IN THE

COURT OF APPEALS OF VIRGINIA

Record No. 0361-21-2

TERRENCE RICHARDSON,

***Petitioner*,**

v.

COMMONWEALTH OF VIRGINIA,

***Respondent*.**

PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

The Panel's June 21, 2022, Order dismissing Mr. Richardson's petition finds Mr. Richardson did not establish diligence, in accordance with Va. Code § 19.2-327.11, because he failed to obtain documents exclusively in law enforcement possession from a 10-year-old eyewitness, who he tried to find and "was not made available" to him. Not only does this absolve the Commonwealth of egregious *Brady* violations, but it also incentivizes law enforcement to withhold exculpatory evidence from both defendants *and* prosecutors. Permitting the Commonwealth to approbate and reprobate—despite centuries of jurisprudence, some from members of the Panel, to the contrary—it adopts the Attorney General's new argument that Mr. Richardson's federal acquittal is of no moment in establishing what a rational fact finder would do with the record before this Court. To reach its erroneous conclusions, it makes unsupported factual findings, applies inapt precedent, and fails to address applicable precedent, relegating, for example, its approbate/reprobate analysis to a footnote without use of those words or a single supporting citation. As explained more thoroughly below, and in accordance with Virginia Supreme Court Rule 5A:34, Mr. Richardson therefore petitions this Court for a rehearing *en banc*.

ARGUMENT

I. Law enforcement—not Shannequia Gay—exclusively possessed and controlled access to the New Exculpatory Evidence.

Mr. Richardson presented this Court with three pieces of evidence that law enforcement willfully hid not only from him, but from Commonwealth's Attorney Chappell: the Gay Statement, the Newby Photo Array, and the 911 Call (collectively, "the New Exculpatory Evidence"). Neither the Attorney General nor the Panel dispute that this evidence is exculpatory. The Virginia and United States Constitutions therefore required the Commonwealth to provide these items to Mr. Richardson. *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, the Panel's June 21, 2022, Order focuses on whether Mr. Richardson did enough to try to interview 10-year-old Shannequia Gay, the witness who provided the Gay Statement, and identified Leonard Newby, a suspect who, in silhouette, looks nothing like Mr.

Richardson did in 1998, in the Newby Photo Array.[1] The Panel ignores 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.[2] *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 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

[1] Neither the former Attorney General nor Mr. Richardson could obtain a clearer copy of the Newby Photo Array from law enforcement. An evidentiary hearing would allow the parties to investigate the disappearance of this vital evidence as well as confirm the photo depicts Mr. Newby, should this Court still have had 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).

[2] Miss Gay continues to refuse contact. *See* Answer Ex. I.

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* 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 this Court demonstrates 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 overcame 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 Panel's June 21, 2022, Order makes 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 Panel's June 21, 2022, Order 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) (this Court 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 Panel relies on in deciding against Mr. Richardson had clear factual findings as to the defendant's diligence on the record before this Court. 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,[3] and a "page 2 of 2," which, though signed by Commonwealth's Attorney Chappell, lists

[3] 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 Panel 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* June 21, 2022, Order at 12.

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. He further states he knew of a "man with dreads" but that someone besides Miss Gay provided that information.

The Panel's June 21, 2022, Order seemingly credits the Commonwealth's memorandum that Mr. Boone made some effort to find Ms. Gay, and that that effort was obstructed. June 21, 2022, 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. The Virginia Supreme Court criticized precisely this type of evidentiary cherry-picking when it reversed this Court's ruling in *Dennis*, and remanded for factual development. *See* 297 Va. at 130 (2019) (finding, absent an evidentiary hearing, this Court "had no basis" to credit untested and unauthenticated hearsay letters while simultaneously rejecting Dennis's proffered affidavits as "untested").

B. The Panel applied inapposite case law.

Compounding its error, the Panel's June 21, 2022, Order then likens 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*, this Court 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*, for example, this Court found due diligence 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. June 21, 2022, Order at 12; *cf. Gatling*, 14 Va. App. at 63. She "was not made available to him." June 21, 2022, 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); Comm. 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 Panel's June 21, 2022, Order concludes 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. June 21, 2022, Order at 16–17.

A. The Panel's June 21, 2022, Order does not comport with this Court's recent decisions.

Not only is the Panel's conclusion inconsistent with the evidence in this case, it is inconsistent with recent decisions before this Court. In *Haas* for

example, the Court found innocence despite an inculpatory confession—which the Supreme Court previously found sufficient to sustain Haas's conviction—still remaining on the record before this Court. *See* 74 Va. App. at 633 ("There is little doubt that . . . a rational factfinder considering both the new and old evidence [could] conclude that the evidence was sufficient to support Haas' convictions."). Conversely, here, no credible evidence supports sustaining Mr. Richardson's conviction.

In *Parson v. Commonwealth*, this Court 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). Here, the *only* evidence before this Court supporting Mr. Richardson's conviction is his guilty plea. To allow this decision to stand therefore establishes the "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. *Cf. id.* Such a rule would not only contradict this Court and the Virginia Supreme Court's precedent, but would ignore the import of the 2020 statutory amendments allowing writs of actual innocence to issue upon guilty pleas. *Contra Watford*, 295 Va. 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)).

B. A federal jury acquitted Mr. Richardson.

Moreover, Mr. Richardson could find no other case where this Court (or any court) had before it—and discarded—a subsequent rational factfinder's acquittal. In fact, the Commonwealth's Answer argued the acquittal alone sufficed for the writ to issue. The Panel's quibble with the difference in charges ignored the record before this Court, and relied on an argument improperly before the Court, *see 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 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. *See generally* Paul Kix, *His Clients Were Acquitted of Murder. Why Did They Get Life Sentences*, The Atlantic, *available at* https://www.theatlantic.com/politics/archive/2022/05/acquitted-conduct-sentencing-jarrett-adams-richardson-claiborne/621015/ (last visited July 4, 2022); https://guiltypleaproblem.org/ (18% of known exonerees pleaded guilty to crimes

they didn't commit, 65% of those were people of color) (last visited July 4, 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/TrialPenaltySixthAmendmentRighttoTrialNearExtinct (last visited July 4, 2022). That 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 Panel's June 21, 2022, Order finds even this unprecedented proof a rational fact finder would not convict unconvincing.

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

On November 21, 2021, the Attorney General filed an Answer agreeing that this Court should issue a Writ of Actual Innocence for Mr. Richardson. Three months later, a new 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.[4]

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

Footnote 5 of the Panel's June 21, 2022, Order implies that the prohibition against approbating and reprobating does not apply, when this Court sits in original jurisdiction, until after oral argument. Not so. When sitting in original jurisdiction, this Court acts as a trial court. *Haas v. Commonwealth*, 283 Va. 284, 292, 721 S.E.2d 479, 482 (2012). Both the Supreme Court and this Court 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

[4] No statute or rule of this Court expressly permits such a supplemental pleading.

(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"); *Dufresne v. Commonwealth*, No. 0281-15-2, 2016 WL 486493, at *9 (Va. Ct. App. Feb. 9, 2016), *opinion withdrawn and superseded*, 68 Va. App. 672, 812 S.E.2d 483 (2018) (Beales, J., dissenting) ("In addition, appellant has approbated and reprobated by taking successive positions 'in the course of litigation' that are mutually contradictory, which *Rowe* prohibits at *any point in the course of litigation—whether still in the trial court or on appeal*." (emphasis added)).

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. 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 this Court, precedent demonstrates that the Attorney General's agreement that the writ should issue carries great weight.[5] In fact, until the Panel's decision, Mr. Richardson could not find a single case in the history of this Court where the Attorney General agreed the writ should issue and the writ was ultimately denied.

[5] Indeed, the Panel's June 21, 2022, Order adopts much of the Commonwealth's new argument whole cloth.

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

Contrary to the Panel's 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." June 21, 2022, 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 this Court's record.[6] Supplemental Exhibit 2 is a memorandum dated May 15, 2021, which the Commonwealth's investigator drafted and provided to Attorney General Herring *before* the Attorney General filed his 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* 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

[6] 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 Panel's June 21, 2022, Order sets precedent allowing for just such a judicial system impasse.

CONCLUSION

The Panel's June 21, 2022, Order contains faulty legal analysis and unsupported factual conclusions. It ignores or implicitly reverses controlling precedent and imposes dangerous new precedent that not only sets impossible standards for innocent petitioners to demonstrate diligence but also compromises judicial efficiency by allowing prosecutors to approbate and reprobate in election years. Finally, and most disturbingly, it implicitly condones law enforcement's unconstitutional concealment of critical evidence. For these reasons, Mr. Richardson respectfully requests that this Court order a rehearing *en banc*, and afford him any additional relief it deems necessary.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

In accordance with Virginia Supreme Court Rules 5A:4(d) and 5A:34, I hereby certify that the foregoing Reply to the Supplemental Brief in Opposition to Petition for Writ of Actual Innocence contains 4,601 words.

/s/Jarrett Adams
Jarrett Adams

CERTIFICATE OF SERVICE

On July 5, 2022, a copy of the foregoing Reply to the Supplemental Brief in Opposition to Petition for Writ of Actual Innocence, and the Exhibits attached thereto, was filed with the Clerk of this Court using the VACES system pursuant to Rules 1:17 and 5A:1(c), and contemporaneously emailed to Jason S. Miyares, Attorney General, jmiyares@oag.state.va.us, and Brandon T. Wrobleski, Special Assistant to the Attorney General for Investigations, bwrobleski@oag.state.va.us, counsel for the Commonwealth of Virginia.

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