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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of February, 2024.

Present: Goodwyn, C.J., Powell, Kelsey, McCullough, Chafin, and Mann, JJ., and Koontz, S.J.

TERRENCE JEROME RICHARDSON, APPELLANT,

against Record No. 220499

COMMONWEALTH OF VIRGINIA, APPELLEE.

UPON AN APPEAL FROM A
JUDGMENT RENDERED BY THE
COURT OF APPEALS OF VIRGINIA.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is reversible error in the judgment of the Court of Appeals.

On appeal, Richardson argues that the Court of Appeals erred when it made factual findings without an evidentiary hearing, found that Richardson failed to exercise reasonable diligence, ruled that a rational factfinder would still convict him once all of the relevant evidence was considered, and allowed the Commonwealth to file a brief that contradicted its earlier position. As the evidentiary hearing issue is dispositive of the reasonable diligence and rational factfinder issues, the Court will address that matter first.

Code § 19.2-327.12 states, in relevant part,

> If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts, the court may order the circuit court in which the order of conviction or the adjudication of delinquency was originally entered to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals shall direct.

This Court has recognized that, "while the Court of Appeals is vested with authority to refer a case brought under this chapter back to the circuit court for an evidentiary hearing if, in its discretion, it deems that the facts require further development, it is not required to do so." *Haas v. Commonwealth*, 283 Va. 284, 291 (2012). "Accordingly, it is up to the Court of Appeals

to exercise its broad discretion in reviewing the record to determine whether the facts require further development." *Dennis v. Commonwealth*, 297 Va. 104, 128 (2019). This Court reviews the Court of Appeals' refusal to refer a case for an evidentiary hearing under the abuse of discretion standard. *Id.*

In the context of actual innocence petitions, "justice favors providing a full opportunity for factual development before the reviewing court decides [a] petition." *Id.* at 131. Therefore, the Court has cautioned the Court of Appeals that it should "err on the side of ordering a circuit court evidentiary hearing" because "[t]rial courts, not appellate courts, are equipped to perform the credibility assessments essential to finding the truth." *Id.* at 130. This is especially true in "heavily fact-dependent cases." *Id.* Without taking any position on the merits of Richardson's petition, the Court is of the opinion that the Court of Appeals abused its discretion when it refused to grant his request for an evidentiary hearing. Accordingly, the decision of the Court of Appeals dismissing Richardson's petition is reversed and the case is remanded to the Court of Appeals for the purposes of ordering an evidentiary hearing to permit Richardson the opportunity to demonstrate whether reasonable diligence was exercised as well as whether the purported newly discovered evidence is material.

Turning next to the issue of whether the Court of Appeals erred in allowing the Commonwealth to file a "supplemental" brief that contradicted its initial brief, the Court concludes that there was no error. As an initial matter, the Commonwealth's reliance on *In re Commonwealth*, 222 Va. 454 (1981), is misplaced. The Commonwealth focuses on this Court's statement that "the Commonwealth may not be estopped from repudiating the earlier position erroneously taken by the Commonwealth's Attorney." *Id.* at 465 (emphasis added). *In re Commonwealth*, however, is distinguishable from the present case. Notably, the present case does not involve the actions taken by a Commonwealth's Attorney in one proceeding that the Attorney General seeks to repudiate in a separate proceeding; rather, this case involves one Attorney General seeking to repudiate the position of another Attorney General in the course of the same proceeding. Under such circumstances, *In re Commonwealth* is inapposite.

This Court has long recognized the common law doctrine "that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Burch v.*

Grace St. Bldg. Corp., 168 Va. 329, 340 (1937) (emphasis added). This doctrine, sometimes referred to as the approbate-reprobate doctrine, is founded on the premise that

> where a man has an election between several inconsistent courses of action, he will be confined to that course which he first adopts. The election, 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.

Arwood v. Hill, 135 Va. 235, 243 (1923).

In contrast, writs of actual innocence are a form of legislative grace not found at common law. *See In re Brown*, 295 Va. 202, 208 (2018) ("We have no common-law authority to grant what amounts to a judicial pardon—that is, to set free a convict lawfully found guilty by a jury—based upon his later protestation that he was in fact innocent."). The power to grant writs of actual innocence is entirely statutory and "can only be exercised 'in *such cases* and in *such manner* as may be provided by the General Assembly.'" *Id.* at 209 (quoting Va. Const. art. VI, § 1) (emphasis in original). In other words, writs of actual innocence are wholly a creature of statute in derogation of the common law.[*]

Looking at the applicable statutes, Code § 19.2-327.10 *et seq.*, it is readily apparent that the General Assembly intended to permit both the petitioner and the Commonwealth to take positions that are contradictory to those taken by the parties in the original trial. *See* Code § 19.2-327.10 (permitting anyone, without exception, who has been convicted of a felony to petition for a writ of actual innocence); Code § 19.2-327.10:1 (allowing the Attorney General to "join in a petition for a writ of actual innocence"); Code § 19.2-327.11 (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). Stated differently, the General Assembly clearly did not intend for the parties to be confined to the positions taken in the original trial. Thus, actual innocence proceedings are, functionally, a form of legislatively authorized approbation and reprobation. Viewed in this light, it would be inconsistent to hold that the approbate-reprobate doctrine applies to amended pleadings filed in response to an actual innocence petition.

[*] That is not to say that common law doctrines do not apply to cases that are purely statutory in nature. Rather, as discussed below, it is the unique nature of actual innocence proceedings that render the approbate-reprobate doctrine particularly inapplicable.

Moreover, if the Court were to conclude that the approbate-reprobate doctrine applied to amended pleadings filed in a writ of actual innocence proceeding, it would preclude the Commonwealth from changing its position even if, after initially opposing the grant of a writ actual innocence, it subsequently concluded that the petitioner was actually innocent. In such a situation, there can be little doubt that the Commonwealth would not only be permitted to change its position, it would be encouraged to do so. Accordingly, the Court of Appeals did not err in allowing the Commonwealth to file a brief that contradicted its initial brief.

This order shall be certified to the Court of Appeals.

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Teste:

Clerk