ANDREW GILBERT SCHMUHL,

Petitioner,

v. **Case No. CL-2021-2333**

HAROLD CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

MEMORANDUM OPINION AND ORDER

DISMISSING

PETITION FOR A WRIT OF HABEAS CORPUS

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MEMORANDUM OPINION AND ORDER

DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Before the Court is a petition for a writ of habeas corpus filed on behalf of Andrew Gilbert Schmuhl (hereafter "Petitioner") and the Motion to Dismiss filed by the Director, Virginia Department of Corrections (hereafter "Respondent"). For the reasons set forth below, the Respondent's Motion to Dismiss is GRANTED. Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a petitioner must prove both that his counsel's performance was deficient and that he was prejudiced by such deficient performance. The petitioner has failed to meet either burden.

Petitioner's request for an evidentiary hearing is denied, given that "the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters…" Va. Code § 8.01-654(B)(4). *See also Friedline v. Commonwealth*, 265 Va. 273, 277 (2003) ("When a trial record provides a sufficient basis to determine the merits of a habeas corpus petition, a circuit court may refuse either party's request for an evidentiary hearing."). The petitioner has also submitted several affidavits and Va. Code § 8.01-660 "grants the habeas court discretion to consider 'affidavits of witnesses' as substantive evidence." *Smith v. Brown*, 291 Va. 260, 264 (2016). In rendering its decision, the Court has considered these affidavits. The Court finds that the trial record, coupled with the Court's consideration of the affidavits submitted by the petitioner, are sufficient for the Court to determine the merits of the habeas corpus petition. Therefore, petitioner's request for an evidentiary hearing is DENIED.

1. Summary of Court's Ruling

This habeas petition comes down to one issue: *Did trial counsel's failure to assert an insanity defense constitute ineffective assistance of counsel?* The petitioner contends that the failure of trial counsel to assert an insanity defense was not only unreasonable but indefensible. The Court finds that trial counsel's approach to the case was neither unreasonable nor indefensible, and their performance throughout the litigation of this case demonstrated not only their zealous commitment to their client but their competence in seeking to achieve their client's objectives. The decision not to assert an insanity defense was no exception.

Petitioner asserts that he could prove at an evidentiary hearing that trial counsel "had no strategic reason not to comply with the insanity statutes…" Petitioner's Reply 4 (Jun. 21, 2021). In fact, there were at least four significant strategic advantages that the petitioner derived by not asserting an insanity defense. These advantages are not the Commonwealth's "*post hoc* rationalizations," nor were they "invented" by the Commonwealth, as now claimed by petitioner. Petitioner's Reply 8 (Jun. 21, 2021).

First, by not asserting an insanity defense, the petitioner avoided being subjected to a psychiatric or psychological examination by the Commonwealth's own expert, pursuant to Va. Code § 19.2-168.1. This was exceptionally significant. Indeed, within days of receiving what it initially believed was an insanity defense notice, the Commonwealth arranged for Dr. Stanton Samenow to conduct the evaluation of the petitioner and noted the date when he would be available to testify.[1] Petitioner acknowledges that his sole chance of acquittal – his "only defense" (Petitioner's Reply 6 (Jun. 21, 2021)) – depended on persuading the jury that he was not legally responsible for the crimes committed against Leo Fisher and Susan Duncan due

[1] *See* Notice and Mot. for Evaluation of the Def.'s Sanity 2 (Nov. 23, 2015).

to a "medication-induced delirium." Pet. 21 (Feb. 16, 2021). Preventing the Commonwealth's mental health expert from evaluating the petitioner not only deprived the Commonwealth's expert of a unique and critical source of information but ensured that the only mental health expert who had actually evaluated the petitioner would be the expert retained by the defense.

Second, by not asserting an insanity defense, the petitioner avoided having to disclose to the Commonwealth the evaluation report of his mental health expert, along with "copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation," pursuant to Va. Code § 19.2-169.5(E). This prevented the Commonwealth from learning the substance of petitioner's expert's mental health evaluation until nine days into the trial.

Third, by not asserting an insanity defense, the petitioner sought the extraordinary strategic advantage of placing before the jury his own mental health expert without any risk of the Commonwealth presenting an effective rebuttal expert. Any such expert would neither have evaluated the petitioner nor been privy to the results of the defendant's own expert evaluation. Petitioner now characterizes trial counsel's plan as "unprecedented", "unheard of", "unsupported", "unreasonable" and yielding "absurd results," Pet. 39-40 (Feb. 16, 2021) – but it was an entirely plausible and reasonable possibility at the time.

Fourth, by not asserting an insanity defense, the petitioner completely avoided the risk of being found Not Guilty by Reason of Insanity, which could have resulted in the petitioner's detention for years and extensive restrictions on his liberty. Instead, if the jury accepted the petitioner's involuntary intoxication defense, its verdict would have been *Not Guilty*. The defendant would walk out of the courtroom a free man, what trial counsel termed the "end game of this, of involuntary intoxication defense, if we win…" Tr. 34 (Nov. 30, 2015). It is hard to imagine a more compelling motivation for a defendant not to assert an insanity defense, especially if there was a reasonable possibility that the trial court could be persuaded to admit the petitioner's expert mental health testimony.

These were each genuine and tangible strategic advantages, but they required trial counsel to assert involuntary intoxication without asserting an insanity defense.

Petitioner now contends that the decision not to assert an insanity defense was not a "strategic" decision but, rather, the inevitable, inescapable and unavoidable consequence of trial counsel's erroneous interpretation of law. In support of that claim, petitioner presents a declaration from Mr. Haywood[2] and an

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[2] Mr. Haywood's declaration reads in part as follows: "I believed that involuntary intoxication and insanity were distinct offenses, and that intoxication was not covered by the insanity provisions of the Code. I also recognized that the law was not exactly crystal clear. I was convinced I was right, but I saw the risk that a court might disagree, which is why I filed a notice and asked the Court to determine whether intoxication is in all cases insanity. Once the Court refused to make that determination, I decided what I believed the law was. We proceeded as we did because we felt we were entitled to rely on the law. I did not make a strategic decision to risk Dr. Ryan's evaluation or opinion being excluded. I was not engaged in gamesmanship about our defense. I simply did not believe the law required us to comply with the insanity statutes." Haywood Declaration. 2 (Feb. 15, 2020) (Mr. Haywood's declaration indicates the year it was signed is "2020," but the Court assumes this is a typographical error, and the year of the declaration is 2021).

affidavit from Mr. Elders,[3] in which each state that the decision to forego an insanity defense was not a strategic decision. Petitioner appears to believe the affidavits of trial counsel are essentially dispositive[4]. They are not, no more than trial counsel's statements made at trial are dispositive.[5] Counsel's subjective state of mind is not controlling.[6] While the Court must certainly give due weight to the interpretation by trial counsel of their reasons for doing what they did, the determination as to whether a course of conduct was a reasonable strategic approach under all the circumstances is ultimately an objective judgment for the Court to make. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 523 (2003) ("In assessing counsel's investigation, we must conduct an objective review of their performance....")[7]

Petitioner's argument also depends on a proposition at odds with the law and the facts, i.e., *that once trial counsel concluded that it was not required to assert an insanity defense, it was required not to assert an insanity defense.* In fact, trial counsel's determination that the law did not require the filing of an insanity defense opened the door to a range of strategic options. One option was to assert an insanity defense. This would virtually guarantee the admissibility of their mental health expert testimony but would forfeit the four significant advantages described above. A second option was not to assert an insanity defense but obtain a pretrial ruling on the admissibility of mental health expert testimony and, if the ruling

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[3] Mr. Elders' affidavit reads in part as follows: "We believed that involuntary intoxication and insanity were different defenses and that we were not required to comply with the insanity provisions of the Code. For that reason, we did not comply with the insanity provisions. We believed we were right, but we misapprehended the law. We did not think we were rolling the dice with Mr. Schmuhl's defense. We also did not make a strategic decision to risk having Dr. Ryan's evaluation or opinion be excluded. In fact, Dr. Ryan's evaluation and opinion were the core of our defense." Elders Aff. 1-2 (Feb. 9, 2021).

[4] See Petitioner's Reply 2 (Jun. 21, 2021) ("The Respondent does not, however, offer any affidavit from trial counsel supporting its speculation. In contrast, Mr. Schmuhl has provided affidavits from his trial counsel affirmatively stating that they *did not* make such strategic decisions....") (Emphasis in Original)

[5] *See, e.g.,* Tr. 180 (Jun. 1, 2016) ("[T]here's a reason we didn't ask for an insanity evaluation, it wasn't strategic, it's because it isn't an insanity defense.")

[6] *See, e.g., Harrington v. Richter*, 562 U.S. 86, 109-110 (2011) ("Although courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions... *Strickland*... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.") (Emphasis Added) (citations omitted). And "[b]ecause we use an objective standard to evaluate counsel's competence, once an attorney's conduct is shown to be objectively reasonable, it becomes unnecessary to inquire into the source of the attorney's alleged shortcomings." *Bonin v. Calderon,* 59 F.3d 815, 838 (9th Cir. 1995) (citation omitted).

[7] In the context of an ineffectiveness claim, a "strategy" means "no more than this concept: trial counsel's course of conduct, that was neither directly prohibited by law or directly required by law, for obtaining a favorable result for his client." *Chandler v. United States*, 218 F.3d 1305, 1315 n.14 (11th Cir. 2000).

was adverse to the defense, file an insanity defense notice.[8] But to obtain that definitive pretrial ruling, trial counsel would need to provide the Court a detailed proffer of the expert testimony it planned to offer. A third option – which was the one actually chosen by trial counsel – was not to assert an insanity defense and not to make the detailed proffer of the expert testimony it planned to offer. For tactical reasons, trial counsel declined to make the detailed proffer,[9] and acknowledged that they understood the risks associated with that decision.[10] However, by selecting this option, trial counsel preserved intact the four significant advantages described above and kept secret the substance of Dr. Ryan's anticipated mental health expert testimony until nine days into the trial.[11]

The Court finds that each of these options presented trial counsel with choices that required the exercise of strategic judgment. In order for a petitioner to prove that "counsel's conduct fell outside the range of reasonable professional assistance," the petitioner must "overcome the presumption" that counsel's actions represent "sound trial strategy." *See Lewis v. Warden of Fluvanna Correctional Center*, 274 Va. 93, 112 (2007). The petitioner has failed to "overcome the presumption."

It is certainly true that trial counsel's performance did not achieve the result that was sought and so the petitioner is now "second-guessing" the decision not to assert an insanity defense. But habeas courts have been warned time and again not to "second-guess" trial counsel's strategic judgments. *See, e.g.*, *Strickland v. Washington,* 466 U.S. 668, 689 (1984), *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998), *and Winston v. Pearson*, 683 F.3d 489, 504 (4th Cir. 2012). Similarly, habeas courts must make

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[8] That option became available on December 23, 2015, when the Court vacated the trial date.

[9] Mr. Haywood stated, "Really what the Court is asking for here is our entire trial strategy. That is what the request is. Our entire case rest on an involuntary intoxication defense. The whole thing. It's not just one piece of evidence. It is our strategy. It's our case. And the Commonwealth knows why they want it, they're here just like we were on a bill of particulars motion. They want to know what our defense is. They don't have that right to know that in advance." Tr. 70-71 (Dec. 23, 2015).

[10] "[W]e're the ones taking on the risk... If it's excluded, well, we don't – you know, we are taking that risk." Tr. 94 (Dec. 23, 2015).

[11] In addition, trial counsel took another step that illustrated the strategic considerations associated with the decision not to assert an insanity defense. On November 20, 2015, trial counsel filed a notice with the Court that was so similar to an insanity defense notice that both the Court and the Commonwealth took it to be an insanity defense notice. Tr. 48 (Nov. 30, 2015). Then, in a pleading that trial counsel filed days later, and at the argument on November 30, 2015, trial counsel denied it was an insanity defense notice and objected to complying with any of the insanity defense's statutory procedures. *Why file the notice then?* There was one clear strategic advantage in doing so: If the Court, over the defendant's objections, treated the notice as an insanity notice, and ordered compliance with the insanity defense's statutory procedures, the defendant would be in no worse position than if he had filed an actual insanity notice but would now have a potentially significant appellate issue. And, if the Court declined to make that decision, and instead required that the defendant either elect or not elect an insanity defense, the defendant was in no worse position than if he had filed no notice at all.

"every effort to 'eliminate the distorting effects of hindsight.'" *Perry v. Warden of Mecklenburg Correctional Center*, 1 Va. App. 21, 23 (1985) (citation omitted).

The decision not to assert an insanity defense was an informed and objectively reasonable strategic decision and, therefore, the Court finds that the petitioner has failed to carry his burden of establishing that trial counsel's performance was deficient.

Petitioner has also failed to establish the prejudice requirement as set forth in *Strickland.* The evidence before the jury demonstrated by overwhelming evidence that the petitioner was not insane, not "involuntarily intoxicated," not "unconscious," and not in a state of "medication-induced delirium." The petitioner, along with his wife, Alecia Schmuhl, had a clear motive for committing the crime, meticulously planned the crime, took multiple deliberate steps to conceal the Schmuhls' involvement in the commission of the crime, and executed the crime in a manner designed to leave neither incriminating evidence nor witnesses behind. Further, the jury was told of all the medications allegedly taken by the petitioner and the toxicological effects of such medication – including the many potentially serious effects on an individual's mental state. In short, even if the petitioner had been permitted to put before the jury his full mental health defense, there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Therefore, the Respondent's Motion to Dismiss must be GRANTED.

2. The "Performance" Prong of Strickland

a. Facts

i. The June 2015 proceedings

On June 19, 2015, trial counsel filed a motion seeking Court appointment of an "evaluator to evaluate [the defendant's] sanity at the time of the offense."[12] The notice was filed pursuant to Va. Code § 19.2-169.5 ("Evaluation of sanity at the time of the offense; disclosure of evaluation results."). Counsel indicated that "there is abundant evidence to believe that Mr. Schmuhl's sanity at the time of the offense will be a significant factor in his defense." *Notice and Mot. for Appointment of Qualified Expert 4* (Jun. 19, 2015). The defendant withdrew this motion at the June 26, 2015 hearing.[13]

ii. The November 13, 2015 hearing

Although the defendant withdrew the motion for the Court to appoint a sanity evaluator, trial counsel made it clear that a decision to invoke the insanity defense was still likely. Mr. Elders stated,

> I strongly suspect, without getting too far over our skis, that we're going to have an NGRI filing that we're going to submit to the Court in the near future. That NGRI filing is going to require the Commonwealth, assuming that it want's [sic] to oppose that finding, to hire it's [sic] own examiner, it's [sic] own mental health experts, to have them interview Mr. Schmul

[12] *Notice and Mot. for Appointment of Qualified Expert 1* (Jun. 19, 2015).

[13] *See* Tr. 2 (Jun. 26, 2015) *and* Order 1 (Jun. 26, 2015).

[sic], and go through the reporting process, which obviously in normal circumstances, takes weeks or months.

Tr. 13 (Nov. 13, 2015).[14]

At the November 13, 2015 hearing, trial counsel acknowledged its understanding that in the event it filed an insanity defense notice, the Commonwealth would be permitted to hire its own mental health experts "to have them interview Mr. Schmuhl." Tr. 13 (Nov. 13, 2015).

iii. The November 20, 2015 notice and November pleadings

On November 20, 2015, trial counsel filed the following notice with the Court:

> Please take notice that the Defendant, Andrew Schmuhl intends to assert at trial that his mental state at the time of the offense met the legal standard for insanity, and intends to present evidence, including expert testimony, in support of this defense. His mental state at the time of the offense resulted from the use of medication.[15]

Upon receipt of the notice, the Commonwealth immediately wrote trial counsel.[16] The letter read in part: "The Commonwealth is in receipt of your notice of intent to present evidence of insanity. The Commonwealth hereby requests Defendant provide a full report concerning the defendant's sanity at the time of the offense, including whether he may have had a significant mental disease or defect which rendered him insane at the time of the offense, the results of any other evaluation of the defendant's sanity at the time of the offense, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation."

On November 23, 2015, trial counsel responded by letter to the Commonwealth's request. The letter indicated that the defendant would submit to an evaluation if ordered to do so by the Court pursuant to Va. Code § 19.2-168.1. The letter made no reference to the Commonwealth's request for a copy of any reports regarding the defendant's sanity at the time of the offense.[17]

Also on November 23, 2015, the Commonwealth filed two motions, one entitled *Notice and Motion to Compel Defendant to Comply with Va. Code § 19.2-169.5*[18] and the other entitled *Notice and Motion for*

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[14] Mr. Elders' statements were made in connection with a defense motion for a continuance, which the Court denied. *See* Order (Nov. 16, 2015).

[15] Respondent's Exhibit 1, at 68.

[16] Respondent's Exhibit 1, at 69.

[17] This letter is not in Respondent's Exhibit 1, but it is in the court's file.

[18] Va. Code § 19.2-169.5 requires that the defense turn over to the Commonwealth all evaluation reports of the defendant's sanity, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation, once the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence in support of an insanity defense.

Evaluation of the Defendant's Sanity Pursuant to Va. Code § 19.2-168.1[19]. In the motion to compel, the Commonwealth sought the defendant's timely compliance with Va. Code § 19.2-169.5 regarding the production of reports and records. In its motion for an evaluation, the Commonwealth sought an order from the Court ordering an evaluation of the defendant's sanity and appointing Dr. Stanley Samenow as the Commonwealth's mental health expert.

On November 25, 2015, the defense filed its response to the two motions. It opposed both motions. In its response, it revealed for the first time the strategic approach it was taking to these issues. Among other statements in the document, trial counsel indicated:

- That the defendant was not claiming a defense of insanity and, therefore, did not cite Virginia Code 19.2-168 in its notice.
- That the defense that was being claimed was involuntary intoxication.
- That, in light of the fact that the defendant was not asserting an insanity defense, the Commonwealth was only entitled to reports and records when they were due pursuant to the discovery order, 10 days before trial.

Defendant's Response to Motion to Compel and Motion for Appointment of Evaluator Under Va. Code § 19.2-168. (November 25, 2015).

iv. The November 30, 2015 hearing

On November 30, 2015, at a hearing to consider these and other matters, the Court questioned Mr. Haywood regarding the November 20th Notice and his subsequent filing.

The Court asked: "[I]n reading your pleading it seems to me that you're not objecting – but if I'm reading it wrong, you tell me, you're not objecting to a Commonwealth interview by Dr. Samenow, assuming that's the person they choose to use, of your client. You're not objecting to producing a report on a date to be ordered by the Court. And you're not objecting to producing the documents that were provided to your experts." Tr. 32 (Nov. 30, 2015). Mr. Haywood responded: "I'm actually – I'm objecting to all those things." *Id.* He went on to state that the defense would comply if ordered to do so, "but we would object to complying because we don't think that that is required according to law." *Id.* at 33.

When asked by the Court what obligations the defendant did have based on an involuntary intoxication defense, Mr. Haywood stated that it "would only require us to file a discovery order." *Id.* "So our position is that none of those [insanity-related] statutes control here and for that reason we don't have any obligation under those statutes and the only thing that controls us here is the discovery order, which would require us to produce reports of our expert ten days before the trial." *Id.* at 35.

These statements by Mr. Haywood make clear that trial counsel – at the very time they were deciding how to approach this issue – understood the substantial strategic advantages of not asserting an

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[19] Va. Code § 19.2-168.1 provides the Commonwealth the statutory right to have the defendant evaluated by a court-appointed mental health expert once the attorney for the defendant gives notice of an intent to present expert testimony in support of an insanity defense. It further provides that the court shall order the defendant to submit to the evaluation and the defendant shall be advised that a refusal to cooperate with the Commonwealth's expert could result in the exclusion of the defendant's expert evidence.

insanity defense. Similarly, trial counsel understood what Mr. Haywood termed the "end game." *Id.* at 34. Unlike a NGRI-acquittee, if the defendant prevailed in his involuntary intoxication defense, the defendant "will walk free" and not be civilly committed. *Id.* at 35.

The Court determined that the defendant needed to make an election and advised Mr. Haywood as follows: "I think you have to elect either you have given the Court an insanity notice and I will proceed – and I will treat it as such and proceed from there or you tell me it's not an insanity notice even though when I read it I thought it was, but if you tell me it's not, I believe I have to accept your representation because you get to choose." *Id.* at 52. Mr. Haywood responded: "It's an involuntary intoxication notice, so it's not an insanity notice and I guess that's as much as I need to say." *Id.*[20]

The petitioner derived several immediate benefits from trial counsel's declaration. First, the Court stated that it would not order the petitioner to cooperate with the Commonwealth's expert. *Id.* Second, the Court did not order the defense to immediately produce to the Commonwealth the defendant's mental health records. This was based on Mr. Haywood's objection: "I think the standard is different under the discovery order, tha[n] it would be under the [19.2-]169.5, that would be my primary objection to this." *Id.* at 53.[21] Third, the Court did not order the defense to produce its expert's report.

The Court set December 23, 2015 as the hearing date to resolve what mental health expert testimony, if any, would be allowed at trial and ordered the parties to brief the issue.

As the hearing came to a close, there was a colloquy with trial counsel that made it clear how important it was to the defense to keep secret the mental health expert's conclusions.[22] The Commonwealth sought production of the mental health expert's report prior to the December 23rd hearing date. Casey Lingan, Deputy Commonwealth's Attorney, stated: "I think that's a reasonable request and I think it would help the Court in determining the *Stamper* [*v. Commonwealth*, 228 Va. 707 (1985)] issue as well…" *Id.* at 64. Mr. Haywood opposed the request, arguing that the defense would be under no obligation to produce

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[20] *See also* Order 1 (Nov. 30, 2015) ("The Court inquired of Counsel for Mr. Schmuhl whether or not his notice filed on November 20, 2015 was a notice of an intent to present an insanity defense. Mr. Hayward [sic] stated that it was a notice of an involuntary intoxication defense and not a notice of an intent to present an insanity defense.").

[21] Mr. Haywood also observed that, in the event the Court ultimately excluded the defendant's mental health expert, it would raise the issue "of whether we have any obligation to turn over records that we provided the expert." Tr. 54 (Nov. 30, 2015).

[22] This was not the defendant's first effort to keep the Commonwealth from learning anything about its mental health experts – including even their names. Initially, the defense filed a motion for permission to make *ex parte* funding requests. *Mot. to Permit Ex Parte Funding Requests* (May 29, 2015). The Court denied the motion. Order (June 5, 2015). Then the defendant filed a motion for either $15,000 to hire "psychiatric experts" or an *ex parte* hearing for the Court to consider appointment of particular experts. *Mot. for Expert Funding* [and] *Mot. for Ex Parte Hearing for Psychiatric Experts* (June 19, 2015). These motions were withdrawn at the hearing on June 26, 2015. Order (June 26, 2015).

any report if the Court ultimately excluded the defendant's mental health expert. *Id.* at 65. Consequently, the Court did not order the production of the expert's report prior to the December 23, 2015 hearing.

v. The December 2015 pleadings and December 23, 2015 hearing

Three additional events in December 2015 demonstrated how critical it was to the defendant's trial strategy to keep secret the substance of its anticipated mental health expert testimony, a strategy that would have been impossible if an insanity notice had been asserted.

First, on December 14, 2015, the defendant filed *Defendant's Memorandum of Law Concerning Admissibility of expert Mental State Testimony.* At the November 30, 2015 hearing, the Court had made it clear to trial counsel that "in order to rule on a *Stamper* issue [regarding the admissibility of mental health expert testimony], the Court is going to need to know precisely what the experts are going to say." Tr. 56 (Nov. 30, 2015). The Court reiterated this point: "And obviously you're going to need to put in a detailed summary of what your expert – who your expert is and what they're going to testify to that you believe would qualify under Stamper." *Id.* at 63. Mr. Haywood responded: "Certainly." *Id.* Nevertheless, the pleading filed by trial counsel on December 14th did not contain a single reference to what the defense mental health experts intended to say at trial.

Second, on December 15, 2015, the Court took the extraordinary step of sending trial counsel a series of pointed questions:

1. *Please describe in more detail the type of expert mental health testimony you intend to put on at trial. It is unclear from your memorandum the nature of mental health expert testimony you intend to present. In particular, the Court wishes to know, first, whether you intend to call a mental health expert who will be relying upon any mental health records that may exist for Mr. Schmuhl and, second, whether you intend to put on expert mental health testimony based on interviews conducted by your mental health experts with Mr. Schmuhl.*

2. *Is the expert testimony you are seeking to offer specific to Mr. Schmuhl or will it be general in nature (such as a toxicologist testifying about the possible effect of a particular medication, as was presented by the Commonwealth in Fitzgerald.). In particular, do you propose to put on testimony of a mental health expert who will be testifying about the effect of particular medication on Mr. Schmuhl, given his particular mental health history or his particular mental health diagnosis. (If so, and if you rely upon Fitzgerald for the right to call such an expert, please explain your position as to whether the Supreme Court in Fitzgerald actually had before it the question of the admissibility of the psychiatrist's testimony as opposed to the admissibility of the toxicologist's testimony.)*

3. *If it is your intent to present mental health testimony of experts based in part on interviews with your client, what is your position with respect to whether the Court has the authority to order that your client submit to an interview from a mental health expert retained by the Commonwealth, as would be done in an insanity case? In your memorandum at Page 10, you state that, in an involuntary intoxication case, expert*

mental state testimony is admitted "to the same degree as in insanity cases...." In your view, does that mean the Commonwealth's expert is afforded the same access to your client to the same degree as in insanity cases?[23]

On December 18, 2015, trial counsel responded to the Court's questions, as follows:

With respect to the first question, trial counsel stated, *inter alia,* that "[t]he defendant believes the court's request risks previewing evidence or divulging strategy in advance of trial." Trial counsel added: "... Mr. Schmuhl is not required to explain the contents of his affirmative defense." *Mem. Regarding the Court's Questions Concerning Expert Testimony 1* (Dec. 18, 2015).

With respect to the second question, trial counsel stated, *inter alia*, that "Mr. Schmuhl is unaware of any requirement that he preview evidence or divulge strategy in advance of trial. The experts retained by the defense are esteemed in their fields and have developed an opinion regarding Mr. Schmuhl's mental state at the time of the offense, in accordance with their professional training and the standards required by their individual disciplines." *Id.* at 2.

With respect to the third question, trial counsel stated, *inter alia*, that "[n]ever has a Virginia court held the involuntary intoxication defense to be an insanity defense, and never before has there been any indication that the Commonwealth may avail itself of the procedures set forth in Va. Code 19.2-167 et seq." *Id.* at 6.

Trial counsel's unwillingness to provide even a scintilla of detail regarding the substance of the mental health expert testimony that they intended to offer at trial – even in the face of direct questions from the presiding judge – illustrates the central strategic importance to the defense of maintaining an impenetrable cloak of secrecy over the anticipated testimony. This, of course, would have been a categorical impossibility had an insanity defense been asserted, given all the disclosure requirements to which a NGRI-defendant is subject. For petitioner to now argue that trial counsel "had no strategic reason not to comply with the insanity statute" (Petitioner's Reply 4 (Jun. 21, 2021)) is to ignore the determined efforts of counsel to keep secret for as long as possible the testimony of its mental health expert and to thus obtain all the tactical benefits associated with the element of surprise.

Similarly, trial counsel's response to the third question posed by the Court – "*[W]hat is your position with respect to whether the Court has the authority to order that your client submit to an interview from a mental health expert retained by the Commonwealth, as would be done in an insanity case?*" – illustrated trial counsel's clear understanding that a critical benefit of not asserting an insanity defense is that the Commonwealth had no right to use the insanity-related statutes to compel the defendant to submit to an evaluation by the Commonwealth's mental health expert. Trial counsel stated: "The insanity statutes... do not apply to involuntary intoxication defenses," and the Court had no "equitable" authority to apply insanity procedures in a non-insanity case. *Mem. Regarding the Court's Questions Concerning Expert Testimony* 6 (Dec. 18, 2015). Once again, this demonstrates the strategic advantage the petitioner derived from not asserting an insanity defense.

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[23] The questions posed by the Court were reproduced in the Defendant's December 18, 2015 response. *Mem. Regarding the Court's Questions Concerning Expert Testimony* 1-4 (Dec. 18, 2015).

The third event that occurred in December 2015 was the December 23, 2015 hearing, the hearing that was set for the specific purpose of resolving pretrial the admissibility of mental health testimony. The Court had made its position clear at the November 30, 2015 hearing: it needed to know "precisely" what the defense experts were going to say and it needed a "detailed summary" of the expert's anticipated testimony. Tr. 56, 63 (Nov. 30, 2015). Trial counsel now had several strategic options among which to choose:

Option one was to persist in trial counsel's refusal to divulge the substance of the defendant's anticipated mental health expert testimony. That would mean the admissibility issue could not be resolved pretrial and would need to be resolved in the midst of trial.[24] This had advantages and disadvantages. The obvious advantage is that it maintained the cloak of secrecy over the defendant's expert testimony until it would be far too late for the Commonwealth to present a rebuttal expert witness, or even prepare to cross-examine. If the court agreed with trial counsel's argument, the defendant would have obtained a stunning advantage – the opportunity to place before the jury unchallenged and unrebutted mental health expert testimony. The disadvantage was equally obvious: the Court might disagree with trial counsel's argument, meaning the defense would need to scramble in the midst of trial to address the loss or limitation of its anticipated mental health expert testimony.

Option two was to divulge the substance of the defendant's anticipated mental health expert testimony and obtain from the Court a definitive pretrial ruling on admissibility. The advantage of this option is that trial counsel would know well before trial what, if any, mental health expert testimony it could place before the jury, and could plan accordingly. The disadvantage is the element of surprise would be lost; the Commonwealth would now know what to expect and could prepare its own expert and its own cross-examination.

There was also a third option, which arose just before the hearing on the admissibility of mental health expert testimony. For reasons unrelated to the issues now before the Court, the trial date was vacated. This meant that in the event the Court disagreed with trial counsel's argument, and excluded or limited the defendant's expert testimony, there was now time for trial counsel to file an actual insanity defense notice, thus ensuring the admissibility of their expert's testimony. The disadvantage, of course, is that the defendant would now be bound to meet all the requirements of an insanity defense notice, including disclosure of reports and records and submitting to an evaluation by the Commonwealth's mental health expert.

Trial counsel chose Option one, arguing that "[r]eally what the Court is asking for here is our entire trial strategy." Tr. 70 (Dec. 23, 2015). Said Mr. Haywood: "My concern is entirely about trial strategy and that's the reason I don't want to say anything more than I have." *Id.* at 81. "I don't want to tell them [the Commonwealth] what our trial strategy is." *Id.* at 92.

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[24] In their December 18, 2015 filing, trial counsel argued that the Court could rule on the admissibility of expert testimony based "on general principles without delving into particulars of the case." *Mem. Regarding the Court's Questions Concerning Expert Testimony* 3 (Dec. 18, 2015). *See also* Tr. 67 (Dec. 23, 2015) (Mr. Haywood stated, "Your Honor, I think first of all, you can rule on the general principles."). The Court, however, had previously advised trial counsel that it needed a "detailed summary" of the expert's anticipated testimony. Tr. 56, 63 (Nov. 30, 2015).

"We're declining to divulge any of our trial strategy." *Id.* at 107. The matter was, therefore, set to be resolved in the middle of trial before the defense expert took the stand.[25]

The December 23, 2015 hearing illustrated yet again that a core element of counsel's trial strategy was to keep secret for as long as possible the substance of the defendant's anticipated mental health expert testimony[26] – even if it meant that its expert might be excluded or limited in the middle of trial.[27] Trial counsel had succeeded – over the vociferous objections of the Commonwealth[28] – in putting off any disclosure of substance until the middle of trial.[29]

vi. The May 27, 2016 hearing

This brings the Court to the hearing on May 27, 2016. The Court opened the hearing by stating that "we're now at the point of addressing the issue of the admission of psychiatric testimony at this trial." Tr. 2 (May 27, 2016).

Mr. Haywood began by arguing that "Virginia appellate courts have not been clear on exactly what involuntary intoxication is and what it isn't, and what is an insanity defense and what isn't." *Id.* at 8. "And the best I can come up with or that I have come up with in that regard is that involuntary intoxication isn't

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[25] *See* Order 2 (Jan. 4, 2016) ("The Court, after hearing argument on the Commonwealth's motion in limine regarding the admissibility of expert mental health testimony, found that the matter could not be resolved pre-trial. The motion shall be resolved at trial prior to any witness on expert mental health testimony beginning his or her testimony.").

[26] This is not a new 2021 finding by the Court in response to the habeas corpus petition. *See, e.g.,* these statements by the Court at the June 1, 2016 hearing: "... [I]n my view, the principle problem that we're having right now is that you [Mr. Haywood] and Mr. Elders and Mr. Priale made a strategic decision, a tactical decision not to disclose the nature, the content of the defense despite the Court's efforts to have you provide the Court detail about it." Tr. 118 (June 1, 2016). "[Y]ou [Mr. Haywood] and Mr. Elders and Mr. Priale made a decision for strategic reasons not to bring it up in – not to raise it in December ...." Tr. 179 (June 1, 2016).

[27] Mr. Haywood stated, "If it's excluded, well, we don't – you know, we are taking that risk." Tr. 94 (Dec. 23, 2015).

[28] At the December 23, 2015 hearing, the Commonwealth argued that the defense had now missed its opportunity to divulge the substance of its anticipated expert testimony and, therefore, the court should decide the matter based on what it had before it – which was "no proffer." Tr. 61 (Dec. 23, 2015). Therefore, said Mr. Lingan, the Court should "[r]ule that mental health evidence can't be presented. I mean, this was the court date we set to determine that very fact." *Id.*

[29] Moreover, trial counsel was no longer willing to concede that the Commonwealth was entitled to the defense's expert report *at all*. At the November 30, 2015 hearing, trial counsel had indicated that it understood it would need to turn over the defense's expert report ten days before trial pursuant to the discovery order. Tr. 35 (Nov. 30, 2015). At the December 23, 2015 hearing, however, trial counsel argued that the discovery order did not require the creation or production of a report at all. Tr. 88 (Dec. 23, 2015).

the insanity defense, or it isn't an insanity defense, but it does require a finding of insanity." *Id.* Mr. Haywood agreed with the Court that "involuntary intoxication is, is temporary insanity." *Id.* He later reiterated this point: "[W]e are sitting on a defense that's premised on temporary insanity." *Id.* at 37.

Mr. Haywood argued that the *Stamper* decision concerned a defense of "diminished capacity" – a defense not recognized in the Commonwealth – and did not preclude the admission of "mental state" testimony in an involuntary intoxication case. He argued that two cases in particular -- *Pritchett v. Commonwealth*, 263 Va. 182 (2002) and *Fitzgerald v. Commonwealth*, 223 Va. 615 (1982) – supported his position. Tr. 4-8 (May 27, 2016).

Mr. Lingan argued that the defense was essentially presenting an insanity defense without having ever filed an insanity notice or complied with the disclosure and evaluation obligations that accompany an insanity defense. "Your Honor, we are embarking on the third week of trial and the Defendant has hereby given notice of his intent to present evidence of insanity. We would ask the Court to bar that evidence, to bar that testimony." *Id.* at 41.

Later that same day, the Court issued an Order, entitled "Order Regarding the Presentation of Psychiatric Testimony by the Defense," which began as follows: "Before the Court are two motions: (1) Defendant's motion to present expert psychiatric testimony on the affirmative defense of 'involuntary intoxication,' and (2) Commonwealth's motion to exclude psychiatric testimony on the affirmative defense of 'involuntary intoxication.' For the reasons stated below, the Defendant's motion is DENIED and the Commonwealth's motion is GRANTED." Order Regarding the Presentation of Psychiatric Testimony by the Defense 1 (May 27, 2016). *See also* Respondent's Mot. to Dismiss (May 20, 2021), Ex. 1 at 110-115.

The Court then proceeded to note that the defendant had asserted a defense of "involuntary intoxication," not "insanity" and, therefore, was not ordered to comply with the rules governing the presentation of an insanity defense. The Court described the hearings of November 30, 2015 and December 23, 2015, as well as the questions posed to trial counsel by the Court on December 15, 2015, and trial counsel's response. *Id.* at 2-6.

Finally, the Court addressed the hearing that had taken place earlier that day:

> [T]he defense disclosed to the Court for the first time the nature and substance of what it characterized as an "involuntary intoxication" defense. The concern the Court expressed to defense counsel on December 23rd – that "what you're dealing with is in fact an insanity defense that is not called an insanity defense" – has been realized. The defense proffered by counsel is that the defendant at the time of the offense suffered from 'medication-induced delirium,' a neurocognitive disorder recognized by the *Diagnostic And Statistical Manual of Mental Disorders* (Fifth Edition) (See Page 597).

Id. at 5. The Court held that "[t]his is not the defense of 'involuntary intoxication'" and that the time "has long passed for the assertion of an insanity defense...." *Id.* at 6. Nor had the defendant "complied with the notice requirement, the report requirement, or the Commonwealth's expert evaluation requirement." *Id.*

The Court then announced its judgment: "All that is now before the Court is whether the defendant can offer expert mental health testimony in support of its 'medication-induced delirium' defense. The Court

finds that it cannot." *Id.* However, "[a]ssuming a proper foundation is laid, this Order does not preclude the defendant from calling an expert to address the toxicological effects of ingested medications." *Id.*

vii. The June 2016 pleadings and the hearing on June 1, 2016

On June 1, 2016, the defendant filed a pleading entitled *Mot. to Clarify to Reconsider and Objection to Order of May 27, 2016.* That same day, the Court held a hearing to consider the defendant's new motions. At this hearing, the defendant sought reconsideration of the Court's May 27th ruling regarding the admissibility of mental health testimony. The motion for reconsideration was denied. Tr. 134 (Jun. 1, 2016). Trial counsel also advised that they were now proceeding on an additional defense of "legal unconsciousness" and were seeking to admit mental health testimony in support of that defense. *Id.* at 95.[30] The Court held that the defense could assert that the defendant was unconscious during the commission of the crimes with which he was charged but "they cannot offer mental health testimony on unconsciousness." *Id.* at 137, 184.

On June 3, 2016, the Court issued an Order which read in part as follows: "The Court, after hearing a further proffer of evidence and argument by Counsel for the Defendant, denied the Defendant's motion to reconsider the Court's ruling of May 27, 2016."[31] Order 1 (Jun. 3, 2016).

Subsequently, Dr. Eileen Ryan testified as an expert in "the toxicology and pharmacological effects of medication." Tr. 235 (Jun. 7, 2016). *See generally* Tr. (Jun. 7-8, 2016) (Dr. Ryan's testimony). Her testimony is further described below.

viii. The defendant's conviction, sentencing, and post-conviction proceedings.

On June 14, 2016, the defendant was convicted on all counts, specifically two counts of abduction to gain pecuniary benefit, two counts of use of a firearm in the commission of an aggravated malicious wounding, one count of burglary while armed with a deadly weapon, and two counts of aggravated malicious wounding. Order, "Jury Trial Day Eighteen" (Jun. 16, 2016). The Court sentenced the defendant to two life sentences plus 98 years of imprisonment, consistent with the jury's recommendation. Sentencing Order (Aug. 26, 2016).

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[30] When the Court asked trial counsel "So why are you raising this [the unconsciousness defense] for the first time now as opposed to Friday [May 27th] or as opposed in your Motion for Reconsideration. Why am I hearing about unconsciousness now?", trial counsel responded that it was "always our intention to raise this defense" and cited "strategic reasons" for not raising it earlier. *Id.* at 98.

[31] Trial counsel subsequently filed a number of pleadings: (1) *Mem. in Support of Testimony Concerning Psychiatric Diagnosis for Purposes of Unconsciousness Defense* (Jun. 7, 2016) (filed in court); (2) *Def.'s Objections and Partial Proffer in Support of Involuntary Intoxication Defense* (Jun. 7, 2016) (filed in court); and (3) *Objections and Mem. Concerning Delirium as Properly the Subject of "Toxicological" Testimony (Jun. 7, 2016)* (filed in court).

The defendant appealed his conviction, which was affirmed on September 11, 2018, by the Court of Appeals of Virginia. *Commonwealth v. Schmuhl*, 69 Va. App. 281 (2018).[32] A petition for rehearing and a petition for rehearing *en banc* were denied by the Court of Appeals. Subsequently, the defendant appealed to the Supreme Court of Virginia which heard argument on the case and affirmed the defendant's

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[32] The Court of Appeals held, *inter alia*, that "the trial court did not err in finding, under *Stamper*, appellant's expert evidence related to his mental state and *mens rea* was inadmissible because, although appellant pleaded involuntary intoxication, he did not plead insanity and did not follow the statutory requirements for putting forward an insanity defense." *Schmuhl*, 69 Va. App. at 304 (footnote omitted). With respect to the trial court's rulings with respect to the unconsciousness defense, the Court of Appeals said the following:

> The trial court here refused to admit evidence relating to appellant's unconsciousness defense because it found that the proposed evidence was essentially an effort to put on an *insanity defense* without calling it such so as to show that appellant lacked the necessary *mens rea* – and that appellant was, therefore, directly prohibited from doing so by *Stamper*. Even assuming without deciding that the trial court erred in excluding this evidence, any error was harmless.
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> * * *
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> The record reflects that appellant was not unconscious during the attack. It shows he planned and completed the home invasion with precision, clarity, and control. Appellant handwrote a shopping list ahead of the attack with the items he needed: "handcuffs, two bottles of Nyquil, two packs of Benadryl, adult diapers (male), two sleeping masks (if available)." Appellant disguised himself, forced his way into the house, and attempted to maintain a fake identity during the entire encounter. Testimony from Fisher and Duncan revealed that appellant did not stumble and did not slur his words during the three hours that he was inside their home. He questioned the couple extensively and demanded information about money that they might keep in the house. He also looked through Fisher's work email – apparently not finding the information for which he searched. Appellant forced the victims to move from room to room throughout the invasion, and he closed window blinds in the house. Appellant shot and stabbed Duncan, he tasered and stabbed Fisher, and he then kicked the already gravely wounded Fisher in the head as he left, telling him, "You're going to die." Evidence showed that appellant attempted to cover up his crimes by recovering the Taser cartridges and gun shell casings and that he doused the foyer rug with gasoline before leaving the home. Appellant used a prepaid phone during the events rather than his personal cell phone, removed his bloody clothing prior to arrest, and soaked the clothing in ammonia as he and his wife fled from the police. Fisher later described appellant's demeanor during the events as "very forceful, authoritative. Very much in control." In addition, testimony from arresting officers showed that appellant was alert when he was first apprehended – and that any change in his level of consciousness took place after he was placed into the police vehicle. Any possible error in not admitting expert evidence of his mental state at the time of the offenses is simply insignificant in comparison with the overwhelming evidence of appellant's lucidity both before and during the events in question.

Id. at 307-309 (footnotes omitted).

convictions "for the reasons stated in the opinion of the Court of Appeals." *Schmuhl v. Commonwealth*, 298 Va. 131 (2019). A petition for rehearing was subsequently denied. R. 181596. *See also* Respondent's Mot. to Dismiss 2 (May 20, 2021).

b. Analysis

i. Law

The general framework for analyzing an ineffectiveness claim is well-established. *See Strickland v. Washington*, 466 U.S. 668 (1984).

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the results unreliable.

Strickland, 466 U.S. at 687. With respect to the first prong of *Strickland* – the "deficient performance" determination – there are several points that must be noted:

First, "the proper standard for attorney performance is that of reasonably effective assistance." *Id.* "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. The court must determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

Second, *Strickland* sets a "high bar." and "[s]urmounting" that high bar "is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). While its requirements are "by no means insurmountable," *Strickland* is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Thus, *Strickland* requires that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Third, *Strickland* does not require that counsel be perfect. "The Sixth Amendment does not guarantee an errorless trial, and 'prevailing professional norms' do not require perfection at trial." *United States v. Haddock*, 12 F.3d 950, 956 (10th Cir. 1993) (citation omitted). As the Supreme Court said in *Yarborough v. Gentry*, "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry,* 540 U.S. 1, 6 (2003) (citations omitted). *See also Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or

lack of foresight or for failing to prepare for what appear to be remote possibilities."). In order to show "that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (citations omitted).

Fourth, judicial review of trial counsel's performance at trial is "highly deferential." *Strickland*, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id. See also Winston v. Pearson*, 683 F.3d 489, 504 (4th Cir. 2012) ("Review of counsel's actions is hallmarked by deference..."). As the Supreme Court said in *Harrington*, "[T]he standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington*, 562 U.S. at 105 (citation omitted).

Fifth, counsel has "wide latitude in deciding how best to represent a client..." *Yarborough*, 540 U.S. at 5-6. As the Supreme Court said in *Strickland*, "[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. *Strickland* "permits attorneys to choose between viable avenues of defense, and attorneys are not ineffective for making a reasonable choice to take one avenue to the exclusion of another or for selecting a reasonable course without considering some other, equally reasonable course." *LeCroy v. United States*, 739 F.3d 1297, 1313 (11th Cir. 2014). *See also Waters v. Thomas*, 46 F.3d 1506, 1522 (11th Cir. 1995) ("Three different defense attorneys might have defended Waters three different ways, and all of them might have defended him differently from the way the members of this Court would have, but it does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance."); *and Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) ("It is '[r]are' that constitutionally competent representation will require 'any one technique or approach.'") (quoting *Harrington*, 562 U.S. at 106.)

Sixth, it is essential that a court in evaluating a claim of deficient performance make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. In other words, the fact that a particular strategic approach was unsuccessful – which will be the case in virtually every ineffectiveness claim – does not mean, or even suggest, that it represents deficient performance. *See, e.g., Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) ("Nor does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness.").

Seventh, *Strickland* requires that a court "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. As the Fourth Circuit said in *Hyman v. Aiken,* "Under the first half of the *Strickland* test, counsel enjoys the benefit of a strong presumption that the alleged errors were actually part of a sound trial strategy and that counsel's performance was within the limits of reasonable professional assistance." *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987) (citations omitted).

Eighth, "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable..." *Strickland*, 466 U.S. at 690. As the Tenth Circuit said in *Bullock v. Carver*, "[W]here it is shown that a particular decision was, *in fact*, an adequately informed strategic choice, the presumption that the attorney's decision was objectively reasonable becomes 'virtually unchallengeable.'" *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002) (emphasis in the original) (citation omitted). *See also Moore v. Marr,* 254 F.3d 1235, 1239 (10th Cir. 2001) ("Strategic or tactical decisions on the part of counsel are presumed correct, unless they were 'completely unreasonable, not merely wrong, so that [they] bear no relationship to a possible defense strategy.") (quotations and citations omitted).

Ninth, in determining whether a choice was a strategic one, the court must "affirmatively entertain the range of possible 'reasons... counsel may have had for proceeding as they did...'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (citation omitted). *See also Chandler v. United States,* 218 F.3d 1305, 1315 n.16 (11th Cir. 2000) (citation omitted) ("If a defense lawyer pursued course A, it is immaterial that some other reasonable courses of defense (that the lawyer did not think of at all) existed and that the lawyer's pursuit of course A was not a deliberate choice between course A, course B, and so on. The lawyer's strategy was course A. And, our inquiry is limited to whether this strategy, that is, course A, might have been a reasonable one."). In any event, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (citation omitted).

Tenth, the Court is not bound by trial counsel's subjective assessments of their own conduct, whether that is to characterize their own actions as non-strategic or to proclaim themselves constitutionally ineffective. *See, e.g., Atkins v. Singletary*, 965 F.2d 952, 959-960 (11th Cir. 1992) ("Atkins relies on his trial attorney's affidavit to argue that counsel ineffectively failed to present expert testimony about the effect alcohol and drugs would have had on Atkins: namely, that Atkins could not have formed intent to commit a crime. This affidavit, however, states only that trial counsel's failure to use an expert was neither a tactical nor strategic decision. And while the affidavit says that trial counsel believes he should have presented such testimony for its 'probable positive defensive effect,' we see no constitutional ineffectiveness. First, the affidavit alone establishes nothing. It admits no ineffective performance; and even if it did admit ineffectiveness, we would give the affidavit no substantial weight 'because ineffectiveness is a question which we must decide, [so] admissions of deficient performance by attorneys are not decisive.'") (quoting *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989)). *See also Lawrence v. McNeil*, 2010 WL 2890576 *20 (N.D. Fla. 2010) ("Because the standard is an objective one, the fact that trial counsel admits at a postconviction evidentiary hearing that his or her performance was deficient matters little."); *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (2007) ("As the California Court of Appeal noted, however, the trial court was not obligated to 'accept a self-proclaimed assertion by trial counsel' of inadequate performance."); and *Harrington v. Richter*, 562 U.S. 86, 109-110 (2011) (*Strickland*... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.") (citation omitted).

Eleventh, the determination as to whether or not a particular strategic choice was reasonable or unreasonable is "a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) ("Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony.").

Twelfth, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (citation omitted). *See also Bullock*, 297 F.3d at 1049 (An "attorney's demonstrated ignorance of law directly relevant to a decision will eliminate *Strickland's* presumption that the decision was objectively reasonable because it might have been made for strategic purposes, and it will often prevent the government from claiming that the attorney made an adequately informed strategic choice.") (footnote and citation omitted). *See also Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986), and *United States v. Carthorne*, 878 F.3d 458, 469 (4th Cir. 2017). Similarly, deficient performance may be shown by an attorney who demonstrates "gross incompetence," *see Kimmelman*, 477 U.S. at 382, or makes a choice that is "so patently unreasonable that no competent attorney" could make such a choice, *see Bullock*, 297 F.3d at 1046 (citations omitted).

Finally, "[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." *Chandler*, 218 F.3d at 1316. *See also Provenzano*, 148 F.3d at 1332 ("Our strong reluctance to second guess strategic decisions is even greater when those decisions were made by experienced criminal defense counsel.").

ii. Discussion

The decision by trial counsel not to assert an insanity defense was an objectively reasonable strategic decision based on trial counsel's comprehensive and deep understanding of prevailing and controlling case law. It reflected a careful and conscientious weighing of risks and rewards, a consideration of the enormous benefits that would be realized by the defendant if their strategy was successful, and the ultimate determination that not asserting an insanity defense would best serve their client's interests.[33]

For this Court to find that trial counsel's conduct constituted "deficient performance" would be to ignore *Strickland* and its progeny's instructions that: (1) *Strickland* sets a "high bar" for determining deficient performance; (2) the *Strickland* evaluation is "highly deferential" to the informed strategic decisions of counsel; (3) *Strickland* does not require perfection or flawless strategy and recognizes that counsel may make a "reasonable miscalculation" without being deemed ineffective; (4) a court must base its decision on the circumstances in front of trial counsel at the time they made their strategic choices, rather than with the perfect vision of hindsight; (5) there are "countless ways" for trial counsel to provide effective assistance and they must have "wide latitude" to decide what approach would work best for their client; (6)

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[33] Trial counsel certainly understood and appreciated that they had the option to assert an insanity defense. Indeed, just one week before filing their November 20, 2015 notice, trial counsel advised the Court that they were on the verge of filing a notice of an insanity defense. *See* Tr. 13 (Nov. 13, 2015). Given that Dr. Ryan was prepared to testify that, at the time of the offense, the petitioner suffered from "medication-induced delirium" (a mental health diagnosis recognized by the Diagnostic and Statistical Manual), and that this delirium "made him incapable of understanding the nature, character, and consequences of his actions" (Dr. Ryan Aff. 1, 5 (Jan. 23, 2021)), trial counsel could have, *but chose not to*, assert an insanity defense. Indeed, trial counsel acknowledged in the November 20, 2015 notice itself that the defendant's "mental state at the time of the offense met the legal standard for insanity." Similarly, trial counsel also acknowledged that their defense was "premised on temporary insanity." Tr. 37 (May 27, 2016). Yet trial counsel declined to assert the insanity defense. *That is the essence of a strategic choice.*

there is a "strong presumption" that counsel's conduct "falls within the wide range of reasonable professional assistance"; (7) and that strategic choices made after "thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." All of these factors compel the conclusion that the choice made here by trial counsel – to not assert an insanity defense – was objectively reasonable and, therefore, does not constitute deficient performance.

The Court would make the following additional observations in support of its finding:

First, the two principal attorneys who represented Andrew Schmuhl – lead counsel Bradley Haywood and Andrew Elders – were highly experienced criminal defense lawyers. Mr. Haywood, according to his affidavit, was in private practice and a partner at Sheldon, Flood & Haywood, P.L.C., during the time period of 2015-2016. He is now the Chief Public Defender for Arlington County and the City of Falls Church. Mr. Elders, according to his affidavit, was in private practice at the law firm of Elders, Zinicola & Blanch, PLLC, during the time period of 2015-2016. He is now Deputy Public Defender for Fairfax County. While certainly not dispositive, the fact that the decisions at issue were made by veteran criminal defense lawyers makes "even stronger" the presumption that the decisions were reasonable.

Second, the case law that supports discounting strategic decisions when they are based on "ignorance of the law" or a failure to conduct "basic legal research" have no applicability to the instant case. Trial counsel's multiple pleadings on the very issues now before the Court reflected comprehensive legal research, a command of the case law, and the marshalling of every possible argument in support of their position.[34] Multiple hearings were convened at which trial counsel meticulously described, dissected, and distinguished the pertinent case law.[35] There is simply no credible comparison between this case and other cases where the "failure to perform basic research" led to a finding of deficient performance.[36]

Third, while petitioner portrays the decision not to assert an insanity defense as a choice that was unreasonable, incomprehensible, indefensible, and incompetent, it was in fact none of these things. For the reasons described below, it was reasonable for trial counsel to believe that they could persuade this Court to admit mental health testimony with respect to their involuntary intoxication and unconsciousness defenses without asserting an insanity defense.

The issue is not whether trial counsel were unsuccessful in their efforts. Ineffectiveness claims, by definition, arise only when trial counsel have been unsuccessful. Nor can the issue simply be reduced – as petitioner now attempts to do -- to a single solitary question of law, divorced from the manifest strategic considerations which the Court has identified. Rather, the issue is whether trial counsel made an objectively reasonable strategic decision after a full and informed consideration of the law and the facts. If so,

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[34] *See Def.'s Mem. of Law Concerning Admissibility of Expert Mental State Testimony* (Dec. 14, 2015), *Mem. Regarding the Court's Questions Concerning Expert Testimony* (Dec. 18, 2015), *Mot. to Clarify, Mot. to Reconsider, and Objections to Order of May 27, 2016* (Jun. 1, 2016), and *Mem. in Support of Testimony Concerning Psychiatric Diagnosis for Purposes of Unconsciousness Defense* (Jun. 7, 2016).

[35] *See, e.g.*, Hr'g (Nov. 30, 2015), Hr'g (Dec. 23, 2015), Hr'g (May 27, 2016), *and* Hr'g (Jun. 1, 2016).

[36] *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000), *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *and Hinton v. Alabama*, 571 U.S. 263 (2014).

counsel's performance is not deficient – even when that reasonable strategic decision ultimately proved unsuccessful.

The Court finds that this is precisely what happened here: Trial counsel made strategic choices after thorough investigation of law and facts relevant to plausible options. Trial counsel were not ignorant of the law. They had not failed to do basic legal research. They were not making frivolous arguments. Rather, trial counsel were intimately familiar with *Stamper* and the Virginia cases that preceded and followed *Stamper*. Their argument was that the Court should not read *Stamper* as precluding them from calling a mental health expert in support of an involuntary intoxication and unconsciousness defense – an argument that was so plausible that at one point it led the Court itself to state: "I am not certain that Stamper controls the question of whether they can call a mental health expert." Tr. 53 (Dec. 23, 2015).[37]

Trial counsel's pleadings demonstrated their careful analysis and reasoning. *See, e.g.,* Def.'s Mem. of Law Concerning Admissibility of Expert Mental State Testimony 1-5 (Dec. 14, 2015). These arguments were the subject of multiple, lengthy hearings. *See generally* Tr. (Dec. 23, 2015), Tr. (May 27, 2016), *and* Tr. (Jun. 1, 2016). These were serious arguments taken seriously.

The fact that trial counsel was ultimately unsuccessful in persuading either this court or the appellate courts[38] of their position regarding *Stamper* did not mean that it was an unreasonable position for trial counsel to take. This is for a number of reasons: (1) In *Stamper*, the defendant was seeking recognition of a new defense – the defense of "diminished capacity." *Stamper v. Commonwealth*, 228 Va. 707, 716 (1985). In contrast, the defendant in Schmuhl was asserting a defense with historical roots in the Commonwealth (*see, e.g.*, *Johnson v. Commonwealth*, 135 Va. 524 (1923)); (2) A defense of involuntary intoxication required the defendant to meet the same *M'Naghten* standard as was required for insanity. This supported trial counsel's argument that it was not violating *Stamper's* proscription against a "sliding scale of insanity." *Stamper*, 228 Va. at 717; (3) While *Stamper* did contain categorical language,[39] *Stamper* was not an involuntary intoxication or unconsciousness case and did not explicitly address the issue of whether expert mental health testimony could be offered to address the discrete issue of the impact of intoxicants on an

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[37] Similarly, the Commonwealth also recognized the possibility that mental health expert testimony might be admissible in limited circumstances and not be precluded by *Stamper*. Mr. Lingan stated, "The individual's mental disease or defect or mental health may very well be relevant to other issues that are narrowly tailored if it is to explain certain things such as the reliability of someone's statement or as the Court, I think, ruled in Severance to explain when you're using circumstantial evidence such as potential flight to explain a hypothetical or an alternate theory of equally as close as in essence as it would be a nefarious intent." Tr. 56 (Dec. 23, 2015). Mr. Lingan also said: "[I]s it a possibility that someone can testify that this person was taking medicine and had this disorder and those are the potential effects that it has on someone with that sort. I can foresee an argument that that would come in. I could foresee that as being a possibility but I'm not willing to concede it without a proffer." *Id.* at 57.

[38] Mr. Haywood remained as petitioner's counsel on direct appeal. Order (Sept. 22, 2016).

[39] "Accordingly, we hold that evidence of a criminal defendant's mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of guilt." *Stamper v. Commonwealth*, 228 Va. 707, 717 (1985)

individual's mental state; (4) There were other Supreme Court of Virginia cases – both before *Stamper (Fitzgerald v. Commonwealth*, 223 Va. 615 (1982)),[40] and after *Stamper (Pritchett v. Commonwealth*, 263 Va. 182 (2002))[41] – that recognized the admissibility of expert mental state testimony despite the absence of an insanity defense.[42] (5) There was case law in Virginia that supported the assertion that the defenses of involuntary intoxication and unconsciousness, on the one hand, and the defense of insanity, on the other hand, were separate and distinct affirmative defenses.[43] (6) There were cases from foreign jurisdictions that supported trial counsel's position that mental health expert testimony was admissible in an involuntary

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[40] In *Fitzgerald*, the Supreme Court of Virginia held that it was not error for the trial court to admit expert testimony from a toxicologist that included the "opinion that the ingestion of various quantities of LSD, Tranxene, and beer could not cause a person to commit certain specified acts of violence or render a person incapable of having the intent to commit such acts." *Fitzgerald v. Commonwealth*, 223 Va. 615, 629 (1982). In the same trial, the defense was permitted to call a psychiatrist who "described Fitzgerald as a chronic alcoholic with a paranoid personality." *Id.* at 625.

[41] In *Pritchett,* the defendant appealed his conviction for first degree murder and other offenses on the grounds that the trial court improperly excluded the testimony of two psychologists who would have testified that the defendant was intellectually disabled and, therefore, particularly susceptible "to suggestive police interrogation in connection with the defendant's contention that his confession was unreliable." *Pritchett v. Commonwealth*, 263 Va. 182, 184 (2002). Noting that "this court has previously held that an expert may testify to a witness's or defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness's or defendant's situation, so long as the expert does not opinion on the truth of the statement at issue," the Court held that the testimony "should have been admitted" and reversed Pritchett's convictions. *Id.* at 187.

[42] In its opinion in this case, the Court of Appeals distinguished the Supreme Court's holdings *Fitzgerald* and *Pritchett*. It noted that the admission of mental health testimony in *Fitzgerald* was pursuant to an "exception" that allowed such testimony to negate *mens rea* in a murder case where the defendant asserted that he was voluntarily intoxicated. With respect to *Pritchett*, the Court noted that mental health testimony should have been allowed to show the "hypothetical effect of the defendant's mental disorder on the reliability of his confession in a police interview – not as to his *mens rea* actually to commit the underlying crime." *Schmuhl*, 69 Va. App. at 304 n.8. Nevertheless, these cases demonstrated that there were circumstances in which mental health expert testimony was admissible without an insanity defense – and trial counsel was now arguing that this should be the same result in *Commonwealth v. Schmuhl.*

[43] Trial counsel cited *Shortt v. Commonwealth*, 2010 Va. App. LEXIS 442 (2010), *Commonwealth v. Shumway*, 72 Va. Cir. 481 (2007), *Honesty v. Commonwealth*, 81 Va. 283 (1886), and *Baccigalupo v. Commonwealth*, 74 Va. 807 (1880) in support of their position. For example, in *Shortt*, the Court of Appeals noted that "[i]nvoluntary intoxication is an affirmative defense," citing *Riley v.Commonwealth,* 277 Va. 467 (2009)(*Riley* involved the "affirmative defense of unconsciousness predicated upon sleepwalking." 277 Va. at 470.). In *Shumway*, the trial court held that "[i]n Virginia, as well as other states, involuntary intoxication and insanity are separate defenses." *See also Defendant's Response to Motion to Compel and Motion for Appointment of Evaluator Under Va. Code § 19.2-168.*1 (November 25, 2015) at 2.

intoxication case.[44] (7) There was precedent in Virginia for the admission of mental health expert testimony in an unconsciousness case, specifically *Greenfield v. Commonwealth*, 214 Va. 710 (1974),[45] as well as precedent from other jurisdictions.

Trial counsel also made an alternative argument, specifically that the diagnosis of "delirium" was admissible pursuant to the Court's May 27, 2016 ruling that "the toxicological effects of ingested medications" would be allowed. *See* Objections and Mem. Concerning Delirium as Properly the Subject of "Toxicological" Testimony 1-2 (Jun. 7, 2016). ("Delirium is indeed a well-known and direct toxicological effect of a variety of medications and combinations of medications, including many that Mr. Schmuhl was taking: fentanyl, dilaudid, clonidine and others, particularly in combination. Moreover, "toxicological" testimony concerning delirium as an effect of drugs has routinely been admitted in courts throughout the country.")[46]

In addition to all of the foregoing, trial counsel was aware of – and affirmatively relied upon -- the fact that this Court had just approved the admission of mental health expert testimony in *Commonwealth v. Charles Severance*, No. FE-2015-430 (Fairfax Cir. Ct. 2015), a capital murder case that – like *Commonwealth v. Schmuhl* – did not involve an insanity defense. The Court's Order granting the admission of mental health expert testimony in Severance was issued just two months prior to the filing of the November 20, 2015 notice in this case.[47]

It is clear from trial counsel's statements at various hearings that trial counsel viewed this Court's decision in *Severance* as precedent for their own effort to admit mental health expert testimony in the

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[44] *Def.'s Mem. of Law Concerning Admissibility of Expert Mental State Testimony* 7 (Dec. 14, 2015). Defendant cited *Perkins v. United States*, 228 F. 408 (4th Cir. 1915), *People v. Penman,* 271 Ill. 82, 110 N.E. 894 (Ill. 1915), *Commonwealth v. McAlister,* 313 N.E.2d 113 (Mass. 1974), *Minneapolis v. Altimus*, 238 N.W.2d 851 (Minn. 1976) and *Boswell v. State*, 610 So. 2d 670 (Fla. Dist. Ct. App. 4th Dist. 1992).

[45] In *Greenfield*, the Supreme Court found that it was not error to limit the testimony of a psychiatrist, but noted that the psychiatrist "was permitted to state within the proper rules of evidence, the basis of his opinion that defendant was unconscious at the time the homicide was committed. He told the jury the nature of his diagnosis, the nature of the diagnostic tools used, and the extent of his examination of the defendant." 214 Va. at 714. *See also Memorandum In Support of Testimony Concerning Psychiatric Diagnosis for Purposes of Unconsciousness Defense* (June 7, 2016).

[46] Trial counsel's memorandum then proceeded to cite cases from state courts around the country in which toxicologists had referenced "delirium" as a toxicological effect of certain medications. *Id. 2-4.*

[47] *See* Order, *Commonwealth v. Charles Severance*, No. FE-2015-430 (Fairfax Cir. Ct. Aug. 13, 2015), ("This ruling permits the defense to place in evidence admissible mental health testimony to provide an alternative explanation for: (1) the Defendant's writings; and (2) the Defendant's effort to gain asylum at the Russian Embassy.") *and* Order, *Commonwealth v. Charles Severance*, No. FE-2015-430 (Fairfax Cir. Ct. Sept. 21, 2015) ("Defendant's Motion for Admission of Mental Health Testimony: This motion is GRANTED. Dr. William Stejskal [a mental health expert] is permitted to testify, in accordance with the limitations prescribed by the Court.").

Schmuhl case. For example, Mr. Haywood made the following statement at the November 30, 2015 hearing:

> I do think that there – I think that this is the type of case where expert testimony would be permissible for limited reasons as it was in Severance. I understand that – actually I have filed that exact same motion, they let me borrow it, so I'm sure the Court will probably see a similar pleading if that comes up in this case, but I do think that for similar reasons we would be allowed to bring in expert testimony for limited purposes in an involuntary intoxication defense.

Tr. 47 (Nov. 30, 2015). In a subsequent hearing, trial counsel returned to this same argument, asserting that their position was "stronger than Severance." Tr. December 23, 2015 at 79. In yet another hearing, trial counsel cited *Pritchett v. Commonwealth*, 263 Va. 182 (2002) as "a case the Court is well familiar with from the Charles Severance case and it was cited in that case and it was relied upon in reaching a ruling on a similar motion regarding mental state testimony." Tr. May 27, 2016 at 4.

In short, the Court's action in *Commonwealth v. Severance* – taken mere months before the mental health expert testimony issues arose in *Commonwealth v. Schmuhl* – makes even more reasonable trial counsel's belief that this Court could be persuaded to admit mental health expert testimony without an insanity defense.[48]

Fourth, in determining the reasonableness of trial counsel's approach, it must be emphasized that, *regardless of how the Stamper issue was ultimately resolved*, the defense's mental health expert witness, Dr. Eileen Riley, would at least be permitted to testify to the toxicological effects of the medications prescribed or taken by the defendant. In other words, in the "risks vs. rewards" analysis, there was little or no risk that Dr. Ryan's testimony would be excluded entirely.[49] And, in fact, Dr. Ryan was ultimately permitted to testify in extensive detail to the potential effects of the medications at issue in this case.[50] Nor was her

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[48] This is not to say that the Court viewed the cases as presenting identical issues. *See* Tr. 49 (Nov. 30, 2015) ("[T]here is a difference between mental health testimony that is going to go to *mens rea* and mental health testimony that goes to a completely discreet issue such as consciousness of guilt, which is one of the issues that I was dealing with [in Severance]."). Nevertheless, the Court's ruling in *Commonwealth v. Severance* made one point absolutely clear to trial counsel: this Court did not view *Stamper* as barring all mental health expert testimony in a non-insanity defense case.

[49] There was nothing in *Stamper* to suggest that the toxicological or pharmacological effects of these medications would not be admissible in this trial, just as such testimony was admitted in *Fitzgerald*. In *Fitzgerald*, the Commonwealth presented the testimony of a professor of pharmacology and the defense presented the testimony of a psychiatrist. Both experts testified, *inter alia*, to the effects of certain drugs. 223 Va. at 624-625.

[50] Given the breadth and scope of Dr. Ryan's testimony, the Court finds no merit in petitioner's argument that an additional aspect of deficient performance was trial counsel's alleged failure to properly prepare Dr. Ryan to testify.

testimony limited to the *physical* effects of these medications; rather, Dr. Ryan was allowed to testify to the *mental* effects of these medications.[51]

Fifth, there were compelling, even overwhelming, strategic reasons for the defendant to choose not to assert the insanity defense. Petitioner asserts that there was "no strategic reason" not to assert an insanity defense. Here are four reasons.

Number One: By not asserting an insanity defense, trial counsel avoided a psychological evaluation by the Commonwealth's own expert psychologist. Such an evaluation had the potential to deal a devastating blow to what trial counsel knew was their client' sole chance at an acquittal. Nor could the defendant avoid such an evaluation once he asserted an insanity defense. By statute, a defendant is ordered to submit to such an evaluation and the Court must "advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence."[52]

Trial counsel did not need to speculate whether the Commonwealth would avail itself of the opportunity to have its expert evaluate the defendant. Just three days after receiving the defendant's November 20, 2015 notice – a notice the Commonwealth initially believed to be a notice of an insanity defense – the Commonwealth filed its motion seeking the statutorily-authorized evaluation. Indeed, it had already selected the evaluator. *See* Paragraph 5 of the Commonwealth's *Notice and Motion for Evaluation of the Defendant's Sanity Pursuant to* Va. Code § *19.2-168.1* (November 23, 2015):

> The Commonwealth has spoken with Dr. Stanton E. Samenow who is available to complete the evaluation in time for trial. Dr. Samenow will be available February 2, 2016 which given the estimated trial schedule would be approximately when he would be needed for testimony.

An evaluation by the Commonwealth's mental health expert would be enormously beneficial to the Commonwealth, and had the potential to do grave damage to the defense. It would give the Commonwealth's expert a thorough (and early) opportunity to understand the nature and content of the defendant's involuntary intoxication claim. It would allow the Commonwealth's expert the opportunity to test the defendant for malingering. And, most significantly, it would give the Commonwealth's expert the opportunity to explore in granular detail every action taken by the defendant before, during and after his attacks on Leo Fisher and Susan Duncan to determine whether they were consistent or inconsistent with the defendant's claim that he was involuntarily intoxicated and/or unconscious at the time of the offense and that he met M'Naghten's legal standards.

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[51] *See generally* Tr. (Jun. 7-8, 2016). The testimony of Dr. Ryan is summarized in detail in the "prejudice prong" section of this opinion.

[52] Va. Code § 19.2-168.1 reads in part as follows: "If the attorney for the defendant gives notice pursuant to Section 19.2-168, and the Commonwealth thereafter seeks an evaluation of the defendant's sanity at the time of the offense, the court shall appoint one or more qualified mental health experts to perform such an evaluation. The Court shall order the defendant to submit to such an evaluation…"

Finally, an evaluation by the Commonwealth's mental health expert would make that expert a far more credible witness at trial, a particularly important consideration given that the defense expert – Dr. Ryan – would be testifying at trial with the benefit of having conducted her own evaluation of the defendant.

While the petitioner now states in his affidavit that "I was willing and available to cooperate with the Commonwealth's evaluation," *see* Petition, Exhibit 8, that claim is completely at odds with trial counsel's zealous efforts to prevent just such an evaluation. In its November 25, 2015 filing, trial counsel asserted that the procedures under Va. Code § 19.2-168.1 applied only to a claim of insanity, not to a claim of involuntary intoxication, and asked the Court to deny the Commonwealth's motions for an evaluation and for the defense's expert report. At the November 30, 2015 hearing, trial counsel again objected to an evaluation of their client by the Commonwealth's mental health expert. Tr. 32 (Nov. 30, 2015). While trial counsel stated that the defense would submit to such an evaluation if ordered by the court, *id.* at 33, trial counsel argued that the Court had no authority to issue such an order because the defense was not asserting an insanity defense. In fact, trial counsel asserted that such an order "would risk violating [the defendant's] constitutional rights including his right to counsel, his right to attorney-client privilege, [and his] Fifth Amendment right to be free from self-incrimination." *Id.* at 34. Then, on December 18, 2015, trial counsel again asserted their opposition to an evaluation by the Commonwealth's expert:

> Never has a Virginia court held the involuntary intoxication defense to be an insanity defense, and never before has there been any indication that the Commonwealth may avail itself to the procedures set forth in Va. Code 19.2-167 et seq. Furthermore, the only reason the Commonwealth has access to the defendant in insanity cases is those insanity statutes, which according to their own language do not apply to involuntary intoxication defenses. Although the court may be concerned about the equities, it does not possess any "equitable" authority to order use of insanity procedures in a non-insanity case. To the extent the outcome is unfair—a contention the defendant would take issue with – it is a matter for the legislature to address, not the court… Holding that the insanity statutes *per se* apply to intoxication cases would result in many defendants being subjected to unnecessary evaluations, in violation of their 5th amendment privilege and their right to counsel, among other constitutionally protected rights and privileges.

Mem. Regarding the Court's Questions Concerning Expert Testimony 6-7 (Dec. 18, 2015).

In short, this benefit alone provided trial counsel ample justification for making the strategic decision not to assert an insanity defense.[53]

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[53] Case law provides other examples of trial counsel making strategic choices in order to prevent the government from being permitted to evaluate their clients. *See, e.g.*, *Lecroy v. United States*, 739 F.3d 1297, 1312, 1320-22 (11th Cir. 2014) (noting that it was reasonable for trial counsel not to have a defense expert evaluate the defendant "for fear that such an evaluation would both expose [the doctor] to damaging cross-examination and also trigger an evaluation of [the defendant] by a Government expert" and "[W]e do not think it was unreasonable for the defense team to try and insulate their preferred teaching expert from damaging cross examination or protect their client from a hostile Government evaluation. These choices represented reasonable tactical decisions by competent attorneys."), *and Barbee v. Davis*, 660 Fed. Appx. (Footnote continued on the next page.)

Number Two: By not asserting an insanity defense, trial counsel avoided the requirement of producing their mental health expert report pursuant to Va. Code § 19.2-169.5.[54] That the Commonwealth would be seeking such a report became clear immediately upon trial counsel's filing of the November 20, 2015 notice. Three days later, the Commonwealth filed a motion requesting the Court to order the defendant "to comply with the provisions of Va. Code § 19.2-169.5." *See Notice and Motion to Compel Defendant to Comply with Va. Code § 19.2-169.5* (November 23, 2015.) Trial counsel promptly opposed the Commonwealth's motion:

> Lacking the statutory authority for the relief it seeks in a case alleging involuntary intoxication, including a report and all records used by the expert in developing his or her opinion, the Commonwealth may rely only on the discovery order in this case, which requires disclosure of a report 10 days before trial.

Id. at 2-3. At the December 23, 2015 hearing, trial counsel went even further – arguing that the Commonwealth was not entitled to the creation or production of the mental health expert at all. *See* Tr. 88 (Dec. 23, 2015) (Mr. Haywood stated, "Your Honor, I don't believe – the discovery order as written, doesn't require us to prepare a report and I'm not sure that it even requires to give a report for this type of evidence.").

Trial counsel's determination to keep secret the mental health evaluator's conclusions and report was as strategically important, if not more important, than keeping the Commonwealth's expert away from their client. A report of their expert – containing the expert's findings, opinions, diagnoses and conclusions – was, in essence, the crown jewels of the defense. As trial counsel stated in response to the Court's request for a detailed proffer of the expert's anticipated testimony:

> Really what the Court is asking for here is our entire trial strategy. That is what the request is. Our entire case rest on an involuntary intoxication defense. The whole thing. It's not just one piece of evidence. It is our strategy. It's our case. And the Commonwealth knows why they want it, they're here just like we were on a bill of particulars motion. They want to know what our defense is. They don't have that right to know that in advance.

Tr. 70-71 (Dec. 23, 2015). And the only way that trial counsel could maintain this position, and continue to keep secret the findings and conclusions of their mental health expert, was to not assert an insanity defense.

293, 327-28 (5th Cir. 2016) ("Trial counsels' reasons for not presenting this evidence are reasonable, especially their wanting to avoid having Barbee examined by the State's expert.").

[54] Va. Code § 19.2-169.5 reads in part as follows: "[T]he Commonwealth shall be given the report [of the mental health evaluator] in all felony cases, the results of any other evaluation of the defendant's sanity at the time of the offense, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation, after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence pursuant to Section 19.2-168."

There is no mystery as to why the law requires defense counsel to disclose their mental health expert's evaluation report in an insanity case. It permits the Commonwealth to prepare for the defendant's affirmative defense of insanity and it permits the Commonwealth's expert to consider and evaluate the merits of the defense expert's findings and conclusions. It is one of the very few affirmative disclosure obligations imposed on a defendant by statute. Dr. Ryan's affidavit, Exhibit 2 to the petition, indicates that Dr. Ryan concluded that the defendant met the *M'Naghten* standard for insanity.[55] Trial counsel succeeded in keeping this judgment a secret until May 27, 2016, nine days into the actual trial – an accomplishment that would have been impossible if trial counsel had asserted an insanity defense.[56]

Number Three: By not asserting an insanity defense, trial counsel sought the extraordinary strategic advantage of presenting the defendant's own expert without the Commonwealth being able to rebut, contradict or counter that expert. Even if the Commonwealth did call an expert witness, that expert would not have had the benefit and credibility of having evaluated the defendant. Thus, the jury would hear from just one expert who had actually evaluated the defendant – Dr. Ryan.

Petitioner now calls this an "absurd result" that constitutes further evidence of the unreasonableness of trial counsel's position. Pet. 40 (Feb. 16, 2021). But that is precisely what would have happened if trial counsel had been successful in persuading the Court to admit the defendant's mental health expert testimony without an insanity defense. The fact that it would have given the defense a stunning strategic advantage in the trial of this matter is not proof of unreasonableness. Rather, it is proof of just the opposite.

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[55] *See* Dr. Ryan Aff. Paragraph 15 ("At trial, I was prepared to testify to my opinion that at the time of the offense, Mr. Schmuhl suffered from a medication-induced delirium that made him incapable of understanding the nature, character, and consequences of his actions.").

[56] The Court limits its discussion to Dr. Ryan, even though the petition also relies on the declaration of Dr. Daniel Murrie. This is because both Mr. Elders' Affidavit and Mr. Haywood's Declaration state that Dr. Ryan "was our only expert trial witness to Mr. Schmuhl's mental state...." Affidavit of Andrew Elders, at Paragraph 7 and Declaration of Bradley Haywood, at Paragraph 8. (This is consistent with the proffer made by trial counsel on May 27, 2016.) Petitioner's Reply appears to suggest that the failure to call Dr. Murrie as an expert witness at trial is additional evidence of trial counsel's allegedly deficient performance. See Petitioner's Reply 16 (Jun. 21, 2021) ("In other words, trial counsel had two experts they failed to offer."). But the decision by trial counsel as to how many experts to call at trial is a classic strategic decision. *See, e.g., Fulk v. United States*, 875 F.Supp.2d 535 (D. South Carolina 2010) (counsel's decision not to call additional expert witnesses not ineffective.) Moreover, Dr. Murrie's declaration states that it was Dr. Murrie himself who "recommended that Dr. Eileen Ryan, a physician and psychiatrist, assume a primary role in further evaluating Mr. Schmuhl's mental state at the time of the offense." Declaration of Dr. Murrie, at Paragraph 3. Additionally, petitioner's statement – "trial counsel had two experts they failed to offer" – is inexplicable. One of those two experts – Dr. Ryan -- was not only "offer[ed]" but testified for most of an entire day of the trial. Tr. 80-231 (June 8, 2016). Finally, the Court would note that it has reviewed Dr. Murrie's declaration and it does not alter the Court's judgment with respect to either *Strickland's* "performance" or "prejudice" prong.

Number Four: By not asserting an insanity defense, trial counsel guaranteed that if the defendant was successful in persuading the jury that he met the legal standard for insanity at the time of the offense, he would walk out of the courtroom a free man. He would not be subject to the panoply of rules and regulations governing a Not Guilty By Reason of Insanity acquittee.[57]

The Court does not need to resort to speculation that this was very much on the mind of trial counsel. Just days after making it clear that the petitioner's defense "is not an 'insanity' defense but, rather, an involuntary intoxication defense,"[58] trial counsel told the Court the following:

> [T]he end game of this, of involuntary intoxication defense, if we win, my understanding is that Mr. Schmuhl will walk free, he would have no further obligation to the court, he would not be civilly committed. While the insanity statutes seem to – well, the[y] definitely require people who are found not guilty by reason of insanity to be committed. And it's all in the same subsection of the Code or the same title of the Code. And that procedure, that commitment procedure is inapplicable, actually it would serve no purpose in a case of involuntary intoxication.

Tr. 34-35 (Nov. 30, 2015). Trial counsel made this same point again in its *Mem. Regarding the Court's Questions Concerning Expert Testimony*:

> In addition to the foregoing, the insanity commitment statutes, whose application is mandatory following an NGRI finding, clearly do not apply where mental illness is not an issue.

Mem. Regarding the Court's Questions Concerning Expert Testimony 8 (Dec. 18, 2015).

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[57] *See* Va. Code § 19.2-182.2 ("Verdict of acquittal by reason of insanity to state the fact; temporary custody and evaluation"), Va. Code § 19.2-182.3 ("Commitment; civil proceedings"), Va. Code § 19.2-182.4 ("Confinement and treatment; interfacility transfers; out-of-hospital visits; notice of change in treatment"), Va. Code § 19.2-182.5 ("Review of continuation of confinement hearing; procedure and reports; disposition"), Va. Code § 19.2-182.6 ("Petition for release; conditional release hearing; notice; disposition"), Va. Code § 19.2-182.7 ("Conditional release; criteria; conditions; reports"), Va. Code § 19.2-182.8 ("Revocation of conditional release"), Va. Code § 19.2-182.9 ("Emergency custody of conditionally released acquitee"), Va. Code § 19.2-182.10 ("Release of person whose conditional release was revoked"), Va. Code § 19.2-182.11 ("Modification or removal of conditions; notice; objections; review"), Va. Code § 19.2-182.12 ("Representation of Commonwealth and acquittee"), Va. Code § 19.2-182.13 ("Authority of Commissioner; delegation to board; liability"), Va. Code § 19.2-182.14 ("Escape of persons placed or committed; penalty"), Va. Code § 19.2-182.15 ("Escape of persons placed on conditional release; penalty"), and Va. Code § 19.2-182.16 ("Copies of orders to Commissioner").

[58] *See Defendant's Response to Motion to Compel and Motion for Appointment of Evaluator Under Va. Code* § 19.2-168. (November 25, 2015), at 1.

In sum, there were multiple, significant strategic reasons for trial counsel – faced with a choice between asserting an insanity defense and not asserting an insanity defense – to choose the latter option.

iii. Conclusion regarding the "Performance" Prong

The Court finds that trial counsel's decision not to assert an insanity defense was an objectively reasonable decision under all the circumstances. Trial counsel thoroughly researched the law and made an informed strategic decision that provided the defendant with several significant and tangible advantages. Given the "high bar" set by *Strickland* for a habeas court's review of trial counsel's performance, given the "highly deferential" standard that a habeas court must apply, given the "strong presumption" that trial counsel acted in a reasonable professional manner, and given the "wide latitude" afforded trial counsel in determining how best to represent a client, the Court finds that petitioner has not carried his burden of proving "deficient performance."

3. The "Prejudice" Prong of Strickland

a. Facts

In the previous section of this Opinion, the Court found that the petitioner did not carry his burden of proving that trial counsel's performance was "deficient." The Court now turns to the "prejudice" prong of *Strickland*. Since a petitioner must satisfy both prongs of *Strickland* to obtain relief, the Court will address the following question: *If trial counsel had asserted an insanity defense, is there "a reasonable probability that... the result of the proceeding would have been different." Strickland v. Washington,* 466 U.S. 668, 687 (1984). In making this determination, a "court hearing an ineffectiveness claim must consider *the totality of the evidence* before the judge or jury." *Id.* (Emphasis Added).

The Court will, therefore, review the "totality of the evidence," beginning with the testimony of the two victims, Sue Duncan and Leo Fisher.

i. Testimony of Sue Duncan

Sue Duncan was the Commonwealth's first witness. She testified as follows[59]:

Ms. Duncan was married to Leo Fisher, who worked at the Arlington law firm of Bean, Kinney Korman. She and her husband lived at [redacted] which was in Fairfax County. Ms. Duncan was recently retired after working for 30 years for a trade association.

On Sunday evening, November 9, 2014, Ms. Duncan was in the kitchen preparing dinner. Leo Fisher was in the living room watch television. The doorbell rang and Ms. Duncan asked Mr. Fisher to get the door. She heard a "weird" noise and went out into the foyer. She found Mr. Fisher lying on the floor and there was a man between herself and Mr. Fisher. It would be more than three hours before the man left their house. The man said, "I'm from the Virginia SEC and I'm arresting your husband." The man "flashed a badge in front of my face but it was really fast so I didn't see what it was, just that it was some kind of

[59] Ms. Duncan's testimony appears at Tr. 47-192 (May 19, 2016).

badge." She asked for identification. "And I could see the expression on his face change and I could see I wasn't going to get identification and it made me afraid."

Ms. Duncan was "scared" and began "backing up." The man then backed her up against the footstool in the living room and "grabbed my hands and he tied my hands and then he tied my feet." To do so, he used zip ties and "was really fast about it."[60] The loops used to secure her wrists and ankles were attached to each other by smaller loops, to create a connection almost like a handcuff. When Ms. Duncan had first come to the foyer, her husband was already tied up at both the feet and the hands with zip ties. Ms. Duncan observed that the man had a hat" pulled down over part of his face." The man spoke clearly to her.

The man ordered them to take him back to their bedroom and "[w]hen we got back to the bedroom he yanked the curtains closed...." Meanwhile, Mr. Fisher "was having trouble breathing", he "looked terrible" and "he said that his heart was racing and he was having trouble breathing." Ms. Duncan "was really afraid" because the year before Mr. Fisher had had a heart attack and had bypass surgery. She told the man she needed to call an ambulance but he refused the request. She then told the man she needed to call Mr. Fisher's doctor and he refused that request as well. The man went into the bathroom and got Mr. Fisher's "pill boxes."

Early in her encounter with the man, she told him she needed to go to the kitchen to turn off the oven, where a chicken was still cooking. He "said no, you're staying on the bed, I'll turn off the oven." The man left the room and "presumably" that's what he did.

Ms. Duncan thought the man "would kill us." She asked the man "Why are you doing this?" He responded by telling Ms. Duncan "that Leo had a hit out on someone and he was working for a cartel called Knights Templar," and that "Leo put a lot of money out to get this hit" and that the man had emails from "Leo's work from his Bean Kinney Korman mail that would prove that Leo had put this hit out." The man "started to ask Leo a lot of questions about the money and the hit, were there other lawyers at Bean Kinney involved, were there other hits...." The man also asked Mr. Fisher if he "was aware that one of the lawyers was having an affair with a client."

Ms. Duncan was "stunned" that the man "just knew a lot about us," including how long they had been married. The man told them that he had "the house under surveillance" and wanted to know about the neighbors and whether "any of them [were] likely to come over." The man also said "he had operations going on in the homes of other attorneys at Bean Kinney Korman at the same time he was in our house." Ms. Duncan was able to understand everything the man was saying to her and that the information about them was accurate.

The man then turned to "questions about Leo, about the law firm where Leo works." The man wanted to know "about different attorneys in the firm, what were their roles, different clients. Just asking all these questions about Bean Kinney Korman."

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[60] Detective Eric Deane testified that zip ties are sometimes used by law enforcement as a restraining device, instead of handcuffs. The Fairfax County Police Department calls them "flex cuffs." Tr. 123-124 (May 24, 2016).

Ms. Duncan became "sick to my stomach" and "thought I was going to throw up...." She approached the bathroom and he started to follow her in. "I started to beg him not to come in, not to follow me in. He said, 'Calm down, ma'am. Calm down. I'm married. I do not want to see you naked.'" The man then pulled out a knife and "broke the part of the tie that was between my wrists." Ms. Duncan made several trips to the bathroom and once "I saw him out in the foyer" and "flipping the outdoor lights." He was "flipping them on and off signaling somebody."

Another time she saw the man standing by one of the entrances to the house talking to a woman outside. There was also a vehicle pulled up very close to their deck, with the headlights shining into the house. Ms. Duncan described the man's demeanor as "very forceful, authoritative. Very much in control." Periodically, the man would leave the bedroom to make or take calls on his cell phone and would have Ms. Duncan and Mr. Fisher stay in the bedroom while he talked on the phone. The man told them he was on the phone "with his boss or his partner." This went on "throughout" the whole three plus hours that the man was in the house. The man would say things like, "Well, the interrogation isn't going very well. Leo is not giving the wright [sic] answers."

At one point, Ms. Duncan began crying and the man came over and said, "Stop crying, ma'am. There's no reason for you to be crying. You need to stop crying."

At some point, he "made us go out to the office" and made "Leo log into the computer on the desk," where he "can log into this work system as well as his work e-mail...." Before having them go into the office, the man went into the family room and "yanked" all the vertical blinds, except for one that was "hard" to get to. The man had "Leo look for certain e-mails or whatever" and got "frustrated because I guess Leo wasn't – he thought Leo wasn't looking in the right places or something." He then told Mr. Fisher to get up and began "looking through Leo's work e-mails and work folders." At some point the man had them go back in the bedroom.

Eventually, Ms. Duncan was separated from her husband. "The man turned to me and he said the interrogation required that he separated us because there might be questions that Leo would not answer in my presence so we had to be separated." He then took Ms. Duncan into the bathroom and closed the door between the bathroom and the bedroom. "But he did say, because I was so worried, so he said that could call out to Leo and Leo could answer." The man said it would only be for 15 minutes. Every few minutes, Ms. Duncan would call out to her husband and her husband would tell her he was okay.

Before he separated them "there was a line of questioning about how much is Leo worth to the firm. Who would replace Leo if [] he were not available. If Leo were gone how would the firm divide up the money. Questions along those lines."

Ms. Duncan told the man when the 15 minutes were up and he said "five more minutes." The next time she called out there was no answer and she opened the bathroom door. The man was "lying on top of Leo and he was cutting his throat. And I said, 'What are you doing, what are you doing? What's going on?' And he jumped off the bed, he jumped off the bed. And he was shouting at me to get out. 'Get out, ma'am, get out now. Don't come in here, get out.'"

Ms. Duncan saw a gun in the man's hand and that he was raising his hand. "So I turned my head but I felt the bullet hit me." The bullet "tore across my scalp down to the bone." She fell down on the floor.

"And then I got up, I felt myself getting up and I knew I was alive." She began crawling toward the phone that was on the other side of the bed. The man then "jumped on top of me and he started stabbing me. So I collapsed." The man was stabbing her "[a]ll across my neck in the back and my shoulders." When the man got off her, "I would get to my knees again and start crawling and he would jump on top of me and stab me …." And "I would collapse and he would get off and then I would get up and start crawling." This happened three or four times. "And then I finally realized I was going to have to pretend to be dead. So the last time I just laid there on the bed." She waited until she did not hear anything and then crawled across the bed "but he had taken the phone."

Since the phone was no longer in the bedroom, she headed toward the office to get to the nearest phone. There was a pad for their alarm system on the wall in the bedroom which had a panic button. "I hit that on the way out and then I went into the office."[61] The noise of the panic alarm is "deafening inside the house." When she went to call 911, she saw the man "going out the front door and slamming the door behind him." She tried to call 911 "but I never heard anyone say anything." While she was on the phone, Mr. Fisher came in. She was surprised because "I thought he was dead." They "told each other we loved each other."

Mr. Fisher "had a towel up against his neck. He was trying to, you know, stop the bleeding." Ms. Duncan was also bleeding and "collapsed on the floor." She felt that she was close to death. The police arrived "really fast." Two ambulances arrived. The first ambulance took Mr. Fisher and the second ambulance took her.

She told the medic "to save the cats because I thought we might not be coming back." At the hospital, they stapled the gunshot wound to her head. She was later told that she "started bleeding really bad from this long wound on the side of my neck and then they took me to the OR." Ms. Duncan was in the hospital for almost a week. Mr. Fisher was in the hospital for two weeks.

During the more than three hours in which she observed the man, he did not appear lethargic in any way, he did not appear to have slurred speech, and he did not appear to stumble about. Throughout her encounter with the man, he was "authoritative" and "in control." He was "constantly telling us things like not to leave the bed, or telling me I needed to calm down or stop crying. Taking us places into the office, for instance on the computer. Taking us back. He clearly had a list of questions that he wanted to ask. When he was taking phone calls he was clearly talking about those questions because he would come back and either follow up or start a new line of questioning. He knew exactly what he was doing when he was in our house."

Ms. Duncan still suffers from her injuries because of the attack. She had "nine stab wounds and I have nine scars. There was this long one on my neck, four more on the back of my neck, three on my shoulder, one on my chest." Some of the wounds, including the gun shot wound, healed with a "keloid which is like this raised, hard, red ridge." The area of her body "across my upper back, shoulders and back of my neck" are "just always achy. It feels like I have a weight sitting on me." In addition, she has permanent nerve damage from the long wound on her neck. Nerves were severed and "I've lost sensation all along this side of my neck and under my chin." It has limited her range of motion and it "hurts when I

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[61] According to Vector Security, the alarm was tripped at the residence of Leo Fisher and Sue Duncan on November 9, 2014 at 9:43 p.m. Tr. 258-259 (May 25, 2016).

turn my neck too far." Ms. Duncan also "suffered a really bad concussion" and "I still have some concussion syndromes" even after 18 months. This includes dizziness, tinnitus, an inability to "tolerate loud noises or bright lights," and "loss-of-balance" issues. The ringing in her ears "was so loud that it drowned everything else out – music, people talking, whatever." The ringing in her ears is still "very loud" if it is quiet or she is trying to fall asleep. "It keeps me from falling asleep and it's hard to concentrate."

Ms. Duncan identified the defendant as the man who committed these crimes.

i. Testimony of Leo Fisher

Leo Fisher testified as follows[62]:

Mr. Fisher was the managing shareholder of the law firm of Bean, Kinney & Korman, where he had worked since May 1990. As managing shareholder, he was responsible for the daily operation of the firm, including the hiring and termination of attorneys. In February 2013, Mr. Fisher hired Alecia Schmuhl as a trademark attorney.

The defendant had also applied for a job at Bean, Kinney & Korman but had not been hired.[63] In January or February 2014, the defendant was hired by the firm as an independent contractor at the request of Alecia Schmuhl. Mr. Fisher first met the defendant at the firm's annual holiday party in December 2013. From "time-to-time" he also "would see him in the hallway" of the firm.

On June 19, 2014, Mr. Fisher had a confrontation with the defendant. "Our office manager Jackie … came to me and her job includes handling all personal matters, payroll records, that sort of thing. And so, as a part of that when employees have applied for mortgages the employment verifications come in and she takes care of it because she has access to all the records. So, she came to me and was quite concerned because she had received an application – I'm sorry, a verification of employment form for Andrew Schmuhl not Alecia. And Andrew never worked for us as an employee, was never a W-2 employee and that's what those applications – those verifications are about. And what particularly concerned her was that Alecia had come to her several times pressuring her to just sign it anyway. And Jackie said that – I don't know all the details, I'm sorry, but she had also gone to the receptionist … and asked the receptionist if this person at the mortgage company called for Jackie to instead send the call to Alecia." (After his recollection was refreshed, Mr. Fisher indicated that it appeared that Alecia Schmuhl had given the mortgage company representative her direct dial number instead of that of Jackie.)[64]

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[62] Mr. Fisher's testimony appears at Tr. 7-209 (May 23, 2016).

[63] The defendant's resume in connection with his application for employment remained in Bean, Kinney & Korman's files and was admitted through Lynda Tompkins, Bean, Kinney & Korman's office administrator. Tr. 40-42 (May 26, 2016.)

[64]There are text messages indicating the defendant's involvement in the mortgage matter. One text advised Alecia Schmuhl that the defendant had told someone named "Beverly" that "you were HRs direct line." Another text advised Alecia Schmuhl "[s]o just pretend to be someone" and "Hell make up an accent" and to "[s]tart in French or [G]erman." Tr. 264-265 (May 31, 2016) and Commonwealth Exh. 351.

Mr. Fisher examined the verification form and asked Alecia Schmuhl about "this and she didn't deny any of it. And so, I said to her, Alecia I have to think about this but I want to tell you, I think, I may have to let you go. But why don't you go home today, for the rest of the day … and come in and see me first thing in the morning." Mr. Fisher then talked to other people in the firm. "[W]e were very concerned. Because it seemed to imply a lack of integrity. And there was some support for just terminating her right then and there."

The following morning when Mr. Fisher met with Alecia Schmuhl, the defendant was there and he was "angry". Mr. Fisher met with both of them, along with the office manager. "Andrew just started very aggressively – Alecia didn't say a thing, actually, and Andrew started very aggressively saying that they were not committing mortgage fraud. And this was not mortgage fraud and he wouldn't let me talk to Alecia. And so, he was getting more and more worked up." Mr. Fisher said the defendant's aggression was directed at him. The defendant leaned across his desk and was "getting very red faced" and was three feet away. He "kept raising his voice. His voice kept getting louder and louder." Mr. Fisher said "I really think you should leave. And, he wouldn't go. And I said this probably four or five times to him and he would not go. And finally I said to him, Andrew, if you don't go you're making this decision very easy for me. Because if I can't talk to Alecia I don't know what else to do. And Alecia at that point turned to him and said, Andrew, leave now because I want to save my job." The defendant "kind of paused and he got up and he walked out."

Mr. Fisher did not want "to let her go." He said that her first year at Bean, Kinney "she had been a very good young attorney. And I didn't want to let her go." Mr. Fisher decided "not to let her go" but imposed conditions, including apologizing to the office manager and the receptionist. Mr. Fisher agreed that the firm would verify that the defendant had done contract work for a "limited" number of hours. "It might have been 8-10 hours."

In late October, 2014, Mr. Fisher terminated Alecia Schmuhl's employment at Bean Kinney & Korman.[65] He gave Alecia Schmuhl a document entitled "Severance Agreement and Release" and told her "to take it and read it over and let me know." Mr. Fisher signed it but, as of November 9, 2014, Alecia Schmuhl had not signed it. On November 7, 2014, Mr. Fisher created a "to-do-list" and the first item on it was to call Alecia Schmuhl regarding the severance agreement.

On the evening of November 9, 2014, at around 6:15 pm, a car came up the driveway of the Fisher/Duncan residence and then the doorbell rang. Mr. Fisher thought it was a delivery person who had

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[65] There are a series of text messages between the defendant and Alecia Schmuhl that establishes that the termination occurred on October 27, 2014. The text messages demonstrate the defendant's anger toward Mr. Fisher. He describes Mr. Fisher as "worthless", as a "worthless piece of sniveling shit," and as "scum." He texted Alecia Schmuhl that they needed to hire "the most bloodthirsty lawyer out there," that "discovery should be fun," that "[y]ou want to bring out their emails in discovery which are probably a gold mine," that they should "[l]awyer up and take them down," that "a gender discrimination suit would also be a nice peek at their financial books," and that the defendant wanted Alecia Schmuhl's "name on their goddamn doorr [sic]." Tr. 266-274 (May 31, 2016) and Commonwealth Exhibit 352A.

gone to the wrong home. He unlocked the handle lock and was just turning the door when "suddenly the door pushed me backwards." Then "a person came in and I saw him point something at me and he tazed – he tazered me...." Mr. Fisher fell to the floor and he felt like he was "having a seizure" and "couldn't stop shaking," and was "shaking very violently on the floor. Mr. Fisher thought he was having a heart attack, which he had previously had in April 2013.

While he was on the floor, the person tied his hands and feet. "[H]e did it very quickly." Initially, the man "had on a dark hat that had a – what seemed to me to be a wide brim and it was sort of pushed down sort of his face was hard to see." Ms. Duncan came into the foyer and began screaming at the man, "[s]aying things like, who are you? Get out of here. Get out of our house." The man "started screaming back at her." And then the "next time I saw her which was quite quickly, her hands and her feet were also bound." Ms. Duncan ask to see identification. The man "pulled something from a pocket or maybe his belt...." And "Sue then said, I want to see an I.D. and he – that when he stormed out. And so, when they came back in he sort of yanked me up."

Mr. Fisher asked the man "[W]ho are you? And he said, he used some name that I don't remember. And I didn't quite catch it." (Mr. Fisher later testified that it was "clearly" not the defendant's own name.) He told Mr. Fisher he was with the Virginia SEC. Mr. Fisher asked the man "why are you here?" The man said that Mr. Fisher had placed a hit on a member of the Knights Templar, which he said was a drug cartel. "And you sent an email putting a hit on somebody in that cartel for 300 and I think he said $70,000." Mr. Fisher said: "[S]ir, who are you looking for? My name is Leo Fisher. And he said, yes, I know." The man said the email had been sent from Bean, Kinney's email. Mr. Fisher said "I've never sent any such email."

The man moved Mr. Fisher and Ms. Duncan to the bedroom. When Mr. Fisher got there, he could see the man "a little bit better" and "I realized it was Andrew Schmuhl." Mr. Fisher never let the defendant know that he knew who he was. The defendant "started interrogating us and he interrogated us for a good three hours, until he attacked us." The defendant asked questions about who else in the firm had access to Mr. Fisher's computer. "And then he started going through, what seemed to me, like a list of topics. And so, he was asking questions about the firm and people in the firm." The defendant said that someone had put a hit on Mr. Fisher for $27,000." Mr. Fisher said "I don't know why anybody would do that. And he said, well, didn't you let somebody go lately? And at first I wasn't sure what he meant but he – I realized he was talking about Alecia. He never used her name." He also never identified himself as Alecia Schmuhl's husband.

Mr. Fisher confirmed that he had let someone go and the defendant said: "[W]ell don't you think that would give them a reason to put a hit on you?" When Mr. Fisher said "no," the defendant said, "[W]ell, why was she let go?" Mr. Fisher told the defendant that "her performance was, you know, very poor for the last six or seven months she was there." Mr. Fisher told him that the three attorneys she worked for were "constantly complaining about her missing meetings, missing deadlines for product." He told the man he had talked to Alecia Schmuhl multiple times. He also mentioned a particular attorney for whom Alecia Schmuhl had worked. At that point, the man asked if Mr. Fisher knew "that one of your attorneys is having an affair with a client." Mr. Fisher said he was unaware of this.

About "half way into this," the defendant said: "I want you to get on – log into your computer at work remotely." He then moved Mr. Fisher and Ms. Duncan into the office. On the way to the office, the defendant closed several sets of vertical blinds. The defendant said "there might be a sniper out there."

Once Mr. Fisher was logged in, the defendant instructed Mr. Fisher to go "to your October 15th email." When Mr. Fisher had gone back in the emails to October 15th, the defendant told Mr. Fisher to "get up" and the defendant got on the computer._The defendant wanted to know where his administrative emails were. Mr. Fisher told him that they were in "my admin box" and that "you can drag from the inbox into an admin box." Mr. Fisher stated that he "can get access to everything in the firm," including a personnel file on every attorney, salary information, and that "there would be a memo that I wrote a two, three page memo" about the mortgage issue. In addition, "[a]ll client information was there." This information was confidential and attorney-client privileged. The contact list in Outlook would also have all client information, "[m]eaning; names, addresses, contact information, key people." The defendant then moved them back to the bedroom.

The defendant both received and made phone calls on a cell phone that he had. He would talk in "a low voice" while on the phone and "walk out of my sight." The defendant indicated he was talking to his "partner" or his "boss."_During the defendant's interrogation, he went through "a set of questions in different topics." And "to me he seemed to be going through it quite systematically."

The defendant said he'd been "surveilling" the Fisher/Duncan house. He also asked Mr. Fisher who he was "closest to in the firm" and "who would succeed me when I was gone. And who would make more money when I was gone." Near the end, the defendant told Ms. Duncan: "[M]a'am, I want you to come – I want to take you out of this room because there may be things your husband won't tell me in front of you." He then put Ms. Duncan into the master bathroom and put her in the room where the toilet was. The defendant told Ms. Duncan that it would take "ten or fifteen minutes." The defendant then asked Mr. Fisher: "[W]ell, is there anything that you want to tell me now that you couldn't tell me before?" Mr. Fisher said "no." He then began asking "detailed questions" about one of the partners for whom Alecia Schmuhl had worked as well as about the partner's family. Mr. Fisher knew that the partner lived a half mile or a mile away and "I'm thinking in my head, oh my God, he's going to go over there next." The defendant also indicated at one point that "there's another operation going on tonight at one of your partner's houses."

The defendant asked whether Mr. Fisher's neighbors "come over unannounced" and whether "we kept a lot of money in the house." Mr. Fisher said "no. We don't keep money in the house. And he said, well, do you have any gold. And I said, we really don't." Mr. Fisher thought "maybe he'll go away with money. And so I said to him, you know, we don't have any money here but we can go to the bank."

The next "thing that happened is, he knocked me over, put a pillow over my face and cut my throat on the bed." In addition to cutting Mr. Fisher's throat, he "stabbed me in the head. He stabbed me in the shoulders – I'm sorry, in the left shoulder a couple of times." He did this while "on top" of Mr. Fisher. Mr. Fisher testified that "[h]e was on top of me and like, pressing the pillow with the knife underneath it." Mr. Fisher screamed to his wife" "he's killing me" and "Muppy, he's murdering me." Ms. Duncan came through the door and "she's screaming at him something like, what are doing. Get off him. Get off him." The defendant began screaming at Ms. Duncan to "get out", "[d]on't come in here." The next thing Mr. Fisher knew was that he was on the floor. And then Mr. Fisher saw the defendant bring "up a gun and he shot" Ms. Duncan. "And I saw her hair go, boom. And I thought he killed her. And she fell." Mr. Fisher grabbed a pair of shorts that were within his reach and put them up against his throat. He was "sort of going in and out" of "awareness."

The defendant then "came past me and he kicked me in the head or hit me in the head with something. I couldn't tell which and he said, you're going to die. And then the next thing I heard was a door slam." Mr. Fisher went through the master bathroom to the landing outside the office and saw his wife on the phone and heard her repeating their home address. They could not tell if somebody was on the phone but thought somebody said "911, hello or whatever" and Mr. Fisher said: "[W]e've been stabbed. We've been stabbed."

Mr. Fisher saw that his wife had blood all over her and "she wasn't able to do anything." Mr. Fisher fell and "I couldn't get up for a while." When he saw the flashing lights of a police car he was able to get up and open the door. Mr. Fisher told the police officer who first arrived on the scene to please help his wife. After the second officer arrived, "I said to him, I know who did this. And he said, who was that. And I said, Andrew Schmuhl and I spelled his name s-c-h-m-u-h-l." Mr. Fisher told one of the officers that Andrew Schmuhl was "the husband of a former employee of my firm. And I gave him her name Alecia Schmuhl." Mr. Fisher gave the officers the code to open his cell phone and said that they could call a Bean Kinney & Korman employee named Lynda Tompkins.[66]

Mr. Fisher was placed in an ambulance. One of the officers "was still trying to hold my throat and he was asking me questions and I kept spitting up blood and he said, please try not to get blood on me. And I said to him, I can't help it." Mr. Fisher was in the hospital for about ten days "and then rehab."

Mr. Fisher identified the defendant as the person who was in his house on November 9, 2014, and who he previously said was Andrew Schmuhl. Mr. Fisher testified that the defendant's speech was not slurred when he was in Mr. Fisher's home on November 9, 2014. Mr. Fisher testified that when the defendant was in his house – which Mr. Fisher indicated was for a duration of three-and-a-half hours – "he was just totally in control," and his voice "was quite clear." Mr. Fisher described the defendant throughout the interrogation as "acting like a lawyer taking a deposition."

When Mr. Fisher was shown a video of the defendant in a police car after arrest, he noted that "he's mumbling" but that "he never mumbled in our house." Also: "[H]e looks to me quite downcast in the car, of the officer's car. Whereas in the house – I mean, he was somebody in control and he was acting like somebody in control. And he was talking like somebody in control." He was not lethargic or slow to respond.

Mr. Fisher suffered the following injuries: "First of all, he cut my throat from side to side. And on the left side, the knife went in and then went through my esophagus which is why the blood was in my mouth and coming up. And I have a permanent scar here that runs all the way across my neck." There were also two stab wounds on the shoulder and a cut right behind the ear. As a result of the wound to Mr. Fisher's neck, he needed a tracheotomy and could not talk for the period of time that the tracheotomy was in place.

Mr. Fisher still suffers from the injuries inflicted by the defendant: "I have pretty significant scars across my throat where it was cut and on my left shoulder, still here behind my ear. But when he cut my throat he cut the nerves here in my throat. And the nerves that he cut he severed them. Control the, among other things, the left side of my tongue. So, my tongue now, instead of being like this, bends to the left.

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[66] Lynda Tompkins was the office administrator at Bean, Kinney & Korman.

And the whole left side is inert. I can't feel it. I can't move it. It only moves because I can move from the right side. And the result is that, when I get tired I slur words which I never did before. And when I'm eating it's very difficult because I can't open my mouth as wide as I could before because the joints, particularly on this side, are affected." In addition, "it's very difficult" for Mr. Fisher to move food around in his mouth and "I bite my tongue a lot all along that left side while I'm eating. And I mean, to the degree that it's bloody. And I have to be very careful when I'm eating with someone including my wife. Because if I start talking or trying to talk or not thinking about what I'm doing in my mouth, I'll bite my tongue."

Mr. Fisher had months of speech therapy and over a year of physical therapy. The injuries he suffered impacted on his work. "[T]he work that I did both when I was actively practicing and in court a lot, that even when I was not in court, was very much dependent upon my ability to speak and to speak clearly. And to communicate with people." Now, "many people who I'm talking to, have to have me constantly repeat things" and as the day "passes" or he is "speaking more," his tongue "swells up and just becomes difficult to articulate."

ii. The effort to save the lives of Sue Duncan and Leo Fisher

Joseph Shifflett was the second Fairfax County Police Department officer to arrive on the scene and focused on rendering first aid to Mr. Fisher, who was "bleeding very heavily." He had to put "my hands, you know, into his neck to get the blood to slow down." Tr. 224-225 (May 23, 2016). "I didn't know if he would make it at that time. I was basically trying to get information out of him for, you know, possibly a dying declaration, how I see it." Tr. 225-226 (May 23, 2016). Mr. Fisher gave Officer Shifflett "the name of Andrew Schmuhl who had done this. He even spelled the name out for me." Tr. 228 (May 23, 2016). Officer Shifflett noticed plastic zip ties around Mr. Fisher's wrists. Tr. 230 (May 23, 2016). Officer Shifflett rode in the ambulance with Mr. Fisher and the medics "provided me an apparatus with basically where you can suction the blood out of the back of his throat to try to alleviate his airway. Which I took over control of that and I continued to do that all the way to the hospital." Tr. 231-232 (May 23, 2016). Mr. Fisher "went unconscious" when "we got into the back of the ambulance." Tr. 232 (May 23, 2016).

Kenneth Eugene Gates, a Fairfax County Fire and Rescue paramedic, testified that he was the first paramedic to arrive on the scene and immediately began caring for Mr. Fisher. He testified that when he first observed Mr. Fisher, "[t]here was a large amount of blood loss surrounding the patient, puddles." Mr. Fisher was "semi conscious" and "[i]n and out of consciousness." The severe injury was "mainly the laceration across his throat. It appeared to be deep enough to not sever[] but enter his carotid artery and his jugular vein. Large amount of blood loss. It also appeared to have severed his trachea, as blood was coming out of airways. By his lung sounds it appear to be down into his lungs as well." Mr. Gates advised the hospital that he was coming in with a "sever[e] trauma patient...." Tr. 38-42 (May 31, 2016).

Eric Christopher Villman was also a Fairfax County Fire and Rescue paramedic. Upon his arrival at the Duncan/Fisher residence, he immediately began to care for Sue Duncan, who was "semi-conscious" and "was covered in blood." His main concern was "the bleeding from her head." There was also "an open wound to her neck" and "some puncture wounds" in her upper abdomen and chest. Mr. Villman "pushed large, heavy dressings into the neck wound area, and I held pressure against the head wounds." More than once, Ms. Duncan asked Mr. Villman "if she was going to die, and I told her, no, I wasn't going to let her die." Mr. Villman called in a "trauma alert" to the hospital, indicating that "this is a very serious case of multiple stab wounds and possibly a gunshot wound to the head." Tr. 92-98 (May 31, 2016.)

Ryan Fisher was the third officer at the scene. He arrived with Officer Shifflett. He observed Ms. Ducan "covered in blood" and "[s]he wasn't moving." Tr. 237 (May 23, 2016). He did not think "she was still alive." *Id.* Officer Fisher said "[t]he entire house was covered in blood. There was really no where in that house that we could walk that there was not blood." *Id.* After he heard Ms. Duncan speak, he began to administer first aid to her. (Officer Fisher was a certified EMT. Tr. 238 (May 23, 2016.)) He observed that on "the top of her head, there was a large – it looked like a stab wound or a cut that was – appeared to be down to the skull that led forehead into her hairline. I noticed that she had a stab wound on her neck." Tr. 238-239 (May 23, 2016). He "started to apply direct pressure to the wound on her neck." Tr. 239 (May 23, 2016). He started "to pack the wound on her neck and as I was doing it, it was just bleeding through the bandages that I was packing the wound with. At one point I literally had to stick my finger up to about my first knuckle into the wound in her neck just to keep it from bleeding out any more." Tr. 240 (May 23, 2016). Officer Shifflett went with Ms. Duncan in the ambulance and continued to apply "direct pressure" to her wound. Tr. 241 (May 23, 2016). He remained with Ms. Duncan until they took her into the operating room. Tr. 245 (May 23, 2016).

Dr. Keilla Amorim Schmidit was a trauma surgeon, acute care surgeon and critical care surgeon at Inova Fairfax Hospital.[67] On the evening of November 9, 2014, she was the trauma surgeon on call. She received a call "that we had two patients coming in, both code blues – meaning they were critically ill, with stab wounds and gun shot wounds." The moment that she knew that two patients were coming in, she put in a call to her partner to "come in from home in the middle of the night."

Dr. Schmidit saw Sue Duncan first. She was in stable condition, "not profusely bleeding," and not the "sicker patient" compared to Mr. Fisher. Even though her wounds at first seemed "[a]pparently superficial," a surgeon "can only tell by taking the patient to the operating room and opening the wound and see how deep they are." Even if a patient is not "bleeding immediately they can still have life-threatening injuries."

In contrast, Mr. Fisher was "quite unstable." He was "bleeding profusely from his mouth and the multiple stab wounds that he had." He was in "sever[e] hemorrhagic shock." His injuries were "[a]bsolutely" life threatening. He was "extremely ill." Her team had "a few minutes to make a difference in this case."

Dr. Schmidit took Mr. Fisher into the operating room and called in a second surgeon because "I did not want to take a chance to not have other person to operate on her in case" she had "a clinical change." And "[s]ure enough she did. She started bleeding from one of her stab wounds." At that point, Sue Duncan's injuries were "[a]bsolutely" life threatening as well. Her partner, Dr. Mischetti, began operating on Sue Duncan while Dr. Schmidit was operating on Leo Fisher.

To save Mr. Fisher, Dr. Schmidit began "a massive transfusion protocol because you have to assume at that point the patient lost most likely 30 to 40 perccent of their blood and you don't have a whole lot of time. Irreversible hemorrhagic shock is when you probably lose between 40 to 50 percent of your blood." Dr. Schmidit then did a tracheostomy because "I had to explore the wounds to see how much damage was done. It was a large wound."

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[67] Dr. Schmidit's testimony appears at Tr. 44-89 (May 31, 2016).

The wound was "different than [any] wound that I have ever seen."[68] It was "[a]s if someone had taken a knife" and "[s]omehow looking for or causing a lot of damage. I've never seen a wound like that before." Because "of the trajectory [of the knife] there was a lot of damage." Some of Mr. Fisher's blood vessels "were just shattered in places." The nature of the wound "was so ragged – there was so much tissue destruction." All together, Mr. Fisher had "maybe 10 [wounds], maybe more. We washed and closed all of them in the same operating room time."

Dr. Schmidit confirmed that the knife wound to the neck was not just across his neck but moved back and forth within the wound. "This wound was different than anything I've seen because it seemed the person attacking had enough time to take the knife" and use "different trajectories," specifically "[d]own, laterally, and upwards. And this is an unusual thing because that means the victim would have allowed that. Meaning being unable to move and had to sustain such horrible pain with this trajectory." This was "not a clean wound. It was a wound that was done with force and a lot of violence. * * * Great force and a lot of violence and a lot of damage."

Dr. Schmidit testified that if she had not taken the actions she took to stop Mr. Fisher's bleeding, he would have died due to "the multiple stab wounds that he had, the severe tissue damage, the amount of blood loss he had suffered."

Dr. Chris Michetti was a general surgeon and a trauma surgeon who worked at Inova Fairfax Hospital.[69] On the night of November 9, 2014, he was paged and asked to come into the hospital for an emergency. He found Sue Duncan to be in "critical condition," a "life-threatening situation." Her initially stable condition had "deteriorated" and she required surgery to "stop bleeding from her wounds." Had he not operated, she "likely would have further deteriorated with the potential of dying." He determined that Ms. Duncan had "multiple deep wounds; I think about seven or eight on her head and neck and chest. Some of them were still actively bleeding. They were very deep, some."

In the operating room, he opened the wounds "to find the blood vessels that were bleeding, stop the bleeding, and eventually repair the wounds." On her neck, she had a wound that had "transected her external jugular vein" – meaning "it was cut completely through" -- and was "bleeding profusely." All her wounds were "explored" and "[w]ashed out" and "[a]ny blood vessels that were bleeding were stopped from bleeding. Muscle that was bleeding was also stopped" and, once the "main bleeding had stopped, all the wounds were repaired." In combination, the wounds were life threatening. Dr. Michetti testified that the wound to Ms. Duncan's head was "down to the skull." He also confirmed that the "external jugular" vein would remain severed for the rest of Ms. Duncan's life.

Dr. Christian LeFevre was Sue Duncan's primary care physician. He testified that, as a result of the attack on November 9, 2014, Ms. Duncan has "multiple scars" on her back and neck and upper extremities. He described them as "ugly scars," and that some of them had "difficulty healing." He also indicated that since the attack he has treated her for "tinnitus," and that he did not expect her scars to heal better in the future. Tr. 127-139 (May 31, 2016).

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[68] Dr. Schmidt testified that she had been doing trauma surgery for ten years. Tr. 52 (May 31, 2016).

[69] Dr. Michetti's testimony appears at Tr. 101-126 (May 31, 2016).

Dr. David Borenstein was Sue Duncan's arthritis physician. He saw her a month before the November 9th attack and was evaluated for a neck problem which caused her some pain. He noted that "she was improving in regard to her neck discomfort" and she was considering decreasing her medication. When she came to see him two or three weeks after the attack, there was a "marked change in her physical function. She basically did not move her head at all. She had had multiple traumas to the head and the neck, and also had a concussion which made her not want to move her neck at all." While "this has improved to a degree," she "still remains limited as far as her range of motion subsequent to that event" and has not recovered the range of motion she had prior to the attack. Tr. 139-156 (May 31, 2016).

Dr. Patty Lee was an otolaryngologist in Fairfax and was asked by a trauma surgeon to evaluate Leo Fisher "because he was experiencing trouble swallowing and with his speech." She first evaluating Mr. Fisher on December 18, 2014, and noticed that he was not "speaking clearly" and also had a "drooping lip on the left side." His "left tongue was not working properly." She confirmed that these observations were consistent with nerve damage. Dr. Lee continued to treat Mr. Fisher until October 2015. There had been some improvement with respect to his lower lip but his "tongue muscle movement was not equal" and he "still had numbness of the tongue on the left side." Mr. Fisher told Dr. Lee that it was sometimes "easy to bite himself on the tongue when he's talking or chewing," and explained that "when your tongue can't feel the teeth coming, then it doesn't know how to get out of the way." Dr. Lee confirmed that Mr. Fisher's speech is still affected, consistent with sustained nerve damage. She also confirmed that after 18 months, if someone is still experiencing nerve damage symptoms, she would expect the nerve damage to be permanent. Tr. 164-173 (May 31, 2016).

iii. The Capture of the defendant and Alecia Schmuhl

Daniel Custard was a Fairfax County Police Officer who also responded to the scene. He was given the name Andrew Schmuhl as a "possible suspect." He was able to "locate a vehicle that was registered in his name, which was a silver 2012 Honda SUV with Virginia registration WYL 8955." He gave a "look out" for responding units to "start looking for that vehicle." Tr. 253-256 (May 23, 2016).

As the officer was on route to the Schmuhl residence, he located the Honda SUV right around Braddock Road and I-495. The vehicle was heading southbound on I-495. After waiting for another police vehicle to arrive, the officer put on lights and siren, but the vehicle "decided not to pull over for us at that point." The vehicle exited I-495 and a police vehicle had to "take evasive action" to avoid being struck by the Honda SUV. Officer Custard "observed the passenger in the vehicle reaching all over the vehicle, appeared to be reaching under the seat and removing his clothing." The driver of the vehicle was Alecia Schmuhl. The vehicle stopped at a red light and one officer began to exit his vehicle "and deploy his canine partner." But the vehicle "took off again" and pulled into a shopping center. Tr. 257-265 (May 23, 2016) and Tr. 20, 43 (May 24, 2016).

The police "effected" a "stop" at that location and the passenger of the vehicle exited the vehicle wearing only an adult diaper. Officer Custard identified Andrew Schmuhl as the passenger of the vehicle. The officer "challenged the passenger of the vehicle at gunpoint" and "told him to get on the ground." The defendant "continued to walk away from the vehicle in the direction of the shopping center." At that point, the defendant was confronted with the police dog and was told that "if he didn't comply with command then he would be bitten." The defendant "got on the ground and we were able to take him into custody." Tr. 265-267 (May 23, 2016).

Officer Custard asked the defendant if "he needed rescue or if he was injured, at which point he told me that he didn't." A "couple minutes later I came back to him" and "noticed that there was a pretty distinct change in his level of consciousness. When I first spoke to him, he was very lucid, he was able to answer questions easily." Now, he was "almost passing out", his "eyes were in the back of his head" and he had "an altered level of consciousness." The officer asked the defendant if he "had taken anything illegal or any medications." The defendant said he had taken Dilaudid and Fentanyl. Tr. 267-268 (May 23, 2016).

When the officer looked in the vehicle he was able to observe: "clothing on the front passenger floorboard of the vehicle that appeared to have blood on it. Along with a novelty badge and a holster to a firearm. I could also smell odor of ammonia that was emanating from the vehicle." Tr. 268 (May 23, 2016).

Officer Custard also retrieved a pill bottle that indicated it was Tizanidine Hydrochloride. He also took custody of Alecia Schmuhl's purse, inside of which was a list. (Commonwealth Exhibit 92.).[70] Tr. 268-269 (May 23, 2016).

Neferti Fuller, a nurse at Inova Fairfax Hospital interacted with the defendant at Fairfax Hospital on the evening of November 9, 2014, and recorded that the defendant told the nurse that he had taken "a handful of muscle relaxers," and that the police had found Tizanidine in the car and that the patient verified that this is the medication he took. Tr. 17-19 (June 9, 2016), Commonwealth Exh. 372. This was corroborated by the testimony of Officer David Curcio, who was one of the officers involved in the arrest of the defendant, and who followed the ambulance transporting the defendant to the hospital. Officer Curcio testified that "I recall that he – he mentioned that he had taken a handful of a muscle relaxer." Officer Curcio indicated that the muscle relaxer he took was Tizanidine, which he learned from observing the defendant's interaction with the nurses at the hospital. Tr. 58-60, 76 (May 24, 2016).

Michaela Casey, a nurse at Inova Fairfax Hospital interacted with the defendant at Fairfax Hospital on November 10, 2014. She asked him why he had been wearing a diaper on the previous evening. "He told me that he had something wrong with his bladder." Tr. 31 (June 9, 2016).

Dr. William Hauda qualified as an expert in forensic medicine and emergency medicine. He confirmed that Tizanidine was in the "class of medication" of muscle relaxers and that a "typical dose"

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[70] Detective Matthew Keisling testified that the list was "handwritten text in bullet format. It reads:

- Handcuffs
- 2 Bottles Nyquil
- 2 Packs Benadryl.
- Adult Diapers (Male)
- 2 Sleeping Masks (if available)

Tr. 112 (May 25, 2016) (Commonwealth Exh. 92). John Alan Jamieson, a Commonwealth of Virginia questioned document examiner, qualified as an expert and testified that the list was written by the defendant. Tr. 255 (May 25, 2016). Also recovered from the Schmuhl's vehicle was a November 7, 2014 Walgreen's receipt indicating the purchase of two containers of Vick's Nyquil, severe 12 ounce" and "Benadryl, allergy ultra tab." Tr. 113 (May 25, 2016). Two unopened bottles of NyQuil and an unopened box of Benadryl were recovered from the Schmuhl's vehicle. Tr. 92 (May 25, 2016).

would take effect in "around an hour." A larger dose "can cause a quicker onset of effect." If an individual hypothetically took the medication at 9:45 pm, he would expect the effects of the medication to be present "within an hour or so." Tr. 55-58 (June 9, 2016).

iv. Recovery of evidence from the Schmuhls' vehicle, the Duncan/Fisher residence, and the Schmuhls' residence.

James Smith testified that he was a Fairfax County Police Department crime scene detective who collected evidence from the vehicle from which the defendant emerged at the time of his arrest. He noticed "a strong chemical odor emitting out – emitting from the interior of the vehicle. Detective Smith observed a prescription bottle in the center console and a white shirt with red stains "balled up on the left kind of – left passenger floorboard." Tr. 105, 106 (May 24, 2016).

Gershon Ramirez was a Fairfax County Police Department officer who was one of the officers who responded to the Duncan/Fisher residence on the evening of November 9, 2014. Upon entering the house, Officer Ramirez noticed a "strong odor" of gasoline that was coming from the house. Tr. 190, 193. (May 24, 2016). Officer Ramirez also testified that she observed "enormous puddles of blood that were tracked throughout the living room." Tr. 191 (May 24, 2016).

Matthew Keisling was the lead Fairfax County Police Department crime scene detective.[71] He initially responded to the Duncan/Fisher residence on the evening of November 9, 2014. He noticed "a very strong smell of a – of a petroleum nature." Later, he returned to the scene with a fire marshall with a canine who was trained to detect the odor of flammable liquids. "The dog indicated on the rug in foyer area." The detective collected both the rug and the foam pad under the rug and both items "had a very strong odor of – of that petroleum smell."[72]

Detective Keisling also searched the Schmuhl's vehicle in which the defendant was a passenger immediately prior to his arrest. Among other items, he found a flip phone in the center console from which the battery had been removed. The "SIM card" for the phone was also located in the car but it was in two pieces. An E-Z Pass was also in the vehicle, in a storage compartment in the center console. It was wrapped in metal foil. The detective also recovered a prescription bottle in the center console that was labeled "Tizanidine."

Detective Keisling also observed a "bundle of clothing" on the floorboard of the front passenger's seat. "Initially visible was a white dress shirt and a pair of dark slacks." The shirt had "visible reddish staining in several locations...." The detective also noticed "a very strong odor of ammonia in the vehicle." And "all the clothing items there were wet and smelled strong of ammonia," including the shirt with the stains. In the front pocket of the shirt "was a piece of wire, a length of wire, and the ends were looped and knotted. And the knots actually had black electrical tape wrapped around the knots." The slacks "had a holster for a handgun installed on the belt." The back pocket of the slacks held "a switchblade style knife." It also held a wallet with items in it "bearing the name and/or likeness of Andrew Schmuhl." In the front

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[71] Detective Keisling's testimony appears at Tr. 199-281 (May 24, 2016) and Tr. 23-247 (May 25, 2016).

[72] Both Leo Fisher and Susan Duncan testified that there was no gasoline on their rug prior to the events of November 9, 2014. Tr. 54-55 (May 19, 2016) and Tr. 104 (May 23, 2016).

right pocket, there was "a disposable cigarette lighter" and two identical keys that "appeared to be consistent with something that would come with toy handcuffs."

In a Best Buy bag located on the floorboard of the front passenger's seat, the detective observed "actual parts of a semiautomatic handgun as well as ammunition."[73] There was "a total of four unfired cartridges as well as the one fired cartridge case." These items were found on the passenger's side floorboard. In a subsequent search of the vehicle, the detective found an additional component of the firearm on the floorboard on the driver's side.

Detective Keisling located a large backpack on the back seat of the vehicle on the rear passenger side. Also in the back seat was another flip phone. Both phones were "pretty much the same brand and style." The detective testified that the phone had an AT&T logo on it. Among the items in the backpack were the following: (1) a roll of duct tape; (2) a roll of black electrical tape; (3) a box labeled as over the counter Benadryl; (4) two pairs of metal toy handcuffs; (5) rubber gloves; (6) a knife that "had some visible reddish staining on the blade and the handle grip area"; (7) several packages of plastic cable ties; (8) a "plugin vacation timer"; a plastic spool with some white nylon cord; (9) an adult diaper; (10) a Deer Park water bottle which had "a strong odor" of ammonia; (11) a suit coat in whose pocket were more ammunition for the same firearm which had been collected in the front passenger's floorboard and an unused cartridge for a Taser device, "as well as one which was fired with the wires exposed and one of the Taser darts still attached"; (12) the Taser device itself; (13) a second discharged Taser cartridge with the wires exposed and three loose Taser darts; and (14) two bottles of NyQuil.

Detective Keisling described the vacation timer as having "an electrical cord plugged into. There's a short length of the cord, which is then split and then fastened with wire nuts to clamps, metal clams," which he subsequently described as "battery clamps." The detective was qualified as an expert and testified to the significance of the device: "[A]lthough the timer itself, if it were a stand alone item, it would be considered a common household device and would not raise suspicion. The fact that it is then assembled with something out of the ordinary rigged to it, these types of clamps bring to mind a level of suspicion. That combined with the detection of the flammable liquid, I put that together as we've got the components of an incendiary device or an incendiary incident. With this being potentially the triggering device and the gasoline is clearly there in the Fisher home and also found in the vehicle of the defendant."

Detective Keisling described the knife as "actually a folding knife. It was found in this open position. There is clearly visible reddish staining on the blade in this area and also the top portion of the grip area."

Detective Keisling also explained that Taser's manufacturer "also places items which are actually called AFIDs. They are very small bits of almost a confetti like material." AFIDS – which the detective explained stood for Anti Felon Identification Device – "have numbers printed on them that refer back to the actual cartridge." The purpose of the AFIDs according to Detective Keisling is that "if that has to be used, then hopefully some of those dots might hang up on the individual if they flee after the use of the Taser. Those AFIDs might be used to identify the subject if they are located later on...."

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[73] The most recent purchaser of the firearm, based on its serial number, was Andrew Gilbert Schmuhl, according to records of the Bureau of Alcohol, Tobacco and Firearms. Tr. 258 (May 25, 2016).

Detective Keisling also testified that amidst the exposed Taser wires from a fired cartridge was "a piece of adhesive tape, transparent adhesive tape, where you can see some pink dots and yellow dots. These are AFIDs." The detective confirmed that when the AFIDs deploy, they do not deploy with the tape. Detective Keisling testified that in his search of the Duncan/Fisher house, as well as collecting their clothing, he did not find any other AFIDs, or spent Taser cartridges, or other Taser darts.

Detective Keisling also recovered two shoes from the vehicle, each of which smelled of flammable liquid. He also recovered from the vehicle an unopened packet of Benadryl and two containers of Nyquil, as well as a November 7, 2014 Walgreen's receipt indicating the purchase of two containers of Vick's Nyquil, severe 12 ounce" and "Benadryl, allergy ultra tab."

The detective also searched the Schmuhl residence. Among the items recovered from the house were the following: (1) a Samsung "smart phone" and an iPhone "smart phone"; (2) an owner's manual for a Cobra 380 pistol (which was the same type of pistol recovered from the Schmuhl vehicle); (3) two receipts for the Taser purchase and additional Taser cartridges from Nova Armament in Herndon, Virginia, dated November 7, 2014, and indicating it was paid for in cash; (4) an operating manual for a Taser C2, which was the device recovered from the vehicle; (5) a bottle of "Pure Power" ammonia.

v. Forensic analysis

Brian Bayliss, a Fairfax County Police Department detective was qualified as an expert in computer and cell phone forensics and testified that he did a forensic examination of the two cell phones recovered from the Schmuhl vehicle. These were prepaid Go Phones. Detective Bayliss testified that "a prepaid phone is very cheap and it can be paid for using a pop-up card, paid with cash, and since it's paid with cash it's very difficult to trace back to an actual account holder or subscriber." Each phone had only one non-system contact. One contact was listed as "O-P." The other contact was listed as "Panama." The detective testified that the term "O-P" was a "common" military term standing for "Observation post. It referred to an individual who was set up between friendly and enemy lines and whose purpose was to give early warning of enemy attacks." Each phone was activated on November 7, 2014. Tr. 217-274 (May 31, 2016), Commonwealth Exh. 353, 354.

Kara White, a crime analyst with the Fairfax County Police Department, qualified as an expert in cell phone record analysis interpretation and mapping. Ms. White analyzed records for the two AT&T Go Phones that were recovered from the Schmulh's vehicle. Ms. White determined, based on cell site information, that one of the AT&T Go Phones hit off a cell tower in the vicinity of the Duncan/Fisher residence on November 7th at 6:05 pm and was used to call the other AT&T Go Phone. On November 9th, between 6:33 pm and 9:45 pm – which was approximately the time of the home invasion – there were numerous calls, as well as text messages[74], between the two AT&T Go Phones with one phone hitting off cell towers in the vicinity of the Duncan/Fisher residence and the other phone hitting off cell towers in the McLean, Great Falls, Tysons Corner and Springfield area. As to the defendant's and Alecia Schmuhl's regular cell phones, which were recovered from their home by the police, they were not used to make phone calls on November 9, 2014. Tr. 4-42 (June 1, 2016) and Commonwealth Exh. 355, 356, 359, 360, 361, and 362.

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[74] One text sent during this time period from the "O-P" phone to the "Panama" phone read as follows: "The sky in Panama is beautifully clear." Tr. 233 (May 31, 2016), Commonwealth Exh. 362.

Michelle Palmer was a trace evidence forensic scientist with the Virginia Department of Forensic Science. She was qualified as an expert in trace evidence, chemical identification and ignitable liquid identification. She determined that the rug liner in the Duncan/Fisher home and the pair of shoes recovered from the Schmuhl vehicle each contained gasoline, and that gasoline is "an ignitable liquid." Tr. 72-73 (May 26, 2016).

Kelly Loynes was a forensic scientist specializing in forensic biology and worked for the Virginia Department of Forensic Science. She qualified as an expert in forensic science and DNA. One of the items she examined was the stained knife that Detective Keisling had recovered from the backpack found in the Schmuhls' vehicle, Commonwealth Exh. 311. Ms. Loynes testified that blood was observed throughout the knife and a DNA mixture profile was developed. Susan Duncan could not be eliminated as a major contributor to the DNA mixture profile and Leo Fisher could not be eliminated as a minor contributor to the DNA mixture profile. Tr. 275-276 (May 26, 2016).[75]

Julian J. Mason, Jr. was qualified as a firearms and tool marks examination expert. Mr. Mason was asked to examine the Cobra-380 semi-automatic pistol and the cartridge case and four unfired cartridges recovered from the Schmuhls' vehicle. He testified to the following: (1) a cartridge is composed of a bullet and a case; (2) "what's left behind" when a cartridge is fired is the "fired cartridge case."; (3) when the gun is fired, the cartridge cases are automatically extracted and ejected from the firearm and fall to the ground; (5) "Based on the unique markings left by the firing pin on the evidence cartridge case and my test fires, I can say that the cartridge case [recovered from the Schmuhls' vehicle] was fired in this particular firearm." Tr. 174-215 (May 31, 2016).

vi. Other Commonwealth witnesses and evidence

Terry Lamb testified that she was the manager of information systems at Bean Kinney Korman. She indicated that Alecia Schmuhl's work computer access would have been terminated immediately upon her being terminated from employment. She also indicated that Mr. Fisher is shown to have logged into the Bean, Kinney & Korman computer system at 8:15 pm on the evening of November 9, 2014, which is consistent with Mr. Fisher's testimony and that of Ms. Duncan's. Tr. 194-207 (May 19, 2016).

Samuel Banks testified that he was a law clerk at Bean Kinney Korman during the summer of 2014. He played in a charity kickball game and recalls that the defendant "played pitcher for the team and he also participated in the offense or he went to bat, if you will." That meant that he "would kick the ball and run the bases...." They played four games from 9 am to about 2 pm and the defendant played throughout. Mr. Banks also indicated that the defendant told him he had injured his back when an improvised explosive device had gone off. Tr. 82-88 (June 9, 2016). Mr. Banks also testified that the defendant had "played actively. In fact, he ran the bases aggressively as well. I was the third base coach during one of the games and he actually was on base running and sort of advanced an extra base and beat the throw and he had to run pretty hard to get there." Tr. 90-91 (June 9, 2016).

Zachary Neely testified that on November 7, 2014, he was working at NOVA Armament in Herndon, Virginia. He sold a Taser that day and what stood out to him about the sale was that it was "[p]aid

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[75] A latent fingerprint examiner, Jessica Davis, located a fingerprint on the knife and determined it to be from the right thumb of the defendant. Tr. 170-186 (May 26, 2016).

in cash." He sold the Taser to a woman[76], who came in twice that day, once to buy the Taser and the second time to buy additional Taser cartridges. He explained to the woman that "each time the individual unit is used it gives out confetti" that "has the serial number of the individual" cartridge on it. Mr. Neely identified the two NOVA Armament receipts recovered by Detective Keisling from the Schmuhl residence as the receipts from his two sales of the Taser and the additional Taser cartridges. Tr. 12-29 (May 26, 2016) and Commonwealth Exh. 323.

Blake Ratliff was the investigations manager at Coinbase, which was "a major exchanger of bitcoin and Ethereum." He indicated that in September 2013, the defendant opened an account with Coinbase, using his own name, his own cell phone number, and his own bank account. However, a different account was opened on November 7, 2014, under the name "Andre Stauffenberg." The phone number associated with that second account was one of the AT&T Go Phones recovered from the Schmulhs' vehicle at the time of their arrest. Tr. 198-231 (May 26, 2016).

The Commonwealth also offered, and the Court admitted an Amended Order from the Circuit Court of Waukesha County in the State of Wisconsin, filed on October 24, 2014. The Amended Order was in connection with an Order to Show Cause against the defendant in connection with a matter styled *In Re The Marriage of: Corinne Lucy Wagner*. Ms. Wagner was the defendant's ex-wife. The Order to Show Cause concerned petitioner's non-compliance with the Judgment of Divorce, specifically that he had failed to timely pay a credit card bill and a student loan, or transfer them to accounts in his name only. The Court found that the petitioner had failed to timely pay the credit card bill, which now had a balance of $8,728.70, and that he was in default of the student loan he was assigned in the divorce judgment, with a balance of $16,038.00. The defendant was found in contempt and ordered to spend 120 days in jail. The Court stayed the jail sentence for 30 days in order to give the defendant the opportunity to purge the contempt. The Court stated: "In order for him to purge the contempt, he must pay both the Chase credit card balance in full and the student loan balance in full or transfer those balances into a credit account that does not have the petitioner's name on it." If necessary, the petitioner was ordered to sell a 2009 Honda motorcycle to accomplish the payment. The Court also ordered the petitioner to pay costs and attorney fees in the amount of $1,000. Tr. 163 (May 31, 2016), Commonwealth Exh. 349.[77]

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[76] The Taser and cartridge purchases were recorded on video. (Commonwealth Exh. 333, 334). Lynda Tompkins, Bean, Kinney & Korman office administrator, identified the woman in the video as Alecia Schmuhl. Tr. 33-35 (May 26, 2016).

[77] A copy of the front page of this order was photographed by the police during their search of the Schmuhl residence. The order was sent to the defendant by the attorney for his ex-wife. It was accompanied by an October 31, 2014 cover letter indicating that the attorney would be "requesting that a capias be issued for your arrest." Tr. 181 (May 25, 2016), Tr. 163 (May 31, 2016), Commonwealth Exh. 262, 263.

vii. Testimony of Andrew Schmuhl[78]

Andrew Schmuhl testified to the following matters:

- He testified to the impact of chronic pain on his life, in particular with respect to his reduced physical activity and his medication regimen.
- He testified that in the summer of 2014, he had chronic back pain, high blood pressure, persistent insomnia, constipation and heavy sweating.
- He testified that in August 2014 he had a kidney stone that required emergency treatment.
- He testified that a spinal cord stimulator was implanted in his back in September 2012 for pain control.
- He testified to Alecia Schmuhl's extensive involvement in his medication management.
- He testified that he viewed the encounter he had with Mr. Fisher regarding possible mortgage fraud "as a minor disagreement and one that really didn't matter to me whatsoever."
- With regard to the injury that led the defendant to leave the military and obtain a disability rating, the defendant stated that it occurred while doing push-ups on ice during physical training, but Veterans Administration records indicated that he reported that the injury occurred while running. (*Id.* at 109.)
- The defendant unsuccessfully sought to have an $18,200 military debt forgiven due to the circumstances that led him to leave ROTC. This was in February 2010. (*Id.* at 114-117.). In the defendant's letter seeking forgiveness of the debt, the defendant indicated that he had student loans in excess of $200,000 and credit card balances of $45,000. He said that "I feel it is an injustice for the government to collect a debt from one of its junior officers who is already struggling financially and is continuing to serve his country with great pride." (Commonwealth Exh. 367A.)
- He testified to having no memory of committing the charged crimes. He testified that he remembered going with Alecia Schmuhl to Shenandoah Valley on November 9, 2014, and his next memory was waking up in the hospital.
- He testified that he did not set up the coin base account in a fake name that was associated with the prepaid cell phones used during the charged crimes. Nor did he recall writing the shopping list that contained items such as "adult diapers". He also denied "staking out" the Fisher/Duncan home, and does not recall committing the home invasion of the Fisher/Duncan home. He also denied seeing the Taser purchased by Alecia or any Taser product in his home.

viii. Other Defense Witnesses

The defendant called several of his treating physicians, specifically Dr. Ramaswany Parthasarathy (an internist with the Veterans Administration), Dr. Christopher Kalhorn (a neurosurgeon with Medstar Georgetown Hospital), Dr. Maria Luisa Ramirez (an endocrinologist with Virginia Hospital), and Dr. Paul

[78] The testimony of Andrew Schmuhl appears at Tr. 74-213 (June 7, 2016).

Shin (a urologist at Shady Grove Fertility.). These physicians testified to the several different medical issues for which the defendant was being treated, as well as the various efforts to manage his pain. As further described below, these physicians, along with the defendant's medical records, laid the foundation for Dr. Riley's testimony regarding the effect of the various medications prescribed and taken by the defendant. Tr. 11-108 (June 2, 2016) and Tr. 72-85, 87-97, 98-115 (June 6, 2016).

The defendant also called several physicians and a nurse regarding the defendant's medical condition on the night of his arrest. Dr. Bell Girma testified to treating the defendant with two doses of Narcan, which reverses the effect of opiates in an individual. Dr. Prem Manchanda testified to the defendant being admitted to Inova Fairfax Hospital on November 9-10, 2014, for chest pain, dehydration and low blood pressure. Tara Zepponi, a registered nurse, testified to the defendant complaining of chest pains and chills and that he was experiencing low blood pressure, seizure-like activity, anxiety and confusion during his hospital admission. Tr. 111-132, 136-141 (June 2, 2016), Tr. 128-152 (June 6, 2016).

The defendant also called several witnesses to corroborate his chronic pain and also to serve as character witnesses. *See* Testimony of Andrew Phillip Gross (a co-worker at the Fort Belvoir Office of the Center Judge Advocate), Robert Prince (a fellow student in graduate school at Valparaiso University), and Joe Silver (a neighbor). Tr. 227-277 (June 6, 2016)

The defendant also called his parents, Donald William Schmuhl and Mary Schmuhl. Mr. Schmuhl testified that his son was very active in high school and college and kept very fit, but that this changed after he got married. Mr. Schmuhl also testified to the chronic pain that his son experienced and his limited ability to do physical activities after his military service. Mr. Schmuhl also testified to Alecia Schmuhl's extensive involvement in managing the defendant's medicines, and also to observing Alecia Schmuhl kick the defendant and punch the defendant in the arm and stomach. Mr. Schmuhl also testified that on the occasion when the defendant was involved in reshingling the roof, Mr. Schmuhl did 85-90 percent of the work and all the lifting. Ms. Schmuhl testified to observing Alecia Schmuhl hit the defendant and also to her extensive involvement in managing the defendant's medicines. She confirmed that the defendant's physical condition deteriorated since 2012. Tr. 296-359 (June 6, 2016), Tr. 4-36 (June 7, 2016).

The defendant also called several police officers for brief testimony. Officer Benjamin McIntosh testified that Ms. Duncan told him "she wouldn't have opened the door if she had known who it was...." Tr. 194 (June 1, 2016). This testimony was offered as impeachment to Ms. Duncan's testimony that it was her husband who opened the door to the defendant. The Commonwealth elicited that Ms. Duncan "was in bad shape" and that "there was a lot of blood" and that the officer was focused on saving her life at the time this statement was made. Tr. 195-196 (June 1, 2016). Detective Eric Dean testified that Ms. Duncan told him that the man who entered the house said "something" along the lines of identifying himself as "Jeff with the Virginia SEC." Tr. 198 (June 1, 2016). This testimony was offered as impeachment to Ms. Duncan's testimony that the man did not identify himself as "Jeff." The Commonwealth elicited that, at the time the detective spoke to her, blood had "started pouring from the gauze area of her neck where there was actually direct pressure being applied at that time" and the medical attention she was receiving "increased probably tenfold...." Tr. 198-199 (June 1, 2016). Detective Stephen Needels testified that Ms. Duncan said the man who entered her house identified himself as from Virginia Securities and Exchange Commission and not just the Virginia SEC. Tr. 201-202 (June 1, 2016). This testimony was offered as impeachment of Ms. Duncan's testimony that the man who entered her house had just said "Virginia SEC." Detective Needels also testified that Ms. Duncan said that she was stabbed in the neck, back and head. Tr. 203 (June 1, 2016).

This testimony was offered as impeachment of Ms. Duncan's testimony that she was not stabbed in the head; rather, she was shot in the head. The Commonwealth elicited that, at the time the detective spoke with her, she was in a hospital bed, with "I-V's and she was being attended to by nurses and medical staff." Tr. 204 (June 1, 2016).

The defendant also called two emergency medical personnel to testify to the defendant's condition after he was taken into custody and before he arrived at the hospital. Lt. Jeannette Hannibal, an EMS Lieutenant with Fairfax County Fire and Rescue, testified that when she first encountered the defendant, he was in the back seat of a police car wearing only an adult diaper. Tr. 210, 212 (June 1, 2016). She also observed that he was "[v]ery slow to answer" and looked "pale" and his pupils were "dilated." Tr. 212 (June 1, 2016) He told the Lieutenant he had taken "pills." Tr. 215-216 (June 1, 2016) The lieutenant also confirmed that she had not had contact with the defendant earlier in the evening. Tr. 224 (June 1, 2016). Firefighter Benjamin Sissen testified that he examined the defendant in the back of an ambulance for a call that "came out as a[n] altered mental status." Tr. 228 (June 1, 2016). His mental state did appear to be somewhat altered, and he confirmed to defense counsel that he appeared to be dazed and disoriented. Tr. 229 (June 1, 2016). This was around 11 pm. The firefighter confirmed that he had not seen the defendant earlier in the evening. Tr. 232 (June 1, 2016).

ix. Testimony of Dr. Eileen Riley

Central to the petitioner's assertion that he was prejudiced by trial counsel's allegedly deficient performance is the claim that Dr. Ryan's testimony was so restricted, truncated, and limited as to deprive him of a fair trial.[79] A review of Dr. Ryan's testimony, however, makes clear that she was permitted to testify extensively and in extraordinary detail with regard to the potential impact on an individual's mental state of all the medications that the defendant was alleged to have been taking.

[79] *See, e.g.,* this statement from the petition: Dr. Ryan "presented limited, stilted testimony regarding drug effects and hypotheticals. Dr. Ryan could not testify to her evaluation of Schmuhl, her diagnosis of him, his past mental health diagnoses, her opinion on whether he was intoxicated, or her opinion of whether he understood the nature, character, and consequences of his acts." Petition at 27.

To lay the foundation for Dr. Riley's testimony, the defense introduced evidence as to all the medications that the defendant was taking at the time of the offense. This testimony came in through both the defendant[80] and several of the defendant's treating physicians.[81]

Dr. Ryan was then called to the stand and qualified as an "expert on medicine in the toxicology and pharmacological effects of medication." Tr. 235 (June 7, 2016).

Her direct testimony was divided into two parts. First, trial counsel asked a series of hypothetical questions based on trial counsel's characterization of the evidence. Second, trial counsel asked a series of questions regarding the potential physical and mental side effects of the various medications being taken by the defendant during the time period of the charged crimes.

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[80] The defendant testified as to the medications that he was taking. He testified that he was taking 75 micrograms of fentanyl. This was taken by patch on his arm. He was taking 2 milligrams tablets of Dilaudid every four to six hours. He was taking one microgram patch of Clonidine per hour. He testified he was taking a Toradol injection into his thighs. He was taking three 600 milligram tablets of Gabapentin for a total of 1800 milligrams per day. He said he was taking .25 [sic] of Xanax and a sleeping pill for sleep. He was taking 30 milligrams of Cymbalta once per day. He testified he was taking lidocaine because all of the drugs "hurt his stomach," but he did not know the dose. He took 100 milligrams of Sumatriptan for migraines. He took four milligrams of Tizanidine two times per day. He took Sucralfate, which was a stool softener. Additionally, he testified that he was taking over the counter medications including Pepto-Bismol, Ex-Lax, Gas-X, Nyquil, Bendaryl, and Bengay cream. Regarding the patches, he stated he had a Salonpas patch on his back. Finally, he testified that he was taking Clomid. He understood Clomid was used to boost his testosterone. Defense counsel asked him if he had been taking "all those drugs everyday between November 7th and 9th 2014[.]" The defendant responded, "Yes, except I might not of [sic] been taking Xanax every day." Tr. 83-92 (June 7, 2016).

[81] Dr. Kalhorn confirmed that the defendant was one of his patients in 2014. He stated the medications were "self-reported" and the defendant's "medication list was given to [his] office." Defense counsel asked if the following medications were reported on that list, "Fentanyl, Clonidine, Dilaudid, Lisonopril, Gabapentin, Cymbalta, Tizanidine, Sumatriptan, Sucralfate, Malox, and Lidocaine[.]" Dr. Kalhorn responded, "Those are the prescriptions that he reported to my office." The jury next heard testimony from Dr. Ramirez. Defense counsel asked Dr. Ramirez if her office required a "list of medications" that a patient was taking, and she answered, "Yes." Defense asked, "And that – that included Alprazolam, Clonidine, Cymbalta, Fentanyl, Gabapentin, Hydromorphone, Lidocaine, Lisinopril… Sucralfate and Tizanidine[,]" and Dr. Ramirez answered, "Correct. Next, defense counsel called Dr. Shin who confirmed that the defendant advised that "he was on narcotic pain medication[.]" Dr. Shin also confirmed that the defendant mentioned he was taking "Fentanyl – 75 micrograms, Dilaudid – varied based on pain, Cymbalta, Gabapentin, Xanax, Clonidine, Lisinopril[.]" Tr. 73, 80, 87-88, 92, 102, 107-108 (June 6, 2016).

With respect to the first part of the direct examination, Dr. Ryan was asked to assume the truth of the following hypothetical:

> An individual has taken – somebody who is opioid dependent, somebody who has dehydration, is experiencing insomnia, who is 215 to 235 pounds, who is taking the following drugs: Cymbalta, 30 milligrams; lisinopril, 20 milligrams – and he's taking all of this – taking a clonidine patch, .1 milligrams per 24 hours; gabapentin, 600 milligrams three times a day; sumatriptan, 50 milligrams as needed and he's taken it that day; Toradol; tizanidine, 4 milligram tabs taken as needed that day; lidocaine; Sucralfate 1 gram tablet; omeprazole, 20 milligram tablet; and Clomid, 25 milligram tab. And four to five 2 milligram tablets of Dilaudid and he is prescribed 75 micrograms of fentanyl but is taking 1.5 micrograms…

Tr. 80-81 (June 8, 2016). Dr. Ryan was then asked a lengthy series of questions as to whether it would be "consistent" that an individual taking all these medications would engage in certain actions, exhibit certain behaviors, and experience certain physical and mental symptoms. Dr. Ryan answered "yes" to each of these questions. Tr. 81-113 (June 8, 2016) These included the following:

- someone would mention facts that have no bearing on his life such as Mexican drug cartels"
- be "disorganized" and engage in actions that were "fragmented."
- say "things that do not make much sense"
- display "a noveity badge" that said something like "pecker inspector," and "expect to be taken seriously"
- "ask questions that may be confusing to the ear to the listener, such a[s] a fictional murder for hire plot"
- "express worry about imaginary snipers outside of the windows"
- "conduct an interrogation and need to call someone who he thinks is his partner or his boss, and then change the questions once he talks to that person"
- be "suddenly unable to navigate a simple computer program" despite having "serious significant expertise in computers"
- "want to help someone and then at the next moment want to hurt them"
- during an abduction, "cut off the restraints of the person abducted, put them in a locked bathroom" and then be "surprised when they emerged from that bathroom"
- "during this serious crime, ask[] about money and seemingly want money, and then when offered money instead attacked a person"
- have "bad aim with a firearm"
- appear to someone to be enraged [or] out of control"
- get gasoline "all over one's shoes" while "pouring something like a can of gasoline" on a rug
- Fail to actually ignite a fire when "the purpose was to commit an arson"
- Have a plan that was "extremely disorganized"
- pack a bag for "use during this serious crime" that was "packed with lots of items that either were not used or seemingly had no connection to the offense"
- be "so confused" that he "might take too many muscle relaxers"

- be "verbally aggressive," "physically aggressive," "emotionally labile," "extremely active and extremely vigilant" at "one moment" and then later be "very fatigued and sedated"
- be "disoriented"
- "not [know] exactly where he [w]as at a given time" or "how he got there" or "whether a loved one was alive or dead"
- respond "inappropriately to external stimuli"
- Lose "short-term or long-term memory," have amnesia or "blackout"
- "go along with someone else's plan," "use a fake name with someone who knows you," and say you're from an agency that does not exist."
- "be pacing," "be restless,"and "wear strange clothing"
- "adopt a false persona"
- "see or feel threatened by snipers who are not present"
- "express facts about themselves that have no basis in the evidence"
- "express to another individual that they have some special power or authority that they don't actually have"
- "have a lower comprehension of his surroundings"
- have "reduced insight," and "lesser judgment"
- "go from being very angry to very assertive, to very calm to helpful, to angry and aggressive again, to sedated"
- "put on an adult diaper" even "if one suffers from constipation"
- "remove one's clothing without having other clothing to put on"
- "get right in someone's face and yell at them without provocation"
- "be forgetful and forget what you need to do next or be reminded what to do next"
- "engage in acts that are completely out of character," such as someone who is "ordinarily peaceful" engaging in "actions of extreme violence"
- "search for information on a computer and not be able to find it"
- "express a belief that stacks of cash or gold were in a house where they are not present"
- "lose track of time" and "forget what time specific events occurred"
- engage "in a burglary" but leave "without stealing anything"

After Dr. Ryan confirmed that these behaviors, actions and symptoms were all consistent with the medications the defendant was taking, trial counsel turned to the mental and physical side-effects of the individual medications. Tr. 113-144 (June 8,2016). Dr. Ryan confirmed the following:

- that fentanyl could cause an individual to "perceive things without external stimuli," to "see things that aren't present," to "result in an impaired level of consciousness," to cause "anxiety," "euphoria," "amnesia," "abnormal thinking," "agitation," "depersonalization," "hostility," and "paranoia."
- that clonidine could cause an individual to see "people who aren't present," hear "voices that might not be present," cause "paranoia," "severe confusion," "anxiety," "restlessness," and "agitation and irritability."

- that when clonidine was taken with certain other medications that the defendant was taking it could enhance or boost the side-effects such as "perceiving things that aren't there, vivid nightmares, restlessness, [and] behavioral changes."
- That Cymbalta used alone could cause "potentially severe confusion," including "hallucinations," as could cause "irritability, anger, aggression [] [s]edation, insomnia," as well as "anxiety." *Id.* at
- That Cymbalta could also cause "serotonin syndrome", characterized by "an altered mental state" and could cause someone to be "very agitated" and have "difficulty with awareness and orientation," "difficulty with memory," "difficulty with thinking generally," and could cause "hallucinations" *Id.* at Tr. 124-126.
- That lisinopril could cause "dizziness, lightheadedness, confusion" and "irritability," "mood alterations," "confusion," "insomnia," "difficulty with perceptual disturbances such as hallucinations" and "impaired memory"
- That Dilaudid could cause "sedation, insomnia. Headaches. Sometimes agitation, feelings of lethargy. Confusion, mental clouding. Sometimes hallucinations," as well as "irritability, anger, depression," sometimes "hypomania or mania which is euphoria," and "confusion, disorientation," meaning that someone would "not know[] where they are. For example, thinking they are at home rather than in a hospital bed."
- That other medications – such as fentanyl and tinzanidine – could also increase "the risk of serotonin syndrome when used in combination with Dilaudid and more so used in combination with other serotonergic agents," which would "also increase the risk of other central nervous system side effects, such as confusion, disorientation, hallucinations for example."
- That there have been reports of "serious adverse central nervous system effects from the use of Clomid," including migraines, anxiety, irritability, mood changes, hallucinations, and paranoia, and could cause someone to "become detached from reality."
- That Tizanidine could cause hallucinations, other types of "abnormal thinking," "anxiety," "agitation and nervousness," "emotional lability," "dizziness, confusion, difficulty urinating. Physical changes. Lightheadedness. Feelings of euphoria. Sleep problems, either excessive sedation or insomnia."
- That there have been reports "of mood and behavior changes" with Toradol.
- That gabapentin could cause "acute confusion," "memory impairment," "sedation," "paranoia," "hallucinations," "emotional lability," "agitation," and cause "people to think abnormally," including reports of individuals having 'false beliefs of evidence, feelings of persecution."
- That sumatriptan or Imitrex could cause "anxiety," "irritation," "feeling detached," "hallucinations," and "memory disturbance"

Dr. Ryan was then asked about "polypharmacy" and confirmed that there was an increased risk of adverse effects from taking multiple medications. She also confirmed that an "instance of polypharmacy" would include a "30-year old man between 215 and 235 pounds, who was prescribed fentanyl, clodine [sic], Dilaudid, gabapentin, Cymbalta, Clomid, lisinopril, omeprazole, sumatriptan, lidocaine, tizanidine, diphenhydramine, [and] dextromethorphan." Dr. Ryan confirmed that someone taking all of these medications would be at a "significantly enhanced risk of serious adverse effects," which would include an "exponential increase in the risk of hallucinations and para-consciousness, paranoia, hostility,

misperceptions, impaired judgment, physical aggression, confusion, difficulty with attention, holding false beliefs and cognitive impairment." Even a "small change" in medication or dehydration could cause "a change in their mental state to experience severe side effects, severe confusional state, hallucinations, that kind of thing...." Tr. 151-165 (June 8, 2016).

Dr. Ryan also confirmed that an individual in "an acute confusional state" could experience "visual hallucinations", "impaired focus and concentration," be "disinhibited," have 'impaired focus and concentration," "hold false beliefs without evidence," might "believe they have special powers and skills," potentially be "physically" and "verbally" aggressive, "see things that aren't there, threats that aren't there," be "disoriented," have "a loss of short-and long-term memory," and have "poor insight or impaired judgment." Tr. 169-170 (June 8, 2016).

b. Analysis

i. Law

Even where a petitioner has proven that trial counsel's performance was defective, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See also Harrington v.* Richter, 562 U.S. 86, 112 (2011) (citation omitted) ("The likelihood of a different result must be substantial, not just conceivable.") A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.*

The *Strickland* prejudice test is a "demanding test," *Winston v. Pearson*, 683 F.3d 489, 505 (4th Cir. 2012) (citation omitted).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (citation omitted). "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695; *see also Hinton v. Alabama*, 571 U.S. 263, 275 (2014).

ii. Discussion

As the Court noted at the outset of this Opinion, this habeas petition comes down to one issue: *Did trial counsel's failure to assert an insanity defense constitute ineffective assistance of counsel?* The Court has already found that petitioner has failed to carry his burden of proving "deficient performance." The Court now finds that petitioner has also failed to carry his burden of proving "prejudice." There is no "reasonable probability" that, if counsel had asserted an insanity defense, the result of the proceeding would have been any different. The petitioner would still have been convicted on all counts. In other words, there is no "reasonable probability" that "the factfinder would have had a reasonable doubt respecting guilt." *Strickland,* 466 U.S. at 695.

There are four reasons for this, but the first reason *alone* is wholly dispositive of petitioner's prejudice claim. That first reason is this: The evidence of the petitioner's guilt was overwhelming and conclusively, irrefutably, negated any claim of insanity, involuntary intoxication, unconsciousness, or "medication-induced delirium." Every aspect of these crimes – the petitioner's motive and malicious intent, his meticulous planning and premeditation, the cool, calculating, composed, methodical and deliberate way in which he carried out his crimes, the weaponry with which he armed himself and the sheer brutality of his attacks, and his multiple strategies to hide his identity, his involvement, and his culpability – proves that the petitioner knew what he was doing, why he was doing it, and understood the nature, character and consequences of his actions.

The second reason is that the assertion of an insanity defense would have triggered the invocation by the Commonwealth of every right to which they were entitled by statute. This requires no speculation, since the Commonwealth invoked each of their rights the instant it believed that the defense *was* asserting an insanity defense. These rights would have provided the Commonwealth significant tools with which to rebut the defendant's claim of insanity.

The third reason is that Dr. Ryan's testimony would not have gone unchallenged, especially to the extent it was predicated on evidentiary assumptions sharply contested by the Commonwealth.

The final reason is that Dr. Ryan did testify at trial and, in that testimony, she exhaustively described the potential mental state effects of the medications that the petitioner was allegedly taking, and how that might hypothetically affect an individual's conduct and behavior. Trial counsel then cited Dr. Ryan's testimony repeatedly in closing argument. Dr. Ryan provided the jury a foundation from which the jury could have – but did not – find the petitioner to be involuntarily intoxicated. Thus, any examination of the potential impact on the fact-finder of what *could have been* her testimony must also consider what actually *was* her testimony.

Reason 1: The Overwhelming Evidence of the Defendant's Guilt

In considering the "totality of the evidence," the Court finds the following facts to be particularly significant:

1. The defendant chose to commit this crime at the McLean home of Leo Fisher and Susan Duncan, rather than at Mr. Fisher's workplace. At his workplace, there would have been numerous other persons around to witness what the defendant was doing, there would be certain intervention by Mr. Fisher's colleagues, the defendant might not even reach Mr. Fisher's office, and his chance of getting away with his crimes would essentially be non-existent. In contrast, the Duncan/Fisher house offered many advantages, especially at night: isolation, the cloak of darkness, the absence of witnesses, time for a prolonged interrogation, and the opportunity to literally set fire to all incriminating evidence. It was not a "given" that this crime would occur where it occurred. That was a choice.

2. The defendant was in a difficult financial situation at the time of the attacks on Leo Fisher and Sue Duncan. The defendant was not working and Alecia Schmuhl had just gotten fired. That same week, a Wisconsin judge had issued an amended order

holding the defendant in contempt and ordering him jailed due to his failure to meet his financial obligations to his ex-wife. Suing the law firm for terminating Alecia Schmuhl represented a way out of their financial problems. The interrogation of Leo Fisher on November 9, 2014 as to why Alecia Schmuhl was let go (without ever mentioning Alecia Schmuhl by name), the interrogation of Leo Fisher regarding the partners for whom Alecia Schmuhl worked, and the effort to gain access to Leo Fisher's work email and administrative files, were all designed to acquire information. Although the plan was to hire "the most bloodthirsty lawyer out there" to sue the law firm, and that discovery should be "fun" and that the emails would be a "gold mine," it is clear that the defendant did not trust either the law firm or Mr. Fisher. On June 19, 2014, during the mortgage fraud issue, the defendant texted Alecia Schmuhl: "Something bad is happening at your firm." (Commonwealth Exh. 351). On October 27, 2014, after Alecia Schmuhl was fired, the defendant texted Alecia Schmuhl, with reference to Mr. Fisher: "Don't count on that scum." On November 9, 2014 – as the defendant sat on Leo Fisher's chair, in Leo Fisher's home, in front of Leo Fisher's computer, reviewing Leo Fisher's email – he took matters into his own hands.

3. The evidence was overwhelming that it was the defendant – rather than someone else – who entered the Duncan/Fisher residence on the evening of November 9, 2014, and committed these crimes. Both Sue Duncan and Leo Fisher identified the defendant as the man who committed these crimes. This was corroborated by the incriminating evidence seized from the Schmuhls' vehicle that evening, including a knife with the defendant's fingerprint on it and the blood of both Leo Fisher and Sue Duncan. It was corroborated by the location of the defendant's AT&T Go Phone during the home invasion. It was corroborated by the coded message sent from the "O-P" phone to the "Panama" phone in the midst of the home invasion. It was corroborated by the apprehension of the defendant and Alecia Schmuhl fleeing the scene of the crimes. And it was corroborated by all the defendant's preparatory work, such as the defendant's writing of the shopping list, the purchase of the Taser, and the activation of the AT&T Go Phones.

4. The defendant entered the Duncan/Fisher residence fully armed and equipped to commit these crimes. He had a Taser and he used it to subdue Leo Fisher. He had a gun and bullets and he used them to shoot Sue Duncan in the head, down to the skull. He had a knife and he used it to nearly stab Sue Duncan and Leo Fisher to death. He had zip ties and he used them to immobilize his victims. He had a fake badge to flash and he flashed it. He had a cell phone to communicate with his "partner" and he used that as well. At some point, he had gasoline and he used that to soak the rug so that he could set the house on fire. It was a near thing, prevented only by Sue Duncan's desperate pulling of the emergency alarm. The fact that the defendant came equipped with this array of weaponry and the tools necessary to achieve his objectives is compelling proof of planning, premeditation and malice.

5. The defendant entered the Duncan/Fisher residence with a cover story. He told Sue Duncan he was from the "Virginia SEC," flashed the novelty badge, and said he was

there to arrest Leo Fisher. The fact that there is no such thing as the "Virginia SEC," or that the badge wasn't real, was irrelevant because they accomplished the objective of buying the defendant the few minutes he needed to immobilize and secure Leo Fisher and Sue Duncan. Similarly, the defendant's cover story of planned hits, drug cartels, and the Knights Templar served its purpose of providing the initial justification for the "interrogation" of Leo Fisher that over the next three-and-a-half hours slowly morphed into the *real* purpose of the "interrogation," to obtain a detailed "deposition" about Leo Fisher's law firm, its succession plans, certain of its partners and then, finally, why Leo Fisher had recently fired a particular attorney. Alecia Schmuhl's name was never mentioned but Mr. Fisher knew that this is who the defendant was referring to when he asked: "[W]ell, why was she let go?"

6. During the search of the Schmuhls' vehicle, the police found two pairs of toy handcuffs. The defendant, however, chose not to use these handcuffs to restrain Sue Duncan and Leo Fisher. Instead, he restrained them with the zip ties. Detective Deane testified that police, in fact, also use zip ties to restrain individuals on occasion, calling them "flex cuffs." Why did the defendant use zip ties when the defendant had the handcuffs at his disposal? To answer this question, it is important to note that the defendant's shopping list said "Handcuffs." It did not say *toy* handcuffs, but that is what was in the backpack in the Schmuhl's vehicle. It was one thing to employ a *toy* badge. It only needed to be flashed for an instant. *Toy* handcuffs were a much different matter. The defendant needed to restrain Ms. Duncan and Mr. Fisher *for hours*. Zip ties, thus, represented a deliberate and considered choice for how best to immobilize his victims.

7. Both Sue Duncan and Leo Fisher noted how fast the defendant was able to secure their wrists and ankles with the zip ties, and then connect the zip ties together with a third loop, an indication of remarkable dexterity for someone claiming to be so involuntarily intoxicated that he had no memory of even being at the Duncan/Fisher residence.

8. The defendant deployed the Taser immediately upon entering the residence. That meant he had it out, loaded with a fresh cartridge, and ready to use, just as Mr. Fisher opened the door. That indicates planning and design and, of course, malice.

9. The defendant never identified himself by his true name, never used Alecia Schmuhl's name (even though he was examining Leo Fisher about her termination), and attempted to disguise himself by wearing a hat low on his face.

10. When Sue Duncan expressed concern about Leo Fisher's medical condition, the defendant went into the bathroom and got his pill box. When Sue Duncan noted that she needed to turn off the oven, the man did it instead. It would have entirely defeated the defendant's plan if Leo Fisher had collapsed or had a heart attack, just as it would have entirely defeated the defendant's plan if a burnt chicken in the oven smoked up the house and set off a fire alarm that summoned neighbors or the fire department. The fact that the defendant retrieved Mr. Fisher's pills and turned off the

oven, yet refused to accede to Sue Duncan's request to summon an ambulance or permit her to call Leo Fisher's doctor, indicates that the defendant knew what decisions jeopardized his plan and which decisions did not.

11. Throughout the home invasion, there was no sign that the defendant was actually suffering any of the debilitating physical or mental side effects of the medications about which Dr. Ryan testified at length. He was able to push his way into the house, zip tie Leo Fisher, zip tie Sue Duncan, move them into the bedroom, move them into other rooms in the house, review Leo Fisher's work email account, move them back into the bedroom, stay in constant communication with his "partner," soak the rug with gasoline, jump on Leo Fisher, slash Leo Fisher's throat with "[g]reat force and a lot of violence," shoot Sue Duncan, jump on Ms. Duncan and inflict multiple "deep wounds" including severing her external jugular vein, kick or hit Leo Fisher in the head, and make his escape. These are the malicious actions of an individual in full control of his physical and mental faculties.

12. Similarly, throughout the home invasion, the defendant interrogated Leo Fisher, and conducted himself so methodically that Leo Fisher described the defendant as "acting like a lawyer taking a deposition." According to Mr. Fisher, he went through "a set of questions in different topics" and "to me he seemed to be going through it quite systematically."

13. Sue Duncan observed that the man spoke clearly to her. His demeanor was "very forceful, authoritative. Very much in control." His speech was not slurred. He did not appear lethargic in any way. He had a list of questions that he wanted to ask. "He knew exactly what he was doing when he was in our house." Similarly, Leo Fisher testified that the defendant's speech was not slurred, that "he was just totally in control" and that his voice "was quite clear." Nor was he lethargic or slow to respond. He may have been "mumbling" to the police after taking a "handful" of muscle relaxant pills, but Leo Fisher was quite clear that "he never mumbled in our house."

14. The defendant took multiple steps to make sure he was not observed during his invasion of the Duncan/Fisher home. He "yanked the curtains closed" in the bedroom and closed all the vertical blinds in the family room except the one he could not get to. He questioned Ms. Duncan and Mr. Fisher about whether the neighbors were likely to come over unannounced.

15. When Ms. Duncan became sick and approached the bathroom, the defendant started following her in. She begged him not to. His response was cool and commanding: "Calm down, ma'am. Calm down. I'm married. I do not want to see you naked." Similarly, when Ms. Duncan was crying, the defendant came over and said: "Stop crying, ma'am. There's no reason for you to be crying. You need to stop crying."

16. Throughout the three-and-a-half hours that the defendant was in the Duncan/Fisher residence, he was in constant communication with the person he referred to as his "partner" or "boss." This was by phone call, by text, and even by flipping the outdoor lights on and off. This other person was the lookout, the "O-P," a common military term for "Observation Post." According to a detective, an "Observation Post" refers "to an individual who was set up between friendly and enemy lines and whose purpose was to give early warning of enemy attacks." The "O-P's" message to the defendant was reassuring: "The sky in Panama is beautifully clear." That message was sent at 8:23 pm, and the home invasion would go on for more than another hour. At various times, the "O-P" was in the McLean, Great Falls and Tysons Corner area – all locations close enough to the Duncan/Fisher residence to provide the defendant an early warning of approaching trouble. The use of a lookout, the use of coded signals, the constant communication between the defendant and his "partner," and the use of the AT&T Go Phones activated just two days earlier, all reflected careful, methodical and deliberate planning.

17. The defendant had detailed knowledge about Sue Duncan and Leo Fisher, including the length of their marriage, and he shared that knowledge with them. This "stunned" Sue Duncan and she testified that the information he had was accurate. The defendant also shared information about Leo Fisher's law firm, including the fact that a particular attorney was having an affair with a client. This is additional evidence that the defendant's mental faculties were intact on the night of November 9, 2014.

18. The defendant's conduct on November 9, 2014, far from being the anomalous and inexplicable acts of an intoxicated and delirious individual, was a manifestation of his hatred toward Mr. Fisher. He viewed Mr. Fisher as a "worthless piece of sniveling shit" and "scum," according to his text messages, and became so "angry" and "red faced" and "worked up" at Mr. Fisher at their June 19, 2014 meeting (regarding the mortgage fraud issue) that Alecia Schmuhl insisted on the defendant leaving Mr. Fisher's office in order to save her job. Tragically for Mr. Fisher, the defendant's rage led him to inflict a wound on Mr. Fisher so extreme and gruesome that Dr. Schmidit – a trauma surgeon for ten years – had never seen anything like it. She testified that it was "[a]s if someone had taken a knife" and was "[s]omehow looking for or causing a lot of damage. I've never seen a wound like that before." The assailant used "different trajectories," specifically down, laterally and upwards. This was a wound inflicted with "[g]reat force and a lot of violence and a lot of damage," leaving in its wake "so much tissue destruction." The defendant was fully aware of the nature, character and consequences of these actions. His last words to Mr. Fisher – after either kicking him in the head or hitting him in the head with something – was "You're going to die."

19. The defendant deliberately and intentionally separated Ms. Duncan from Mr. Fisher before attacking Mr. Fisher. He placed her in the bathroom and shut the door. As a result, Ms. Duncan was initially unaware that the defendant had put a pillow over Mr. Fisher's face and was cutting his throat. According to Mr. Fisher, he screamed to his wife: "Muppy, he's murdering me." Ms. Duncan came through the door and began

screaming at the defendant: "Get off him. Get off him." The defendant screamed at Ms. Duncan: "[G]et out," "[d]on't come in here." Then the defendant raised his gun and shot Ms. Duncan in the head. When that did not kill Ms. Duncan, the defendant jumped on her and began stabbing her "[a]ll across my neck in the back and my shoulders." He did not stop stabbing her until she pretended to be dead. The defendant's decision to separate Ms. Duncan from Mr. Fisher before he began cutting Mr. Fisher's throat was a clear effort to minimize the risk of one victim intervening to protect the other victim.

20. Extensive preparation went into the home invasion. The AT&T Go Phones were activated two days earlier. One of these phones was linked to a Coinbase account in a name different than Andrew Schmuhl, even though the defendant already had a Coinbase account in his own name and his own cell phone number and his own bank account. Use of these prepaid phones – which a detective testified are "very difficult to trace back to an actual account holder or subscriber"— would prevent law enforcement from linking calls made from the AT&T Go Phones to the Schmuhls. A Taser was purchased, along with extra cartridges. The defendant put on an adult diaper, which meant he would be able to relieve himself during the home invasion without leaving Sue Duncan and Leo Fisher unattended. The defendant equipped himself with the firearm and knife he would use that evening. The defendant made out a shopping list with items that might be helpful in a home invasion, including "Handcuffs", "2 Sleeping Masks", and the adult diapers. A vacation timer device was altered so that it might serve as an ignition device. Detective Keisling testified that this device was "potentially the triggering device" for igniting the gasoline found in the Duncan/Fisher residence.

21. When the defendant was initially taken into custody, he was "very lucid" and "able to answer questions easily." That changed after he took a "handful" of Tizanidine muscle relaxants, and the medication took effect. But what the police initially observed was consistent with the clear-talking, non-lethargic, fully-conscious defendant who had just spent the last three-and-a-half hours in complete command and control of the Duncan/Fisher residence.

22. After police activated lights and sirens, Alecia Schmuhl initially refused to pull over and one police vehicle had to actually "take evasive action" to avoid being struck by the Honda SUV. The evidence admitted at trial indicates that the defendant was quite busy during the period of time when Alecia Schmuhl was engaging in conduct to delay their apprehension. The defendant took off all of his clothing, disassembled the Cobra-.380 firearm, and was reaching "all over the vehicle." The SIM card on one of the AT&T Go Phones was broken. The battery on one of the AT&T Go Phones was removed. Significantly, the clothing the police found on the front passenger floorboard in front of where the defendant had been sitting "appeared to have blood on it" and all the clothing items were wet and smelled of ammonia. These efforts to destroy or alter incriminating evidence is additional proof of the defendant's understanding of what he had done and the jeopardy he was now facing.

23. Recovered from the vehicle was an item of evidence that demonstrates that the defendant's mental faculties were entirely intact on the evening of November 9, 2014. This item was a piece of adhesive tape to which were attached "AFIDs," which were described as an almost "confetti like material" that have serial numbers on them that refer back to specific Taser cartridges. As Detective Keisling testified, AFIDs are expelled when a Taser is deployed. AFIDs constitute a means for law enforcement to identify the specific cartridge used to deploy a Taser. No AFIDs were found in the search of the Duncan/Fisher house. Zachary Neely, who sold the Taser and cartridges to Alecia Schmuhl, testified that he had explained to her that the Taser, when deployed, would expel "confetti" with the "serial number of the individual" cartridge on it. The presence of the adhesive tape with the AFIDs stuck to them, and the absence of all AFIDs from the residence, indicate that, after deploying the Taser, the defendant had the presence of mind to retrieve the expelled AFIDs, thus removing a potential means by which law enforcement might tie him to the home invasion.

24. Similarly, when the police searched the Schmuhls' vehicle, they found a spent empty cartridge case in the bag with the disassembled firearm belonging to the defendant. A firearms expert testified that, when a bullet is fired, the cartridge case is expelled and falls to the ground. The expert further testified that, based on his forensic analysis, this particular cartridge case was fired from the defendant's Cobra-.380. This indicates that after shooting Sue Duncan, the defendant took the time to locate and retrieve the expelled and spent empty cartridge case, thus removing evidence that could tie the shooting to the defendant's gun.

25. The rug and rug liner in the Duncan/Fisher home were soaked with gasoline. Both Sue Duncan and Leo Fisher testified that there had been no gasoline on the rug prior to the home invasion. In the Schmuhl car was the vacation timer – modified so that it constituted the "components of an incendiary device" and a "triggering" device – which could have been used to set the rug on fire and burn down the house. Sue Duncan's tripping of the emergency alarm thwarted this plan, but it does indicate that there was a plan, and the equipment necessary to execute the plan, to leave behind no witnesses and no incriminating evidence once the defendant was done with Leo Fisher and Sue Duncan.

26. The defendant arrived at the Duncan/Fisher residence with additional items in reserve that could potentially have been of use during the home invasion. These included the following items recovered by the police from the Schmuhls' vehicle: a roll of duct tape, a roll of black electrical tape, rubber gloves, several packages of plastic cable ties, additional ammunition, and additional Taser cartridges. These were all in the same backpack that contained the Taser as well as the knife used by the defendant to stab and cut the victims.

In sum, the evidence against the defendant was not only overwhelming but conclusively negates any claim that the defendant was insane, involuntarily intoxicated, unconscious, or suffering from a

"medication-induced delirium." Therefore, on this basis alone, the Court finds that the defendant has failed to prove prejudice.

Reason 2: The Commonwealth's Statutory Rights

On November 20, 2015, immediately upon receipt of what the Commonwealth believed was a notice of an insanity defense, the Commonwealth wrote trial counsel requesting "a full report concerning the defendant's sanity at the time of the offense, including whether he may have had a significant mental disease or defect which rendered him insane at the time of the offense, the results of any other evaluation of the defendant's sanity at the time of the offense, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation."[82]

This was followed three days later with two Commonwealth motions, one entitled *Notice and Motion to Compel Defendant to Comply with Va. Code § 19.2-169.5* and the other entitled *Notice and Motion for Evaluation of the Defendant's Sanity Pursuant to Va. Code § 19.2-168.1*. In the motion to compel, the Commonwealth sought the defendant's timely compliance with Va. Code § 19.2-169.5 regarding the production of reports and records. In its motion for an evaluation, the Commonwealth sought an order from the Court ordering an evaluation of the defendant's sanity and appointing Dr. Stanley Samenow as the Commonwealth's mental health expert.

The Commonwealth, of course, received no expert report and no opportunity to have Dr. Samenow evaluate the defendant. This is because trial counsel asserted that the notice they filed on November 20, 2015 was not in fact a notice of an insanity defense. The prejudice analysis under *Strickland* now requires the Court to consider what impact, if any, the assertion of an insanity defense would have had on the outcome of the trial.

As stated above, in light of the "totality of the evidence," the Court finds that it would not have made any difference in the outcome of the trial. But in addition to considering the "totality of the evidence," the Court would note that the assertion of an insanity defense would have significantly enhanced the Commonwealth's ability to cross-examine Dr. Ryan and prepare a rebuttal expert. This is for three reasons.

First, it would have guaranteed that the Commonwealth would have early pre-trial access to all defense sanity evaluations. The Commonwealth would not have to wait until nine days into trial to learn for the first time the substance of the defendant's involuntary intoxication, unconsciousness and "medication-induced delirium" defenses.

Second, it would have guaranteed that the Commonwealth would also have early access to the psychological, psychiatric, medical and other records obtained in the course of the evaluation.

Third, the Commonwealth's expert would have the opportunity to conduct a full sanity evaluation of the defendant – meaning that Dr. Ryan would not be the sole mental health expert to have actually met with and evaluated the defendant.

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[82] Respondent's Exhibit 1, at 69.

Many ineffectiveness cases warn of evidence that is termed "double edged," meaning that certain evidence may both benefit a defendant and be a detriment to the defendant.[83] Here, the assertion of an insanity defense would have permitted Dr. Ryan to present her full psychiatric evaluation of the defendant. But it also would have provided the Commonwealth significant tools to challenge Dr. Ryan's testimony.

Reason 3: Dr. Ryan's Testimony Would Not Have Gone Unchallenged

This is not an ineffectiveness case where the prejudice claim is that counsel failed to uncover or elicit or introduce materially significant evidence that was undisputed, uncontradicted and unchallenged. Here, Dr. Ryan's testimony would certainly have been challenged. Consider, for example, Paragraph 11 of Dr. Ryan's Affidavit. It reads as follows:

> *My review of the evidence provided indicated that Mr. Schmuhl's behavior at the time of the offense was consistent with delirium. The victims' descriptions of Mr. Schmuhl portrayed him as acting in a manner indicating delusional thinking, which is observed in delirium. Mr. Schmuhl also exhibited paranoid behavior, hiding from "snipers" in the victims' home. Additionally, the manner in which Mr. Schmuhl carried out the crime appears to have been highly impulsive and illogical and offered little to no likelihood of avoiding apprehension. Lastly, Mr. Schmuhl was apprehended naked and wearing a diaper. The police described observing an "altered level of consciousness" and called an ambulance for that reason. The Fairfax County EMS report also indicated that Mr. Schmuhl had "an altered level of consciousness" after the offense. In the Fairfax INOVA emergency department, Mr. Schmuhl was noted to have an "altered mental status" and to have "answer[ed] questions inappropriately." Mr. Schmuhl was noted in the medical records to be delirious, alternating between being hyperalert and hypervigilant and somnolent (drowsy).*

Virtually every statement in this paragraph would have been subject to challenge at trial.

- *"The victims' descriptions of Mr. Schmuhl portrayed him as acting in a manner indicating delusional thinking, which is observed in delirium."*

Sue Duncan and Leo Fisher each testified about the defendant's "manner." He was described as "in control," "authoritative," "totally in control," and "acting like a lawyer taking a deposition."

- *"Mr. Schmuhl also exhibited paranoid behavior, hiding from "snipers" in the victims' home."*

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[83] *See, e.g., Lewis v. Warden of Fluvanna Correctional Center*, 274 Va. 93, 116 (2007) ("This evidence concerning Lewis' prescription drug abuse is evidence of a type that the Court in *Wiggins* [*v. Smith*, 539 U.S. 510 (2003)] termed 'double edge[d]'." (citation omitted). *See also Prieto v. Warden of Sussex I State Prison*, 286 Va. 99, 114 (2013) ("Counsel is not ineffective for failing to present evidence that has the potential of being "double-edged.") (citation omitted).

The defendant's reference to "snipers" was in the context of shutting the blinds that covered windows that looked out to the "next door neighbor." Tr. 152 (May 23, 2016). The defendant had a particular concern about neighbors – asking Mr. Fisher "[D]o your neighbors come over unannounced at all," Tr. 52 (May 23, 2016) – so shutting the blinds while he was committing multiple violent felonies at the Duncan/Fisher residence can hardly be termed paranoid behavior.

- *"Additionally, the manner in which Mr. Schmuhl carried out the crime appears to have been highly impulsive and illogical and offered little to no likelihood of avoiding apprehension."*

The terms "highly impulsive" and "illogical" are inconsistent with the elaborate planning and preparation that preceded the home invasion, and the execution of the home invasion itself. One of the defendant's goals was to gain access to Leo Fisher's work email account, and that goal was achieved. Another goal was to gain information about the circumstances associated with Alecia Schmuhl's termination and that goal was achieved as well. A third goal was to leave no witnesses behind. That goal was not achieved, but only due to the lifesaving efforts of first responders and trauma surgeons. Dr. Ryan also asserts that the crimes committed by the defendant "offered little to no likelihood of avoiding apprehension." But what if Sue Duncan had been unable to trip the emergency alarm? What if the defendant had succeeded in killing Leo Fisher and Sue Duncan, whether by gunshot, by knife, by fire, or by all three? There would be no witnesses to testify at a trial, the incriminating evidence would be consumed by fire, and the defendant would never have been taken into custody fleeing the scene.

- *"Mr. Schmuhl was apprehended naked and wearing a diaper."*

The alternative to being naked was for the defendant to be taken into custody wearing clothing stained with the blood of his victims. Further, according to Detective Keisling, "all the clothing items there were wet and smelled strong of ammonia." The defendant could hardly have soaked his clothing in ammonia while continuing to wear the clothes. It also must be recalled that the defendant was removing his clothing while being chased by the police. Actions were taken that may well have never been taken if Alecia Schmuhl and the defendant had been able to take a leisurely drive home while the Duncan/Fisher residence was burning to the ground. As to the diaper, it makes logical sense that an individual conducting a multi-hour home invasion, which necessitated the constant monitoring of two victims, would not want to excuse himself to go to the bathroom.

- *"The police described observing an "altered level of consciousness" and called an ambulance for that reason. The Fairfax County EMS report also indicated that Mr. Schmuhl had "an altered level of consciousness" after the offense. In the Fairfax INOVA emergency department, Mr. Schmuhl was noted to have an "altered mental status" and to have "answer[ed] questions inappropriately." Mr. Schmuhl was noted in the medical records to be delirious, alternating between being hyperalert and hypervigilant and somnolent (drowsy)."*

The "altered level of consciousness" was readily explained by the "handful" of muscle relaxants consumed by the defendant *after* the home invasion. This "altered level of

consciousness" is not remotely what either Sue Duncan or Leo Fisher observed, and it is entirely contradicted by the three-and-a-half hours the defendant spent interrogating Leo Fisher, searching his computer, restraining the victims, communicating at regular intervals with his "partner," stabbing Leo Fisher with great force and violence, and shooting and stabbing Sue Duncan. The defendant was "very lucid" when the police first took him into custody. It was only after the "handful" of Tizanidine took effect that the defendant experienced an "altered level of consciousness."

In short, testimony from Dr. Ryan with regard to insanity, involuntary intoxication, unconsciousness, or "medication-induced delirium, would have been subject to cross-examination and rebuttal on multiple grounds. It would not have gone unchallenged.

Reason 4: Dr. Ryan Did Provide Extensive "Mental State" Testimony About the Effects of Certain Medications

Dr. Ryan did testify. As stated above, her testimony fell into two categories. First, Dr. Ryan was asked to assume that the defendant was taking various medicines. Then Dr. Ryan was asked whether certain behaviors and conduct would be "consistent" with an individual who was taking these various medications. Second, Dr. Ryan was asked to describe the mental and physical side-effects of the medications taken individually and collectively. Dr. Ryan's testimony was extensive. She was the sole witness on June 8, 2016.

During closing argument, trial counsel relied extensively on Dr. Ryan's testimony. *See* Tr. 103-136 (June 13, 2016).[84]

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[84] *See. e.g.,* these excerpts from trial counsel's closing argument on June 13, 2016:

- **At Tr. 102**: "I wasn't lying to you and what Dr. Ryan was telling you was accurate as well."
- **At Tr. 103-104**: "You know, you heard from Dr. Ryan, so you know generally ow this works. But when people – if you're on a drug and it makes sense; right? If you keep taking it at the same dosages, you're not having problems, maybe you're not going to have problems in the future. So, oftentimes you're looking for a change. You looking for a change in something that triggers a change in mental status."
- **At Tr. 109-110**: "And you've heard, also, testimony that in the middle of 2014 was really kkind of when this mental fog and a lot of these really significant health problems started just to get a lot worse. At the same time you've got the Clomid introduced. You've got the Dilaudid increase. And then, on the weekend of the offense, you go from twenty-five to fifty to seventy-five, all the way to a hundred and fifty micrograms, two Fentanyl patches. That's six times the dose that he was on just a year-and-a-half prior. Bodies are not meant to handle that, particularly not bodies – there are a cocktail of eleven, twelve or more medications, including over-the-counter medications. This is not what is supposed to happen, and it is something that is of grave concern to a medical professional like Dr. Ryan."
- **At Tr. 118**: "The expert testimony you heard was completely unrebutted, and it tracked everything that I just told you. You had a psychiatrist with twenty-five years in the field who's treated pain patients with these drugs. She knows what they do. She knows their dangers."

(Footnote continued on the next page.)

The Court recognizes that if the defendant had asserted an insanity defense, Dr. Ryan would likely have been able to describe in full the matters addressed in her affidavit. Nevertheless, an evaluation of prejudice must include consideration of what Dr. Ryan *was* permitted to address.[85]

iii. Conclusion regarding the "Prejudice" Prong

For all the foregoing reasons, the Court finds that the petitioner has failed to prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

4. Conclusion

In order to prevail in an ineffectiveness claim, the petitioner must prove both that trial counsel's performance was "deficient" and that it was "prejudicial." The Court finds that the petitioner has failed to prove either prong of *Strickland*. Therefore, the Respondent's Motion to Dismiss is GRANTED and the Petition for a Writ of Habeas Corpus is DISMISSED.

- **At Tr. 118-119**: "So, what is the very worst possible side effect here and what is the one that Andrew experienced? You heard Dr. Ryan talk about it. It's an acute confusional state."
- **At Tr. 132-133**: "The restless and hyperactivity, going on for a period of four hours, doesn't stop moving, completely restless, pacing, getting on the phone, coming back. One of the victims testified that he barely sat down for two full hours, three full hours. He showed disorientation, could not remember what he said to the police during the interrogation. Doesn't know where his wife is. And when he goes to the hospital didn't know where he was. He had hallucinations again, thinking there are snipers in the back yard, that strange long pause as if he's hearing voices, as if there was some other conversation going on in his psyche. You have the imaginary stacks of cash. None of this exists. You have a loss of awareness. You have that black-out that he testified about. You have the amnesia, and again you have the fluctuation, which is typical. The hyperactivity followed by the hypoactivity; manic at the Fisher home and then lethargic in the police cruiser and the hospital. This is the course of an acute confusional state according to Dr. Ryan.

[85] Among the medication side-effects about which Dr. Ryan testified were the following: the possibility of seeing things that aren't present, having an impaired level of consciousness, abnormal thinking, agitation, hostility, paranoia, seeing people who aren't present, hearing voices that might not be present, severe confusion, dizziness, hallucinations, anger, physical aggression, hostility, misperceptions, impaired judgment, irritability, holding false beliefs, cognitive impairment, altered mental state, difficulty with thinking, difficulty with memory, lightheadedness, mood alteration, perceptual disturbances such as hallucinations, disorientation, and detachment from reality.

This is a FINAL ORDER. The Clerk of the Court is directed to provide a copy of this Memorandum Opinion and Order to counsel of record.

SO ORDERED, this 26th day of August, 2021.

Randy I. Bellows
Circuit Court Judge