

No. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

Wesley Brian Earnest PETITIONER, *pro se*  
(Your Name)

VS.

Virginia — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Virginia Supreme Court  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Wesley Brian Earnest  
(Your Name)

Sussex One State Prison, 24414 musselwhite Drive  
(Address)

Waverly, VA 23891  
(City, State, Zip Code)

N/A  
(Phone Number)

Support Commander

Hearings

## QUESTION(S) PRESENTED

- ① Should lower courts deny the use of exonerating DNA evidence (blood and hair) simply because the third-party DNA donor is unknown?

- ② Will courts' refusal to allow exonerating DNA evidence imprison substantially more innocent people countrywide due to circumstantial evidence and significantly diminish public confidence in the judicial system?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Support Commander

Hearings

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	4
STATEMENT OF THE CASE ..... (Facts on Record)	5
REASONS FOR GRANTING THE WRIT ..... (Argument)	18
CONCLUSION.....	25

## INDEX TO APPENDICES

APPENDIX A	Virginia Court of Appeals
APPENDIX B	Virginia Supreme Court
APPENDIX C	Circuit Court of Amherst County Virginia (Habeas Corpus)
APPENDIX D	Virginia Supreme Court (Habeas Corpus)
APPENDIX E	
APPENDIX F	

## TABLE OF AUTHORITIES CITED

## CASES

## PAGE NUMBER

United States v. Bonner, 648 F.3d. 209 (2011)	p.22
Holmes v. South Carolina, 547 us 319 (2006)	p. 24
Crane v. Kentucky, 476 US 683, 690 (1986)	p. 24
Crawford v. Washington, 541 US 36 (2004)	p. 24
Washington v. Texas, 388 US 14 (1967)	p. 24
Chambers v. Mississippi, 410 US 284 (1972)	p. 24
Davis v. Alaska, 415 US 308 (1974)	p. 24

## STATUTES AND RULES

## OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is Decision of Virginia Court of Appeals

- ☒ reported at 61 Va. App 223, 734 S.E. 2d 680; or, (2012)  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished. (Never been argued on merits)

The opinion of the Virginia Supreme court appears at Appendix B to the petition and is

- ☒ reported at Record No. 130018; or, (July, 2013)  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished. (Error #5. Never argued on merits)

1.

The opinion of the Circuit Court  
of Amherst County, Virginia Appendix C  
Habeas Corpus case No. CL14009211-00  
May 5, 2017

The opinion of the Virginia Supreme  
Court Appendix D

Record No. 171028

Circuit Court No. CL14009211

From the Circuit Court of Amherst County

May 22, 2018

## JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was May 22, 2018.  
A copy of that decision appears at Appendix D.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The "due process" clause of the Fifth Amendment and Fourteenth Amendment.

The "compulsory process" of the Sixth Amendment. The "Confrontation" clause of the Sixth Amendment.

The most fundamental right of a defendant to put on a complete defense by creating an alternative theory to a crime.

## Statement of the Case

On May 6, 2008, Wesley Earnest was indicted for first degree murder of his estranged wife, Jocelyn Earnest, and use of a firearm in Bedford County Circuit Court in Bedford, Virginia. He was tried and found guilty of both offenses on April 5, 2010. The verdict was set aside on July 14, 2010 and a mistrial order entered July 26, 2010 due to the jury receiving impermissible materials during deliberations.

A new trial was scheduled for November 8, 2010 in neighboring Amherst County as a change of venue was granted. The same Judge James W. Updike, Jr. again presided and on November 19, 2010, a guilty verdict was returned by the jury (T. 2864). The jury recommended life imprisonment plus three years (T. 2888). On January 25, 2011, the Court sentenced Petitioner in accordance with the jury recommendations (S. 25).

Petitioner appealed his convictions to The Virginia Court of Appeals and the judgment of the trial court was affirmed. Earnest v. Commonwealth, 61 Va. App. 223, 734 S.E. 2d 680 (Ct. App. 2012).

Petitioner appealed to the Virginia Supreme Court but the petition was refused July 29, 2013. A petition for rehearing was filed but refused September 23, 2013. A petition for Writ of Certiorari to the U.S. Supreme Court was filed but denied February 24, 2014. Petitioner filed for a writ of habeas corpus in Amherst County Circuit Court, Amherst, Virginia. Judge James W. Urdike, Jr., the same as the trial judge, denied Petitioner's request for relief without an evidentiary hearing. On May 5, 2017, this ruling was made a final Order of the court. On May 22, 2018, the Virginia Supreme Court denied the petition.

### Court Opinions/Orders

- ① Wesley Brian Earnest v. Commonwealth  
61 Va.App. 223, 734 S.E. 2d 680 (Ct. App. 2012)
- ② Wesley Brian Earnest v. Commonwealth, Record No. 130018  
Order of the clerk of Supreme Ct. of Virginia
- ③ Wesley Brian Earnest v. Virginia, Record No. 13-779  
Order of U.S. Supreme Court, February 24, 2014
- ④ Wesley Brian Earnest v. Keith W. Davis, et al  
Habeas Corpus Case No. CL14009211-00, May 5, 2017

Support Commander

6

Hearings

⑤ Wesley Brian Earnest v. Keith W. Davis, et al  
Habeas Corpus Case No. CL14009211-00  
Record No. 171028 Refusal

May 22, 2018

The trial transcript with page  
number is designated by [T. Page#]  
and the sentencing transcript with page  
number is designated by [S. Page #]

Word Count:

This petition includes 3414 words.

## Statement of Facts

Wesley Brian Earnest married Jocelyn Earnest in 1995 and moved into the marital residence located in Bedford County, Virginia. They separated in 2004 when Earnest used his construction experience to build a lake house about an hour's drive away from the marital residence. Earnest was a public school educator by profession and his wife was a supervisor for a large insurance company called Genworth Financial. Both Earnest and his wife moved on to other relationships and official divorce proceedings began in early 2006. In 2005, Earnest took a job about 200 miles away in Chesapeake, Virginia and he moved to the Tidewater area. He had almost no contact with his wife for years, did not even have her phone number and did not even know she had moved job locations. Divorce attorneys were handling marital bills for assets jointly owned as money was in escrow from the sale of a rental house they owned. A meeting was held with Earnest, Mrs. Earnest and their attorneys in early 2007 to discuss asset distribution and this was the last time they met.

Earnest lived and worked about 200 miles away as he was separated from his wife for years. Earnest worked as a high school assistant principal [T. 2512] in the Tidewater area where the only eye witnesses in this case testified Earnest was on the day and night in question 12/19/07. Teacher Cindy King [T. 2284-2295], computer technology specialist Al Ragas [T. 2296-2312] and Taco Bell employee Wayne Stewart [T. 2333-2369] all testified Earnest was in Chesapeake, Virginia at times when it is impossible for him to be about 200 miles away in Bedford County, Virginia [T. 2514].

Earnest voluntarily met with detectives on 12/21/07 and notified them of his whereabouts during the week of 12/16/07 to 12/21/07. [see Interview Transcript]

Detectives failed to contact the hundreds of high school staff who could have verified Earnest worked each day. [T. 1703-1705]

At the detective's request, Earnest gave in writing, a detailed accounting of his whereabouts for the week of 12/16/07 to 12/21/07.

Detectives failed to obtain available video footage from the dozens of cameras at the high school where Earnest worked.

Detectives failed to obtain available video footage from the Taco Bell restaurant as well. Detectives used sealed search warrants against Earnest and he was unaware of being the target of their investigation.

Months later, Earnest was arrested and all video recorded footage had been recorded over. On March 10, 2008, detectives interview Taco Bell employees for the first time, nearly three months after Earnest gave his whereabouts and potential alibi witnesses to detectives.

This case is a completely circumstantial case along with mere speculation. Earnest's arrest was justified by a thumbprint on the piece of paper of the typed, suicide note found at the old marital residence where Earnest lived for a decade [T. 475]. In addition, in December, 2006, Jennifer Kerns and Earnest's wife removed all items from his lake house including computer paper, furniture, etc. [T. 864-866, 2372-2375, 2524, 2417-2419]

Later in December, 2006, a pendente lite hearing for the divorce was held in Bedford Circuit Court during which the court ordered Earnest would have exclusive use and possession of the lake house and his wife had exclusive use and possession of the old marital residence.

[T. 860, 1373, 2640]

Kenneth Riding and Andrew Johnson were called by the Commonwealth as fingerprint analysts and they both agreed fingerprints can last for decades and that even Hitler's fingerprints are still analyzable some 70 years later.

[T. 2023-2031, 2053, 2146-2147, 2162]

For this reason, a motion to strike was promoted by defense counsel and all charges asked to be dismissed.

Riding also testified the alarm system Keypad was not submitted for fingerprint analysis nor was the thermostat, any windows, doorknobs, etc. submitted even though hard and plastic surfaces are good for finding fingerprints.

[T. 2057-2058]

The condom wrapper, unopened condom and box of condoms found at the scene were also not sent for fingerprint analysis.

[T. 653-656, 671]



There was a security alarm system on the house as well as new locks.

[T. 2678-2679]

The divorce attorney for Earnest's wife testified he had no access to the house security alarm system code nor any key to the new locks placed on the house. [T. 806, 831, 1441-1442]

Officer Mayhew testified there was no forced entry to the house and all doors and windows were locked and secured.

[T. 818-819]

Earnest's wife began an intimate relationship with Marcy Shepherd in 2005 and Shepherd identified herself as the "new love" in her life. [T. 1052-1055, 1096]

The Commonwealth's medical examiner, Dr. Tharp, performed an autopsy verifying Mrs. Earnest died of a gunshot wound to the head, and she testified there was gun shot residue on her right hand. For months, Dr. Tharp wrote "undetermined" on the death certificate as to suicide or homicide. After Earnest's arrest, she changed the death certificate to homicide. [T. 1162-1171, 1185, 1195-1209]

A small frame .357 revolver pistol was recovered at the scene. It was similar in size to The "Lady Smith" revolver marketed to women. [T. 1125]

Earnest stated he bought the gun for his wife years earlier in 1979 and selected it for its small frame and ease of operation. [T. 2269-2270]

Earnest's father, who owns a farm in West Virginia testified Mrs. Earnest practiced shooting her .357 pistol at his farm. [T. 2257-2259]

The medical examiner stated she was unable to determine the time of death. However, an electronic time of death can be established at approximately 7:30 p.m.

At 7:28 p.m., Mrs. Earnest sent an email, likely from her Blackberry, and this is the last known communication from her.

[T. 816, 894-896, 2487]

At 7:35 p.m., her home security alarm system was disarmed using the keypad and security code. [T. 940-942] She apparently just returned home from a counseling session with her therapist. The security system had motion sensors, door and window contacts.

Marcy Shepherd stated she had a date with Mrs. Earnest and they had texted earlier.

[T. 1011-1014] However, after 7:28 p.m., dozens of text messages and phone calls go unanswered the evening of 12/19/07.

Shepherd stated she went over to her house that evening despite her text messages going unanswered. She stated Mrs. Earnest's car was in the driveway, but nobody answered the door. [T. 1030-1044]

Shepherd stated she went back to the house the following morning, 12/20/07, got the house key, and entered the house to find the body. Shepherd called a mutual friend, Maysa Munsey, who arrived at the scene prior to any others.

Two emergency medical technicians, a deputy, Munsey and Shepherd were all at the scene together prior to detectives arriving. All five people indicated they did not see a suicide note. Neither Munsey or Shepherd were processed for gun shot residue nor were their cars searched. [T. 562, 759-760, 818]

Shepherd told the police about her texts and calls to Mrs. Earnest 12/19/07, however her phone was not examined or seized until weeks later because she was reluctant to give it to them. [T. 789-790, 1082]

When Shepherd did relinquish her phone, selective text messages on 12/19/07 had been deleted and could not be retrieved. [T. 795-797, 1088] Shepherd also failed to initially report her intimate relationship with Mrs. Earnest to detectives.

Earlier in the day of 12/19/07, Munsey was arrested and appeared in Amherst County court for identity theft and fraud. Mrs. Earnest accompanied her to court and it appears the identity theft occurred from the human resources department where Munsey, Shepherd and Mrs. Earnest all worked. [T. 2434-2440] All three had taken the week off work. They all worked for Genworth Financial.

On 12/20/07, detectives recovered blood and hair at the scene, the DNA which does not belong to Earnest or his wife.

DNA analyst, Rodney Woolforth, testified all physical DNA evidence excludes Mr. Earnest. [T. 640-646, 812, 2193-2194, 2236-2237]

A bed sheet, condom wrapper, unopened condom and box of condoms was not processed for DNA. [T. 653-656, 671]

In December, 2007, Earnest borrowed David Hall's truck as he moved residences in Chesapeake, Virginia. He and Hall were friends who used the truck for hunting together and to move to Chesapeake previously. About a month later in January, 2008, Earnest bought new tires for the truck and surprised Hall with the gift.  
[ 1849 - 1850, 1865, 1886, 1889, 1855, 1866-1869 ]

Hall testified that for "eleven months" he and his wife told detectives that Earnest did not have his truck on the night in question, 12/19/07. However, mere speculation was used to cast suspicion on Earnest and Hall changed his story. The Judge even said, "We have rules against allowing this," yet allowed it anyway. The police processed Hall's truck and no evidence relevant to Mrs. Earnest's death was found. [T. 1982]

Bedford County Deputy Neal stated Google Maps estimated four hours and eighteen minutes (4 hours 18 minutes) to drive from Earnest's employment to Mrs. Earnest's house.

Deputy Neal admitted he did not take into account traffic patterns, rush hour traffic, weather conditions, varying routes, holiday traffic, etc. In addition, he did not make the drive at the time after Earnest would get off work. Deputy Neal claimed he could speed across the state in three hours, forty minutes.  
[T. 1746-1750, 1765-1773]

Nonetheless, unimpeachable eye witness testimony by computer technology specialist Al Ragas proves Earnest was at work at the high school after 4:00 p.m. 12/19/07 and back at work 12/20/07 between 7:30 a.m. and 7:45 a.m. drinking coffee and chatting.  
[T. 2296-2312]

Unimpeached witness, Wayne Stewart of Taco Bell, testified Earnest was his customer around 6:30 p.m. 12/19/07 and even described his order all while in Chesapeake, Virginia. Stewart signed a written statement which was also signed by his assistant manager indicating Earnest was about 200 miles away at the time of his wife's death. [2333-2369]

Cell phone towers prove Earnest never left Chesapeake, Virginia on 12/19/07.

## Argument

Earnest tried to put on evidence of third-party guilt, but the court would not allow it. Despite the blood and hair at the scene exonerating Earnest, he was not allowed to use it fully in his defense to show an alternative theory to the crime.

The Commonwealth put on evidence showing they believe Mrs. Earnest did not commit suicide. The court then ruled from the very beginning of trial, before opening arguments, that Earnest cannot introduce third-party guilt. This put the jury in a box and forced them to convict Earnest because alternative theories were not allowed.

The court ruled Earnest must develop a case against a third party to use it, however this changes the presumption of innocence and burden of proof is placed on the defense.

The court ruled that since the DNA belonged to an unknown person, Earnest could not use it because he could not develop a case against an unknown person.

With DNA evidence exonerating wrongly convicted people across the country, it is even more of an egregious error on the court to refuse to allow a thorough defense using DNA evidence which excludes the defendant. Even the governor of Virginia recently promoted legislation to make it easier for wrongfully convicted people to use DNA to get out of prison.

It is commonly known, and experts agree, that an assailant oftentimes injures oneself in the commission of a crime. This fact was highlighted in the famous O.J. Simpson trial when prosecutors brought forth blood at the scene with DNA belonging to O.J. himself. In the Earnest case, blood and hair was found at the scene in a bathroom a few feet from the body. The trashcan was empty as if someone was bleeding and cleaned up, yet the master bathroom trashcan was overflowing. [T. 809-813] When defense counsel tried to show a blood trail from the body to the sink, the court stopped all questions using the third-party guilt ruling. Missing lead fragments from the bullet also support the idea of an assailant injuring himself in the shooting.

19

Support Commander

Hearings



Governor of Virginia, Terry McAuliffe, recently commuted Ivan Teleguz from a death sentence to life in prison. This Teleguz case was solved because the assailant injured himself in the commission of the crime and left blood in the bathroom.

Investigator Kevin Whitfield and Deputy U.S. Marshall Michael Nelson subsequently tracked down the third-party assailant who was a match for the DNA.

(see Ivan Teleguz v. Commonwealth of Virginia 273 Va. 458; 643 S.E. 2d 708; 2007)

In the Earnest case, forensic DNA specialist Susan Cropp testified hairs at the scene exclude Earnest. [T. 2194]

DNA analyst and expert, Rodney Woolforth, testified blood in the sink at the scene excludes Earnest as well.

[T. 640-646, 812, 2193-2194, 2236-2237]

The court's restriction of the use of third-party guilt permeated the entire trial, prevented some witnesses to testify in his defense, stopped adversarial questions and prevented Earnest from creating an alternative theory, related even to Marcy Shepherd, the "new love" in Mrs. Earnest's life.

Support Commander

20

Shepherd testified she was in a romantic relationship with The deceased at the time of her death. She specifically indicated being the "new love" as written in the suicide note. Shepherd had a date with the deceased the very evening of her death at the very time of her disappearing from electronic communication. Shepherd admitted to driving over to Mrs. Earnest's house the evening of her death.

[T. 1052-1055, 1096, 1011 - 1014]

She had access to the house key and security alarm system. Although she had a multi-year relationship with Mrs. Earnest, family and friends indicated they knew nothing of their relationship. DNA evidence clearly shows there are others who were at the scene of which nobody knows of these relationships.

Shepherd was a suspect but she did not give her cell phone to police until weeks later. Key text messages around 7:30 p.m. on 12/19/07 were deleted and unrecoverable.

[T. 789-790, 795-797, 1082, 1088]

Shepherd even found The body 12/20/07.

21

[T. 562, 759, 818]

Despite Shepherd having a current relationship with the deceased, having found the body, having deleted key messages on her cell phone, had a date the very evening of her death, admitted to being there near the time of death, the court ruled the defense could not put on evidence of third-party guilt unless it could be proven the third-party was guilty. Questions of Shepherd were limited as a result.

In addition, Maysa Munsey was arrested for identity theft and fraud on the very day of Mrs. Earnest's death. Mrs. Earnest was with Munsey in court earlier that day and it is evident the identity theft occurred from the human resources department where they worked. [T. 2434-2440]

Munsey was at the scene, where they found the body, before detectives. There is a whole lot going on in the lives of Mrs. Earnest, Marcy Shepherd and Maysa Munsey, however, the third-party guilt ruling by the court prevented questions and witnesses to enlighten the jury. Especially with the DNA of other unknown persons who were at the scene, this information was material to the case.

United States v. Bonner, 648 F.3d 209 (2011)

It is the most fundamental constitutional violation to prevent the defense from forming an alternative theory as to the crime, in fact, it is required in order for counsel to show effectiveness.

This was a completely circumstantial evidence case against Earnest. The third-party guilt ruling violated Earnest's right to put on a complete defense, thus his "due process" rights were violated which are grounded in the Fifth Amendment and Fourteenth Amendment.

The court's refusal to allow Earnest to call several witnesses under the third-party guilt ruling violated Earnest's "compulsory process" rights grounded in the Sixth Amendment. The DNA (blood and hair) at the scene excludes Earnest, and these unknown donors would have also acted as "witnesses" of a third-party guilt.

The court's stopping all adversarial questions of Commonwealth witnesses using third-party guilt restrictions violated Earnest's Sixth Amendment right to "confront" witnesses. A Writ of Certiorari should be granted.

The Virginia Appellate Court and the Virginia Supreme Court refused to hear arguments on this point. This argument has never been heard on the merits.

Earnest testified as to his innocence at both trials and it is a miscarriage of justice to ignore this claim.

[T. 399-417, 2461-2473, 2381-2399, 2403-2412]  
[S. 13, 14]

Earnest was denied a "meaningful opportunity to present a complete defense."

Holmes v. South Carolina, 547 US 319 (2006)

Crane v. Kentucky, 476 US 683, 690 (1986)

Crawford v. Washington, 541 US 36 (2004)

Washington v. Texas, 388 US 14 (1967)

Chambers v. Mississippi, 410 US 284 (1972)

Davis v. Alaska, 415 US 308 (1974)

## Conclusion

If courts throughout the nation are allowed to use a third-party guilt ruling to prevent even DNA from exonerating defendants, substantially more innocent people will be wrongfully convicted nationwide. The public confidence in the judicial system will be significantly diminished. If scientific DNA is not allowed to point to a third party's guilt, then mere accusations and circumstantial evidence will be used as the standard, and the judicial system will step backwards a century or more. Earnest was denied a "meaningful opportunity to present a complete defense." Earnest's constitutional rights to "due process", "compulsory process" and "confrontation clause" were violated and he should be granted a Writ of Certiorari.