

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 21st day of July, 2022.

Terence Jerome Richardson, s/k/a
Terrence Jerome Richardson,

Petitioner,

against Record No. 0361-21-2

Commonwealth of Virginia,

Respondent.

Upon a Petition for Rehearing En Banc

Before Chief Judge Decker, Judges Humphreys, Beales, Huff, O'Brien, AtLee, Malveaux,
Athey, Fulton, Ortiz, Causey, Friedman, Chaney, Raphael, Lorish, Callins and White

On consideration of Terrence Richardson's petition to set aside the judgment rendered herein on the 21st day of June, 2022 and grant a rehearing *en banc* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en banc* in this case. Code § 17.1-402(D).

Ortiz, J., with whom Causey, Friedman, Chaney, and Lorish, JJ., join, dissenting.

I respectfully dissent from the Court's denial of Terrence Richardson's petition for rehearing *en banc*. *En banc* review is "an important and useful device in the administration of justice" to address "special circumstances and important implications" of certain cases. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 260 n.20, 261 (1953). Richardson's appeal and petition for rehearing raise several issues "of such significance to the full court that it deserves the attention of the full court." *Id.* at 262-63. Particularly, the full court should address the application of the approbate/reprobate doctrine to the Commonwealth's position after a change in the administration. Just three months after the Commonwealth argued Richardson was entitled to a writ of actual innocence, it submitted a supplemental brief, reversing its original position and

asking this Court to deny Richardson's petition. Moreover, full court consideration is warranted to address how an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and a witness's refusal or unavailability to speak with the defense should impact our analysis under Code § 19.2-327.11's diligence requirement. The full court should also address how a federal acquittal for a crime arising out of the same facts as a state court guilty plea should affect our analysis of whether a reasonable factfinder would have convicted a defendant in the state court case.

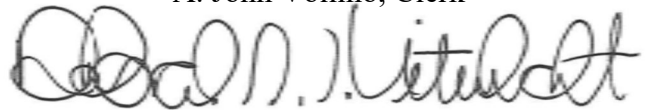
For these reasons, the full court should review this case.

A Copy,

Teste:

A. John Vollino, Clerk

By:



Deputy Clerk