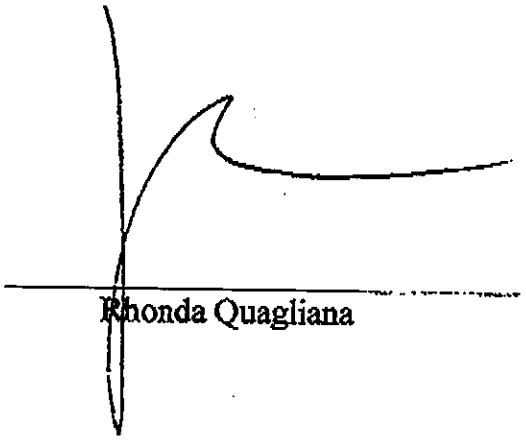
CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 16th day of February, 2012 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902.



Rhonda Quagliana

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No.: 11-102

GEORGE HUGUELY,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENSE INSTRUCTION P, REGARDING ELEMENTS OF STATUTORY BURGLARY

The defendant, George Huguely ("Mr. Huguely"), by counsel, in support of his motion to instruct the jury using Defense Instruction P, regarding the elements of statutory burglary, submits the following Memorandum in Support:

Factual Background

In this case, Mr. Huguely is charged with statutory burglary under Virginia Code § 18.2-91, among other offenses.

Mr. Huguely has moved the Court to instruct the jury using a proposed instruction from the Virginia Model Jury Instructions G12.220, as modified by established case law.

Argument

Mr. Huguely's proposed instruction more closely states the applicable law and the elements that the jury must find, under established case law, to convict the defendant of statutory burglary. Accordingly, the Court should offer Mr. Huguely's instruction.

"Each party is entitled to have jury instructions upon vital points in language chosen by it, if the instruction is a correct statement of the law." Walshaw v. Commonwealth, 44 Va. App. 103, 120 (2004) (quoting Broady v. Commonwealth, 16 Va. App. 281, 291 (1993)).

"Although neither the Code nor the Rules of the Supreme Court of Virginia set forth jury instructions that the trial court must give at the conclusion of the evidence in a criminal case, it is well established as a matter of common law that '[i]t belongs to the [trial] court to instruct the jury as to the law, whenever they require instruction, or either of the parties request it to be given.'" Dalton v. Commonwealth, 29 Va. App. 316, 323, (1999) rev'd on other grounds, 259 Va. 249 (2000) (quoting Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657, 662 (1874)).

When a case "presents peculiar features [and] is very close upon the facts," then it is especially important that "the instructions should be directed to these features" and "most carefully drawn." Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 348 (1926).

The Commonwealth has proposed the use of Virginia Model Jury Instruction G12.220, which includes the following elements of the crime of "statutory burglary":

(1) That George Huguely without permission in the nighttime broke and entered a dwelling house; and

(2) That he did so with the intent to commit assault and battery.

Va. Model Jury Instr. G12.220.

Mr. Hugucly has proposed the use of the same instruction, but he has modified the elements to clarify that the defendant must have had the required intent "at the time of the breaking and entering."

This statement is more consistent with case law on the issue and draws the jury's attention more closely to a particular element that is at issue in this case.

First, the requirement that the defendant had the intent to commit assault and battery "at the time of the breaking and entering" is consistent with established case law, which has been recently confirmed by the Supreme Court of Virginia.

The Supreme Court of Virginia has long held that a person may only be convicted of statutory burglary if, at the time of the breaking and entering, he entered "with intent then and there ... to commit" the predicate felony. Taylor v. Commonwealth, 207 Va. 326, 334 (1966).

If a party breaks and enters, and then later develops intent to commit a predicate offense, then he cannot be guilty of statutory burglary.

In fact, the period of time in which an individual must have that intent is brief. The Court has recently clarified that the crime of statutory burglary is complete at the moment of breaking and entering. Rowland v. Commonwealth, 281 Va. 396, 401 (2011) (citing cases). The crime of burglary is not continuous, that is, "the crime of burglary does not continue until the perpetrator vacates the premises." Id. (emphasis added). Instead, "once a perpetrator enters at nighttime, with or without breaking, with the requisite intent, the crime of burglary is complete." Id. (emphasis added).

For purposes of statutory burglary, a "breaking" occurs when a party uses even slight force to gain entry." Johnson v. Commonwealth, 221 Va. 872, 876 (1981).

And for purposes of statutory burglary, an "entry" occurs when any part of the defendant's body enters the dwelling house. Rowland, 281 Va. at 401 (citation omitted).

Therefore, a party can only be found guilty of statutory burglary if, at the very moment that he uses any force to gain entry and enters with any part of his body, he has the intent "then and there ... to commit" the requisite crime within. See Taylor, 207 Va. at 334.

Second, this jury instruction draws the jurors' attention to the particular element at issue in this case. Mr. Huguely has presented evidenced that, no matter any later formation of intent, he did not have the intent to commit assault and battery at the time of the breaking and entering.

Accordingly, Mr. Huguely's proposed jury instruction is preferable, both because it is more consistent with established case law, and because it is more applicable to the particular case before the jury.

WHEREFORE, for the reasons stated above and for other reasons stated before the Court on this motion, George Huguely respectfully moves the Court to instruct the jury using Defense Instruction P regarding the elements of statutory burglary, and for such other and further relief to which he may be entitled.

GEORGE HUGUELY

By Counsel

ST. JOHN, ROWLING, LAWRENCE & QUAGLIANA, LLP

By: _____

Rhonda Quagliana VSB# 39522
Francis McQ. Lawrence VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138
434-296-1301 facsimile
Counsel for Defendant

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 16th day of February, 2012 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902.

Rhonda Quagliana

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No.: 11-102

GEORGE HUGUELY,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENSE INSTRUCTION U, REGARDING ROBBERY

The defendant, George Huguely ("Mr. Huguely"), by counsel, in support of his motion to instruct the jury using Defense Instruction U, regarding robbery, submits the following Memorandum in Support:

Factual Background

In this case, Mr. Huguely is charged with robbery, among other offenses.

Mr. Huguely has moved the Court to instruct the jury using a proposed instruction from the Virginia Model Jury Instructions G47.100, as modified by established case law.

Argument

Mr. Huguely's proposed instruction more closely states the applicable law and is relevant to the contested issues that are central to the charges of robbery. Accordingly, the Court should offer that instruction.

"Each party is entitled to have jury instructions upon vital points in language chosen by it, if the instruction is a correct statement of the law." Walshaw v.

Commonwealth, 44 Va. App. 103, 120 (2004) (quoting Broady v. Commonwealth, 16 Va. App. 281, 291 (1993)).

"Although neither the Code nor the Rules of the Supreme Court of Virginia set forth jury instructions that the trial court must give at the conclusion of the evidence in a criminal case, it is well established as a matter of common law that '[i]t belongs to the [trial] court to instruct the jury as to the law, whenever they require instruction, or either of the parties request it to be given.'" Dalton v. Commonwealth, 29 Va. App. 316, 323, (1999) rev'd on other grounds, 259 Va. 249 (2000) (quoting Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657, 662 (1874)).

When a case "presents peculiar features [and] is very close upon the facts," then it is especially important that "the instructions should be directed to these features" and "most carefully drawn." Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 348 (1926).

The Commonwealth has proposed the use of Virginia Model Jury Instruction G47.100, which includes the following list of elements of robbery:

> (1) That the defendant intended to steal; and
>
> (2) That the defendant took the computer; and
>
> (3) That the taking was from Yeardley Love or in her presence; and
>
> (4) That the taking was against the will of Yeardley Love; and
>
> (5) That the taking was accomplished by violence to the person, intimidation of the person, or the threat of serious bodily harm.

Va. Model Jury Instr. G47.100.

In Defense Instruction U, Mr. Huguely has proposed a similar instruction, with the addition of "permanently deprive Yeardley Love" of the computer instead of "steal," and with two additional elements as required by established Virginia case law:

> (6) That the violence, intimidation, or threat by which the taking was accomplished occurred before or simultaneous with the taking;
>
> (7) That George Huguely's motive or purpose of the violence, intimidation, or threat was to steal the computer; and
>
> (8) That the intent to steal, that is, the intent to permanently deprive her of the ownership of the computer, existed at the time of the violence, threat, or intimidation.

The instruction proposed by Mr. Huguely is more favorable for two specific reasons.

First, Mr. Huguely's instruction is more consistent with case law. The model instruction merely states that "the taking was accomplished by" violence.

But established law in Virginia requires a "temporal correlation" test for the offense of robbery, which requires that the various elements of the offense of robbery occur at the same time. In Branch, the Court identified the elements of robbery, a crime against the person of the victim, as "the taking, the intent to steal, and the violence (or intimidation)." Branch v. Commonwealth, 225 Va. 91, 94 (1983). The Court explained that "[d]efinitionally, there is a temporal correlation among these elements." Id.

This "temporal correlation" test has two requirements. See Shepperson v. Commonwealth, 19 Va. App. 586, 591–92 (1995) (explaining and applying these two requirements). First, "[t]he violence must occur before or at the time of the taking." Branch, 225 Va. at 94. Second, a conviction for robbery requires that "the animus

furandi was conceived before or at the time the violence was committed." Id. at 94–95 (emphasis added). The taking of another's property as an afterthought is not robbery, but is only larceny. Id.; see also Shepperson, 19 Va. App. at 592 ("[F]or theft by violence or intimidation to constitute robbery, the intent to steal must exist at the time of the violence or intimidation.").

In Branch, the question before the Court was "whether robbery was the motive for the killing." Branch, 225 Va. at 95 (emphasis added).

If the taking is an afterthought "performed for entirely different reasons" than the violence, then the taking is only larceny. Id. at 93 (holding that evidence was insufficient as a matter of law to support robbery when the defendant accidentally killed the victim in a heated argument, and then took his wallet in an effort to hide the victim's identity).

The Commonwealth must prove beyond a reasonable doubt that the intent to steal existed before or at the time of the violence. See Shepperson, 19 Va. App. at 588. In Shepperson, the evidence showed that the defendant killed the victim and then took his wallet. Id. The defendant argued that he only thought to take the belongings after the killing, when he decided when he decided "to use [the victim's] identification to create a paper trail to mislead the police." Id. The Court held that for a conviction of robbery, the jury must conclude that the defendant intended to steal from the victim at the time the violence occurred. The Court explained, "If [the defendant] killed [the victim] intending to steal his property, then the theft was robbery. If [the defendant] killed [the victim] only for a purpose unrelated to theft, and as an afterthought decided to steal his property, the theft was larceny." Id. at 592. The Court left that issue for the resolution of the jury.

And if Mr. Huguely first took the computer with violence, but with an intent other than an intent to permanently deprive the owner of possession, then the taking was not robbery. If Mr. Huguely took the computer but did not intend to permanently deprive her of possession, but then he later made the decision to permanently deprive her of possession, then at the later time he committed larceny.

This principle was established in Jones v. Commonwealth, 172 Va. 615 (1939). In that case, the Court articulated the standard applied in determining whether a taking constitutes a robbery or only larceny. The Court provided, "[W]e must look to the intention as it existed at the time of the taking rather than to its formation subsequently." Id. at 621 (emphasis added). In Jones, the defendant snatched a pistol from the hand of a police officer who was scuffling with the defendant's half-brother. The defendant fled and then threw the pistol away. The evidence indicated that the actual taking was with violence, because the defendant grabbed the pistol out of the officer's hand. But the evidence indicated that during the violent act that accompanied the taking, Jones acted only to assist or protect his relative and to "remove the source of the danger." Id. at 619. Therefore, at the time of the forced taking, there was no intent to steal. The intent to steal did not "correlate" with the taking. The Court concluded that instead, the violence was committed with an intent other than the intent to steal, even though the intent to steal arguably existed later when Jones discarded the property. Id. at 619–21.

Therefore, the key issue in applying this "temporal correlation" test is whether the intent to steal existed before or during the violence. Put differently, the key issue is whether theft "was the motive for the killing [or violence]." Branch, 225 Va. at 95.

The Commonwealth's proposed instruction does not properly state this legal principle, and therefore Mr. Huguely's Defense Instruction U must be given to the jury.

Second, Mr. Huguely's instruction addresses the contested facts at issue in this case. In this case, Mr. Huguely has argued and presented evidence that he did not have such an intent to steal at the time of any violence or any taking. Therefore, Mr. Huguely's case "presents peculiar features [and] is very close upon the facts," and the Court must ensure that "the instructions [are] directed to these features" and "most carefully drawn." See Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 348 (1926).

Accordingly, Mr. Huguely's proposed jury instruction U is preferable, both because it is more consistent with established case law, and because it is directly applicable to the particular issues before the jury.

WHEREFORE, for the reasons stated above and for other reasons stated before the Court on this motion, George Huguely respectfully moves the Court to instruct the jury using Defense Instruction U regarding the elements of robbery, and for such other and further relief to which he may be entitled.

GEORGE HUGUELY

By Counsel

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

By: _____

Rhonda Quagliana VSB# 39522
Francis McQ. Lawrence VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

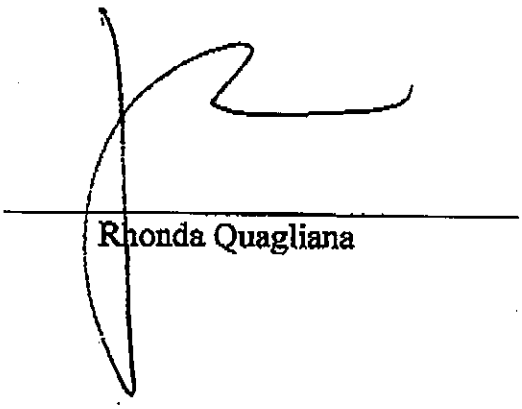
By: _____

Rhonda Quagliana VSB# 39522
Francis McQ. Lawrence VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138
434-296-1301 facsimile
Counsel for Defendant

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 16th day of February, 2012 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902.



Rhonda Quagliana

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No.: 11-102

GEORGE HUGUELY,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENSE INSTRUCTION BB, REGARDING THE DEFINITION OF "MALICE"

The defendant, George Huguely ("Mr. Huguely"), by counsel, in support of his motion to instruct the jury using Defense Instruction BB, regarding the definition of "malice," submits the following Memorandum in Support:

Factual Background

In this case, Mr. Huguely is charged with murder in the first degree, among other offenses.

Mr. Huguely has moved the Court to use Defense Instruction BB to instruct the jury on the definition of "malice."

Argument

Mr. Huguely's proposed instruction more closely states the applicable law and is relevant to the contested issues that are central to the charge of first-degree murder. Accordingly, the Court should offer that instruction.

"Each party is entitled to have jury instructions upon vital points in language chosen by it, if the instruction is a correct statement of the law." Walshaw v. Commonwealth, 44 Va. App. 103, 120 (2004) (quoting Broady v. Commonwealth, 16 Va. App. 281, 291 (1993)).

"Although neither the Code nor the Rules of the Supreme Court of Virginia set forth jury instructions that the trial court must give at the conclusion of the evidence in a criminal case, it is well established as a matter of common law that '[i]t belongs to the [trial] court to instruct the jury as to the law, whenever they require instruction, or either of the parties request it to be given.'" Dalton v. Commonwealth, 29 Va. App. 316, 323, (1999) rev'd on other grounds, 259 Va. 249 (2000) (quoting Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657, 662 (1874)).

When a case "presents peculiar features [and] is very close upon the facts," then it is especially important that "the instructions should be directed to these features" and "most carefully drawn." Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 348 (1926).

The Commonwealth has proposed the use of Virginia Model Jury Instruction 33.220, which provides the following definition of "malice":

> Malice is that state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason. Malice may result from any unlawful or unjustifiable motive, including anger, hatred or revenge. Malice may be inferred from any deliberate willful and cruel act against another, however sudden.

Va. Model Jury Instructions 33.220.

Mr. Huguely's proposed instruction includes the following sentence:

> It is not confined to ill will to any one or more particular persons, but is intended to denote an action flowing from a wicked or corrupt motive, done with an evil mind and purpose and wrongful intention, where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief.

Mr. Huguely's proposed insertion is supported by established Virginia case law, including the very cases cited by the Virginia Model Jury Instructions.

The citations to the model instruction include this very sentence in a block quote from the case of Thomas v. Commonwealth, 186 Va. 131, 139 (1947).

Mr. Huguely's inserted sentence is also used by Virginia Practice Jury Instruction § 10:17, drafted by Ronald J. Bacigal, reporter of criminal decisions of the Virginia Court of Appeals.

Mr. Huguely's proposed instruction incorporates this case law. The Commonwealth's proposed instruction, by contrast, inexplicably deletes that particular sentence.

Accordingly, Mr. Huguely's proposed jury instruction BB is preferable because it is consistent with established case law, including the very case law cited by the model instruction.

WHEREFORE, for the reasons stated above and for other reasons stated before the Court on this motion, George Huguely respectfully moves the Court to instruct the jury using Defense Instruction BB regarding the definition of "malice" for purposes of

felony murder, and for such other and further relief to which he may be entitled.

GEORGE HUGUELY

By Counsel

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

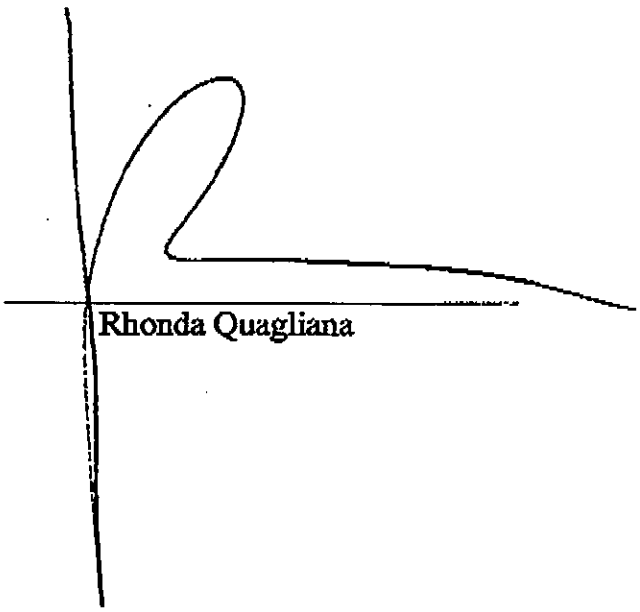
By: _____

Rhonda Quagliana VSB# 39522
Francis McQ. Lawrence VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138
434-296-1301 facsimile
Counsel for Defendant

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 16th day of Fcbruary, 2012 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902.



Rhonda Quagliana

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No.: 11-102

GEORGE HUGUELY,

Defendant.

MEMORANDUM IN SUPPORT OF USE OF JURY INSTRUCTION MM REGARDING DEFENSE OF ACCIDENTAL DEATH

The defendant, George Hugucly ("Mr. Hugucly"), by counsel, in support of his motion in support of the use of an instruction MM, regarding the defense of accidental death, submits the following Memorandum in Support:

Factual Background

In this case, Mr. Huguely is charged with first-degree murder under Virginia Code § 18.2-32, among other offenses.

Mr. Huguely has moved the Court to instruct the jury using defense instruction MM, regarding the defense of accidental death. This instruction is based on Virginia Model Jury Instruction 33.850 and is modified in accordance with case law and for the particular facts of this case.

Argument

Mr. Huguely's proposed instruction MM clarifies the law, avoids potential juror confusion, and addresses the particular facts at issue in this case. Accordingly, the Court should grant his instruction.

"Each party is entitled to have jury instructions upon vital points in language chosen by it, if the instruction is a correct statement of the law." Walshaw v. Commonwealth, 44 Va. App. 103, 120 (2004) (quoting Broady v. Commonwealth, 16 Va. App. 281, 291 (1993)).

"Although neither the Code nor the Rules of the Supreme Court of Virginia set forth jury instructions that the trial court must give at the conclusion of the evidence in a criminal case, it is well established as a matter of common law that '[i]t belongs to the [trial] court to instruct the jury as to the law, whenever they require instruction, or either of the parties request it to be given.'" Dalton v. Commonwealth, 29 Va. App. 316, 323, (1999) rev'd on other grounds, 259 Va. 249 (2000) (quoting Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657, 662 (1874)).

The Supreme Court of Virginia has "repeatedly said that instructions should be simple, impartial, clear and concise," and not "argumentative, confusing [or] potentially misleading." Bryant v. Commonwealth, 216 Va. 390, 392 (1975).

When a case "presents peculiar features [and] is very close upon the facts," then it is especially important that "the instructions should be directed to these features" and "most carefully drawn." Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 348 (1926).

In this case, Mr. Huguely has proposed instruction MM, based on Virginia Model Jury Instruction 33.850. The Model Jury Instruction reads as follows:

> Where the defense is that the killing was an accident, George Huguely is not required to prove this fact. The burden is on the Commonwealth to prove beyond a reasonable doubt that the killing was not an accident. If after considering all the evidence you have a reasonable doubt whether the killing was accidental or intentional, then you shall find George Huguely not guilty.

Va. Model Jury Instruction 33.850 (modified to insert name of defendant).

Mr. Huguely has proposed an instruction that would add an additional paragraph, and would read, in full, as follows:

> Where the defense is that the killing was an accident, George Huguely is not required to prove this fact. The burden is on the Commonwealth to prove beyond a reasonable doubt that the killing was not an accident. If after considering all the evidence you have a reasonable doubt whether the killing was accidental or intentional, then you shall find George Huguely not guilty of all forms of murder, and the act can be at most manslaughter.

Mr. Huguely's proposed instruction clarifies the law, avoids jury confusion, and addresses the particular facts of this case.

This case is governed by Martin v. Commonwealth, 218 Va. 4 (1977). In that case, the victim was shot with a shotgun. Id. at 304. The defendant explained that he had found a shotgun, and that as he was attempting to show the gun to the victim, it accidentally fired. Id. at 305. The Court instructed the jury on various forms of murder, including "the theory of accidental killing in instructions defining involuntary manslaughter." Id.

The defendant in Martin offered an instruction similar to the instruction above. The Commonwealth objected to the instruction, arguing that the principles were already

contained in other instructions. The trial court refused the instruction, and defendant appealed. Id.

The Supreme Court held that it was error to refuse the instruction. Id. The Court reasoned that although the jury was instructed on "the theory of accidental killing in instructions defining involuntary manslaughter," the instructions did not instruct the jury that "the burden was upon the Commonwealth to prove the killing was not accidental and that the jury should acquit the defendant if it entertained a reasonable doubt whether the death was accidental or intentional." Id. The Court reasoned that even if the jury was instructed on the theory of accidental killing, the trial court was also required to instruct the jury on the burden of proof with respect to the accidental killing. Id.

In the instant case, the Commonwealth has similarly charged a form of murder, and Mr. Huguely has raised a defense of accident.

Moreover, while the instructions instruct the jury on the elements of involuntary manslaughter and "the theory of accidental killing," nowhere do the instructions specifically instruct the jury regarding the burden of proof with regard to accident. In fact, because Mr. Huguely's position is that the killing is an accident, the jury may be misled and confused into believing that Mr. Huguely bears the burden with proving that fact.

In conclusion, the instant case is governed by Martin, and the instruction is required. Mr. Huguely's proferred instruction would avoid the jury confusion that concerned the Court in Martin. The instruction is an accurate statement of the law. And the instruction is consistent with the particular facts and evidence of this case.

WHEREFORE, for the reasons stated above and for other reasons stated before the Court on this motion, George Huguely respectfully moves the Court to offer instruction MM to the jury, and for such other and further relief to which he may be entitled.

GEORGE HUGUELY

By Counsel

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

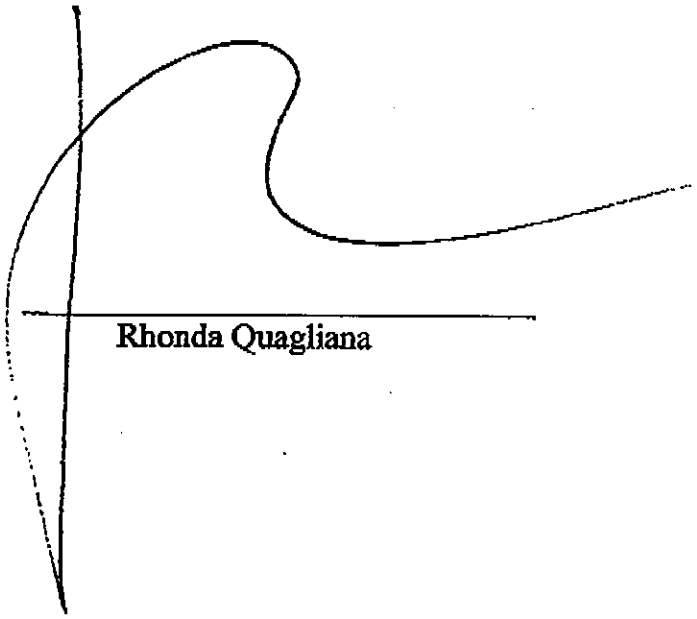
By: _____

Rhonda Quagliana VSB# 39522
Francis McQ. Lawrence VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138
434-296-1301 facsimile
Counsel for Defendant

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 16th day of February, 2012 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902.



Rhonda Quagliana

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No.: 11-102

GEORGE HUGUELY,

Defendant.

MEMORANDUM IN SUPPORT OF USE OF JURY INSTRUCTION NN REGARDING DEFENSE OF INTOXICATION

The defendant, George Hugucly ("Mr. Hugucly"), by counsel, in support of his motion in support of the use of an instruction NN, regarding the defense of intoxication, submits the following Memorandum in Support:

Factual Background

In this case, Mr. Huguely is charged with first-degree murder under Virginia Code § 18.2-32, among other offenses.

Mr. Huguely has moved the Court to instruct the jury using defense instruction NN, regarding the defense of intoxication. This instruction is based on Virginia Model Jury Instruction 33.950 and is modified in accordance with case law and for the particular facts of this case.

Argument

Mr. Huguely's proposed instruction NN clarifies the law, avoids potential juror confusion, and addresses the particular facts at issue in this case. Accordingly, the Court should grant his instruction.

"Each party is entitled to have jury instructions upon vital points in language chosen by it, if the instruction is a correct statement of the law." Walshaw v. Commonwealth, 44 Va. App. 103, 120 (2004) (quoting Broady v. Commonwealth, 16 Va. App. 281, 291 (1993)).

"Although neither the Code nor the Rules of the Supreme Court of Virginia set forth jury instructions that the trial court must give at the conclusion of the evidence in a criminal case, it is well established as a matter of common law that '[i]t belongs to the [trial] court to instruct the jury as to the law, whenever they require instruction, or either of the parties request it to be given.'" Dalton v. Commonwealth, 29 Va. App. 316, 323, (1999) rev'd on other grounds, 259 Va. 249 (2000) (quoting Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657, 662 (1874)).

The Supreme Court of Virginia has "repeatedly said that instructions should be simple, impartial, clear and concise," and not "argumentative, confusing [or] potentially misleading." Bryant v. Commonwealth, 216 Va. 390, 392 (1975).

When a case "presents peculiar features [and] is very close upon the facts," then it is especially important that "the instructions should be directed to these features" and "most carefully drawn." Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 348 (1926).

In this case, Mr. Huguely has proposed instruction NN, based on Virginia Model Jury Instruction 33.950. The Model Jury Instruction reads as follows:

> If you find that George Huguely was so greatly intoxicated by the voluntary use of alcohol and/or drugs that he was incapable of deliberating or premeditating, then you cannot find him guilty of first degree murder.
>
> Voluntary intoxication is not a defense to second degree murder, voluntary manslaughter, involuntary manslaughter, burglary, statutory burglary, robbery, or larceny. Even if you find that George Huguely was greatly intoxicated by the voluntary use of alcohol and/or drugs, you must still find him guilty if you find that the Commonwealth has proved every element of the crime beyond a reasonable doubt.

Va. Model Jury Instruction 33.950 (modified to include lesser offenses under second paragraph).

Mr. Huguely has proposed an instruction that would add a last paragraph, to read, in full, as follows:

> If you find that George Huguely was so greatly intoxicated by the voluntary use of alcohol and/or drugs that he was incapable of deliberating or premeditating, then you cannot find him guilty of first degree murder.
>
> Voluntary intoxication is not a defense to second degree murder, voluntary manslaughter, or involuntary manslaughter. Even if you find that George Huguely was greatly intoxicated by the voluntary use of alcohol and/or drugs, you must still find him guilty if you find that the Commonwealth has proved every element of the crime beyond a reasonable doubt.
>
> However, intoxication is relevant for other purposes, including evaluating defendant's judgment, coordination, and memory.

Mr. Huguely's proposed instruction clarifies the law, avoids jury confusion, and addresses the particular facts of this case.

And as for the final paragraph, Mr. Huguely's instruction avoids jury confusion. While intoxication is not relevant as a defense to certain offenses, that intoxication is still relevant.

The Court of Appeals in Johnson similarly held that intoxication is still relevant to issues that are raised in a criminal case. Johnson v. Commonwealth, 1996 WL 494818 (Va. Ct. App. 1996). In Johnson, the defendant and the victim fought in his apartment, and the victim was later found dead. The defendant was indicted for first-degree murder. Johnson, 1996 WL 494818, at *3 (Va. Ct. App. 1996). At the time of arrest that day, the defendant told police that he had struck the victim with his hands and feet. Id. at *2. But at trial, he testified that he did not remember fighting with the victim and that he did not know who had hurt him. Id. at *3.

At the close of the Commonwealth's evidence, the Court granted Johnson's motion to strike the first-degree murder charge. Therefore, Johnson presented his own evidence only on the charge of second-degree murder. Id. at *5.

The defendant had testified, apparently with no objection, that he was drinking on that day, that he had been on a multi-day drinking binge at the time, and that he sometimes experiences blackouts when he drinks. Id. at *2–3. But after the Commonwealth moved to strike other evidence offered by the defendant that would speak to the extent and effect of his intoxication. Id. at *5. The defendant attempted to offer the testimony of a toxicologist, who would have testified that "increasing levels of alcohol in the bloodstream affect a person's judgment, coordination, and memory." Id.

The Court held that the evidence of intoxication was relevant and admissible. It reasoned that "[a]fter the trial court granted in part [defendant's] motion to strike, evidence that he was intoxicated at the time of the offense was not relevant to negate any element of a lesser included offense of first degree murder. However, the testimony of [the toxicologist] may have been relevant for other purposes." Id.

Similarly, in the instant case, the Commonwealth and Mr. Huguely have introduced evidence of Mr. Huguely's intoxication on the day in question. That intoxication cannot serve as a defense to any charge other than first-degree murder; however, evidence of that intoxication can properly be considered by the jury in considering Mr. Huguely's "judgment, perception, and memory." Id.

For example, such evidence would help the jury evaluate evidence that Mr. Huguely went to Ms. Love's apartment to speak to her, that he used force to enter her apartment to speak with her, and that he took her computer in order to force her to speak with him in the future. Without evidence of George's intoxication, the jury would not be able to properly evaluate and contextualize his rationale for his actions.

In sum, the jury should be instructed on the definition of intoxication, and they should be instructed on the purposes for which they may consider Mr. Huguely's intoxication. Such an instruction would clarify the law, avoid juror confusion, and assist the jury in considering the particular facts of this case.

WHEREFORE, for the reasons stated above and for other reasons stated before the Court on this motion, George Huguely respectfully moves the Court to offer

instruction NN to the jury, and for such other and further relief to which he may be entitled.

GEORGE HUGUELY

By Counsel

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

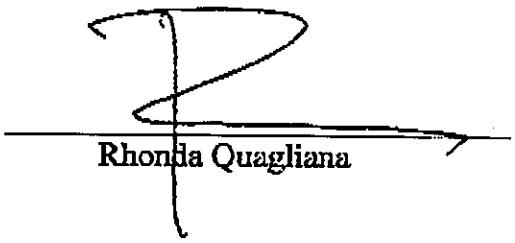
By: _____

Rhonda Quagliana VSB# 39522
Francis McQ. Lawrence VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138
434-296-1301 facsimile
Counsel for Defendant

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 16th day of February, 2012 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902.



Rhonda Quagliana