

VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY

WESLEY BRIAN EARNEST,

Petitioner,

v.

Case No. CL14009211

KEITH W. DAVIS, WARDEN,
Sussex I State Prison, and
HAROLD W. CLARKE, Director
of Virginia Department of Corrections,

Respondents.

ORDER

Upon mature consideration of the petition of Wesley Brian Earnest for a writ of habeas corpus, the motion to dismiss of the respondents, the petitioner's response to motion to dismiss and the authorities cited therein, and a review of the record in the criminal case of Commonwealth v. Wesley Brian Earnest, which is hereby made a part of the record in this matter, the Court finds for the following reasons that the petitioner is not entitled to the relief sought.

The petitioner raised the following claims in his petition:

- A. His due process rights were violated because:
 - i. The prosecutor intimidated witnesses;
 - ii. The prosecutor withheld exculpatory evidence;
 - iii. The police attempted to elicit a confession from the petitioner in the absence of his attorney;

Appendix C

- iv. The court erred in excluding third-party evidence;
- v. The court erred by changing venue to this Court;
- vi. The prosecutor made inflammatory arguments in his closing;
- vii. The Commonwealth failed to preserve evidence.

B. Petitioner's attorneys were ineffective for:

- i. Failing to investigate exculpatory evidence and police misconduct;
- ii. Failing to investigate authenticity and chain of custody of evidence;
- iii. Failing to investigate whether charging documents were unconstitutionally obtained;
- iv. Allowing improper evidence to go to the jury in an earlier trial;
- v. Not objecting to evidence of the petitioner's illegal entry into the home;
- vi. Not preparing a defense of suicide;
- vii. Failing to have a divorce document admitted into evidence;

C. The trial Court erred in:

- i. Not allowing an expert witness to testify;
- ii. Allowing certain testimony by Commonwealth's witnesses;
- iii. Moving the trial to this Court;
- iv. Allowing evidence of time to travel to the scene of the crime;

v. Allowing evidence about David Hall's truck.

The Court finds that claims A and C could have been raised at trial and on appeal. The Court further finds that C(i) and C(ii) were presented on direct appeal.

With respect to claim B(i) which alleges the attorney failed to investigate exculpatory evidence, the Court finds that petitioner has failed to name any witness who could provide evidence of police misconduct and has not even identified the officer alleged to be guilty of misconduct. The Court further finds that the petitioner has not identified any other witnesses who could have testified for him or provided any alibi evidence and has not proffered any testimony or explained how any such evidence would have assisted his case. The Court further finds that the petitioner has not identified the witness allegedly threatened by agents of the Commonwealth. On the other hand, the Court finds that the attorney presented at least three alibi witnesses. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(ii) alleging the attorney failed to investigate the authenticity and chain of custody of certain evidence, the Court finds that the Commonwealth provided a reasonable foundation for admission of David Hall's sign-in sheet. The Court further finds that the sign-in sheet was not used to change Hall's testimony. The Court further finds that the petitioner has failed to

show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(iii) which alleges the attorney failed to investigate whether the charging documents were constitutionally obtained, the Court finds that there is absolutely nothing in the record to suggest any defect or deficiency in any of the charging documents. Consequently, the Court finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(iv) alleging the attorney failed to prevent inadmissible evidence being given to the jury during deliberations, the Court finds that the inadmissible journals were provided to the jury in the first trial without the knowledge of defense counsel and without his involvement so that any error was inadvertent. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(v) where the petitioner claims the attorney failed to object to questions about the petitioner's prior unauthorized entry into the victim's home, the Court finds that the evidence of such entry was probative of the petitioner's having knowledge of how to gain entry into the home without the use of force. The Court further finds that the evidence was probative of his having the means to commit the offenses as they were committed and in a manner that was consistent with the appearance of suicide. The Court further

that the probative value of this evidence outweighed any incidental prejudice. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient because he failed to object to admissible evidence. The Court further finds that the petitioner has not shown that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(vi) which alleges the attorney failed to present a defense that the victim killed herself, the Court finds that the attorney adopted a reasonable strategy of arguing that the Commonwealth had not proven his client's guilt beyond a reasonable doubt. The Court further finds that the attorney was aware of the strength of the Commonwealth's evidence offered to negate suicide. The further finds that relying on a suicide defense would have justified the admission of the victim's journals which would have been very damaging to the petitioner's case. The Court further finds that the attorney was able to present alibi witnesses, placing the petitioner in Chesapeake on the day of the murder. The Court further finds that the attorney offered expert testimony supporting his defense and emphasized the suspicious behavior of acquaintances of the victim. The Court finds that the attorney's strategy was reasonable. Consequently, the Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(vii) alleging the attorney failed to present a divorce document showing that the murder weapon was in the possession of the victim,

the Court finds that the petitioner has failed to identify the document or to state its contents. The Court further finds that because the divorce was in an early stage, the petitioner has not shown that there was any document that would have proven what he wanted and still be admissible against a hearsay objection. The Court further finds that box containing the gun when it was purchased was at the home of the petitioner's girlfriend and that no ammunition for the gun was found in the victim's home. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

Consequently, the Court rules that since claims A and C are non-jurisdictional issues that could have been raised at trial and on direct appeal, they are not cognizable in a habeas corpus proceeding under *Lawlor v. Warden*, 288 Va. 223, 764 S.E.2d 264 (2014) and *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). The Court further rules that claims C(i) and C(ii), having been presented on direct appeal, are also barred by *Henry v. Warden, Riverside Regional Jail*, 265 Va. 246, 248, 576 S.E.2d 495, 496 (2003).

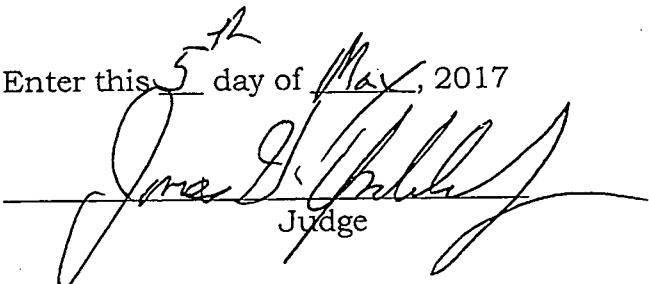
The Court further rules that under the criteria set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the petitioner has not shown that his attorney was ineffective and that, therefore, claim B should be dismissed.

For the foregoing reasons and for the reasons set forth in this Court's opinion letter of February 16, 2017, the Court believes that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to the petitioner, Jack T. Randall, Esquire, counsel for the petitioner and Eugene Murphy, Senior Assistant Attorney General, counsel for the respondents.

Enter this 5th day of May, 2017


Judge

I ask for this:



Counsel for Respondents

Seen and objected to:



Counsel for Petitioner

On the grounds that the evidence provided, arguments stated in the petition were sufficient to warrant a hearing in this matter, to proceed with witnesses, and) have a ruling on the merits. Additionally, this matter should have been ruled on by a judge other than the judge who presided at the trial.

A Copy, Teste:

Deborah Coffey Mozingo, Clerk

By: Antine C. Maddy

Deputy Clerk
Circuit Court Amherst County, VA

Appendix D

Virginia Supreme Court
Habeas Corpus

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Tuesday the 22nd day of May, 2018.*

Wesley Brian Earnest,

Appellant,

against Record No. 171028
 Circuit Court No. CL14009211

Keith W. Davis, Warden, etc., et al.,

Appellees.

From the Circuit Court of Amherst County

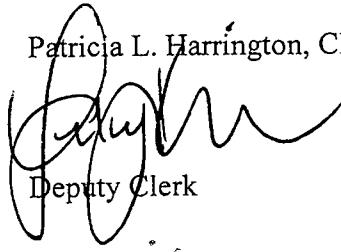
Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste: -

Patricia L. Harrington, Clerk

By:


Deputy Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**