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June 22, 2012

VIA HAND DELIVERY

The Honorable Llezelle Dugger, Clerk
Circuit Court of Charlottesville
315 East High Street
Charlottesville, Virginia 22901

Re: Commonwealth v. George Huguely

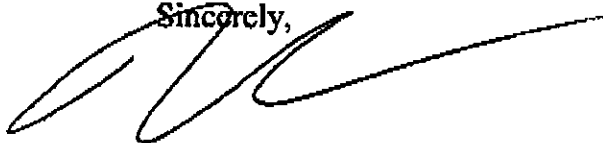
Dear Ms. Dugger:

Please find enclosed for filing Defendant's Reply Memorandum and Memorandum in Support of Supplemental Motion to Set Aside the Verdict and for a New Trial, in the above-referenced matter.

Please do not hesitate to call me if you have any questions or concerns.

Thank you.

Sincerely,



Rhonda Quagliana

RQ/amy

Enclosure

Cc: Warner D. Chapman, Esquire (with enclosures) (by hand delivery)

Francis McQ. Lawrence, Esquire

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6/22/12

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v.

Case No. 11-102

GEORGE HUGUELY,

Defendant.

**DEFENDANT'S MEMORANDUM IN SUPPORT OF SUPPLEMENTAL
MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL**

Defendant, George W. Huguely, V ("Mr. Huguely"), by counsel, for his

Memorandum in Support of Supplemental Motion to Set Aside the Verdict and for a New
Trial, respectfully submits the following:

Background

Following the conclusion of the criminal case against Mr. Huguely, Yeardeley Love's mother, Sharon Love and her sister, Lexi Love (collectively, the "Loves"), filed a civil claim against Mr. Huguely in a wrongful death suit, and also filed similar claims against the University of Virginia and other individual defendants.

Prior to the filing, on April 19, 2012, a hearing was held in the Charlottesville Circuit Court to determine the status of exhibits and trial materials. At that time, the Court heard a motion filed on behalf of the Loves as intervenors, seeking access to those materials for purposes of preparing the civil suits. At that hearing, the Loves' civil attorney, Mahlon G. ("Bud") Funk, made reference to a longstanding relationship with the City of Charlottesville Commonwealth's Attorney's Office. A transcript of the proceeding is attached as Exhibit "A".

FILED
2012 APR 22 P 11:40
CIRCUIT COURT CLERK'S OFFICE
CHARLOTTESVILLE, VA
LLEZUELO, COURTNEY A. CLERK
BY: [Signature]

During the criminal prosecution, Mr. Huguely had not been made aware that the Loves had engaged civil lawyers, were specifically preparing to sue Mr. Huguely or the other defendants, or that their civil attorney was in contact with the Commonwealth's Attorney, Mr. Warner Davies Chapman ("Mr. Chapman"). In fact, in a letter to counsel dated January 30, 2012, Mr. Chapman advised Mr. Huguely's lawyers only that a "potential cause of action may be available to either both the Loves under the circumstances." This letter is attached as Exhibit "B". The letter made no mention of anything else in connection with the preparation of a civil suit and was misleading under circumstances where Mr. Chapman knew the Loves had engaged civil attorneys and had been in communication with those lawyers for some period of time.

Following Mr. Funk's remarks on April 19, 2012, Mr. Huguely's counsel sent a letter to Mr. Chapman seeking clarification of the subject. In response to that letter, Mr. Chapman sent a letter to counsel of Mr. Huguely, acknowledging that he had been contacted by at least two of Ms. Love's civil attorneys as early as August of 2011, and that he was aware that the civil attorneys had been engaged to file suit. The letter is attached as Exhibit "C".

Summary of Argument

The Commonwealth was obligated to disclose to Mr. Huguely at least the fact that the Loves had retained civil attorneys to bring suit against Mr. Huguely and others. The Commonwealth was obligated to disclose any other potentially exculpatory information concerning the potential civil suit as relating to Sharon and Lexi Love or any other

prosecution witness. The nondisclosure violated Mr. Huguely's constitutional rights and requires a new trial.

The Due Process Clause of the United States Constitution provides that failure to disclose potentially exculpatory evidence may require reversal where the evidence is material to either guilt or punishment. Exculpatory evidence includes evidence that impeaches the credibility of a prosecution witness. In Virginia, the right of a criminal defendant to cross-examine witnesses for potential bias is absolute, and the Supreme Court of Virginia has recognized that a pending civil claim is grounds for bias on the part of a witness.

In this case, the Commonwealth was aware that the Loves had retained civil attorneys, who were preparing a multi-million-dollar civil lawsuit against Mr. Huguely and others. The Commonwealth failed to disclose that information to counsel for Mr. Huguely. In fact, the letter sent to defense counsel indicated that no specific steps had been taken in the civil realm, since it references only that the victim's family would potentially have a civil remedy, not that the Loves were actively pursuing a civil suit.

Accordingly, Mr. Huguely should be granted a new trial.

Argument

I. The Commonwealth's Duty Under Brady

The Due Process Clause of the United States Constitution requires that the prosecution disclose to the defense any evidence in its possession that is both favorable to the accused and material either to guilt or to punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194 (1963). The prosecution's duty to disclose any such evidence is

independent of any requests by the accused, and this duty includes the duty to disclose impeachment evidence, as well as exculpatory evidence. Corell v. Commonwealth, 232 Va. 454, 465 (1987); Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. (1936). The government has no obligation to produce information which it does not possess or of which it is unaware, but the Commonwealth is deemed to have constructive knowledge of all information known by its staff and all information known by others “acting on the government’s behalf in the case, including police.” Workman v. Commonwealth, 272 Va. 633, 646 (2006) (quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995)). Under Brady, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Id. at 644–45. To constitute a violation of the defendant’s constitutional rights, there must be a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Garnett v. Commonwealth, 49 Va. App. 524, 534 (2007) aff’d, 275 Va. 397 (2008) (citations omitted) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3380, 3383 (1985)).

Yet, significantly, the Court of Appeals has emphasized that the best policy on the part of the Commonwealth is to disclose such information even if it is “in doubt” that the material qualifies under Brady. See Cherricks v. Commonwealth, 11 Va. App. 96, 102 (1990) (“When the Commonwealth elects to withhold exculpatory evidence on the ground that it is not material, it does so at its own peril and with the realization that the trial court or an appellate court may hold otherwise, thereby invalidating a conviction.”).

Therefore, if the Commonwealth declines to disclose such evidence, but a reviewing court later determines that the nondisclosure was improper, then the only redress is a new trial.

II. Evidence for Bias / Impeachment and Brady

The Commonwealth's failure to provide information that was directly relevant to the potential biases of its own witnesses was a clear violation of Mr. Huguely's rights under Brady.

In Virginia, a defendant's right to cross examine to show bias is "absolute" and virtually unlimited:

The right to cross-examine witnesses to show bias or a motive to fabricate, when not abused, is absolute. Inquires of this nature are always relevant, and the fact finder should consider the evidence of bias and motivation and assign the weight to be accorded to the testimony of the witness.

Lewis v. Commonwealth, 43 Va. App. 126, 131 (2004) (quotation omitted). This right is rooted in the Confrontation Clause of the U.S. Constitution and the Virginia Constitution. See Whittaker v. Commonwealth, 217 Va. 966, 968 (1997) ("The right of an accused to cross-examine prosecution witnesses to show their bias or motivation ... is an absolute right, one preserved to the accused by the constitutional guarantee of confrontation."); Moore v. Commonwealth, 202 Va. 667, 669 (1961) (citing, inter alia, Section 8 of the Virginia Constitution).

Indeed, the right to cross-examine is so absolute that it takes precedence over other rules of evidence and even over statutory enactments. See Charles E. Friend, The Law of Evidence in Virginia § 4-6, at p. 157 (6th ed. 2003). Courts have thus held, for example,

that it is error to limit an accused's cross-examination of prosecuting witnesses as to juvenile offenses, even though a statute protects such matters from disclosure. Id.

The right to cross-examine for bias is always relevant and the jury must consider such evidence in deciding what weight, if any, to give the testimony of the witness. For example, bias alone permits the fact finder to reject completely the testimony of the biased witness. Id. (citing Boggs v. Commonwealth, 153 Va. 828 (1929)). Similarly, while evidence of specific acts of misconduct are generally not admissible in Virginia to impeach a witness' credibility, where the evidence is relevant to show that a witness is biased or has a motive to fabricate, the evidence is not collateral and is admissible. See Banks v. Commonwealth, 16 Va. App. 959, 963 (1993) (citations omitted).

As relevant here, the Supreme Court has held that a prosecution witness' pending or expected civil suit against the accused demonstrates possible bias. Lane v. Commonwealth, 190 Va. 58, 75 (1949). In Lane, the Supreme Court held that it was error to deny an accused the ability to cross-examine the victim on the fact of a pending civil suit. The Court reasoned, "A conviction in this case may have been thought favorable to a successful prosecution of the civil action, notwithstanding the differences between [civil and criminal] procedures. For that reason, the evidence [of the civil suit] ought to have been admitted, purely on the question of the temper, bias, feeling or intent of [the prosecution witness]." Id. Evidence of a civil suit is not material only if the civil suit has already concluded, because in such a case the witness would have "nothing to gain in her civil claim from lying in the criminal case[]." Ryan v. Commonwealth, 219 Va. 439, 447 (1978).

III. The Commonwealth's Nondisclosure of the Civil Suit Violated Brady.

Here, the failure of the Commonwealth to disclose that a civil suit was being actively pursued violated Mr. Huguely's constitutional rights under Brady.

It is undisputed that the Commonwealth was aware that civil lawyers had been engaged by the Love family and were preparing to file a civil lawsuit. This civil lawsuit turned out to be two civil lawsuits, each of which sought in excess of \$30,000,000.00 in damages. Ms. Sharon Love and Ms. Lexi Love—the plaintiffs in those suits—testified both in the guilt/innocence phase of Mr. Huguely's trial and at sentencing. Mr. Huguely's counsel did not have the information possessed by the Commonwealth that civil attorneys had been engaged and that a civil suit was imminent. Not only was a civil suit imminent, but according to Mr. Funk the civil action was intended to be deferred until the criminal case was over.

Mr. Huguely was charged with both first-degree premeditated murder and felony murder, both theories of the case inconsistent with allegations made by the Loves in their civil suit alleging that Mr. Huguely unintentionally caused Yeardeley's death and that she died as the result of an "accident." Disclosure of the impending civil lawsuits would have enabled defense counsel to explore whether the Commonwealth had indicted Mr. Huguely for offenses that even the Loves did not believe appropriately defined Mr. Huguely's level of culpability. During closing argument, Mr. Lawrence called the Commonwealth's position "overzealous." Had defense counsel been aware of the impending civil claim, they would have cross-examined the Loves on any motivation on their part to overstate the criminal case.

At the sentencing phase of the trial, Sharon Love and Lexi Love were the sole witnesses for the Commonwealth, and defense counsel for Mr. Huguely did not cross-examine them. Both testified about the loss they suffered resulting from Yeardley's death. Following their testimony, the jury sentenced Mr. Huguely to 25 years' imprisonment on the charge of second-degree murder. The jury did not learn that the Loves intended to file a civil claim against Mr. Huguely and the University of Virginia and other defendants for over \$30,000,000.00. Had counsel been advised that a civil suit was imminent and that the Loves would contend in that suit that Yeardley's death was an accident, counsel would have made the appropriate inquiry. In light of the defense counsel's theory of the case—which is quite similar to the theory advanced by the Love family in the civil suit—it is probable that counsel's ability to cross-examine the Loves for bias on their \$30,000,000.00 lawsuits would have "produced a different verdict," at least as to sentencing.

Because the active development of a civil claim was hidden from Mr. Huguely's lawyers, he was deprived of the ability to consider other investigative needs prior to trial and possible avenues of cross examination with other prosecution witnesses. For instance, a number of witnesses for the Commonwealth were close friends of Sharon and Lexi Love. It is unknown to this day whether those witnesses were contacted by the civil attorneys or were told by the Loves about the civil actions, had knowledge that their testimony and the outcome of the trial could affect the outcome of a multi-million-dollar lawsuit, whether they anticipated being called as witnesses in such proceedings, and how their testimony was accordingly affected.

The Brady material withheld has been deemed critically important and probative by our courts, and the failure of the Commonwealth to provide such information to the defendant requires that he be granted a new trial.

Conclusion

For the reasons set forth above, Mr. Huguely requests that he be granted a new trial.

GEORGE HUGUELY

By Counsel

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