976). Any reasonable doubt as to a juror's qualifications should be resolved in favor of the accused. [Breeden, *supra*; Williams v. Comm., 14 Va. App. 208, 415 S.E.2d 856 (1992)], and borderline objections should always be resolved in favor of disqualification [Hope v Peyton, 340 F. Supp. 197 (W.D. Va. 1972); Barker v. Comm., 230 Va. 370, 337 S.E.2d 729 (1985)]. In attempts at rehabilitation, proof that a prospective juror is impartial cannot be based on mere assent to persuasive

suggestions (Educational Books, Inc. v. Comm., 3 Va. App. 384, 349 S.E.2d 903 (1986); McGill v. Comm., 10 Va. App. 237, 391 S.E.2d 597 (1990); see also U.S. v. Thompson, 744 F.2d 1065 (4th Cir. 1984), where the trial court abused its discretion in proceeding with the trial after juror gave equivocal response). Failure to exclude a juror who is properly subject to challenge for cause is prejudicial error, and the error is not cured when either the Defendant or prosecution exercises a peremptory challenge to excuse that juror [Va. Code §8.01-357; Briley v. Comm., 222 Va. 180, 279 S.E.2d 151 (1981); Dehart v. Comm., 20 Va. App. 213, 456 S.E.2d 133 (1996)]. The right of an impartial jury extends not only to impartiality upon the issue of guilt or innocence but also upon the question of punishment [Patterson v. Comm., 222 Va. 653, 283 S.E.2d 212 (1981)]. Juror bias, whether presumed or proven, requires automatic reversal, Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor J., concurring).

7. Question No. 7 and Assignment of Error No. 7: A pre-trial ruling from the Trial Court prohibited the Defense from referring to the punishment ranges under Virginia law as to offenses (first degree murder, use of firearm/murder, or accessory after the fact to murder) in *voir dire* and opening or closing arguments. As a result, neither the Defense nor Prosecution could effectively screen prospective jurors for peremptory or for cause challenges and an essential facet of the criminal justice system remained undisclosed to the jurors until the punishment phase of the trial. The jurors being advised of the

punishment ranges helps insure the fairness of the trial and confidence in the outcome of the verdict. The same resulted in a violation of due process of law and effective assistance of counsel (U. S. Constitution, 5th, 6th, and 14th Amendments). The argument and authorities given in paragraphs numbered three, five, and six, *supra*, are also incorporated in this argument.

8. Question No. 8 and Assignment of Error No. 8: The following jury instruction was given over Defense objection: "You may infer that every person intends the natural and probable consequences of his/her acts". By such inference, the 14th Amendment requirement that the state prove every element of an offense beyond a reasonable doubt is eliminated and the same amounts to the functional equivalent of a directed verdict. The same shifts the burden of proof regarding a defendant's criminal intent. Sandstrom v. Montana, 442 U. S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1970); Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983) (U.S. Constitution, 5th, 6th, and 14th Amendments).

9. Question No. 9 and Assignment of Error No. 9: The Defense noted an objection to the Trial Court's granting of the proposed Commonwealth flight jury instruction as an improper comment on the evidence, as drawing specific attention to something in evidence, amounting to the functional equivalent of a directed verdict, and shifting the burden of proof regarding a defendant's criminal intent. The instruction granted the Commonwealth by the Court was as follows: "If a person leaves a place where a crime was committed or flees

to avoid detection, apprehension, or arrest, this creates no presumption that the person is guilty of having committed the crime. However, it is a circumstance which you may consider along with the other evidence." The proffered Defense instruction refused by the Court (the Court having decided it would grant the flight instruction over Defense objection) was as follows: "If a person leaves a place where a crime was committed, this creates no presumption that the person is guilty of having committed the crime. However, it is a circumstance which you may consider along with the other evidence. In your consideration of the evidence of flight, you should consider that there may be reasons for that which are fully consistent with innocence. Those may include fear of being apprehended, unwillingness to confront the police, reluctance to appear as a witness, or being under duress or threat." This addition to the instruction was supported by the evidence (Appellant having testified as being under duress or threat when leaving the scene of the offense alleged -- App. 740-777). The Defense language would have resulted in a more fundamentally fair instruction. A similar instruction proposed by the Defense was used in United States v. Hawkes, 753 F.2d 355 (4th Cir. 1985). (U.S. Constitution, 5th, 6th, and 14th Amendments and the equivalent guarantees of the Virginia Constitution). The Supreme Court of Virginia in Turman v. Comm. (decided October 31, 2008 subsequent to this trial) found the Virginia Model Jury Instruction on flight, which was utilized in this case, defective. Further, for the reasons stated above, the granting of the flight instruction given

in this case was not harmless error and constituted reversible error.

10. Question No. 10 and Assignment of Error No. 10: The Defense did not raise any objection to the statements made by Defendant in the three written statements and two audio recorded statements given by her to the police. The custodial interrogation of the Defendant in Arizona by the Brunswick County police authorities was conducted over a period of approximately thirteen hours, with breaks, on 3 September 2005. Additional interrogation and statements from Defendant were obtained the following three days. Officer Roberts acknowledged that the three written statements and two audio recorded statements, which the Defense did not object to, would not reflect everything said and done during those interviews of Defendant. (App. 407-408). Officer Roberts was in effect given a free rein to testify as to select portions of Defendant's statements being attributed to Defendant by him, which were not reflected in the three written statements or two recorded statements. Accordingly, mitigating or exculpatory portions of statements made by Defendant outside the three written statements and two recorded statements did not come into evidence along with the selected portions of such statements being testified to by Officer Roberts. In Boggs v. Comm., 229 Va. 501, 331 S.E.2d 407 (1985), the general principle that the prosecution has no right to introduce selected portions of a Defendant's confession and exclude those portions which are mitigating or exculpatory was reiterated. A video with audio recording, or audio recording, of the entire custodial interrogation of Defendant

would have eliminated this problem, as the jury could see or hear all the statements being made by Defendant, the context in which such statements were made, and, if video recorded, the conduct and demeanor of the investigating officer(s) and the defendant. The end result was fundamental unfairness in the trial. (U. S. Constitution, 5th, 6th and 14th Amendments).

11. Question No. 11 and Assignment of Error No. 11: Regarding the furnishing of prosecution witness names and statements to the Defense, existing Virginia discovery rules are restrictive in comparison to the federal rules of discovery. In the instant case, the Defense was informed by the Commonwealth of four prospective Commonwealth witnesses who might be called to testify as to allegedly inculpatory statements made in their presence by Defendant. The Defense requested the Commonwealth be required to furnish the names, addresses, and telephone numbers of those four prospective witnesses in order that Defense Counsel could locate and interview those witnesses regarding these alleged inculpatory statements. Absent such order from the Court, the Defendant requested the appointment of a private investigator, as an indigent, to assist the Defense in locating these witnesses for interview by Defendant's Counsel. In order to be able to effectively confront the witnesses against her and to be provided with effective assistance of counsel, the Defendant needs to be advised by the government before preliminary hearing or trial of who those witnesses against her are, the opportunity to question those witnesses, to take statements from them, and to

review any statements given by them to the government in order to properly impeach those witnesses at trial or preliminary hearing or to develop exculpatory information. The denial by the Trial Court of this Defense request resulted in a denial of due process of law, equal protection, and the effective assistance of counsel as guaranteed by the U. S. and Virginia Constitutions (5th, 6th, and 14th Amendments of the U. S. Constitution and equivalent guarantees of the Virginia Constitution). (Va. Code, §10.2-163; Ake v. Oklahoma, 470 U. S. 68 (1985); Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996); U. S. v. Sheppard, 559 F. Supp. 571 (E.D. Va. 1983)). The Defense also incorporates herein its argument at App. 152-163.

12. Question No. 12 and Assignment of Error No. 12: The Defense requested a pre-trial ruling from the Trial Court prohibiting the Commonwealth from using in the jury's presence the word "murder" other than in argument, as the same is conclusive, argumentative, and should be properly restricted to only opening and closing arguments. The Trial Court overruled the Motion except insofar as prohibiting either party from using inflammatory, misleading, or unfairly prejudicial language. Commonwealth witness, Virginia State Trooper Steven Kean, in direct examination by the Commonwealth, testified "...we met with them, and when we spoke with Lt. Washburn, he stated that they were currently investigating a murder that had happened at that location on Dry Bread Road..." (App. 570). Whether or not a murder had occurred was the ultimate issue and this testimony invaded the province of the jury. The same

resulted in fundamental unfairness and a denial of due process of law. (U. S. Constitution, 5th, 6th and 14th Amendments).

13. Question No. 13 and Assignment of Error No. 13: Through pretrial motion, the Defense advised the Trial Court that it had no objection to any photographs or video tapes of the scene of the alleged homicide, of the shed located behind the deceased's house where the deceased's body was located, or to any photographs depicting only the skull of the deceased (to illustrate the blunt force trauma to the head of the deceased); however, as the body of the deceased was in such a state of decomposition, the prejudicial effect of displaying photographs of same outweighed the probative value. The Defense advised the Trial Court it was not contesting the manner in which the deceased died (bird shot to the chest followed by blunt force trauma to the head), and that photographs of the decomposed body of the deceased, as well as autopsy photographs, would not depict the same, whereas photographs of the skull of the deceased would. Neither the gunshot wound to the chest nor the blunt force trauma to the head was visible in photographs of the body of the deceased to the extent to have probative value outweighing the prejudicial effect of the jurors viewing such photographs of the remains of the deceased. Photographs of a deceased person are properly excluded where they are calculated to arouse the sympathies or prejudices of the jury or to direct the minds of the jurors to improper or irrelevant considerations. Wright v. Kelly, 203 Va. 135, 122 S.E.2d 670 (1961).

14. Question No. 14 and Assignment of Error No. 14: The Defense requested of the Trial Court a Limine ruling prohibiting the Commonwealth from commenting on or seeking to introduce into evidence any and all statements made by co-defendant Cardell Avent tending to incriminate or inculpate defendant. Verbal and written orders were entered by the Trial Court that neither party shall introduce statements in its Case-in-Chief allegedly made by the co-defendant without filing a Motion in Limine and getting a further ruling from the Court. Such statements attributed to the co-defendant were admitted into evidence over Defense objection (1) through statements attributed to Defendant by Commonwealth witness Officer Brian Roberts in the Commonwealth's Case-in-Chief (App. 386-390) (the Defense also incorporates herein its argument in number ten, *supra)*; and (2) again through the testimony in its Case-in-Chief through witness Brian Roberts that "...Cardell's comments that he had given us in the interview certainly didn't line up with what she had said..." (App. 399) (the Defense also incorporates its argument set forth in number ten, *supra*). (Violation of 5th Amendment due process, 6th Amendment right of confrontation, 14th Amendment; Bruton v. U.S. and its progeny, 391 U. S. 123 (1968)).

15. Question No. 15 and Assignment of Error No. 15: The Defense objected pretrial to the Commonwealth referring to or bringing into evidence an alleged previous assault or assault and battery on May 15, 2005 by defendant against the deceased, as there were no eyewitnesses to such alleged incident and the

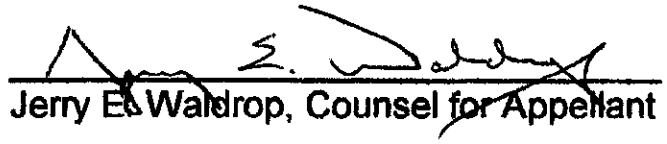
deceased would obviously not be subject to cross-examination by the Defense, as there was no trial and subsequent conviction of defendant of such alleged offense, and due to the general rule that evidence of other alleged offenses is inadmissible to prove the offense charged at bar; in particular, such previous alleged offense bore no relationship to the peculiar aggravating circumstances of this case wherein the deceased was shot and then struck by the co-defendant. The Defense similarly objected pre-trial to the Commonwealth commenting on or seeking to introduce into evidence any alleged statements made by the deceased tending to incriminate and inculpate the defendant (to include the alleged previous assault or assault and battery on 5-15-05). Commonwealth witness John Bass, in the Commonwealth's Case-in-Chief, testified as to "an assault or something they had because of a conflict between them or something" (in answer to a question regarding defendant's relationship with her father) (App. 558). In its first closing argument, the Commonwealth advised the jury regarding "warrants (the alleged assault and battery of deceased by defendant) out on her" (App. 875). The prejudicial effect of this testimony and this argument outweighed its probative value. (See Walker v. Comm., 28 Va. (1 Leigh) 574 (1829) -- the mere fact that intent is an element of the offense does not automatically make evidence of prior offenses admissible. The Virginia Appellate Courts have often said that there must be a connection between the prior offense and crime charged. "If the circumstances (of the other event) have no intimate connection with the main

fact; if they constitute no link in the chain of evidence...they ought to be excluded..."). (Violation of 5th Amendment due process, 6th Amendment right of confrontation and effective assistance of counsel, 14th Amendment).

CONCLUSION

For the above mentioned reasons, alone or in combination, the Defendant should be afforded a new trial or the verdicts and sentences against the Defendant should be reversed. Appellant respectfully prays that this Court reverse the lower court proceedings or afford her a new trial.

MELONI THOMAS
BY COUNSEL



Jerry E. Waldrop, Counsel for Appellant

CERTIFICATE

1. The name of the Appellant is Meloni Thomas, Inmate #385596, and her address is Fluvanna Correctional Center for Women, Building 1, Wing A-109-B, P. O. Box 1000, Troy, Virginia 22974.

2. Counsel for the Appellant is Jerry E. Waldrop, Waldrop Law Office, PLLC, 318 South Main Street, Emporia, Virginia 23847, telephone number 434-634-5729, facsimile number 434-634-5729.

3. Counsel for the Appellee is Eugene Murphy, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, telephone number 804-786-2071, facsimile number 804-371-0151.

4. Counsel for Appellant is court-appointed.

5. Counsel waives oral argument.

6. Fifteen copies of this Brief have been filed with the Clerk of the Supreme Court of Virginia this 31st day of August 2009.

7. Three copies of this Brief have been mailed or delivered to Counsel for the Appellee, Eugene Murphy, Esquire, at the Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 31st day of August 2009.

8. An electronic copy of this Brief and Appendix has also been filed contemporaneously with the Clerk, Supreme Court of Virginia, this 31st day of August 2009. The electronic copy has been filed on CD.

9. A copy of this Brief has been mailed or delivered to Meloni Thomas this 31st day of August 2009.

Jerry E. Waldrop, Counsel for Appellant

PL E:AUGUST2009\THOMAS-MELONI APPL-BRIEF-SCT