IN THE

SUPREME COURT OF VIRGINIA

Court of Appeals Record No. 0361-21-2

TERRENCE RICHARDSON,

***Petitioner*,**

v.

COMMONWEALTH OF VIRGINIA,

***Respondent*.**

PETITION FOR APPEAL

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Terrence Richardson is serving a life sentence for a murder he unquestionably did not commit. After discovering critical exculpatory evidence that law enforcement intentionally withheld from both the defense *and* the Commonwealth's Attorney, Mr. Richardson petitioned the Court of Appeals to prove his innocence. The court dismissed his petition for want of diligence—without even ordering an evidentiary hearing, despite an unclear factual record—thereby implicitly condoning law enforcement's unconstitutional actions, and setting an impossible diligence bar for future actual innocence petitioners to meet. Not only did this absolve the Commonwealth of egregious *Brady* violations, but it also incentivized law enforcement to conceal exculpatory evidence from both defendants and prosecutors.

Moreover, because the record lacked any credible basis to uphold Mr. Richardson's conviction besides his guilty plea and, in fact, included a federal acquittal for the same conduct, the Court of Appeals' decision must be understood to hold that a defendant who pleads guilty after a standard plea colloquy can never be proven innocent. This contradicts the General Assembly's intent in amending the actual innocence statutes, and this Court's case law. It does not contradict, however, Attorney General Miyares' legal policy, which the court permitted the Commonwealth to argue—notwithstanding the Commonwealth's initial position that Mr. Richardson was entitled to a writ of actual innocence, and the centuries-old doctrine that prohibits parties from changing position mid-litigation based on

perceived self-interest, or, in this case, which way the political wind is blowing. Mr. Richardson accordingly petitions this Court for appeal to correct the Court of Appeals' erroneous analysis and unsupported factual findings.

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.

Mr. Richardson preserved this error in his Brief in Support of Petition for Writ of Actual Innocence Based on Nonbiological Evidence at 9, 11–13; in oral argument; and in his Petition for Rehearing *En Banc* at 2–6.

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).

Mr. Richardson preserved this error in his Petition for Rehearing *En Banc* at 6–10.

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.

Mr. Richardson preserved this error in his Brief in Support of Petition for Writ of Actual Innocence Based on Nonbiological Evidence at 16–18; in oral argument; and in his Reply at 8–14; Petition for Rehearing *En Banc* at 10–14.

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

Mr. Richardson preserved this error in his reply brief at 1–4, in oral argument, and in his Petition for Rehearing *En Banc* at 14–20.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On the morning of April 25, 1998, Officer Allen W. Gibson was shot in the woods behind the Waverly Village apartment complex in Waverly, Virginia. After a brief investigation, which the Commonwealth now describes as "irregular," law enforcement targeted Terrence Richardson and Ferrone Claiborne as Officer Gibson's assailants. Facing the death penalty, and lacking access to vital exculpatory evidence, Mr. Richardson pled guilty to a reduced charge of involuntary manslaughter (Va. Code § 18.2-36), a Class 5 felony, on December 8, 1999. Judge James A. Luke of the Sussex County Circuit Court sentenced him to 10 years in the state penitentiary with 5 years suspended, and 2 years' probation.

Public outcry over what was perceived to be a lenient plea deal led federal prosecutors to launch their own investigation into Officer Gibson's death, and on November 21, 2000, Mr. Richardson was indicted on two counts of conspiracy to distribute crack cocaine (21 U.S.C. § 846(2)) (one of which was ultimately dismissed by the prosecution), one count of using a firearm to commit a murder during drug trafficking (18 U.S.C. § 924(c) and (j)), and one count of murder of a law enforcement officer during drug trafficking (21 U.S.C. § 848(e)(1)(B)).

After an eight-day trial, the federal jury acquitted Mr. Richardson of Officer Gibson's murder and the related firearm charge on June 13, 2001. The jury convicted him, however, of the drug trafficking offense.

On September 27, 2001, Judge Robert E. Payne sentenced Mr. Richardson. Notwithstanding the jury's murder acquittal, Judge Payne found "the guilty plea[] in the state courts constitute[d] judicial admission of participation in the event and presence at [Officer Gibson's murder]." Richardson Ex. F at 117. Relying on that finding to upwardly modify Mr. Richardson's sentencing guidelines, he then sentenced him to life in prison

On April 6, 2021, Mr. Richardson filed a Petition for Writ of Actual Innocence Based on Non-Biological Evidence in accordance with Va. Code 19.2-327.10, *et seq.*. After a thorough investigation, the Commonwealth, through her then-Attorney General Mark Herring, filed an Answer agreeing the writ should issue. After

campaigning on a tough on crime platform, Jason Miyares succeeded Mr. Herring, and, shortly thereafter, advised the Court of Appeals that new evidence and case law compelled the Commonwealth to file a "supplemental pleading."

The Commonwealth's supplemental pleading, filed on February 28, 2022, contained neither new facts nor new case law. Instead, it flouted centuries of common law and Virginia jurisprudence by reversing course and arguing that Mr. Richardson's conviction should be sustained and the petition dismissed, because Mr. Richardson pled guilty.

After oral argument, the Court of Appeals entered an order on June 21, 2022, dismissing Mr. Richardson's petition (the "Order"). While crediting trial counsel's statement that he "attempted to speak with [Shannequia] Gay, but she was never made available," the Court nevertheless concluded that Mr. Richardson failed to demonstrate diligence in uncovering Miss Gay's suppressed statement, because a subpoena existed for her, so Mr. Richardson should have been able to speak to her. Order at 12–13. It also found the federal jury's acquittal—for the same shooting of Officer Gibson—unpersuasive in proving that "no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt." *Id.* at 15–17.

In accordance with Virginia Code § 17.1-402(D), Mr. Richardson filed a petition for rehearing *en banc* on July 5, 2022, which the court denied on July 21,

2022, though several judges dissented from that decision. Mr. Richardson noticed his appeal on August 4, 2022. *See* §§ 17.1-411 and 19.2-317. This petition follows.

STATEMENT OF FACTS

As Officer Gibson lay dying, he gave a very clear identification of his assailants: two Black males, one skinny with "dreadlocks," a white t-shirt and an "old blue baseball cap," and one short, medium-build, and balding. He further stated that the tall skinny one shot him accidentally, as they struggled for his gun. Despite Officer Gibson's detailed description of his assailants, authorities undertook what can only be described as a round-up of all the young Black men in the area. Although Mr. Richardson and his co-defendant, Ferrone Claiborne lived in the area, the record does not reveal why they eventually became the chief targets of the investigation, as neither matched Officer Gibson's description—Mr. Richardson was shorter than Officer Gibson and wore his hair in corn rows; Mr. Claiborne was tall and bald.

On the same day that Officer Gibson was shot, law enforcement spoke to an eye-witness, 10-year-old[1] Shannequia Gay, who provided a clear and detailed description of the man with whom Officer Gibson struggled.[2] She identified a "man with dreads," in a white t-shirt, which she later saw stained with blood. *See*

[1] Miss Gay was born in 1988, so may have been 9 at the time.

[2] The April 25, 1998, Statement is sometimes referred to herein as the "Gay Statement."

Richardson Ex. G.[3] "SAA Stevens" of the State Police and "Dep. V.P. Ricks of the Sussex County Sheriffs" signed the statement, as did Greg Russell. *Id.*; Answer Ex. H at 2. Law enforcement then hid that eyewitness statement—which corroborated Officer Gibson's description of an assailant who did not resemble Mr. Richardson—from the Commonwealth's Attorney and defense counsel.

Contemporaneous to giving her statement, Miss Gay also participated in a photo identification,[4] which law enforcement likewise concealed from Mr. Richardson and the Commonwealth's Attorney. Richardson Ex. H. Though State Police refused to provide Mr. Richardson or the Commonwealth with a clear copy of the photo lineup,[5] the silhouetted picture of the person Miss Gay selected from

[3] Exhibits filed in support of Mr. Richardson's petition in the Court of Appeals are identified as "Richardson Ex."; exhibits filed in support of the Commonwealth's Answer are identified as "Answer Ex."; exhibits filed in support of the Commonwealth's Supplemental Pleading are identified as "Suppl. Ex.".

[4] Sometimes referred to herein as the "Newby Photo Array."

[5] An evidentiary hearing would have allowed the parties to investigate the disappearance of this critical evidence as well as confirm the photo depicts Mr. Newby, should there be any doubt as to who Ms. Gay identified. *See* Va. Code § 19.2-327.12; *see also* Answer Ex. H (Detective Russell confirming Miss Gay selected photo 2, not a photo of Mr. Richardson).

the line-up they did provide (below, right), bears absolutely no resemblance to Mr. Richardson (below, left), who wore his hair in cornrows.

It does, however, resemble Leonard Newby, a young, Black man, with dreadlocks and an extensive criminal record, whose sister, Evette Newby, lived in an apartment directly above where the shooting occurred, and who curiously cut his hair the day after the shooting. At the time of Officer Gibson's shooting in 1998, Leonard Newby was on bond for gun possession, and therefore was known to the police. Despite this wealth of suspicious evidence, law enforcement virtually ignored him as a suspect.

A 911 call further substantiated Miss Gay's statement. On April 30, 1998, a male caller left an answering machine message on the Virginia State Police's line, stating that Leonard Newby was involved in Officer Gibson's shooting and had cut his dreads. The Virginia State Police likewise withheld this supporting evidence

from Mr. Richardson, Mr. Claiborne, the Commonwealth's Attorney, and the federal court.[6]

After undersigned counsel became involved in this case in 2017, he found allusions to Miss Gay's initial statement and identification in law enforcement's files. The Sheriff's Office refused to cooperative and provide these documents, so he obtained the federal investigation file—consisting of thousands of pages of documents—and uncovered the New Exculpatory Evidence. He continued his investigation, confirming that neither Mr. Richardson's state nor federal trial counsel nor Commonwealth's Attorney David Chappell had seen these documents at the time of the respective trials. The Attorney General's Office likewise spent nearly a year investigating this case, and found no proof that either of Mr. Richardson's trial counsel or Commonwealth's Attorney Chappell was aware of these documents at the time of trial.

ARGUMENT

I. Because law enforcement—not 10-year-old Shannequia Gay—exclusively possessed and controlled access to the New Exculpatory Evidence, the Court of Appeals erred by focusing on whether Mr. Richardson made diligent efforts to interview this child.

There is no dispute that the Virginia and United States Constitutions required the Commonwealth to provide the New Exculpatory Evidence to Mr. Richardson.

[6] The Gay Statement, the Newby Photo Array, and the 911 Call are collectively referred to as "the New Exculpatory Evidence."

See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 420 (1995) (holding that a prosecutor's duty to disclose under *Brady* "remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention"); *Workman v. Commonwealth*, 272 Va. 633, 644, 636 S.E.2d 368, 374 (2006) (granting a new trial and finding evidence subject to *Brady* disclosure even where prosecutor represented he was not aware of such evidence). That the Commonwealth failed to fulfill its constitutional obligation is, likewise, undisputed. Disregarding the Commonwealth's unconstitutional failure, however, the Court of Appeals' decision focused on whether Mr. Richardson did enough to try to interview Shannequia Gay. The court's decision ignored that Miss Gay refused to talk to Mr. Richardson, and that law enforcement—not a child witness—possessed these exculpatory documents.

A. Miss Gay was not constitutionally obliged to speak to Mr. Richardson.

Assuming, *arguendo*, that 10-year-old Miss Gay's choice not to speak to Mr. Richardson's investigator was entirely her own, Miss Gay had every right to make that choice.[7] *See United States v. Walton*, 602 F.2d 1176, 1179-80 (4th Cir. 1979) ("[T]he witness may refuse to be interviewed."); *Briley v. Bass*, 584 F. Supp. 807, 820 (E.D. Va. 1984) ("The Commonwealth could not force [their witness] to talk with defense counsel"). There are no lawful means to compel a witness to talk to a defense investigator, as Virginia does not employ deposition discovery in

[7] Miss Gay continues to refuse contact. *See, e.g.*, Answer Ex. I.

criminal trials. *Cf. U.S. v. Tipton*, 90 F.3d 861, 889 (4th Cir. 1996) ("[T]here is no right to have witnesses compelled to submit to interview."). In fact, repeated attempts to contact a witness after the witness has refused contact may be illegal—or, at best, perceived as such. *Cf.* Va. Code § 18.2-460 (penalizing witness intimidation and other obstructions of justice involving witnesses); Va. Code § 18.2-60.3 (contacting a person after "actual notice" they do not want to be contacted "*prima facie* evidence" that the person was placed in fear of death or bodily injury for purposes of proving stalking).

But the assumption that Miss Gay made her own choices is—at best—incredible. Miss Gay had a relative in law enforcement who encouraged and controlled police interactions with her. *See* Answer Ex. P. Police met with Ms. Gay multiple times, presented her multiple line ups, and took multiple statements from her. *See, e.g.*, Answer Exs. E, F, and K. Each time they met with Miss Gay, the meeting resulted in a slightly revised statement that comported more with the case they wanted to build. *See id.* It defies logic to believe that these same law enforcement officers would allow her to freely speak to a defense investigator. *Cf. United States v. Ebrahimi*, 137 F. Supp. 3d 886, 889 (E.D. Va. 2015) (finding government illegally obstructed defendant's access to witnesses where young, poor, or otherwise vulnerable witnesses could have perceived the government's request to be present during interviews as instruction not to talk to the defense). Even if law

enforcement did not interfere or discourage her communications, her parents certainly could have done so, particularly as they recognized their child was traumatized. *See, e.g.*, Answer Ex. G.

B. No amount of diligence could uncover evidence law enforcement willfully concealed.

Brady assures "that [the defendant] *will not be denied access* to exculpatory evidence *known to the government but unknown to him*." *Commonwealth v. Tuma*, 285 Va. 629, 635, 740 S.E.2d 14, 18 (2013) (citations omitted) (emphasis in original). The record before the Court of Appeals demonstrated that law enforcement knew Miss Gay made an exculpatory statement and an exculpatory photo identification. Law enforcement—and law enforcement alone—controlled access to these documents. Even if Miss Gay had overcome her law enforcement influences, remembered when, why, and how her memory of the events surrounding Officer Gibson's death changed over time, and truthfully and accurately provided this information to Mr. Richardson's counsel, Mr. Richardson *still* would have lacked access to the documents themselves. *Contra id.* Given the ever-changing testimony of the witnesses in this case, these documents were critical to either support Miss Gay's testimony or impeach her at trial. *See, e.g.*, Richardson Ex. M (Chappell's contemporary description of his witness issues); Answer Ex. W (same). The only entity who possessed these pieces of evidence before and after Mr. Richardson's guilty plea was law enforcement. Law enforcement demonstrated its willingness to

ignore *Brady*, the trial court's discovery orders, and Commonwealth's Attorney Chappell's requests and trial needs. No amount of diligence on Mr. Richardson's part could overcome this determination to deprive him of his constitutional right to the New Exculpatory Evidence.

II. The Court of Appeals made impermissible factual findings regarding the extent of Mr. Richardson's diligence.

Even if this case turned on Mr. Richardson's diligence in finding Miss Gay—and it should not—the Court of Appeals' decision should not stand because it makes factual conclusions the record does not clearly support, and fails to consider apt controlling authority. *See Dennis v. Commonwealth*, 297 Va. 104, 130–32, 823 S.E.2d 490, 503–04 (2019) (Court of Appeals abuses its discretion in deciding writs of actual innocence when it fails to order an evidentiary hearing and makes factual determinations from an unclear record).

A. The record is unclear regarding contact with Miss Gay.

A party's exercise of due diligence is a factual question. *McDonnough v. Commonwealth*, 25 Va. App. 120, 127, 486 S.E.2d 570, 573 (1997). Both cases the Court of Appeals relied on in deciding against Mr. Richardson had clear factual findings as to the defendant's diligence on the record. This case does not.

Trial counsel David Boone's affidavit states that, had he known of the information in the Gay Statement, he would not have encouraged his client to plead guilty. Richardson Ex. J ¶ 11. His contemporary letter to Mr. Richardson does not

reference Miss Gay or any information Miss Gay knew, and so supports his affidavit. *See* Richardson Ex. L. The memorandum summarizing the Commonwealth's interview with Mr. Boone states he "recalled the name Shannequia Gay," and he knew of her before the plea agreement because he believed Mr. Chappell "may have provided him with the name along with a summary of who she was and what she said." Answer Ex. N. He recalled Miss Gay "observed a male coming out of the woods and remembers that her cousin had a bicycle near the crime scene." *Id.* Boone stated that his investigator tried to speak with Gay, but she "was never made available." *Id.* The memorandum does not state who prohibited access. *Cf. Ebrahimi*, 137 F. Supp. 3d at 887 (A party's right to present his own witnesses to establish a defense is a fundamental element of due process, so "the right of the defense to have access to witnesses in a criminal case should be unfettered and free of government intervention.").

Commonwealth's Attorney Chappell stated he did not remember issuing a subpoena for Miss Gay. Commonwealth's Answer Ex. M. Commonwealth's Supplemental Exhibit 4 somewhat supports this statement, as it consists of three

pages: an unsigned subpoena, returns of service for that subpoena on Miss Gay,[8] and a "page 2 of 2," which, though signed by Commonwealth's Attorney Chappell, lists different witnesses from the form subpoena (except Miss Gay), and provides an incomplete address for Miss Gay. This suggests that someone other than Mr. Chappell issued the subpoena. Mr. Chappell further stated he knew of a "man with dreads" but that someone besides Miss Gay provided that information.

The Court of Appeals' decision seemingly credits the Commonwealth's memorandum that Mr. Boone made some effort to find Ms. Gay, and that that effort was obstructed. Order at 12. It then finds that the existence of the subpoena means Mr. Boone should have been able to find and interview Miss Gay. *Id.* at 11–13. This Court criticized precisely this type of evidentiary cherry-picking when it reversed the Court of Appeals in *Dennis*, and remanded for factual development. *See* 297 Va. at 130 (finding, absent an evidentiary hearing, the Court of Appeals "had no basis" to credit untested and unauthenticated hearsay letters while simultaneously rejecting Dennis's proffered affidavits as "untested").

[8] There is no evidence that the Commonwealth served a copy of the subpoena on David Boone, despite both attorneys' recalling the discovery relationship between them to be congenial. *See* Richardson Ex. K ¶ 6; Answer Ex. N at 1; *Cf.* Va. Sup. Ct. Rs. 3A:12; 1:12. The Court of Appeals suggests that diligence therefore required Mr. Boone to make a daily inspection of the court file, an unfair and inequitable burden, and one impossible to meet for, e.g., a detained, *pro se* defendant. *See* Order at 12.

B. The Court of Appeals relied on inapposite case law to find lack of diligence.

Compounding its error, the Court of Appeals then likened Mr. Boone's efforts in trying and failing to find a subpoenaed witness to the attorneys' nonexistent diligence efforts in *Tyler* and *Madison*, instead of relying on precedent with a more similar factual pattern. In *Tyler*, the "new evidence" came from a person, Rogdrick, who was not only a social acquaintance of Tyler but who Tyler knew to be an eyewitness in the altercation leading to his conviction. 73 Va. App. 445, 451–55, 861 S.E.2d 79, 83–85 (2021). The trial court found Rogdrick's absence notable and inquired into trial counsel's attempts to locate and subpoena him. *Id.* at 455. Trial counsel responded "that he didn't know where Rogdrick was." *Id.* When pressed, trial counsel proffered no reason for failing to find this witness. *Id.* His lack of effort appeared particularly suspect as he issued a subpoena for another eyewitness, Craig, who he knew to reside with Rogdrick. *Id.* at 465, 89.

In *Madison*, the Court of Appeals found—after an evidentiary hearing on the question of diligence—that the record lacked "*any* diligence on Madison's part," to find an eyewitness neighbor. *Madison v. Commonwealth*, 71 Va. App. 678, 702 n.14, 839 S.E.2d 129, 141 n.14 (2020).

Conversely, in *Gatling v. Commonwealth*, the Court of Appeals found due diligence satisfied where a defense attorney called a witness twice and sought discovery from the Commonwealth. 14 Va. App. 60, 63, 414 S.E.2d 862, 864 (1992).

Here, per the Panel's factual findings, Mr. Richardson's trial counsel tried to contact Miss Gay pre-trial. Order at 12; *cf. Gatling*, 14 Va. App. at 63. She "was not made available to him." Order at 12; Answer Ex. N. A subpoena had already issued for her. *See, e.g.*, Answer Ex. M; *cf. Gatling*, 14 Va. App. at 63. *Contra Tyler*, 73 Va. App. 455; *Madison*, 71 Va. App. at 702 n.14. It is unclear what additional steps Mr. Richardson could have taken to discover the plethora of interactions between Miss Gay and law enforcement, when law enforcement determined he should not.

III. No credible evidence exists that would allow a rational fact finder to find Mr. Richardson guilty.

To sustain his burden in this case, Mr. Richardson must establish "such a high probability of acquittal, that this Court is reasonably certain that no rational fact finder would have found him guilty." *In re Watford*, 295 Va. 114, 124, 809 S.E.2d 651, 657 (2018); *see Haas v. Commonwealth*, 74 Va. App. 586, 633, 871 S.E.2d 257, 281 (2022) (innocence established where it is "*more likely than not* that no rational trier of fact would have found proof of guilt beyond a reasonable doubt" (emphasis added) (internal citations and punctuation omitted)).

Besides Mr. Richardson's guilty plea, there is not a single piece of physical evidence connecting him to Officer Gibson's death. *Cf. Watford*, 295 Va. at 128–29 (finding burden met where Commonwealth could not point to any evidence—besides Watford's guilty plea—tying Watford to crime scene). Mr. Richardson does not match Officer Gibson's dying description of his assailant. All of the

Commonwealth's witnesses have changed their stories multiple times or otherwise compromised their testimony such that no credible testimony supports Mr. Richardson's conviction. The Commonwealth's chief witness, Shawn Wooden, gave multiple statements exculpating Mr. Richardson before he changed his story. *See, e.g.*, Richardson Ex. M ("But the murder case was crippled from the start . . . because the prosecution's "star" witness had a prior felony record and had given inconsistent accounts of critical facts about the shooting."). He is now a convicted perjurer. *See, e.g.*, Answer Ex. D (Federal Trial Transcript Vol. III, Part I at 161–2; 167); Suppl. Ex. 2 at 2 (Wooden finally recognized his lies have consequences, stating "he had to serve five years for his lies and did not want anymore time").

The New Exculpatory Evidence further demonstrates Mr. Richardson's innocence, as it supports another assailant committing this crime: Miss Gay's initial statement describes someone who looked like Leonard Newby and not Terrence Richardson; the Newby Photo Array shows she selected someone who, minimally, did not have Mr. Richardson's silhouette; and the 911 call—regardless of its provable veracity—again demonstrates law enforcement knew of Leonard Newby's possible connection to this crime and chose not to investigate him. Despite this dearth of inculpatory evidence, the Court of Appeals concluded that it is more likely than not that a jury would still find beyond a reasonable doubt that Mr. Richardson committed voluntary manslaughter, without offering *any* factual basis for this

finding. Order at 16–17. *But cf. Haas*, 74 Va. App. at 633–34 (granting writ of innocence while acknowledging "there is little doubt" that *sufficient evidence still existed to sustain Haas's conviction*).

A. The Court of Appeals' decision makes a defendant's guilty plea dispositive.

In *Parson v. Commonwealth*, the Court of Appeals stated that it was "not establishing an inflexible rule as to how a rational fact finder would interpret a defendant's guilty plea in every factual situation." 74 Va. App. 428, 445 n.8, 869 S.E.2d 916, 924 n.8 (2022). Yet here, the *only* credible evidence before the court supporting Mr. Richardson's conviction was his guilty plea. Thus, by finding that Mr. Richardson failed to meet his burden of proof, the Court of Appeals established the very "inflexible rule"—that a rational fact finder will always find a guilty plea that followed a standard plea colloquy sufficient to bar an innocence finding—that it claimed to not want to establish. *Cf. id.*

Such a rule contradicts this Court's controlling precedent. *See Watford*, 295 Va. at 126–27 ("[A] guilty plea cannot be dispositive of whether a writ of actual innocence will issue[.]"). It ignores the import of the 2020 statutory amendments allowing writs of actual innocence to issue upon guilty pleas. *Contra id.* at 121–22 (legislative amendments are "purposeful and not unnecessary or vain," made "with full knowledge of the law as it stood bearing on the subject with which it proposed to deal" (internal citations omitted)); *Holloway v. Commonwealth*, 72 Va. App. 370,

377, 846 S.E.2d 19, 22 (2020) ("[A]ppellate courts 'must assume that the General Assembly chose, with care, the words it used in enacting the statute, and [they] are bound by those words when [they] apply the statute.'"). And it ignores the reality that, for a variety of reasons largely having to do with income level and race, innocent people do plead guilty. *See, e.g.*, https://guiltypleaproblem.org/ (18% of known exonerees pleaded guilty to crimes they didn't commit, 65% of those were people of color) (last visited Aug. 16, 2022); NADCL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, *available at* https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrial Near Extinct (last visited Aug. 16, 2022).

In filing his Petition, Mr. Richardson affirmed that had he been privy to the New Exculpatory Evidence that law enforcement concealed from him, he would not have pleaded guilty. He also explained, in detail, why he felt forced to plead guilty in the first place. *See, e.g.*, Richardson Ex. J at 153:25–155:15.

Mr. Richardson's trial lawyer, David Boone, affirmed that, had he been privy to the New Exculpatory Evidence, he would not have encouraged Mr. Richardson to plead guilty. *See* Richardson Ex. J ¶ 11 ("If I had information that someone else was identified . . . it would have definitely changed my defense of Mr. Richardson."); Answer Ex. N at 1 (confirming that he did not receive the New Exculpatory Evidence); Richardson Ex. B (contemporaneous letter to Mr. Boone from defense

investigator Jack Davis); Richardson Ex. L (contemporaneous letter to Mr. Richardson describing lack of evidence in his favor).

Commonwealth's Attorney David Chappell likewise affirmed that he was unaware of and did not share the New Exculpatory Evidence with Mr. Richardson's counsel. *See* Richardson Ex. K ¶¶ 6–8; Answer Ex. M; *cf. Kyles v. Whitley*, 514 U.S. 419, 420 (1995); *Workman v. Commonwealth*, 272 Va. 633, 644, 636 S.E.2d 368, 374 (2006).

These affirmations and admissions—which benefit from a more complete understanding of the record—must have more weight than a plea that occurred because law enforcement unconstitutionally withheld crucial information from Mr. Richardson, his counsel, and Commonwealth's Attorney Chappell. Mr. Richardson's guilty plea—a direct result of law enforcement's misconduct and concealment of exculpatory evidence—should not be given any weight, much less the total weight the Court of Appeals gave it. *See Watford*, 295 Va. at 126 (allowing guilty pleas to be dispositive would render actual innocence statutes "meaningless").

B. A federal jury acquitted Mr. Richardson.

Moreover, Mr. Richardson could find no other case where a court anywhere in the United States had before it—and disregarded—a subsequent rational factfinder's acquittal. In fact, the Commonwealth's Answer argued the acquittal alone sufficed for the writ to issue. The Court of Appeals' quibble with the difference

in charges ignored the record before it, and relied on an argument improperly before the Court, *see* Section IV, *infra.*

The Commonwealth charged Mr. Richardson with capital murder—which requires the same *mens rea* as the intentional murder for which the federal jury acquitted him. *Compare* 21 U.S.C. § 848(e)(1)(B) *with* Va. Code § 18.2-31(6). That he pled guilty to a lesser included crime reflects only the Commonwealth's admitted lack of evidence, *see, e.g.*, Richardson Ex. M, and his status as poor Black man in southern Virginia community reeling with outrage from an unconscionable killing of young, white police officer and father. Community outrage resulted in the federal trial for same criminal conduct which the Commonwealth determined did not constitute (provable) intentional murder. When questioned after trial, a federal juror stated "no one ever really thought [Mr. Richardson was] guilty of murder." *E.g.*, Answer at 74. Yet the Court of Appeals' decision found even this unprecedented proof a rational fact finder would not convict unconvincing and insufficient.

IV. By permitting the Commonwealth to approbate and reprobate, the Court of Appeals erroneously defied centuries of Virginia precedent.

On November 21, 2021, the Commonwealth filed an Answer agreeing that the Court of Appeals should issue a Writ of Actual Innocence for Mr. Richardson. Three months later, Attorney General Jason Miyares assumed office. Consistent with his position as a legislator—and entirely ignoring the statutory changes to the actual innocence statutes—he enacted a legal policy objecting to actual innocence petitions

by defendants who pleaded guilty. *But cf. Berger v. United States*, 295 U.S. 78, 88 (1935) (A prosecutor represents the sovereign "whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). Consistent with this legal policy and despite the glaring and admitted "irregular[ities]" with this case, *see, e.g.*, Suppl. Br. at 49, the Attorney General filed a new pleading on behalf of the Commonwealth, which it entitled "supplemental," that, in substance, was an entirely new answer, reversing its previous concessions.

A. The Commonwealth's concession that the writ should issue bound it.

Relegating its approbation/reprobation analysis to a footnote, which does not reference that doctrine, the Court of Appeals concluded that the prohibition against approbating and reprobating does not apply, when it sits in original jurisdiction, until after oral argument. *See* Order at 8 n.5. Not so. When sitting in original jurisdiction, the Court of Appeals acts as a trial court. *Haas v. Commonwealth*, 283 Va. 284, 292, 721 S.E.2d 479, 482 (2012). Both this Court and the Court of Appeals regularly apply the approbate/reprobate doctrine to bar inconsistent argument during the course of trial litigation—from pleading to post-trial argument. *See, e.g.*, *Commonwealth v. Proffitt*, 292 Va. 626, 641, n.2, 792 S.E.2d 3, 10 n.2 (2016) (considering whether Commonwealth's representations to the court during the course of trial were inconsistent); *Collelo v. Geographic Servs., Inc.*, 283 Va. 56, 78,

727 S.E.2d 55, 65 (2012); *Rompalo v. Commonwealth*, 72 Va. App. 147, 159, 842 S.E.2d 426, 432 (2020), *aff'd*, 299 Va. 683, 857 S.E.2d 394 (2021) (refusing to consider appellant's argument under approbate/reprobate doctrine when she took inconsistent positions "in the court below").[9]

At trial, a party's factual and legal position in its pleadings binds it. *See Winslow, Inc. v. Scaife*, 224 Va. 647, 653, 299 S.E.2d 354, 358 (1983); *Burch v. Grace St. Bldg. Corp.*, 168 Va. 329, 341, 191 S.E. 672, 677 (1937) (Pleadings are not "mere fiction" but "solemn statements of fact, upon the faith of which the rights of the parties are to be adjudged."). Here—following months of thorough investigation—the Commonwealth filed an Answer, agreeing to the writ, or, minimally, an evidentiary hearing. After a change in political leadership, the Commonwealth rescinded its previous concessions and argument—relying mostly on outdated decisions and dissents, and evidence already before this Court—not new law or facts. That it titled its about-face a "supplemental pleading" does not change what the pleading really was: an unlawful, inconsistent new answer to satisfy the new administration's tough on crime legal policy. *Cf. Lewis-Gale Med. Ctr., LLC v.*

[9] In fact, Judge Beale, a member of the deciding Panel, had previously correctly observed that the doctrine applied "*whether still in the trial court or on appeal*." *Dufresne v. Commonwealth*, No. 0281-15-2, 2016 WL 486493, at *9 (Va. Ct. App. Feb. 9, 2016) (Beales, J., dissenting) (emphasis added).

Alldredge, 282 Va. 141, 148 n.1, 710 S.E.2d 716, 719 n.1 (2011) (courts evaluate pleadings on their substance, regardless of how they are styled). Thus, instead of a reliable ally during oral argument—as the Commonwealth's Answer promised—Mr. Richardson had an erratic opponent. *Cf. Berry v. Klinger*, 225 Va. 201, 202, 300 S.E.2d 792, 795 (Va. 1983) (litigant's opponent entitled to rely upon litigant's pleadings); *Arwood v. Hill's Adm'r*, 135 Va. 235, 243, 117 S.E. 603, 606 (1923) ("[A]n election between several inconsistent courses of action . . . if made with knowledge of the facts, is itself binding; it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position.").

He also lost a compelling ally. Though the parties' concessions and representations in pleadings and argument do not bind the Court of Appeals, precedent demonstrates that the Attorney General's agreement that the writ should issue carries great weight.[10] In fact, until the Court of Appeals' decision, Mr. Richardson could not find a single case in the history of that court where the Attorney General agreed the writ should issue and the writ was ultimately denied.

[10] Indeed, the Order adopted much of the Commonwealth's "supplemental" argument whole cloth.

B. The Attorney General's "supplemental" brief did not contain new law or facts.

Contrary to the Court of Appeals' conclusion and the Commonwealth's initial representation to the Court, the Commonwealth's "supplemental" pleading did not present "additional and material documentary evidence related to Richardson's petition." Order at 8 n.5; *see* Feb. 4, 2022, Wrobleski Letter to Court. All of the exhibits the Commonwealth presented, except Supplemental Exhibit 2, were part of the trial court record, and therefore part of the court's record.[11] Supplemental Exhibit 2 is a memorandum dated May 15, 2021, which the Commonwealth's investigator drafted and provided to Attorney General Herring *before* the Commonwealth filed its Answer. The memorandum summarizes a conversation with Shawn Wooden, a Commonwealth witness who testified consistently with this memorandum at preliminary hearing and in the federal trial, *see, e.g.*, Answer Ex. D (Transcript Vol. III Part I at 58–172). Supplemental Exhibit 2 may have been new in *form*, but it certainly was not new in *substance*.

Nor did the Commonwealth maintain the purpose of its Supplemental Brief was really to provide this Court with new facts and law. In argument, Assistant Attorney General Wrobleski conceded the supplemental pleading merely reflected the new administration's "legal *policy*" (emphasis added). The Commonwealth is

[11] For example, the Commonwealth's Answer references the Gay subpoena on page 59 and in Exhibit M.

the Commonwealth regardless of the political affiliations of its legal representatives, and its concessions bind it. True, parties must apprise the Court of new, applicable law and facts. *See, e.g.,* Va. Sup. Ct. R. 5A:4A. They cannot, however, rely on that obligation to "play fast and loose" with their legal positions, depending on their perceived self-interest, *i.e.* their potential political gains. *See Wooten v. Bank of Am., N.A.*, 290 Va. 306, 310, 777 S.E.2d 848, 850 (2015). Nor should that perceived self-interest trump an innocent man's right to be free. *See Jones v. City of Virginia Beach*, 17 Va. App. 405, 408 (Va. Ct. App. 1993) (A prosecutor's "twofold aim" "is that guilt shall not escape or innocence suffer."); *Berger*, 295 U.S. at 88.

C. Allowing changes in political leadership to overcome the approbation/reprobation bar would inhibit judicial efficiency.

Prosecutors are certainly entitled to set legal policy for their offices. Indeed, the electorate presumably relies on their stated policy when choosing among candidates. But allowing prosecutors to reverse concessions and agreements mid-litigation due to the outcome of an election and subsequent policy changes could stymie the judicial system. Defendants have a constitutional right to a speedy trial, and judicial expediency mandates that criminal justice not halt while candidates campaign and votes are tallied. If prosecutors may approbate and reprobate without consequence, however, no defendant could rely on plea agreement entered in an election year, if the date for plea entry or sentencing fell after the first of January the

following year. The Court of Appeals' decision sets precedent allowing for just such a judicial system impasse.

CONCLUSION

The Court of Appeals based its decision on faulty legal analysis and unsupported factual conclusions. It ignored or implicitly reversed controlling precedent and imposed dangerous new precedent that not only set impossible standards for innocent petitioners to demonstrate diligence but also will compromise judicial efficiency by allowing prosecutors to approbate and reprobate in election years. Finally, and most disturbingly, it implicitly condoned law enforcement's unconstitutional concealment of critical evidence. For these reasons, Mr. Richardson respectfully requests that this Court grant his petition for appeal, reverse the Court of Appeals' decision, grant him a writ of actual innocence, as Virginia Code § 19.2-327.10, and grant him any additional relief it deems just and proper.

Respectfully Submitted,

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CERTIFICATE

In accordance with Virginia Supreme Court Rules 5:17(i), I affirm the following:

This Petition is fewer than 35 pages in length.

Mr. Richardson is represented by retained counsel.

In accordance Rules 1:17 and 5:1B, this petition will be filed through VACES, today, August 16, 2022, and thereby served on the Respondent, the Commonwealth of Virginia, and contemporaneously emailed to counsel for the Commonwealth of Virginia:

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In accordance with 5:17(j), Mr. Richardson, by and through his counsel, respectfully requests to state orally, in person, to a panel of this Court the reasons why the petition for appeal should be granted.

Sarah A. Hensley
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