Appendix # 2

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 25th day of June, 2021.

Jake Rader, No. 2019435, Petitioner,

against Record No. 200858

Darrell Miller, Warden,
Lunenburg Correctional Center, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed June 18, 2020, the rule to show cause, the respondent's motion to dismiss, and petitioner's reply, the Court is of the opinion that the motion should be granted and the petition should be dismissed.

Petitioner was convicted by a jury in the Circuit Court of Chesterfield County of making a threat in writing and two counts of felony failure to appear. Petitioner was sentenced to five years' imprisonment for making a threat in writing, and three years' imprisonment for both counts of failure to appear. The court ordered that the petitioner serve the sentences concurrently. Petitioner's appeal to the Court of Appeals of Virginia was unsuccessful, and his appeal to this Court is pending.* He now challenges the legality of his confinement pursuant to these convictions.

In claim (1), petitioner contends he was deprived of his right to confront witnesses against him, in violation of the Sixth Amendment. Petitioner alleges the Commonwealth violated his rights by failing to subpoena "the Verizon Wireless custodian of records to obtain a certified copy of the alleged threatening, 'text-message-data-document.'" Petitioner contends the Commonwealth was required to present testimony of the custodian and a certified copy of the "text-message-data-document," which is a term petitioner uses in apparent reference to screenshots of the text messages introduced by the Commonwealth to prove the threatening

*Petitioner appealed only the conviction for making a threat in writing, challenging the sufficiency of the evidence.

Appendix #2 (cont)

nature of the messages sent to the victim, Edgar Bowman. He asserts the text messages were "authored" by Verizon Wireless or the custodian of records at Verizon. Therefore, he should have been permitted to question the author of the text messages. Petitioner further contends a certified copy of the text messages from Verizon was necessary to demonstrate the "trustworthiness" of the messages. Petitioner also appears to claim the best evidence rule was violated when the text messages were admitted into evidence without requiring a certified copy from Verizon.

The Court holds claim (1) is barred because these non-jurisdictional issues could have been raised at trial or on direct appeal and, thus, are not cognizable in a petition for a writ of habeas corpus. *Slayton v. Parrigan*, 215 Va. 27, 29 (1974).

In a portion of claim (2), petitioner contends the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), when the Commonwealth failed to produce a summary of Officer Tennyson's interactions with Bowman on the day Tennyson took a report regarding the threatening messages. Petitioner asserts the summary of the report is exculpatory because it demonstrates the victim was merely "concerned" about the messages but does not demonstrate the victim felt threatened, nor did the summary reflect that Bowman identified petitioner as the sender of the messages. Furthermore, petitioner asserts the summary has no date or time, suggesting it could have been authored after the police sought an arrest warrant for petitioner. In support of his claim, petitioner has attached what appears to be a typed summary of different officers' notes or actions, including those of Tennyson. The summary notes that "Bowman . . . received text messages from Bowman" and Bowman "became concerned" about the messages. Thus, petitioner concludes, the summary demonstrates there was insufficient evidence to charge him with making a threat in writing. Petitioner also asserts the failure to produce the summary prevented petitioner from calling Tennyson as a witness.

The Court holds this portion of claim (2) is without merit. Although it is not clear in the record before this Court, it appears petitioner may have been provided this summary as part of pre-trial discovery. Nevertheless, even if petitioner did not have possession of the summary, the record, including the trial transcript, demonstrates petitioner was aware at the time of trial of the substantive information contained in the summary.

Appendix # 2 (cont)

Petitioner was terminated from his employment by his boss, Bowman, on May 2, 2016. Bowman received threatening text messages around May 23, 2016, that he recognized as being sent from petitioner's phone number. The messages indicated that petitioner was angry and stated, "I'm gonna finish this," and "Ur never going to see me coming." Petitioner also told Bowman his "days are numbered," and referenced "burn[ing] it down." On May 24, Bowman took screen shots of the text messages and made a report to Tennyson. Other messages were sent to Bowman's wife and stated petitioner's belief that he was fired for "money/divorce." Petitioner refers to an alleged affair and alludes to an impending divorce between Bowman and his wife. The messages go on to contend Bowman's daughter would suffer in the future in ways that petitioner described using significant vulgarity.

At the advice of Tennyson, Bowman texted petitioner and asked him to refrain from contacting him, his wife, staff, or clients again. Following this message, petitioner escalated by sending Bowman texts implying he would have his nephew sexually assault Bowman's daughter. He sent more messages using vulgar and racist language, stating the business will "burn," and attached a picture of a penis. Thereafter, Bowman went to a magistrate to request that a warrant issue against petitioner and sought a protective order because he perceived the messages to be threatening. Detective Hylton reviewed the criminal complaint filed by Bowman and investigated the messages. During Hylton's investigation he exchanged emails and had at least one phone call with petitioner in which petitioner admitted to sending messages to Bowman but assured the officer that he would no longer communicate with Bowman and was moving out of state. Petitioner was eventually apprehended and represented himself with the assistance of stand-by counsel.

At trial, during petitioner's cross-examination of Bowman, petitioner asked, "Is it not true that you told Tennyson that you felt concerned about these text messages?" Bowman stated he could not remember the exact word he used, but testified he was fearful for his family because of the nature of the messages. Therefore, it appears that not only was petitioner aware that Tennyson could have been called as a witness, but he was also aware that Bowman reported being "concerned" about the text messages to Tennyson and made use of this information at trial. *See Commonwealth v. Tuma*, 285 Va. 629, 635 (2013) ("*Brady* is not violated, as a matter of law, when impeachment evidence is made 'available to [a] defendant[ ] during trial.'" (internal

citation omitted)).

Additionally, to the extent petitioner appears to argue that the summary is exculpatory and material because it suggests Bowman sent the messages to himself, or received the messages from his wife, this claim is without merit. The record, including the trial transcript and email petitioner sent to Hylton, demonstrates petitioner admitted to sending text messages to Bowman. Furthermore, after receiving the text messages, Bowman sought a warrant for petitioner's arrest and a protective order against petitioner based on the text messages. In light of the overwhelming evidence establishing petitioner sent the text messages, petitioner has failed to demonstrate how using the summary as impeachment evidence would have been favorable to petitioner or undermined the confidence in the outcome. *See Workman v. Commonwealth*, 272 Va. 633, 645 (2006) (considering whether evidence was material, a court must determine "if the suppression of evidence 'undermines the confidence in the outcome of the trial'" (internal citation omitted)).

In another portion of claim (2), petitioner contends the Commonwealth failed to produce the warrant for petitioner's arrest, in violation of *Brady* and *Giglio*. Petitioner states the date on the arrest warrant demonstrates it was issued before Hylton attempted to locate petitioner. Petitioner contends this "timeline" is "disturbing" because it demonstrates Bowman could not have felt threatened.

The Court holds this portion of claim (2) is barred. The record, including the trial transcript, demonstrates that, at the latest, the warrant was made available to the petitioner during trial when the court admitted the warrant as Commonwealth's Exhibit 2. This non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29.

In another portion of claim (2), petitioner contends the Commonwealth violated *Brady* and *Giglio* when it failed to produce Hylton's "synopsis" or notes. In support of his claim, petitioner attached a document which appeared to be a typed summary of Hylton's interactions with petitioner. The summary included an email exchange between Hylton and petitioner, in which petitioner apologized to the detective for "any problems I have caused" and agreed to refrain from contacting Bowman. The notes state Hylton called petitioner after receiving the email and includes a "synopsis" of their phone conversation in which petitioner admits he should

not have sent "the messages" to Bowman. Petitioner declined to turn himself into the authorities, but assured Hylton that he would no longer contact Bowman. Petitioner asserts Hylton's notes were exculpatory because the notes and synopsis do not show a violation of Code § 18.2-60.

The Court holds this portion of claim (2) is without merit. The record, including the trial transcript and discovery provided to petitioner, demonstrates petitioner was provided the email between Hylton and himself as part of pre-trial discovery. Moreover, petitioner was a party to the email and the phone conversation summarized in the "synopsis." Therefore, the substance of those statements was known to the petitioner and cannot form the basis of a *Brady* violation. *See Tuma*, 285 Va. at 635-36 (stating a purpose of the *Brady* rule is to assure that the defendant "will not be denied access to exculpatory . . . evidence known to the government but unknown to him."); *see also Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2002) ("Certainly, . . . information that is not merely available to the defendant but is actually known by the defendant would fall outside of the *Brady* rule.").

Additionally, to the extent petitioner asserts the absence of information in the summary or synopsis was exculpatory, he has failed to demonstrate how a lack of inculpatory evidence results in affirmative evidence that is either exculpatory or material. Therefore, petitioner failed to demonstrate a *Brady* violation.

In another portion of claim (2), petitioner contends the Commonwealth failed to produce unidentified "screen-shots," in violation of *Brady* and *Giglio*. Petitioner does not specify what the "screen shots" showed, but it appears the petitioner may be contending the Commonwealth failed to disclose the screen shots of the threatening text messages introduced at trial.

The Court holds this portion of claim (2) is factually without merit. The record, including the discovery provided to petitioner and the trial transcript, demonstrates petitioner was provided the screen shots of the text messages before trial.

In another portion of claim (2), petitioner contends the Commonwealth failed to produce a "ping warrant" used to locate petitioner's phone in violation of *Brady* and *Giglio*. Petitioner contends the date on the warrant would show it was not sought until after the warrant for petitioner's arrest was issued. Petitioner appears to assert this would have proven Bowman was not threatened by petitioner, because had he sufficiently expressed fear the police would have moved more quickly to obtain the warrant. Petitioner further suggests he could have used this

information to impeach Hylton's testimony at trial that he began to investigate the case promptly after receiving the complaint.

The Court holds this portion of claim (2) is barred. The record, including the trial transcript, demonstrates that, at the latest, the information regarding the warrant was made available to the petitioner during trial when Hylton testified that on June 9, 2019, he obtained a "ping warrant" to discover the location of petitioner's cell phone. This non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29.

In another portion of claim (2), petitioner contends the Commonwealth failed to produce a certified copy of the text messages from Verizon Wireless, in violation of *Brady* and *Giglio*. Petitioner contends the Commonwealth was under a duty to obtain a certified copy of the text messages from Verizon Wireless but failed to do so. Petitioner asserts the Commonwealth "knew they possessed no certified copies" of the text messages but pursued the prosecution anyway.

The Court holds this portion of claim (2) is barred. The record, including the trial transcript, demonstrates petitioner was aware at the time of trial that the Commonwealth had not obtained certified copies of the text messages and cross-examined Hylton on this issue. This non-jurisdictional issue could have been raised during the direct appeal process and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29.

In claim (3), petitioner contends the Commonwealth engaged in vindictive prosecution when the prosecutor pursued a conviction, even though she was aware that no crime had been committed and secured the conviction by purposefully withholding the above-mentioned evidence. Petitioner further contends the Commonwealth's decision to pursue the charges in the absence of a certified text message document from Verizon and in light of the "other evidence" "epitomizes" conduct unbecoming a prosecutor, unprofessionalism, and a disregard for the court's discovery orders.

The Court holds claim (3) is barred because this non-jurisdictional issue could have been raised during the direct appeal process and, thus, is not cognizable in a petition for a writ of habeas corpus. *Id.*

(Appendix #2 (continued)

Upon consideration whereof, petitioner's June 25, 2020 motion to expedite and petitioner's September 30, 2020 "Motion to Release" are denied.

Accordingly, the petition is dismissed and the rule is discharged.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Helen S. Kayser

Deputy Clerk

Exhibit # 4

CR17F02548-01

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

COMMONWEALTH OF VIRGINIA

v.

JAKE RADER, Defendant

HEARING ORDER

This day, August 8, 2019, came Melissa H. Hoy, Attorney for the Commonwealth, in the presence of JACOB RADER, the defendant, Pro Se, and his stand by counsel, Matthew Mikula, Esquire, and moved this court for an order limiting the defendant from producing certain evidence at the trial of this matter. Evidence and arguments were presented, and the Court ruled as follows:

1. In regard Commonwealth's motion to limit the presentation of mental health evidence of and by the defendant, in any portion of the guilt phase of the trial, to include voir dire and opening, that motion is GRANTED. The defendant is therefore precluded from presenting any mental health evidence or testimony in the guilt phase of the trial.

2. In regard to the Commonwealth's motion to limit the presentation of evidence, by the defendant, about the terms of his employment with the victim and the reasons for his termination from same, that motion is taken UNDER ADVISEMENT. However, the defendant is precluded from presenting evidence of same in voir dire or opening statement.

3. The Court was told by the defendant that he had received all of the discovery from the Commonwealth. However, the Court further orders the Commonwealth to produce copies of all of the discovery given to the defendant, for the Court's file. That is attached to this order.

MTM

J. R

Appendix #1
And
Page #1

JOHN JONES LAW, PLC
P.O. Box 487
De Soto, MO 63020

John I. Jones, IV
(314) 498-8642
jones@johnjoneslawplc.com

July 16, 2021

Jake A. Rader #2019435
Lunenburg Correctional Center
PO Box 1424
Victoria, VA 23974

Dear Mr. Rader:

Enclosed please find a copy of the Supreme Court of Virginia's order in your appeal.

I regret that the Court did not grant review of the merits of your case. I remain convinced that the arguments, especially that regarding whether your alleged communications constituted "true threats," were meritorious. Unfortunately, the Court disagreed. I also regret that so many potential issues that we spoke about were not preserved for appeal or were otherwise not likely to grant relief in my professional opinion.

With the conclusion of your appeal in state court, my representation of you is now at an end. You may have other remedies available to pursue, and I encourage you to discuss them with an attorney who specializes in postconviction remedies. However, I cannot advise you further regarding such matters.

I sincerely wish you all the best.

Best Regards,

John I. Jones, IV
Virginia State Bar No. 89300

Enclosure

Page 1. and Appendix #1