IN THE

SUPREME COURT OF VIRGINIA

Record No. 220499

TERRENCE JEROME RICHARDSON,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE INNOCENCE PROJECT AS *AMICI CURIAE* IN SUPPORT OF TERRENCE JEROME RICHARDSON

David B. Hargett, Esq.
Virginia Bar No. 39953
HARGETT LAW, PLC
11545 Nuckols Road, Suite C
Glen Allen, VA 23059
Office: (804) 788-7111
Facsimile: (804) 915-6301
email: dbh@hargettlaw.com

David B. Smith, PLLC
Virginia Bar No. 25930
108 North Alfred Street, 1st FL
Alexandria, Virginia 22314
(703) 548-8911
Fax (703) 548-8935
dbs@davidbsmithpllc.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST

The Virginia Association of Criminal Defense Lawyers ("VACDL") is a state-wide organization of Virginia attorneys, both private and members of the various offices of the public defender, whose practices are primarily focused on the representation of those accused of criminal violations. The VACDL operates exclusively for charitable, educational, and legislative purposes, and has approximately 675 members. The VACDL's mission is to improve the quality of justice in Virginia by seeking to ensure fairness and equality before the law. The VACDL has appeared as amicus curiae in appellate cases in the Commonwealth of Virginia and the United States Supreme Court.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of more than 11,500 attorneys, and another 28,000 affiliate members from all 50 states. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. Every year, NACDL files numerous

amicus briefs to provide assistance in cases that present issues of broad importance to criminal defendants, defense attorneys, and the criminal legal system as a whole.

The Innocence Project is a non-profit organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA testing and other evidence discovered since the time of their conviction. To date, the work of the Innocence Project and affiliated organizations has played a leading role in the exoneration of 3,298 individuals nationwide for crimes they did not commit.

The case before the Court involves an all-too frequent fact pattern in wrongful convictions, where exculpatory evidence is not provided to the defense and innocent individuals ultimately plead guilty, frequently under threat of a far more severe punishment – including a sentence of death – if they instead chose to exercise their constitutional right to trial. Of the more than 3,000 people exonerated nationally, more than 1 out of 10 pled guilty to crimes they did not commit. The withholding of exculpatory evidence has a similarly leading role in wrongful convictions; a full 50%

of the nation's known wrongful convictions have occurred in cases where the State withheld exculpatory evidence.

The Innocence Project has an interest in this case because it determines whether innocent individuals in Virginia will have a mechanism for relief from their wrongful conviction and imprisonment.

STATEMENT OF THE CASE

The *Amici Curiae* adopt the statement of the case and the facts as presented by the Appellant, Mr. Richardson.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred by finding due diligence lacking, where the record evinced that law enforcement willfully concealed the new evidence at issue from Mr. Richardson, his trial counsel, and the Commonwealth's Attorney.

II. The Court of Appeals erred, because it made factual findings from an unclear record rather than order an evidentiary hearing as this Court mandated it must in Dennis v. Commonwealth, 297 Va. 104, 130–32, 823 S.E.2d 490, 503–04 (2019).

III. The Court of Appeals erred in finding that a rational factfinder would convict Mr. Richardson, where no credible evidence supported his conviction but his guilty plea, and a federal jury acquitted him of the same wrongful conduct.

IV. The Court of Appeals erred in allowing the Commonwealth to approbate and reprobate in defiance of centuries of Virginia jurisprudence.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. The decision from the Court of Appeals puts all future innocence cases in jeopardy. The Court of Appeals erroneously concluded that the defense could have found the hidden evidence, that defense counsel was not diligent, that an evidentiary hearing was unnecessary, and that a rational trier of fact would have convicted Mr. Richardson. Also, the Commonwealth should be bound by its initial, detailed response that Mr. Richardson was entitled to the writ or, if necessary an evidentiary hearing. (*Assignments of Error I, II, III and IV*).

STANDARD OF REVIEW

On appeal of a dismissed petition for a writ of actual innocence, conclusions of law and conclusions based on mixed questions of law and fact are reviewed *de novo*. *Johnson v. Commonwealth*, 273 Va. 315, 321 (2007). Whether an actual innocence case should be referred to the circuit court for an evidentiary hearing is reviewed for abuse of discretion. *Haas v. Commonwealth*, 283 Va. 284, 291 (2012). "In heavily fact-dependent cases . . . that turn on the materiality of new evidence offered by new witnesses whose credibility is not apparent from the record, the Court of Appeals should err on the side of ordering a circuit court evidentiary hearing." *Dennis v. Commonwealth*, 297 Va. 104, 130 (2019).

ARGUMENT

Mr. Richardson, acquitted of murder but sentenced to life in prison for that murder, is entitled to a writ of actual innocence. At the very least, an evidentiary hearing should be held, and the Commonwealth should be bound by its concession that Mr. Richardson is entitled to a writ of actual innocence or an evidentiary hearing.

In any criminal case, it is disturbing when the police or prosecution fails to disclose exculpatory evidence, and the resulting due process violation often leads to a wrongful conviction. Requiring disclosure demonstrates that the prosecutor's job is not to win the case, but to see "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The prosecution's failure to disclose evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Additionally, the prosecutor's duty includes material that is "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 474 (1995).

Once a *Brady* violation occurs, the adversarial system rarely returns to the level playing field the law rightfully demands. The defendant's ability to contest the improper actions of state agents is greatly diminished when *Brady* material is discovered after a conviction has been secured, and the defendant is substantially disadvantaged when attempting to persuade a court, once a conviction is final, that the suppression of this exculpatory information infected the entire trial and led to an unfair or unjust result.

When an innocent person is wrongfully convicted and remains incarcerated, the criminal justice system suffers as a whole by eroding public confidence, perpetuating injustice, robbing the innocent person of liberty, creating a ripple effect on other innocence cases, wasting resources, denying justice to the victims, and allowing the actual guilty person to remain free at large.

Virginia has a statutory remedy for innocent persons who can prove – with newly discovered evidence – that they would not have been convicted if a reasonable fact-finder heard all the evidence at the time of trial. Virginia recently expanded the number of eligible persons who could

pursue this remedy to include those who had entered pleas of guilty.

Mr. Richardson entered a plea of guilty to a lesser offense to avoid the death penalty. Now, he has new evidence of innocence. The Court of Appeals erroneously concluded that Mr. Richardson could not prevail. If allowed to stand, the lower court's rulings create dangerous precedent. This brief will address some of the significant errors.

1. Due Diligence

The record is extensive, but it seems clear that the suppressed evidence concerning Shannequia Gay, the child witness, was not discoverable by the defense prior to the guilty plea. The defense did not know about the child's detailed statements provided immediately after the shooting. The defense did not have access to the documents and lineup photographs where the child described the shooter and apparently identified some other person as the shooter. That evidence should have been provided to the defense, but it was not.

No evidence suggests the defense was aware a child witness had provided a detailed description of the shooter and had identified – through photo lineups – some other person as the shooter. It is inconceivable the

defense was aware of the initial statements of the child or had any access to lineup evidence or the written statement of the child.

Looking at this situation from the perspective of a reasonable defense attorney: *If the defense knew that some person identified a third party as the shooter, the conversation on whether to plead to anything would change dramatically*.

Yet, the Court of Appeals relied on the theory that just because the child had been subpoenaed a few weeks before the guilty plea, the defense "had ample time to investigate the subpoena, to talk to [the child] about what she saw, or to work with her parents to do so." *Richardson v. Commonwealth*, 75 Va. App. 120, 141 (2022). This conclusion ignores the realities of an investigation by the defense when a witness does not want to speak with the defense attorney or his investigator. The defense was denied access to the child witness when the investigator attempted to interview her in 1998. (JA 593). Additional evidence shows that the child's mother was protective and concerned about her safety from the moment the shooting occurred. The child, who was bombarded with law enforcement officers from the day of the shooting to many times

throughout the years that followed, still refuses to speak. (*See* JA 464). This shows that the defense never had a chance of getting the exculpatory evidence from the child. Instead, it was perfectly reasonable for the defense to believe that because the prosecutor never turned over any such exculpatory evidence, *there was no such evidence to be obtained*.

The more recent interviews of the defense attorney and the prosecutor demonstrate that neither of them knew that the child had identified another person out of a lineup as the shooter.

The prosecutor stated in a sworn affidavit that he "do[es] not recall receiving information that any person identified someone other than the defendants in a photo lineup as the perpetrator in the death of Officer Gibson or any accompanying statements reflecting that." (JA 422).

Likewise, the defense attorney did not have any such information and *did not have any reason to believe the child provided exculpatory evidence to the police on the day of the shooting*. After suffering a medical condition adversely affecting his memory, the defense attorney does not know, for sure, whether he heard about the child witness. He thinks he *may* have received a summary of what the child would say, but there is

nothing suggesting the details or even the gist of that potential testimony. (See JA 593). Perhaps what is more important, if the prosecutor did not have the information about the child witness, there is no reason to believe the defense could have uncovered the hidden evidence.

Also, by the time the child was served with a subpoena to testify as a witness for the prosecution, no reasonable defense attorney would conclude that her testimony would be that someone else committed the crime. By that point, the only logical conclusion for defense counsel was that she was going to assist the prosecution's case.

The Court of Appeals concluded that the defense *might have heard* about the witness and *maybe could have known* the child was subpoenaed by the Commonwealth a few weeks before the plea, but there is no reason to believe the defense could have discovered the exculpatory evidence because, in combination, the police were hiding it, the child was refusing to talk, and the prosecutor never (personally) had the information to disclose.

Due diligence should be guided by reason. When an attorney decides what to investigate, the attorney should perform an investigation that is

reasonable under the circumstances. "In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Specifically – as to the information regarding the nine-year-old witness – the Court of Appeals wrongly found a lack of diligence when the evidence shows that, early on, counsel's investigator attempted to speak with her but was denied access. (JA 593). Moreover, there is reason to infer from the evidence that (a) the child witness would not have agreed to be interviewed by the defense, (b) the child witness would not and could not have provided the defense any documents relating to the line-ups she was shown or the full written statement that she gave, and (c) the subpoena for the child (occurring a year and a half after the shooting) would not have informed the defense of anything of value or worthy of pursuit *because it must be assumed* she was not subpoenaed by the Commonwealth to testify that she identified another person as the shooter of Officer Gibson.

In short, this is a *heavily fact-dependent* case that requires a fully developed record rather than assumptions based on isolated facts. As *Dennis* directs, the court "should err on the side of ordering" an evidentiary hearing. *Dennis,* 297 Va. at 130.

2. The Strength of the Evidence of Innocence

Many factors in this case strongly point to the innocence of Mr. Richardson. Officer Gibson's description of the perpetrators does not match Mr. Richardson. No physical or forensic evidence connects Mr. Richardson to the shooting. There were no latent prints on the gun, no fibers, no hair fragments, no DNA, and no other forensic evidence connecting Mr. Richardson to Officer Gibson.

The acquittal in federal court after the federal prosecutors presented their strongest case is significant for two reasons. The federal trial demonstrated that the prosecutor's only real witness, Wooden, is a liar and unworthy of belief, and no rational trier of fact would find Mr. Richardson guilty with the additional evidence of the child's description of the perpetrators and identification of a different person who committed the shooting. The fact that the charge of murder in federal court was

different from the manslaughter charge to which Mr. Richardson pled is of no import; the issue of innocence turns on whether Mr. Richardson was the person who shot Officer Gibson.

Moreover, the fact Mr. Richardson pled guilty should carry no weight. It arguably does not matter that Mr. Richardson entered a guilty plea because the statutory change allowing petitions in guilty plea cases does not indicate that guilty plea cases should be treated any differently. Additionally, any reasonable person in Mr. Richardson's position would accept the plea offer, even if reluctantly, in a desperate attempt to avoid the death penalty. See, e.g., *Crum v. Clarke*, Rec. No. 171622, 2019 Va. Unpub. LEXIS 30, *3 (granting habeas relief where petitioner was coerced into pleading guilty based on the prosecutor's threat to reinstate attempted capital murder charge). For the same reason that a confession is not voluntary if it was "extracted by any sort of threats or violence," *Bram v. United States*, 168 U.S. 532, 542-543 (1897), a plea is not voluntary when made under a threat of possible execution. Viewed within the totality of circumstances, especially the very real threat of the death penalty, the guilty plea should not be considered evidence of guilt.

When considering the facts as a whole – including (a) the officer's description which does not match Mr. Richardson, (b) the complete lack of forensic evidence connecting Mr. Richardson to the shooting, and (c) the inherently incredible assertions made by Wooden, the additional evidence pertaining to the child witness (her description, lineup identification, etc.) is compelling proof that Mr. Richardson is actually innocent and no reasonable fact finder would have found him guilty if the new evidence had been available to the defense during the state prosecution.

3. The Commonwealth's Concession

After investigating this case for at least six months, the Commonwealth concluded that "Mr. Richardson should be granted a writ of actual innocence based upon the unique set of circumstances presented in this case." (JA 425). The Commonwealth also asserted that if the Court of Appeals did not agree to grant the writ on the record, an evidentiary hearing should be held to determine the material facts in the case. (JA 426).

The legal doctrine of approbate-reprobate applies to this matter because the Commonwealth cannot adopt two different positions on the

same issue in a legal proceeding. The doctrine prohibits a party from approving one set of facts or arguments in the case and then rejecting the same facts or arguments in another part of the case. See, e.g., *Rowe v. Commonwealth*, 277 Va. 495, 502 (2009). The doctrine is based on the fundamental principle of fairness in the legal proceedings, which requires parties to act in good faith and not to manipulate the legal system. "All litigants are subject to the doctrine of approbate and reprobate." *Delaune v. Commonwealth*, 76 Va. App. 372, 380 (2023).

Under the doctrine, the Commonwealth should be bound by the detailed concession that Mr. Richardson is entitled to a writ of actual innocence or, at the very least, an evidentiary hearing.

CONCLUSION

The decision of the Court of Appeals should be reversed and the matter should be remanded (1) for an evidentiary hearing on the material facts in dispute (2) with instructions that the Court of Appeals must accept the Commonwealth's concession that Mr. Richardson is actually innocent and entitled to the writ.

Respectfully Submitted,

By:_____
Counsel

David B. Hargett, Esquire
Virginia State Bar No. 39953
HARGETT LAW, PLC
11545 Nuckols Road, Suite C
Glen Allen, VA 23059
Office: (804) 788-7111
Facsimile: (804) 915-6301
email: dbh@hargettlaw.com
Counsel for VACDL

David B. Smith, PLLC
Virginia Bar No. 25930
108 North Alfred Street, 1st FL
Alexandria, Virginia 22314
(703) 548-8911
Fax (703) 548-8935
dbs@davidbsmithpllc.com
Counsel for NACDL

CERTIFICATE

On **April 19, 2023**, the foregoing was submitted to the Court via VACES, and a true copy was emailed to counsel for the Commonwealth, as follows:

Jason S. Miyares, Attorney General
jmiyares@oag.state.va.us

Theophani K. Stamos, Special Counsel to the Attorney General of Virginia for Cold Cases, Actual Innocence and Special Investigations
tstamos@oag.state.va.us

Brandon T. Wrobleski, Special Assistant to the Attorney General for Investigations
bwrobleski@oag.state.va.us

Andrew N. Ferguson, Solicitor General
Aferguson@oag.state.va.us

Erika L. Maley, Principal Deputy Solicitor General
Emaley@oag.state.va.us

Graham K. Bryant, Deputy Solicitor General
Gbryant@oag.state.va.us

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Phone: (804) 786-2071
Fax: (804) 371-015

And a copy was emailed to counsel for Mr. Richardson, as follows:

Jarrett Adams, Esq. (NY LIC No. 5455712) (Pro Hac Vice)
Sarah A. Hensley, Esq. (VSB No. 73032)
The Law Offices of Jarrett Adams, PLLC
40 Fulton Street, Floor 28
New York, NY 10038
Telephone: (646) 880-9707
Facsimile: (332) 366-8605
Email: jadams@jarrettadamslaw.com
Email: sarah@jarrettadamslaw.com

/s
David B. Hargett, Esquire