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# COMMONWEALTH *of* VIRGINIA

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February 4, 2022

The Honorable John Vollino
Clerk of Court
Court of Appeals of Virginia
100 North Ninth Street
Richmond, Virginia 23219

**Re: Terence Jerome Richardson v. Commonwealth**
**(s/k/a Terrence Jerome Richardson)**
**CAV Record No. 0361-21-2**

Dear Mr. Vollino:

This case involves a petition for a writ of actual innocence filed by Terence Jerome Richardson. The former Conviction Integrity Unit of the administration of Attorney General Mark R. Herring [hereinafter "CIU"] investigated this matter, resulting in the Commonwealth's filing of a brief on Monday, November 1, 2021, joining in the instant petition for writ of actual innocence.

Following the change in administration on January 15, 2022, the Attorney General has reconsidered the Commonwealth's position in this case. The purpose of this letter is to notify the Court that the Commonwealth no longer adheres to certain arguments contained in its previously filed brief. The Commonwealth specifically withdraws its previous representation under Va. Code § 19.2-327.10:1 that it joined in the instant petition for writ of actual innocence. *See Bush v. Commonwealth*, 68 Va. App. 797, 804, 813 S.E.2d 582, 585 (2018) (noting that despite the Commonwealth's concession that an actual innocence petitioner had met his burden

of proof, "fidelity to the uniform application of law preclude[d] [the Court] from accepting concessions of law made on appeal.").

The Commonwealth additionally withdraws from its position that Petitioner's federal acquittals for the crimes of Murder of a Law-Enforcement Officer during Drug Trafficking (18 U.S.C. § 848 (e)(1)(B)) and Using a Firearm to Commit Murder during Drug Trafficking (18 U.S.C. § 924(c) and (j)) [hereinafter "federal acquittals"] are material evidence that is properly before this Court for consideration. Notably, Petitioner's initial five-page Petition does not request that this Court consider the federal acquittals as supporting evidence. Although the Commonwealth's Answer urged this Court to consider the federal acquittals as an item of newly discovered evidence, Commonwealth's Answer at 1, the Commonwealth's position is now that the federal acquittals were not "evidence" relating to Petitioner's guilt, delinquency, or innocence pursuant to Code § 19.2-327.11(C). Additionally, neither the Commonwealth nor the Petitioner moved this Court to amend the initial petition to include the federal acquittals as a basis for granting the requested relief. For these reasons, the federal acquittals are not properly before this Court as evidence in support of Petitioner's arguments.

Even if the federal acquittals were a proper part of an amended petition in this case, Petitioner's acquittal of murder by the federal jury has no relevance to his state guilty plea to involuntary manslaughter. The federal jury was only instructed on the federal law of second-degree murder during a drug trafficking conspiracy; it was not presented with a lesser-included jury instruction for the Virginia common-law crime of involuntary manslaughter. Commonwealth Ans. Ex. D at 1218–25. Petitioner's acquittal of the federal crime of intentionally and maliciously killing Officer Gibson during a drug trafficking conspiracy therefore has no probative effect on his previous admission in Sussex County Circuit Court that he committed a different Virginia common-law crime with distinct elements and a less-culpable mental state.

The Commonwealth finally submits that Petitioner has failed to prove that the federal acquittals are material, as required by Code § 19.2-327.11(A)(vi)(a). *Contra Turner v. Commonwealth*, 282 Va. 227, 250–51 (2011) ("Additionally, "[e]vidence that relates to a matter that is properly at issue in the case is said to be material.") (quoting Charles E. Friend, The Law of Evidence in Virginia § 11–1, at 431 (6th ed. 2003)). The federal acquittals rest on inadmissible evidence of other conduct that was not properly at issue in the proceedings against the Petitioner in Sussex County Circuit Court, namely, a federal conspiracy by the Petitioner to traffic 50 or more grams of crack cocaine.

The remainder of Petitioner's argument, while it presents certain evidence as "newly discovered," is an attempt to use the writ of actual innocence as an "omnibus substitute for the carefully crafted procedures of the habeas corpus writ." *Contra Bush,* 68 Va. App. 797, 803 n.1. The Commonwealth agrees that no conviction should

stand when it is proven to have been based on ineffective assistance of counsel or *Brady* violations. However, these issues can only properly come before this Court on direct appeal or through the writ of habeas corpus. The primary focus of the instant petition is to raise legal claims that are not cognizable in Virginia actual innocence proceedings, as demonstrated by (1) Petitioner's approximately 36 references to the alleged withholding of "New Exculpatory Evidence;" (2) Petitioner's citations to unrelated and nonbinding West Virginia, North Carolina, and federal precedent regarding ineffective assistance of counsel and *Brady*; and, (3) Petitioner's conflation of the writ of actual innocence with a motion to withdraw a guilty plea. *See Tyler v. Commonwealth*, 73 Va. App. 445, 456 (2021) (citing *In re Neal*, 44 Va. App. 89, 90 (2004) (refusing to consider an actual innocence petitioner's legal argument that there was insufficient evidence to support his conviction).

The Commonwealth additionally withdraws its concessions regarding Petitioner's allegedly newly-discovered evidence, namely, the "Gay Statement" and the "Newby Photo Array."[1] Petitioner alleges that these items constitute after-discovered evidence relating to the testimony of Shannequia Gay. The Commonwealth's position is now that the Petitioner has failed to satisfy his burden of proof to show, "categorically and with specificity," that the allegedly newly-discovered evidence satisfies the requirements of § 19.2-327.11. The Commonwealth specifically contends that Petitioner has failed to carry his burden of proof with respect to the "diligence" consideration under § 19.2-327.11(vi) and the "materiality" and "totality of the evidence" considerations under § 19.2-327.11(vii). Because Petitioner cannot carry his burden of proof with respect to the "Gay Statement" and the "Newby Photo Array", the Commonwealth additionally withdraws from and abandons its request for an evidentiary hearing regarding these items of evidence. Commonwealth Ans. at 56, 60.

Review of the Petitioner's initial filings indicates that they contain nothing other than bare assertions that the "Gay Statement" and the "Newby Photo Array" satisfy the "diligence" standard under § 19.2-327.11(vi). The Commonwealth's Answer further sheds light on the insufficiency of Petitioner's efforts to contact and interview Shannequia Gay prior to his involuntary manslaughter conviction becoming final. Commonwealth Ans. at 55. The only representation before this Court regarding the "diligence" with which Petitioner endeavored to learn about any information regarding Shannequia Gay prior to his conviction becoming final are that Petitioner's investigator "attempted to locate and meet with her but was unsuccessful." *Id.* Petitioner's trial counsel and his trial investigator knew or had

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[1] The Commonwealth maintains its view, stated at page 66 of its Answer, that Petitioner could not establish that the other allegedly newly discovered piece of evidence, a 911 tip, was material within the meaning of Code § 19.2-327.11(vii). The Commonwealth furthermore avers that Petitioner has failed to allege any facts showing how the "911 Tip," which was allegedly created four days after the killing of Officer Gibson, "could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction . . . by the circuit court." Code § 19.2-327.11(vi).

reason to know that Shannequia Gay was a material witness with potential identification testimony to offer, yet on the record before this Court, they apparently made only one attempt to speak with her before the Petitioner pled guilty. This minimal pretrial effort to discover additional evidence regarding Shannequia Gay falls short of the "devoted and painstaking application to accomplish [the] undertaking" required under this Court's precedent. *See Tyler*, 73 Va. App. at 464.[2]

The Commonwealth further notes that it possesses approximately 15 transcripts of interviews conducted by the CIU in this case that do not appear to have been provided to the Court or opposing counsel. *See* Code § 19.2-327.11(C) (permitting the Attorney General to proffer "any evidence pertaining to the guilt or delinquency or innocence of the petitioner that is not included in the record of the case"). One of these previously undisclosed transcripts, dated May 14, 2021, contains statements from a material witness, Shawn Lydell Wooden, which echo Wooden's trial testimony and inculpate the Petitioner. Wooden testified as an eyewitness at the state preliminary hearing in the instant case, as well as in the federal trial that resulted in Petitioner's drug trafficking conviction. In the previously undisclosed May 2021 statement, generated by a former CIU investigator, Wooden maintained that Petitioner "was using and selling drugs," that there was "nothing he had to offer or say that could help [Petitioner]," and that "[t]he only things he could say on the stand would be harmful to [Petitioner and co-Petitioner Ferrone Claiborne] . . ." The CIU investigator also noted the following:

> Sometime in 2018, while incarcerated at Green Rock Correctional Center in Pittsylvania County, Virginia, Jarrett Adams [Petitioner's attorney] got in touch with Wooden over the phone through his counselor at the prison. Wooden recalls that Mr. Adams admonished him for his testimony and called him a liar. Wooden reportedly told Mr. Adams not to contact him again.

This material information should have been part of the evidence submitted to this Court, *see* Code § 19.2-327.11(C), and the Commonwealth now attaches the interview transcript to this letter along with a motion for leave to file a supplemental brief and supplemental exhibits.

Finally, the Commonwealth no longer contends that no rational trier of fact would have found proof of Petitioner's guilt beyond a reasonable doubt. Commonwealth Ans. at 70. Petitioner's guilty plea to involuntary manslaughter and

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[2] The record before this Court regarding the diligence employed by Petitioner is substantially similar to that in *Tyler*. In *Tyler*, this Court found that the "diligence" requirement under the actual innocence statutes was not satisfied when Tyler's trial counsel made a bare assertion at trial that he had tried and failed to locate a particular witness who would later recant; Tyler's counsel did not further specify what efforts had been made to attempt to locate the witness before Tyler's conviction became final. *Tyler*, 73 Va. App. at 464, (2021).

the lengthy factual proffer that accompanied it—though only part of this Court's analysis under the actual innocence statutes—are compelling evidence of a "'self-supplied conviction' that acts as a 'waiver of all defenses other than those jurisdictional.'" *In re Watford*, 295 Va. 114, 126–27 (2018) (quoting *Peyton v. King*, 210 Va. 194, 196 (1969)) (granting petition for writ of actual innocence when, among other factors, the record was "devoid of any mention of the facts supporting [petitioner's] guilty plea").

The Commonwealth's position is now that evidence of Petitioner's self-supplied conviction for involuntary manslaughter, as well as the detailed facts proffered in support of his guilty plea, distinguish this case from *Watford* and render Petitioner unable to satisfy this Court that no rational trier of fact would have found proof of Petitioner's guilt beyond a reasonable doubt. The Commonwealth therefore moves this Court to dismiss and/or deny the instant petition for writ of actual innocence.

A motion for leave to file a supplemental response regarding the positions articulated in this letter, as well as for leave to file any necessary exhibits in support thereof, will follow. I would appreciate it if you would circulate this letter to the Judges of the Court.

Yours sincerely,

Brandon T. Wrobleski
Special Assistant to the Attorney General
for Investigations
Virginia State Bar No. 89697

cc: Jarrett Adams, Esq., Counsel for Terrence Richardson
Michael HuYoung, Esq., Counsel for Terrence Richardson

# MEMORANDUM
## (PRIVILEGED AND CONFIDENTIAL – WORK PRODUCT)

**TO:** Richardson/Claiborne Team

**FROM:** Kyle Richards

**RE:** Witness Interview

**DATE:** 05/14/2021

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**Shawn Lydell Wooden**
**Augusta Correctional Center**
**1821 Estaline Valley Road**
**Craigsville, VA 24430**

I met with Shawn Wooden at the Augusta Correctional Center. Having identified myself and explained the role of the CIU, I made Wooden aware that he was free to end the conversation at any point. After the introduction, Wooden stated that he was not going to go to court for this case. He added that if he were forced to go to court, he would not say anything while on the stand.

Wooden stated that he has known Terence Richardson since they were both in their 20s. Wooden's grandmother lived on Dogwood Street in Waverly and Richardson also lived on Dogwood. He added that he knew Ferrone Claiborne but not as well as he knew Richardson. Wooden said that Claiborne was known to go to Hopewell to get drugs but Wooden was not sure if Claiborne was selling the drugs. Richardson was using and selling drugs.

Wooden conceded that he was living with the mother of one of his children at the time of Officer Gibson's murder. He added that he was working for a "bark company" in Waverly called "Summit….". Wooden was unable to recall the full name of the business. He was a laborer who spread mulch.

Wooden declined to give much information about the day in question stating that in 2019 or 2020 he had received a call from the Innocence Project. He informed me that he told the IP that he did not want to be involved. Sometime in 2018, while incarcerated at Green Rock Correctional Center in Pittsylvania County, Virginia, Jarrett Adams got in touch with Wooden over the phone through his counselor at the prison. Wooden recalls that Mr. Adams admonished him for his testimony and called him a liar. Wooden reportedly told Mr. Adams not to contact him again.

Wooden did mention that his hair style at the time was "low cut" with no braids or dreadlocks. He believes that Leonard Newby had dreadlocks and states that was the reason

he gave Newby's name to law enforcement as a possible suspect. Wooden added that Richardson had a "plaits" hairstyle at the time of the shooting but was unsure about Claiborne hair.

Wooden stated he originally lied to law enforcement to protect his friend, Terence Richardson. When asked why he changed his story, Wooden said that he had to serve five years for his lies and did not want anymore time. He declined that he received any money or promises for his testimony/information. Wooden added that anyone who said otherwise was lying.

When I began to question Wooden about specifics of his testimony and the day in question, he declined to answer. Several times during our conversation, Wooden said that there was nothing that he had to offer or say that could help Richardson or Claiborne. The only things he could say on the stand would be harmful to them, so he prefers not to say anything. At this point Wooden stated that he wanted to end the conversation as he had nothing helpful to say.