

**IN THE CIRCUIT COURT
FOR THE CITY OF NORFOLK**

DEREK ELLIOTT TICE)
(D.O.C. Inmate # 287570),)
)
 Petitioner)
 v.)
)
GENE M. JOHNSON,)
DIRECTOR OF VIRGINIA)
DEPARTMENT OF CORRECTIONS,)
)
 Respondent.)
_____)

Case No. _____

PETITION FOR WRIT OF HABEAS CORPUS

Place of Detention: Sussex I State Prison, 24414 Musselwhite Drive, Waverly, Virginia

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief:

Circuit Court for the City of Norfolk; Norfolk, Virginia

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):

- a. Capital Murder
- b. Rape

3. The date upon which sentence was imposed and the terms of the sentence:

- a. Capital Murder, January 31, 2003 – Life
- b. Rape, January 31, 2003 – Life

4. Check which plea you made and whether trial by jury: Plea of guilty: N/A; Plea of Not Guilty: X; Trial by jury: X; Trial by judge without jury: N/A.

5. The name and address of each attorney, if any, who represented you at your criminal trial:

James O. Broccoletti, Zoby & Broccoletti, 6663 Stony Point South, Norfolk, Virginia 23502;

Jeffrey R. Russell, One E. Plume Street, 2nd Floor, Norfolk, Virginia 23510.

6. Did you appeal the conviction? Yes

7. If you answered "yes" to 6, state: the result and the date in your appeal or petition for certiorari:

- a. Appeal to the Virginia Court of Appeals, denied, August 8, 2003;
- b. Appeal to the Virginia Supreme Court, denied, July 6, 2004;
- c. Motion for Reconsideration to the Virginia Supreme Court, denied, October 1, 2004.

Citations of the appellate court opinion or orders:

- a. Derek Elliott Tice v. Commonwealth, Record No. 0408-03-1, Circuit Court No. CR98002980, August 8, 2003 Order of the Honorable McClanahan, Virginia Court of Appeals
- b. Derek Elliot Tice v. Commonwealth, Record No. 040160, Court of Appeals No. 0408-03-1, July 6, 2004 Order of Deputy Clerk of Supreme Court of Virginia
- c. Derek Elliot Tice v. Commonwealth, Record No. 040160, Court of Appeals No. 0408-03-1, October 1, 2004 Order of Clerk of Supreme Court of Virginia

8. List the name and address of each attorney, if any, who represented you on your appeal:

S. Jane Chittom, Appellate Defender, Public Defender Commission, 701 East Franklin Street, Suite 1416, Richmond, Virginia 23219

B. *Habeas Corpus*

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court? No

10. If you answered “yes” to 9, list with respect to each petition: the name and location of the court in which each was filed: N/A

11. Did you appeal from the disposition of your petition for habeas corpus? N/A

12. If you answered “yes” to 11, state: the result and the date of each petition: N/A

B. *Other Petitions, Motions or Applications*

13. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the nature of the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you. N/A.

C. *Present Petition*

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

a. *Due Process Violations*

- (i) The Commonwealth of Virginia (“Commonwealth”) violated Derek Elliot Tice’s due process rights by substantially interfering with two key witnesses’s free will to testify at Mr. Tice’s criminal trial.

Omar Ballard (“Ballard”), the sole rapist and murderer of the victim in this case, confessed and repeatedly stated to the police that he alone raped and murdered the victim. As set forth in Ballard’s Affidavit attached to the Memorandum in Support of Derek Elliot Tice’s Petition for Writ of Habeas Corpus (“Petitioner’s Memorandum”), on two separate occasions representatives of the Commonwealth discouraged Ballard from providing exonerating testimony at the trial of Mr. Tice. Rather than testify as he

intended to do before the visits, Ballard refused to testify. The Commonwealth therefore substantially interfered with Mr. Tice's right to present a defense by depriving him of key witness testimony. The Commonwealth's actions also violated fundamental fairness as due process requires. *Petitioner incorporates herein by reference the Affidavit of Omar Ballard, which is attached to Petitioner's Memorandum as Ex. 21, Sections III. and V. of the Factual Background, and Section I.A. of the Argument in Petitioner's Memorandum.*

At Mr. Tice's trial, Joseph Dick was going to testify truthfully that Mr. Tice was not involved in the crimes. Shortly before Dick's testimony, a prosecutor and Detective Robert G. Ford visited Dick and implicitly threatened him with withdrawal of his plea agreement if he did not testify consistent with the statements he had previously made implicating himself, Mr. Tice and others in the crime. Because of the threats, Dick took the stand and said that Mr. Tice was involved in the crime. *Petitioner incorporates herein by reference the Affidavit of George H. Kendall, Esq., which is attached to Petitioner's Memorandum as Ex. 25, Sections II.B, II.C., and II.D of the Factual Background and Section I.A. of the Argument in Petitioner's Memorandum.*

- (ii) The Commonwealth violated Mr. Tice's due process rights by withholding Brady exculpatory material. Specifically, the Commonwealth failed to disclose that Ballard had been identified by the police around the time of the murder as a possible suspect by Tamika Taylor upon whom the Commonwealth was relying for information, but the police ignored Taylor's lead for months. Knowledge that police had a lead that they ignored would have allowed Mr. Tice's counsel to cross-examine the Commonwealth's witnesses on the strength of their initial belief that this crime was committed by one person, and to impeach those witnesses on their central theory that more than one person committed this crime and their motives for steadfastly adhering to that theory even after Ballard surfaced and said that he committed the crime alone. *Petitioner incorporates herein by reference the Declaration of Tamika Taylor, which is attached to Petitioner's Memorandum as Ex. 20, Section II of the Factual Background (discussing Declaration of Tamika Taylor), and Section I.B. of the Argument in Petitioner's Memorandum.*

b. *Ineffective Assistance of Trial Counsel.*

- (i) Trial counsel's assistance to Mr. Tice was constitutionally deficient because trial counsel suggested to Ballard that he not testify at Mr. Tice's trial. Ballard, the only suspect that was linked to the scene of the crime by DNA evidence, was encouraged by not only the Commonwealth, but also Mr. Tice's own trial counsel, not to testify at Mr. Tice's trial. Ballard had

intended to testify truthfully that he committed the crime alone and that, therefore, Mr. Tice was not involved. *Petitioner incorporates herein by reference the Affidavit of Omar Ballard, which is attached to Petitioner's Memorandum as Ex. 21, Section II of the Factual Background (discussing visits by Detective Ford and a prosecutor), and Section II.A. of the Argument in Petitioner's Memorandum.*

- (ii) Trial counsel's assistance to Mr. Tice was constitutionally deficient because trial counsel failed to successfully enter into evidence a letter from Ballard to a third party in which Ballard admitted committing the crime with which Mr. Tice was charged. Once Ballard was not available to authenticate the letter at trial, trial counsel was constitutionally deficient because he failed to even attempt to authenticate the letter through other means. *Petitioner incorporates herein by reference Section II of the Factual Background (discussing Ballard's early 1999 letter) and Section II.A of the Argument in Petitioner's Memorandum.*

- (iii) Trial counsel's assistance to Mr. Tice was constitutionally deficient because trial counsel failed to move to suppress Mr. Tice's constitutionally defective and coerced confession. Trial counsel failed to move to suppress Mr. Tice's confession, which was defective both because it occurred in violation of his right to remain silent and his right to counsel under Miranda v. Arizona, 384 U.S. 436 (1966), and was involuntary given in violation of Mr. Tice's substantive due process rights. Pursuant to the standard outlined in Strickland v. Washington 466 U.S. 668 (1983), any reasonable defense counsel would have moved to suppress the confession. Doing so would have been sound trial strategy. In conjunction with the Miranda violation, the evidence that Detective Robert G. Ford, in line with his prior practice of coercing confessions, had secured Mr. Tice's confessions through overbearing tactics including repeated and convincing threats that Mr. Tice would surely die unless he confessed, provided good reason to believe a suppression motion would succeed. *Petitioner incorporates herein by reference Section II.D of the Factual Background and Section II.B of the Argument in Petitioner's Memorandum.*

- (iv) Trial counsel was ineffective for failing to offer any number of experts to rebut the Commonwealth's flawed multiple-perpetrator theory upon which the case against Mr. Tice hinged. Experts in the fields of crime scene reconstruction, pathology, DNA and other fields could have established that this crime could have only been committed by one person, which had to have been Ballard. Yet defense counsel failed to offer even one such expert. Any reasonable counsel would have presented expert testimony to refute the Commonwealth's multiple-assailant theory because doing so would have compelled a jury to conclude that Ballard alone committed the crimes for which Mr. Tice was convicted. Trial counsel should have investigated and at least attempted to present exculpatory evidence through

expert testimony that one person, Ballard, committed the crimes for which Mr. Tice was convicted. *Petitioner incorporates herein by reference Section V of the Factual Background and Section II.C of the Argument in Petitioner's Memorandum.*

c. *Trial Court Errors*

- (a) The trial court erred by excluding expert testimony from Dr. Richard Leo concerning police interrogation techniques and the effect of those techniques on the reliability of confessions, including Mr. Tice's confession.
- (b) The trial court erred by excluding evidence that Detective Robert G. Ford had elicited false confessions in other cases. *Petitioner incorporates herein by reference Section I of the Factual Background in Petitioner's Memorandum.*
- (c) The trial court erred by excluding testimony concerning accepted interrogation practices in the Norfolk Police Department offered by the defense at Mr. Tice's trial, which would have established that the tactics used during Mr. Tice's interrogation were improper.
- (d) The trial court erred by excluding a letter written by co-defendant Joseph Dick that contradicted his testimony that he and Mr. Tice were involved in the crimes for which Mr. Tice was convicted.

d. *Ineffective Assistance of Appellate Counsel*

- (a) While the errors raised herein that were not raised on direct appeal were not known by Mr. Tice's appellate counsel, to the extent that the court finds that the errors should have been known, Mr. Tice submits that appellate counsel was ineffective for failing to raise all claims that should have been known at the time of Mr. Tice's direct appeal.

15. List each ground set forth in 14, which has been presented in any other proceeding:

- e. 14(c), Trial Court Errors.

List the proceedings in which each ground was raised:

- a. 14(c), Trial Court Errors were presented in Mr. Tice's direct appeal.

16. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not:

- a. The grounds listed above 14(a), Due Process Violations and 14(b), Ineffective Assistance of Trial Counsel, have not been asserted in any other proceeding because this information had not come to light at the time of Mr. Tice's direct Appeal.

[Handwritten Signature]
Signature of Petitioner

Sussex I, 24414 Musselwhite Drive, Waverly, Virginia 23891-1111
Address of Petitioner

STATE OF VIRGINIA
CITY/COUNTY OF *Waverly*

The Petitioner being first duly sworn, says:

- 1. He signed the foregoing petition;
- 2. The facts stated in the petition are true to the best of his information and belief.

[Handwritten Signature]
Signature of Petitioner

Subscribed and sworn to before me

this 8 day of September

2005.

NOTARY PUBLIC *C. E. GRANT*

My commission expires:

**My Commission Expires
May 31, 2006**