No. _____

In The
Supreme Court of the United States

BLAKE KELMAR,

Petitioner,

v.

HAROLD CLARKE, Director,
Virginia Department of Corrections,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When assessing the prejudice caused by an attorney's affirmative misadvice about the collateral consequences of a plea agreement, should courts look only to likely trial outcomes or should they also consider the petitioner's actual circumstances and how those circumstances bear on the question of whether a reasonable person in the same position would have rejected the plea agreement if properly advised?

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The unpublished Supreme Court of Virginia decision sought to be reviewed, *Kelmar v. Commonwealth*, No. 140711 (Oct. 6, 2014) is attached as Appendix ("App.") A. The unpublished state circuit court orders from which Kelmar's appeal was taken in *Kelmar v. Commonwealth* is attached as App. B & C.

JURISDICTIONAL STATEMENT

The Virginia state circuit court had jurisdiction over Blake Kelmar's Petition for Writ of Habeas Corpus under Virginia Code § 8.01-654. The Supreme Court of Virginia had appellate jurisdiction under Virginia Code § 17.1-406(B). The Supreme Court of Virginia declined, however, to grant Kelmar's petition for appeal.

The jurisdiction of this Court is invoked under the United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 10, petitioner having asserted below and asserting herein deprivation of rights guaranteed by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The question presented implicates the Sixth Amendment right to counsel: "In all criminal prosecutions,

the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The question also involves the Fourteenth Amendment to the United States Constitution, which applies the Sixth Amendment to the states and which provides in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

SUMMARY OF ARGUMENT

Petitioner Blake Kelmar requests relief from the Virginia state courts' final judgments denying and dismissing his petition for a writ of habeas corpus. In his petition, Kelmar raised a claim that his Sixth Amendment right to the effective assistance of counsel was violated by his counsel's affirmative misadvice that if he pled guilty, he would be subject to a maximum of ten years on the sex offender registry, with no mention of the fact that he would be registered as a violent sex offender or that he would have to register for life. Kelmar argued that he was prejudiced by this affirmative misadvice because if he had been properly advised about sex offender registration consequences, he would have rejected the plea

agreement. Kelmar did not receive a significant benefit from the plea agreement, and he and his family had informed counsel that he simply could not take a plea that would result in lifetime sex offender registration, because such a plea would prevent him from securing the residential care his disabilities require. The state habeas court denied relief,[1] focusing on the prosecution's evidence and applying a purely objective analysis that ignored Kelmar's individual circumstances and potential alternate outcomes of plea negotiations. App. B, C. The Supreme Court of Virginia upheld the denial of relief without analysis.

The state court applied an incorrect standard that conflicts with this Court's precedent requiring consideration of whether a reasonable person *in the petitioner's situation* would have rejected a particular plea agreement. The state court refused to consider facts bearing on Kelmar's situation – even those bearing on his plea bargaining situation – and conducted an analysis that focused only on the evidence against Kelmar and likely trial outcomes. Had the state court considered Kelmar's situation, however, the court would have concluded that a reasonable person in his circumstances would have rejected the plea agreement if properly informed. The state court is not alone, however, in its misunderstanding of the nature of the prejudice analysis in cases of misadvice about collateral consequences. Many other courts focus only

[1] The state court adopted the order drafted by the respondent without making any changes.

on the evidence against the petitioner, ignoring the petitioner's circumstances and how they bear on the question of whether a reasonable person in the same situation would have rejected the plea agreement. Other courts, however, recognize that this Court's precedent requires a consideration of the petitioner's individual circumstances and how they bear on the plea bargaining process. This case presents an opportunity for the Court to clarify that the latter approach is the proper one.

STATEMENT OF THE CASE

This petition concerns how courts should assess the prejudice caused by an attorney's affirmative misadvice as to serious collateral consequences of a plea agreement. In this case, as in many others, the courts focused solely on the evidence against the petitioner and whether a reasonable person would "insist" on a trial given the strength of the evidence. In doing so, the courts ignored (1) the particular circumstances that rendered the collateral consequences unacceptable to the petitioner and (2) the possibility that given proper advice, the petitioner could have reached an acceptable plea bargaining outcome short of trial.

This Court's recent plea bargaining jurisprudence has left significant confusion among state and federal courts as to how to assess prejudice in cases of misadvice about collateral consequences. Given the lack of a single clear standard, many courts apply an

old standard that looks only to whether a reasonable person would have insisted on trial given the evidence. Other courts, looking to this Court's recent emphasis on the realities of plea bargaining, take into account the individual petitioner's circumstances and the possibility of a different plea bargaining outcome. Had the courts in this case taken the latter approach, they certainly would have concluded that Kelmar was prejudiced by his attorney's affirmative misadvice regarding the sex offender registration consequences of his plea. Because the courts applied the antiquated and artificial former approach, however, they found that Kelmar was not prejudiced.

A. Procedural History

The criminal charges at issue arose from the allegation that Blake Kelmar, then a nineteen-year-old student with Asperger Syndrome,[2] sexually assaulted thirteen-year-old "A.L.N." on November 22, 2010. On November 23, Kelmar was charged with one count of carnal knowledge without force of a thirteen-year-old in violation of Virginia Code § 18.2-63, and one count of aggravated sexual battery of a

[2] Asperger Syndrome is "an autism spectrum disorder (ASD), one of a distinct group of complex neurodevelopment disorders characterized by social impairment, communication difficulties, and restrictive, repetitive, and stereotyped patterns of behavior." National Institute of Neurological Disorders and Stroke, Asperger Syndrome Fact Sheet, http://www.ninds.nih.gov/disorders/asperger/detail_asperger.htm (last updated Nov. 6, 2014).

thirteen or fourteen-year-old in violation of Virginia Code § 18.2-67.3. On February 24, 2011, Kelmar waived his preliminary hearing without an agreement as to a plea. On April 5, 2011, the indictments were amended to charge two counts of carnal knowledge without force, and Kelmar entered no-contest pleas to these charges. The Commonwealth's Attorney stated that she had amended the charges because there was conflicting evidence about whether Kelmar had used force, and also because Kelmar had agreed to waive preliminary hearing so as not to require the complainant's testimony. Plea Tr. 14-15.

Kelmar was sentenced on August 9, 2011. After hearing extensive evidence of Kelmar's deficits, the circuit court concluded that Kelmar suffers from a serious mental health condition, had diminished capacity, and is a low risk for reoffending "not only for sex offenses but for any criminal offense." State Habeas Appendix (hereinafter "SH App.") 148. The court sentenced Kelmar to two consecutive five-year prison terms but suspended the entire sentence for a period of ten years. SH App. 149. On August 10, 2011, the court signed and entered its sentencing order. Kelmar did not file an appeal or any other post-trial motions.

On August 8, 2013, Kelmar filed a petition for a writ of habeas corpus in Hanover County Circuit Court. The Attorney General filed a motion to dismiss on January 13, 2014. Kelmar filed his reply on January 30, 2014. On the same day, the circuit court issued a letter order granting the motion to dismiss

and ordering the Attorney General to prepare and circulate an order. Kelmar objected to the Attorney General's draft order, which the court adopted in its entirety, and filed a timely notice of appeal.

On April 29, 2014, Kelmar filed a petition for appeal to the Supreme Court of Virginia. On May 5, 2014, the American Civil Liberties Union of Virginia filed a brief of amicus curiae in support of Kelmar's petition for appeal. The Attorney General filed a brief in opposition on May 21, 2014. Kelmar then filed a reply on June 2, 2014. On October 6, 2014, the Supreme Court of Virginia entered an order denying Kelmar's petition for appeal. The order read in its entirety:

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

App. A.

B. Blake Kelmar's Guilty Plea & Sentencing

At the plea hearing, the Commonwealth proffered that Kelmar and A.L.N. met at Kelmar's brother's Bar Mitzvah and that subsequently, on November 10, 2010, A.L.N. texted Kelmar to ask him if he wanted to hook up. SH App. 18. The Commonwealth proffered that A.L.N. and Kelmar did meet and began

kissing, but that then "it began to go further than what the thirteen year old wanted to have happen." *Id.* The Commonwealth alleged that Kelmar "forced her to give him oral sex, penetrated her with two fingers into her vagina, and touched her breasts." *Id*. In response to the Commonwealth's proffer, Mr. Geary pointed out that there was a two-inch thick stack of text messages between the parties, and that they were primarily one-sided from A.L.N. to Kelmar. SH App. 20. In fact, Mr. Geary noted that A.L.N.'s messages to Kelmar contained "very graphic detail, pretty shocking graphic detail" requesting sexual contact with Kelmar. Mr. Geary also noted that he had turned the messages over to the Commonwealth because A.L.N. had denied to law enforcement that she requested sexual contact with Kelmar or that she had sent sexually explicit texts. *Id.*

It was evident at Kelmar's plea hearing that his attorney knew that sex offender registration requirements were of particular importance to Kelmar, given his disabling mental condition. In fact, Mr. Geary stated that he "may end up asking the Court" for "something other than perhaps what he's charged with" because of the sex offender registry. SH App. 21. The Court accepted Kelmar's no-contest plea and found him guilty as charged in the amended indictments. SH App. 22. Notably, the Court did not make the mandatory findings under Virginia Code § 9.1-902(H), which requires the Court to inform defendants of registration requirements and grants defendants a right to withdraw their pleas based on that information.

At Kelmar's sentencing hearing on August 9, 2011, the Court heard extensive evidence about his disorder and its attendant deficits. Significantly, there was substantial dispute about whether the Commonwealth could even have proven the facts proffered at the plea hearing. In addition to A.L.N.'s false claims that she did not initiate sexual contact with Kelmar, Kelmar is incapable of undoing buttons or zippers, rendering incredible A.L.N.'s account of the events. SH App. 20, 49, 54-58. Kelmar was born with spina bifida[3] and has a documented "history of fine motor problems that required occupational therapy." SH App. 32.

Additionally, Kelmar's deficits meant that he "does not fully understand social situations and was more vulnerable to ALN's social pressure to meet and have a sexual encounter than the typical 19-year-old." SH App. 42. There was also ample evidence that A.L.N. was the sexual aggressor and that Kelmar has a low risk of recidivism. Dr. Dennis Carpenter, a clinical psychologist specializing in children, testified that based on his review of all the details of the events, it was obvious that A.L.N. was "clearly the sexual aggressor." Dr. Carpenter testified that A.L.N.

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[3] "Spina bifida is characterized by the incomplete development of the brain, spinal cord, and/or meninges (the protective covering around the brain and spinal cord)." National Institute of Neurological Disorders and Stroke, Spina Bifida Fact Sheet, http://www.ninds.nih.gov/disorders/spina_bifida/detail_spina_bifida.htm (last updated Apr. 16, 2014).

had sent Kelmar sexually explicit text messages asking him to "fuck her, kiss her vagina, and ask[ing] how big his cock was." SH App. 88. Furthermore, it was clear from the text exchanges that Kelmar did not send sexual texts back or even understand much of A.L.N.'s sexual innuendo and terminology, including well-known phrases such as "hooking up" and "friends with benefits." SH App. 79, 88-90. Dr. Carpenter agreed with Dr. Evan Nelson's conclusion that it was in fact the victim in the case, A.L.N., who was "grooming Kelmar for a sexual experience versus the other way around." SH App. 90. Dr. Nelson noted that Kelmar's texts in response "were not lurid, he was not asking for details of her body, proposed sexual activities, etc. He did not seem to be grooming her; it was ALN who was grooming him." SH App. 36.

Finally, Dr. Carpenter performed a risk assessment and evaluated Kelmar, concluding that he is a low risk to recidivate and has virtually no voluntary interactions with females. SH App. 71-76. Like Dr. Carpenter, Dr. Leigh Hagan also testified that Kelmar was a low risk to reoffend. SH App. 98-101. Similarly, Dr. Nelson concluded, "[t]his was a situational offense and not part of an enduring pattern of acting out or sexual misbehavior." SH App. 43. Indeed, even the Commonwealth admitted, "our victim is a lot of times the one that suggests that they have sex. She was the aggressor on it." SH App. 132.

At sentencing, it was again clear that sex offender registration was particularly important to Kelmar, with his attorney arguing that the circuit

court should defer sentencing to avoid registration, which would result in Kelmar being barred from his college. SH App. 142-43. It was also clear at sentencing that Kelmar's ongoing enrollment and participation in programs for people with Asperger Syndrome was of the utmost importance.

The evidence presented at sentencing led the circuit court to find that Kelmar is a low risk for reoffending "not only for sex offenses but for any criminal offense." SH App. 148. The court sentenced Kelmar to two consecutive five-year prison terms but suspended both for a period of ten years. SH App. 149.

The next day, State Trooper Angela Shaffier arrived at the Kelmar home to register Kelmar as a sex offender. SH App. 181 ¶ 14. Trooper Shaffier fingerprinted Kelmar and took pictures of him. *Id.* While at the Kelmar house, Trooper Shaffier reviewed Kelmar's paperwork in front of his parents. She informed them that (1) Kelmar was to be registered as a *violent* sex offender and that (2) he would be required to register as a violent sex offender for life. Neither Kelmar nor his parents had ever known that he was to be classified as a violent sex offender, or that he would have to register for life. They were shocked. Trooper Shaffier reported that Kelmar's disabilities were obvious and that she had to handle him with "kid gloves" because she was afraid to upset him. SH App. 181-82 ¶ 14; SH App. 179 ¶ 9.

During the registration process, Kelmar and his parents expressed their surprise and dismay to Trooper Shaffier. On September 7, 2011, within a short time of finding out that Kelmar would have to register as a violent sex offender for the rest of his life, Kelmar's parents tried to contact Mr. Geary several times. SH App. 182 ¶ 15. Kelmar and his parents went to extraordinary lengths with Mr. Geary, his associate David Caddell and the firm they worked for to fix the problem so that Kelmar would not be registered as a violent sex offender for the rest of his life. They did not know what procedural mechanisms were available or whether to proceed with a motion to withdraw the plea, an appeal, or something else altogether. They did not know what could be done; all they knew was that the result was entirely unexpected and disastrously wrong, and that they simply wanted Mr. Geary to fix it. SH App. 182 ¶ 17. Mr. Geary did nothing and several weeks later the firm fired him. Shortly after that, sadly and unrelated, Mr. Geary committed suicide.

Registering as a violent sex offender has changed Kelmar's entire life, having uniquely harsh consequences because of his disabilities. Understanding these circumstances is key to understanding why Kelmar never would have accepted a plea had he not been misinformed, as well as how he has been prejudiced by that misinformation. Kelmar's disability requires him to spend his adulthood in residential treatment or an assisted living facility, but every facility contacted said they would not accept a violent

sex offender, making it impossible for Kelmar to find a facility willing to accept him.

Similarly, the sex offender registry has a highly detrimental effect on Kelmar's ability to receive services for which he was otherwise eligible through the Department of Aging and Rehabilitative Services ("DARS"). Registration as a violent sex offender severely limits DARS resources and services to find employment, as well as the assistance needed for security, independence, and quality of life for people with disabilities like Kelmar's. In fact, the Kelmars have confirmed the result that they most tried to avoid: there is no residential program suitable for Kelmar's disabilities that will admit him, due to his life-long status as a violent sex offender. Kelmar cannot attend his local autism support group because it meets in a church that has a day care and that is next to a school. He cannot even participate in online support groups sponsored by the Global and Regional Asperger Syndrome Partnership – an educational and advocacy organization serving individuals on the autism spectrum – because there could be people under age eighteen online.

REASONS THE WRIT SHOULD BE GRANTED

I. This Court Should Grant Certiorari Because There is Confusion Among State and Federal Courts About How to Assess Prejudice in Guilty Plea Cases of Misadvice About Collateral Consequences.

The courts are deeply split over how to assess *Strickland v. Washington*, 466 U.S. 668 (1984) prejudice in ineffective assistance cases arising from trial counsel's misadvice about the collateral consequences of a plea agreement. On the one hand, some courts take a purely objective approach, questioning whether a reasonable person would have insisted on going to trial given the evidence against the petitioner. On the other hand, some courts recognize the need to also consider the petitioner's individual circumstances and characteristics – i.e., whether a reasonable person *in the petitioner's position* would have accepted the plea agreement regardless of the misadvice. Although both of these are objective standards, the latter also accounts for the characteristics and circumstances of the petitioner at issue. Meanwhile, the former standard accounts only for the strength of the evidence against the petitioner, and ignores the realities of plea bargaining.

In denying Kelmar's petition, for example, the circuit court cited seven cases for the proposition that "the vast majority of courts that have addressed this issue have rejected this claim, finding that the analysis is objective." App. C at 4 (citing *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012); *Pilla v.*

United States, 668 F.3d 368, 373 (6th Cir. 2012); *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995); *United States v. Shin*, 891 F. Supp. 2d 849, 854 (N.D. Ohio 2012); *United States v. Rocky Mountain Corp.*, 746 F. Supp. 2d 790, 801-02 (W.D. Va. 2010); *Wanatee v. Ault*, 101 F. Supp. 2d 1189, 1204-05 (N.D. Iowa 2000); *Royal v. Netherland*, 4 F. Supp. 2d 540, 555 (E.D. Va. 1998) (subsequent history omitted)). The court proceeded to note, "the lone Eighth Circuit case relied upon by the petitioner . . . was criticized by the Seventh Circuit shortly after it was issued." App. C at 4 (citing *United States v. Arvanitis*, 902 F.2d 489, 494 n.4 (7th Cir. 1990)).

Despite the state court's assertion, however, the weight of authority is by no means so clear as to the standard applicable. Indeed, the state court cited only three federal circuit courts – the Fourth, Sixth, and Ninth – and three district courts from within those same circuits, plus a federal district court within the Eighth Circuit, which itself has applied a more nuanced approach. Notably, a number of the cases cited preceded *Padilla* by many years, and one – *Sanchez* – discussed materiality in an entirely different legal context.[4] In reality, there is significant confusion about the standard for assessing prejudice in guilty plea collateral consequence cases, and there is no "vast majority" supporting a purely objective view.

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[4] The discussion in *Sanchez*, cited by the circuit court, deals with the standard for assessing materiality under *Brady v. Maryland*, 373 U.S. 83 (1963). *Sanchez*, 50 F.3d at 1453-54.

In collateral consequence cases, the question of prejudice often revolves around whether a rational person who was informed of the consequences would have rejected his plea offer and insisted on trial. Many courts treat strong evidence of guilt as foreclosing relief, but other courts take a more multifaceted approach, emphasizing the individual defendant's situation. For example, in deportation consequence cases, both the Fourth Circuit Court of Appeals and the Kentucky Supreme Court (on remand in *Padilla*) have emphasized factors such as family ties, the immigrant's ties to this country, and the immigrant's ties to his country of origin. These courts, while still applying an objective standard, consider whether a rational person *in the petitioner's situation* who was informed of the consequences would have rejected his plea offer and proceeded to trial.

This split among courts seems to be rooted in the fact that *Padilla* – this Court's seminal collateral consequences case – failed to clearly articulate a prejudice standard, leaving courts to apply the language of *Hill v. Lockhart*. *Hill*, however, focuses the prejudice inquiry on whether a properly advised petitioner would have insisted on going to trial. In applying this "trial-outcome" standard, many courts emphasize the strength of the prosecution's case and give little or no weight to the circumstances of the individual defendant who faces the collateral consequence at issue, and that is what the Virginia courts did in this case. That the confusion lies in the application of *Hill* is exemplified by the subjective versus objective discussion in

Wanatee (one of the cases cited by the Virginia circuit court). *Wanatee*, 101 F. Supp. 2d at 1204-05.

Of course, whether it would have been rational to reject a particular plea bargain based on its collateral consequences and whether a defendant would have insisted on going to trial are, practically speaking, different questions. A petitioner could, for example, reject a particular plea based on its collateral consequences but continue to bargain for a different outcome short of trial. Under either standard, the strength of the prosecution's evidence would invariably be a factor in the prejudice inquiry. Because of the focus on *Hill*'s trial-outcome language, however, the strength of the evidence is in many cases the *only* factor discussed with any detail, with little or no consideration of the petitioner's individual circumstances and their interplay with the collateral consequences at issue.

In a case cited by the state court below, the Court of Appeals for the Sixth Circuit declined to reach the performance prong of *Strickland* of a *Padilla* claim because the petitioner could not show prejudice in light of the strong case against her. *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012). The Court found that "no rational defendant in Pilla's position would have proceeded to trial" given "overwhelming evidence of her guilt." *Id.* The Court of Appeals thus affirmed the district court's determination that "Pilla 'had no realistic chance of being acquitted at trial' and that, if she had proceeded to trial, she 'had no

rational defense, would have been convicted and would have faced a longer term of incarceration.'" *Id.*

Indeed, there are numerous other cases across the country in which courts, applying the *Hill* standard and emphasizing the likely outcome of trial, have denied relief on prejudice grounds. *See, e.g.*, *Haddad v. United States*, 486 F. App'x 517, 521 (6th Cir. 2012) (applying *Pilla* and concluding that petitioner was not prejudiced because he was "caught red-handed" and even though he proffered several possible defenses, "he offers no reason to believe that these defenses had any chance of success, let alone that they were rational."); *Dorfmann v. United States*, Nos. 13 Civ. 49999(JCF), 99 Cr. 51(JCF) 2014 WL 260583, at *5 (S.D.N.Y. Jan. 23, 2014) (citing strength of the evidence); *Garcia v. United States*, No. 97-022 MEJ, 2012 WL 5389908, at *10 (N.D. Cal. Nov. 5, 2012) ("no rational defendant in Garcia's position would have proceeded to trial because of the overwhelming evidence against Garcia."); *Sarria v. United States*, 866 F. Supp. 2d 1369, 1376 (S.D. Fla. 2011) (petitioner cannot show prejudice because "[h]e has not proclaimed his innocence or alleged any potential defenses."); *Mendoza v. United States*, 774 F. Supp. 2d 791, 800 (E.D. Va. Mar. 24, 2011) (concluding that "the existence of such overwhelming evidence *forecloses* any reasonable probability that petitioner would have proceeded to trial."); *see also Soza v. United States*, Nos. 1:12cr278, 1:13cv1534, 2014 WL 1338671, at *4 (E.D. Va. Apr. 3, 2014) ("[t]here is nothing in the record to establish that Petitioner may

have been able to avoid conviction or that a meritorious defense might have been available to him at trial.").

In contrast, other courts focus not only on likely trial outcomes, but also on the circumstances of the individual petitioner. In fact, even the Eighth Circuit's subsequent actions in *Hill* cast doubt on a purely objective view of the prejudice prong. According to the Eighth Circuit, this "Court did not determine if Hill's claim met the first part of the *Strickland* test . . . because the Court decided that Hill's pleadings failed to allege the 'prejudice' required by the second part of the *Strickland* test." *Hill v. Lockhart*, 877 F.2d 698, 701 (8th Cir. 1989), *aff'd on reh'g en banc*, 894 F.2d 1009 (8th Cir. 1990). And importantly, "[a]ccording to the Supreme Court, Hill 'alleged no *special circumstances* that might support the conclusion that he placed *particular emphasis* on his parole eligibility in deciding whether or not to plead guilty.'" *Id.* (quoting *Hill*, 474 U.S. at 60) (emphasis added). Subsequently, Hill filed a second petition that alleged these particular grounds for prejudice. *Id.* The District Court granted relief and the Eighth Circuit affirmed, noting, "[t]he judgment that Hill's plea would have been different but for the misadvice he received was well-supported by the record." *Id.* at 703. "Not only had Hill explicitly asked his counsel about the parole system . . . but he had made clear that the timing of eligibility was the dispositive issue for him in accepting or rejecting a plea bargain." *Id.* Moreover, "Hill's testimony regarding

his conversations with counsel, including those focused on the parole-eligibility dates, went unchallenged," and Hill testified that he would not have entered the plea had he been properly advised. *Id.* The court explained in a footnote, "[t]his part of the *Strickland* test is evaluated subjectively, not objectively. That is, it does not matter whether a reasonable person would have pleaded differently, given the correct information. . . . What counts is the likelihood that Hill would have pleaded differently." *Id.* at n.11.

As the state court below correctly noted, the Seventh Circuit soon disagreed, describing the *Hill* opinion as "not well reasoned." *United States v. Arvanitis*, 902 F.2d 489, 494 n.4 (7th Cir. 1990). But other courts have continued, like the Eighth Circuit, to account for the individual petitioner's circumstances. For example, the United States Court of Appeals for the Armed Forces has found prejudice under very similar circumstances to those present in this case and in *Hill*. *United States v. Rose*, 71 M.J. 138, 144 (U.S. C.A.A.F. 2012) (noting that "Appellee requested information regarding sex offender status on several occasions . . . made clear to his counsel that the information was important to him, and was nonetheless advised to plead guilty."). Similarly, the Michigan Court of Appeals has found prejudice based solely or mostly on the petitioner's assertion that he would not have pled guilty. *People v. Fonville*, 804 N.W.2d 878, 896 (Mich. Ct. App. 2011) (noting that the defendant "repeatedly informed the trial court that he would not have pleaded guilty [to] child enticement if he had known

that he would also be required to register as a sex offender.").

Likewise, the Court of Appeals of New Mexico has recognized that prejudice should be assessed in light of the uniquely harsh consequences entailed by sex offender registration. *State v. Trammell*, 336 P.3d 977 (N.M. Ct. App. 2014). The court observed, "[g]enerally, a defendant must establish [prejudice] through evidence beyond self-serving statements, including pre-conviction evidence, indicating a preference to either plead or go to trial and the strength of the evidence against him or her." *Id.* at 983.

Similarly, the Court of Appeals of New Mexico has found a "substantial likelihood of prejudice" under these principles even where the petitioner "admitted to the acts for which he was convicted, stating that he took 'full responsibility' for them." *State v. Edwards*, 157 P.3d 56, 66 (N.M. Ct. App. 2007).

Meanwhile, in Illinois, internal confusion about the standard persists. Recently, in *People v. Dodds*, 7 N.E.3d 83 (Ill. Ct. App. Feb. 27, 2014), the Appellate Court of Illinois determined that it was constrained by Illinois Supreme Court precedent requiring the petitioner to assert "either a claim of actual innocence or the articulation of a plausible defense" to demonstrate prejudice for the failure to advise of sex offender registration requirements. *Id.* at 98-99. Still, the court found more persuasive the argument that petitioner need only show it would have been rational

to reject the plea agreement under the petitioner's unique circumstances. *Id.* at 99-101. Even applying the former standard, however, the court found prejudice. *Id.* at 101; *see also People v. Presley*, 969 N.E.2d 952, 963 (Ill. Ct. App. 2012) (finding no prejudice where counsel failed to inform of sex offender registration consequences because "our supreme court has stated that the question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial."). And in another case applying the very same principle to deny relief, the Illinois Supreme Court has hinted, "[a]lthough we recognize that there may be circumstances where a defendant could prove that the deficient performance affected the outcome of the plea process in other ways, as with all applications of the second prong of the *Strickland* test, the question whether a given defendant has made the requisite prejudice showing will turn on the facts of a particular case." *People v. Hughes*, 983 N.E.2d 439, 458 (Ill. 2012) (citing *Strickland*, 466 U.S. at 695-96).

As these cases make clear, there is deep confusion regarding how to assess prejudice in cases of withdrawing guilty pleas and misadvice about the collateral consequences of plea agreements. And additionally, some courts recognize that a properly advised defendant still might not go to trial, but realistically could continue to bargain for a satisfactory outcome short of trial. Given the depth of this confusion and its obvious import for the ultimate

outcome of such cases, this Court should grant certiorari to clarify how courts should assess prejudice in cases of an attorney's misadvice about the collateral consequences of a plea.

II. This Court Should Grant Certiorari to Clarify that the Prejudice Assessment Must Take into Account the Petitioner's Individual Circumstances and Concerns.

This Court should grant certiorari to clarify that when considering prejudice in such cases, courts must take into account the petitioner's individual circumstances and how they would bear on the plea bargaining process. This Court "ha[s] long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 559 U.S. at 373. Although trial counsel's performance during plea bargaining always has been critically important, this Court's recent jurisprudence reflects a growing recognition that providing effective plea ad-vice is the sine qua non of most criminal defense representation. *See, e.g.*, *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012) (holding that a claim of ineffective assistance lies for an attorney's bad advice to reject a plea offer); *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012) (finding counsel ineffective for failing to relay a favorable plea offer to the defendant).

Sixth Amendment jurisprudence concerning plea bargaining reflects the "simple reality" that the vast majority of convictions in this country follow guilty pleas, not trials. *Frye*, 132 S. Ct. at 1407. As this Court explained in *Frye*, plea bargaining is now where the rubber meets the road for defendants. "'To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.'" *Id.* (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (alteration in original); *see also Lafler*, 132 U.S. at 1388 ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.").

Consistent with these principles, in *Padilla v. Kentucky*, this Court held that *Strickland* applies to immigration advice in the context of plea bargaining, and that failure to advise a defendant of adverse immigration consequences constitutes deficient performance. *Padilla v. Kentucky*, 559 U.S. 356, 366, 369 (2010). Because the Kentucky Supreme Court had not reached prejudice, *Padilla* was reversed on the performance prong and remanded for a prejudice determination. Although this Court did not conduct a prejudice analysis in *Padilla*, this Court did state, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea

bargain would have been rational *under the circumstances*." *Id.* at 372 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)) (emphasis added). Furthermore, this Court observed that "[t]he nature of relief secured by a successful collateral challenge to a guilty plea – an opportunity to withdraw the plea and proceed to trial – imposes its own significant limiting principle," which is that a habeas win results in the loss of the deal. *Id.* at 372-73.

Despite this Court's language and its confidence in the limiting principle, the state in this and many other cases responds to collateral-consequence claims by asserting that it would have been irrational for the petitioner to insist on a trial given overwhelming evidence of guilt. As discussed above, many courts apply the standard that a habeas petitioner must show he "would have insisted on going to trial," and this language, which originates from the predecessor case, *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), has become a frequently articulated standard for *Padilla* prejudice. *Padilla* itself, however, asks whether it would have been rational to reject the particular plea bargain, not whether a defendant would have insisted on going to trial, and from a practical standpoint these might be two very different standards.

Given that this Court's decision in *Padilla* is part of a line of cases emphasizing the realities of representation during the plea bargaining process, it is remarkable that many courts have strictly focused on the *Hill* standard and likely trial outcomes. Cases like *United States v. Akinsade*, 686 F.3d 248 (4th Cir.

2012) and the remand opinion in *Padilla* – i.e., cases that consider the petitioner's circumstances and how they might influence the plea bargaining process – are much more realistic and consistent with this Court's recent jurisprudence. Under this approach, a court considers the strength of the prosecution's evidence because it bears on the outcome of the case itself, whether the case ends in a trial or a plea bargain, but the court does not treat a trial like a foregone conclusion. Instead, the court considers the possibility that a defendant, properly informed, might risk rejecting an offer that would result in unacceptable collateral consequences to see if he might achieve a plea agreement that avoids those consequences. *See also* Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 696 (2011) (criticizing "the 'trial-outcome' prejudice approach" for wrongly focusing the *Padilla* inquiry on whether "there is a reasonable probability [the petitioner] would have gotten a result at trial that is better than what he received with the attorney error.").

In other words, a purely objective interpretation of the prejudice standard ignores the realities of the plea bargaining process. Although this Court in *Padilla* did not reach prejudice, its discussion of attorney performance standards made clear that the Court understood there to be options other than deportation or a guilty verdict at trial. Indeed, this Court observed that "[c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in

order to craft a conviction and sentence that reduce the likelihood of deportation. . . ." *Padilla*, 559 U.S. at 373. Additionally, the Court discussed "informed consideration" of consequences as benefiting the "plea-bargaining *process*," observing that "[b]y bringing deportation consequences *into this process*, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id.* (emphasis added).

And in *Frye* this Court also emphasized the prevalence of plea bargains and the "reality . . . that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Id.* at 1407. Furthermore, the Court rejected "the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process," concluding that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* Focusing on the practical aspects of the plea bargaining process, the *Frye* Court concluded, "[t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 1409.

Similarly, in *Lafler*, this Court cites not only *Hill*'s trial-outcome language, but also *Hill*'s statement that prejudice "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." 132 S. Ct. at 1384 (quoting *Hill*, 474 U.S. at 59); *see also id.* ("In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice."). And, in *Lafler* as well as *Frye*, this Court mandated a situation-specific determination of prejudice that takes into consideration whether both the defendant and the court would have accepted the plea. *Id.* at 1386-87. These approaches to prejudice, which look at the actual steps of the plea bargaining process and possible outcomes throughout the process, are much more reality-based than *Hill*'s focus on trial outcomes.

Since *Padilla* failed to clearly articulate a prejudice standard, courts have applied the language of *Hill*, which focuses the plea prejudice inquiry on whether a properly advised petitioner would have insisted on going to trial. In applying this standard, many courts emphasize the strength of the prosecution's case and give little attention to the circumstances of the individual defendant who faces the collateral consequence at issue. Other courts, while referring to the *Hill* standard and discussing the strength of the evidence, also give weight to individual circumstances. This Court should grant certiorari to make clear that in collateral consequence cases, it is necessary to consider the realities of both the

individual's circumstances and the plea bargaining process in order to determine whether the petitioner was prejudiced by his attorney's deficient performance.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari to consider the questions presented by this petition. Alternatively, the Court should grant the petition for writ of certiorari, vacate the judgment below, and remand for reconsideration under the correct standard.

Respectfully submitted,

JONATHAN P. SHELDON
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10621 Jones St., #301A
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(703) 691-8410
Fax: (703) 251-0757
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Counsel for Petitioner Blake Kelmar

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 6th *day of* October, 2014.

Blake Edward Kelmar, Appellant,

against Record No. 140711
Circuit Court No. CL13002648-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Hanover County

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

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ [Illegible]
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT
OF HANOVER COUNTY

BLAKE EDWARD KELMAR,

Petitioner,

v. **Case-No. CL13002648-00**

COMMONWEALTH OF VIRGINIA,

Respondent.

FINAL ORDER

Upon mature consideration of the petition for a writ of habeas corpus filed by Blake Edward Kelmar, the motion of the respondent and the authorities cited therein, the reply pleading of the Petitioner, and upon review of the entire record in this case and review of the criminal case of *Commonwealth v. Blake Edward Kelmar,* which is ordered made a part of the record in this case, the Court makes the following findings of fact and conclusions of law:

1. The petitioner is currently confined pursuant to a final order of this Court dated August 10, 2011, convicting him of two counts of carnal knowledge of a child thirteen years of age and sentencing him to serve five years on each of these charges. However, the Court suspended the petitioner's entire sentence.

(Case Nos. CR11000231-00 and -01). Following his convictions, the petitioner did not file a direct appeal.

2. The petitioner now alleges that he is entitled to habeas corpus relief on substantially the following ground: his trial counsel was ineffective for failing to object to this Court's failure to make a finding pursuant to Virginia Code § 9.1-902(H)[1] and for misadvising Kelmar regarding the sex offender registration consequences of his guilty pleas.

3. This claim is without merit.

Claim 1

4. Kelmar alleges that his trial counsel was ineffective for providing him with deficient advice regarding the sex offender registry consequences of his convictions. In order to prevail on a claim of ineffective assistance of counsel, the petitioner must show that his trial counsel's conduct was objectively unreasonable and that he was prejudiced as a result. *See Strickland v. Washington,* 466 U.S. 668 (1984). In addition, the prejudice analysis in a case in which a petitioner has entered a guilty plea requires that the petitioner establish a reasonable probability that but for counsel's alleged misadvice, that he would have

[1] This portion of the claim is wholly conclusory. Moreover, Petitioner fails to establish "actual prejudice," not merely an alleged failure to conduct the inquiry, as he is required to do in a habeas proceeding. *See Stokes v. Warden,* 226 Va. 111, 119, 306 S.E.2d 882, 886 (1983).

insisted on entering a not guilty plea and proceeding to trial. *See Hill v. Lockhart,* 474 U.S. 52, 59 (1985). If the Court can dismiss a habeas case due to absence of prejudice, it need not reach the performance prong. *See Strickland,* 466 U.S. at 697. Because Kelmar cannot establish prejudice in this case, the Court need not reach the deficient performance issue with respect to Kelmar's allegations of affirmative misadvice regarding the collateral consequence of registering as a sex offender for life.

5. In the instant case, the petitioner's claims fail because he has not established the requisite prejudice. Specifically, the petitioner states in the argument section of his petition that had he been aware of the sex offender registry consequences of his guilty plea, he "would not have pled guilty because [Kelmar] and his parents all believed that [Kelmar] had strong factual defenses to the charges based on what happened and because of his disabilities." (Habeas Petition at 8). This type of conclusory claim fails to state a basis for relief under *Strickland. See Muhammad v. Warden,* 274 Va. 3, 19, 646 S.E.2d 182, 195 (2007) (failure to proffer factual basis to support habeas claims is fatal); *see also Sigmon v. Director,* 285 Va. 526, 535-36, 739 S.E.2d 905, 909-10 (2013). The petitioner fails to articulate with particularity in the argument section of his petition what his "strong factual defenses" would have been or why there is a reasonable probability that he would have entered a not guilty plea and proceeded to trial based on these "strong factual defenses."

6. Moreover, Kelmar does not state in the argument section of his petition with particularity what defenses his, "disabilities" would have given him during the guilt phase of the trial. In fact, during argument at sentencing, trial counsel conceded that although petitioner may have had a diminished capacity, this did not provide him with a defense to the charges during the guilt phase of the trial, as the Commonwealth's Attorney had stated. *See* Tr. 34-37 (citing *Peeples v. Commonwealth,* 30 Va. App. 626, 631, 519 S.E.2d 382, 384 (1999) (*en banc*)). Although petitioner does not state with particularity in the argument section of his petition what his "strong factual defenses" were, he implies that evidence in the record suggesting that the juvenile victim in the case was the aggressor provided him with a factual defense. However, this is not the case. Petitioner does not deny in the petition that the sexual contact with the victim occurred, and he, in fact, admitted that to the arresting officer, Investigator Shawn Dover. During the summary of the evidence, the Commonwealth's Attorney stated that the petitioner told Dover that he had had contact with the victim during which he "had picked her up, they rode around awhile, they, quote, stopped in a parking lot, she sucked my dick, and I played with her boobs; I also put my fingers into the – into her vagina. He stated he believed – that he believed she was fourteen when, in fact she was thirteen, Judge." (Tr. 14).

7. Petitioner contends in his petition that the prejudice analysis under *Lockhart* is done on a "subjective" basis. He makes no contention that an objectively

reasonable defendant would have insisted on entering a not-guilty plea and proceeding to trial, thus apparently tacitly conceding he could not prevail on that argument. However, the vast majority of courts that have addressed this issue have rejected this claim, finding that the analysis is objective. *See, e.g., United States v. Fugit,* 703 F.3d 248, 260 (4th Cir. 2012); *Pilla v. United States,* 668 F.3d 368, 373 (6th Cir. 2012); *Sanchez v. United States,* 50 F.3d 1448, 1454 (9th Cir. 1995); *United States v. Shin,* 891 F. Supp. 2d 849, 854 (N.D. Ohio 2012); *United States v. Rocky Mt. Corp.,* 746 F. Supp, 2d 790, 801-02 (W.D. Va. 2010); *Wanatee v. Ault,* 101 F. Supp.2d 1189, 1204-05 (N.D. lowa 2000); *Royal v. Netherland,* 4 F. Supp. 2d 540, 555 (E.D. Va. 1998) (subsequent history omitted), Indeed, the lone Eighth Circuit case relied upon by the petitioner for this proposition (Petition at 16-17) was criticized by the Seventh Circuit shortly after it was issued. *See United States v. Arvantis,* 902 F.2d 489, 494 n. 4 (7th Cir. 1990).

8. The crimes for which the petitioner was convicted do not require the Commonwealth to prove that the defendant used force, threat, or intimidation. Instead, they are strict liability crimes, and the victim's "consent" is irrelevant. Mere proof of the prohibited sexual contact alone, given the victim's age, is adequate to convict under the statute, Virginia Code § 18.2-63. To the extent the petitioner suggests that he is entitled to habeas corpus relief in this Court because a fact finder may have misapplied the law because he was a "sympathetic defendant," that

claim fails as well. *Strickland* admonishes that a habeas petitioner is not entitled to relief based on the habeas court's conjecture that the petitioner might have had the "luck of a lawless decision maker," which excludes "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland,* 466 U.S. at 694. Moreover, the Petitioner received a substantial benefit from the plea agreement, reducing his sentencing exposure. (Tr. 14, 32-35). After presenting argument on sentencing, the Petitioner received a fully suspended ten-year sentence. Accordingly, this claim is without basis and the Court rejects it. *See Meyer v. Branker,* 506 F.3d 358, 369-70 (4th Cir. 2007) (because petitioner received favorable treatment in plea and had "virtually no chance to succeed on the merits at trial," he failed to show an "objective defendant would have insisted on going to trial"); *see also Miller v. Champion,* 262 F.3d 1066, 1072 (10th Cir. 2001) (noting that courts often review the strength of the prosecutor's case as the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial); *United States v. Mora-Gomez,* 875 F. Supp. 1208, 1214 (E.D. Va. 1995). Of course, based on his own pleading and the record, Kelmar was also aware he faced a substantial sex offender registry obligation, even though he claims that he did not understand the "lifetime" obligation. (Affidavit of Mr. and Mrs. Kelmar at if 7; Tr. 119). Petitioner had virtually no chance of acquittal at trial. Had he entered a not guilty plea, he almost certainly would have been convicted and received the **same sex offender**

registration requirement. This claim is without merit.

9. The Court's conclusion regarding a lack of prejudice is unchanged based on the arguments Kelmar has made in his reply pleading filed in this Court, which this Court has reviewed prior to entry of this order. Specifically, the Court finds that any marginal impeachment value of evidence regarding his supposed inability to manipulate buttons or zippers or the victim's alleged failure to disclose information to authorities regarding text messages she allegedly sent to the Petitioner or other contact she had with the Petitioner would not have caused an objectively reasonable defendant to insist on entering a not guilty plea and proceeding to trial in this case. This is particularly true given the Petitioner's statement to police which was not only damaging, but also materially corroborated the victim's version of events, as well as the substantial benefit Petitioner received by entering a guilty plea.

10. The Court finds an evidentiary hearing is not necessary in this case.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted. The Court waives petitioner's endorsement on this order pursuant to Rule 1:13.

It is further hereby ORDERED the Clerk serve by mail certified copies of this Order on the petitioner and on Donald E, Jeffrey, III, Senior Assistant Attorney General, counsel for the respondent.

Entered this 25th day of February 2014,

/s/ J. Overton Harris
Judge

I ask for this:

/s/ Donald E. Jeffrey, III
Donald E. Jeffrey, III
Senior Assistant
Attorney General

Seen and objected:

/s/ Jonathan A. Sheldon
Jonathan A. Sheldon
Counsel for the Petitioner

APPENDIX C

Commonwealth of Virginia
FIFTEENTH JUDICIAL CIRCUIT

[SEAL]

J. Overton Harris
Post Office Box 505
Hanover, Virginia 23069-0505
(804) 365-6161

JUDGES	COURTS
Harry T. Taliaferro, III	**Northumberland County**
J. Martin Bass	**Westmoreland County**
Gordon F. Willis	**Spotsylvania County**
David H. Beck	**King George County**
Joseph J. Ellis	**Lancaster County**
J. Overton Harris	**Caroline County**
Charles S. Sharp	**Richmond County**
Sarah L. Deneke	**Stafford County**
_____	**Hanover County**
J. Peyton, Farmer, Retired	**Essex County**
	City of Fredericksburg

Joseph E. Spruill, Jr., Retired
William H. Ledbetter, Jr., Retired
H. Harrison Braxton, Jr., Retired
Ann Hunter Simpson, Retired
John R. Alderman, Retired
Horace A. Revercomb, III, Retired

January 30, 2014

John P. Sheldon, Esq.
Sheldon, Flood & Haywood, P.L.C.
10621 Jones Street, Suite 301A
Fairfax, Virginia 22030
Counsel for Petitioner

Donald E. Jeffrey III, Esq.
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Senior Assistant Attorney General

Re: Kelmar v. Commonwealth
Hanover County Circuit Court
Case Number CL13002648-00

Dear Counsel:

Before the court is Petitioner's Petition for a Writ of Habeas Corpus and Respondent's Motion to Dismiss. The Court has reviewed the record and finds no evidentiary hearing is necessary. The Motion to Dismiss is granted. Petitioner's Petition for a Writ of Habeas Corpus is denied and dismissed.

Mr. Jeffrey shall prepare and circulate an order reflecting the ruling of the court and submit it for entry within 14 days.

Very truly yours,

/s/ J. Overton Harris
J. Overton Harris
Hanover County Circuit
Court Judge