FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

EVERETT A. MARTIN, JR.
JUDGE

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

November 27, 2006

Ms. Deborah L. Boardman
Hogan & Hartson
555 - 13 Street NW
Washington, D.C. 20004

Mr. Stephen McCullough
Office of the Attorney General
900 East Main Street
Richmond, Va. 23219

Re: Derrick E. Tice v. Gene M. Johnson, Director
At Law No. CL05-2067

Dear Ms. Boardman and Mr. McCullough:

This letter will address the remaining grounds of the petition for a Writ of *Habeas Corpus*. I have taken into consideration your pre-hearing memoranda, the trial record, the evidence adduced at the hearing on September 11-12, 2006, and your post-hearing briefs. At the beginning of the hearing the petitioner withdrew his claim based upon the alleged interference with the testimony of Joseph Dick.

Interference with the Testimony of Omar Ballard

For the reasons I stated at the end of the hearing, I have serious reservations about giving credence to anything Ballard said, and I resolve all credibility issues on this claim in favor of the respondent. I do, however, believe Ballard knew the Commonwealth had no further leverage over him at the time detectives Ford and Wray visited him in prison shortly before the petitioner's second trial. (Transcript pg. 78). I therefore believe that much of his testimony in which he stated that Ford and Wray did not intimidate him. (Tr. pg. 83-4).

I find that if anyone was intimidated during the meeting with Ballard, it was Mr. Broccoletti and Mr. Russell. Mr. Broccoletti testified that he preferred that Ballard not testify, but he had a very good reason for this preference. If Ballard did not testify, his statements to the police would come into evidence and the

Commonwealth would have no opportunity to cross-examine. If Ballard did testify, Mr. Broccoletti knew he would be putting an unpredictable and uncontrollable witness on the stand and he had no idea what Ballard would say on direct examination, much less on cross-examination. (Tr. pp. 145-9).

I conclude that neither the detectives nor the petitioner's attorneys substantially interfered with Ballard's willingness to testify.

The Failure to Introduce Ballard's Letter

I need not decide if the petitioner's attorneys were deficient in failing to introduce Ballard's letter (Petitioner's Exhibit 1), because I find there was no prejudice to the petitioner. The letter is two rambling pages of vulgarity. It only contains one sentence (of two and one-half lines) in which Ballard admits committing the crimes. He did not state in the letter that he committed the crimes alone.

I find the admission of the letter into evidence would have been cumulative and thus his attorneys' failure to have it admitted caused the petitioner no prejudice. In Ballard's statement to the police of March 4, 1999, which was read to the jury, he took sole responsibility for the crimes and he explicitly denied anyone else was involved. In his statement to the police of March 11, 1999, which was also read to the jury, he again admitted committing the offenses, but he was not asked and he did not say whether anyone else was involved. His second statement is the equivalent of the letter at issue.

The Failure to Suppress the Petitioner's Confession of June 25, 1998

The petitioner claims his attorneys were deficient in failing to suppress his confession on any one of three grounds: (i) voluntariness, (ii) his invocation of his right to counsel, and (iii) his invocation of his right to silence. To establish prejudice because of a failure to file a motion to suppress, the petitioner must first show that the motion would probably have been granted. U.S. v. Williams, 910 F.2d 1574, 1581 (7th Cir. 1990); Kellogg v. Scurr, 741 F.2d 1099, 1104 (8th Cir. 1984); Sallic v. North Carolina, 587 F.2d 636, 641 (4th Cir. 1978).

Voluntariness

The attorneys had a good reason for not moving to suppress the confession for involuntariness and thus were not deficient. Mr. Broccoletti and Mr. Russell had conducted mock examinations and cross-examinations of the petitioner, and they concluded he would not do well under the rigorous cross-examination he could expect from Mr. Hanson. They did not find him credible. (Tr. pg. 182). Mr. Broccoletti also knew that Ford was an experienced witness who stands up well under cross-examination. Furthermore, two of the petitioner's co-defendants had failed in attempting to suppress their confessions. Finally, the petitioner agreed with their strategy.

I also find a motion to suppress the statement on this ground would probably have failed. The facts regarding the taking of the statement are disputed in only a few particulars. Did Ford only mention or did he threaten the death penalty? What was Ford's tone of voice? What was his demeanor? I find that Ford was probably more aggressive then he admitted, but far less so than the petitioner claims. On this issue I find credible and persuasive Mr. Broccoletti's testimony that the petitioner never told him about some of the threatening statements he now claims the police made. (Tr. pg. 180). Furthermore, the police did not deprive the petitioner of the minimal comforts one can expect while in their custody. They did not batter him; they did not carry weapons; they did not handcuff or shackle him. He was twice given Miranda warnings. He has some college education. The interrogation had not been lengthy at the time the petitioner incriminated himself.

The petitioner admitted he has served in both the Army and the Navy. I imagine he was exposed to harsh language and coarse behavior during that service. Homicide detectives are responsible for the investigation of society's most serious crimes. They do not usually deal with the most genteel persons. A certain aggressiveness in their methods is to be expected. I thus conclude his counsel were not deficient on this issue and the petitioner suffered no prejudice.

Invocation of the Right to Counsel

The petitioner's invocation of his right to counsel and his right to silence are contained in notes Detective Crank made on June 25, 1998 at 7:04 p.m. (Petitioner's Exhibit 6). These notes recite a conversation he had with the petitioner, the last three sentences of which read: "He told me he decide (sic) not to say any more; that he might decide to after he talks with a lawyer or spends some time alone thinking about

it. I told him he would be given time to think about it. He did not request a lawyer." (Emphasis is in the original.)

On direct examination the petitioner testified he told Crank he did not want to talk anymore and that he might do so after he spoke to a lawyer. (Tr. pp. 252-4). On cross-examination Mr. McCullough read part of Crank's notes to him and asked if that was what he had said. The petitioner answered "no" and then agreed that Crank's notes are "incorrect in that regard." (Tr. pg. 300). No one further questioned the petitioner specifically about what he claimed to be inaccurate in Crank's notes. I can only conclude the petitioner meant the phrase "or spend some time alone thinking about it" was inaccurate. However, I find Crank more credible on this issue. He was writing down the petitioner's words shortly after they were spoken. The petitioner is trying to recall his words of eight years ago.

The Supreme Court of Virginia has held:

> To invoke this right [to counsel], a suspect must state his desire to have counsel present with sufficient clarity that a reasonable police officer under the circumstances would understand the statement to be a request for counsel. [Citations omitted] If, however, a suspect's reference to an attorney is either ambiguous or equivocal, such that a reasonable officer under the circumstances would only have understood that the suspect *might* be invoking his right to counsel, the officer is not required to stop questioning the suspect.

Commonwealth v. Hilliard, 270 Va. 42, 49, 613 S.E. 2d 579, 584 (2005); Davis v. U.S., 512 U.S. 452, 459 (1994). The Court in Hilliard held this statement was not sufficient to invoke the right to counsel: "Can I have somcone else present too, I mean just for my safety, like a lawyer like y'all just said." 270 Va. at 51, 613 S.E. 2d at 582. In Commonwealth v. Redmond, 264 Va. 321, 329-30, 568 S.E. 2d 695, 699-700 (2002), the Supreme Court reviewed four cases in which the defendants made far less ambiguous references to counsel than the petitioner made, and those cases held the right was not invoked. In Redmond, the Court held this statement was not a clear and unambiguous assertion of the right: "Can I speak to my lawyer? I can't even talk to a lawyer before I make any kinds of comments or anything?" 264 Va. at 330, 568 S.E. 2d at 700.

The petitioner stated he might decide to continue speaking to the investigators "after he talks with a lawyer or spends some time alone thinking about it." Mr. Broccoletti did not believe a motion to suppress for a denial of the petitioner's right to counsel would have succeeded. (Tr. pg. 134-5). Based upon the precedents cited I find the petitioner did not clearly and unambiguously invoke his right to counsel and thus his counsel were not deficient in failing to file a motion to suppress his statement on that ground and he suffered no prejudice as the motion would probably have been denied.

Invocation of the Right to Silence

Mr. Broccoletti and Mr. Russell testified the petitioner never mentioned invoking his right to silence. (Tr. pp. 184, 218). The petitioner could not recall ever mentioning it to his lawyers. (Tr. pp. 276-7). In the absence of Crank's notes I would give little credence to a post-conviction claim by petitioner that he invoked his right to silence. However, Crank's notes were filed with the Clerk of this Court on April 15, 1999. The petitioner's second trial began January 27, 2003. Under these circumstances the petitioner's failure to mention his invocation of his right to silence does not excuse his attorneys' failure to try to suppress the statement. The petitioner is not an attorney.

Mr. Broccoletti conceded he must have seen the notes at some time during his representation of the petitioner, but that he had no specific recollection of them before this summer. (Tr. pp. 131-3, 168-70). Mr. Russell also had no recollection of having seen the notes before this summer. (Tr. pp. 203-4). The petitioner testified he never saw the notes until the present petition was being prepared. (Tr. pp. 278-9).

When a defendant has received a Miranda warning and waived his right to remain silent, as the petitioner did, the waiver will be presumed to continue throughout the interrogation until the defendant "manifests in some way which would be apparent to a reasonable person his desire to revoke it." Washington v. Commonwealth, 228 Va. 535, 548-9, 323 S.E.2d 577, 586 (1984). The Supreme Court of Virginia has adopted the Davis standard in determining whether a suspect has invoked his right to silence. Midkiff v. Commonwealth, 250 Va. 262, 267-8, 462 S.E.2d 112, 115 (1995). In *dictum* there the Court held the statement "I do not want to answer any more questions" would suffice. 250 Va. at 268, 462 S.E. 2d at 116.

I have found five cases in which the Supreme Court of Virginia has ruled on the invocation of the right to silence. In three of those cases, in which the Supreme Court held the statements were equivocal, the statements were significantly different from the petitioner's. Midkiff, supra; Lamb v. Commonwealth, 217 Va. 307, 227 S.E.2d 737 (1976); Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975). In Burket v. Commonwealth, 248 Va. 596, 610, 450 S.E.2d 124, 132 (1994), the Court held the statements "I just don't think I should say anything because" and "I need somebody that I can talk to" were equivocal. In Weeks v. Commonwealth, 248 Va. 460, 470, 450 S.E.2d 379, 386 (1994), the Court without discussion held "Do not want to discuss case any further" invoked the right to the silence. The statement here falls between those in Burket and Weeks, but it is closer to Weeks.

There are two published cases from the Court of Appeals of Virginia on the issue. In Green v. Commonwealth, 27 Va. App. 646, 654, 500 S.E.2d 835, 839 (1995), the defendant's statement he "didn't have anything more to say" was held to be equivocal when considered with his actions. In Mitchell v. Commonwealth, 30 Va. App. 520, 527, 518 S.E.2d 330, 333 (1999), the statement "I ain't got s--- to say to y'all" was held not to invoke the right to silence.

I have also reviewed the five cases the respondent has cited from intermediate appellate courts of other states, and I do not believe the statements in any of them are similar to the petitioner's statement. Although it is without precedential value, the closest statement I have found to that of the petitioner was in Boone v. Commonwealth, Record No. 0934-99-1 (Ct. of Appeals, April 4, 2000). There the defendant said "he did not wish to talk to [him] at that time." The Court of Appeals held that statement invoked the right to silence.

I find the first part of petitioner's statement (when put in the first person) "I've decided not to say any more" was unambiguous and unequivocal. The second part of the statement "I might decide to say more after I talk to a lawyer or spend some time alone thinking about it" did not render the entire statement ambiguous or equivocal. It merely indicated he might be willing to speak at a later time.

The subsequent interrogation of the petitioner after he invoked his right to silence shows that his right to silence was not "scrupulously honored" under Michigan v. Mosley, 423 U.S. 96 (1975) and Weeks, supra. Ford and Wray did "carefully advise" the petitioner of his right to silence before his initial interrogation.

There apparently was a cessation of the interrogation after petitioner told Crank he did not want to say anything else. (Tr. pg. 314). No attempt was made to "persuade" petitioner to reconsider his position, but Crank did not tell Ford and Wray that petitioner said he did not wish to say anything else; it appears they did not know it. (Tr. pp. 315-6, 398-400, 458-9). Ford and Wray resumed the questioning twenty-eight minutes after the conclusion of Crank's session with petitioner. (Tr. pp. 253-4, 376-7, 453-4, Respondent's Exhibit A). A significant period of time had not passed. No Miranda warning preceded the resumed interrogation, which related to the same crimes as the initial interrogation.

Based upon the evidence, I believe a motion to suppress the petitioner's confession would probably have been granted on this ground. Were his counsel deficient in not making the motion and was petitioner prejudiced by their failure to do so under Strickland v. Washington, 466 U.S. 668 (1984)?

If Strickland is read broadly, petitioner's counsel were not deficient. The purpose of "actual effectiveness" is to insure a fair trial. 466 U.S. at 686. The petitioner had a fair trial. A jury unanimously convicted him; the trial judge confirmed the verdict and imposed a sentence authorized by law; the Court of Appeals affirmed his conviction; he sought an appeal to the Supreme Court of Virginia, but it was denied. Did his counsels' "conduct so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"? Ibid. I answer that question in the negative. Did Mr. Broccoletti and Mr. Russell make "errors so serious [they were] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"? 466 U.S. at 687. I again say no. They avoided the imposition of the death penalty in his first trial and they obtained a reversal of his first conviction. Both of his attorneys are highly respected and most capable. A review of the transcript of petitioner's second trial shows he was effectively represented.

If Strickland is read narrowly, and I believe I must so read it, Williams v. Taylor, 529 U.S. 362, 393-5 (2000), I conclude his counsel were deficient. They made one mistake. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. Mr. Broccoletti testified:

> The one part of the notes that do concern me is where he said, 'He told me he decided not to say any

> more.' As I go back and look at that now, that statement may have generated something, may have generated a motion.
>
> There must have been some reason I didn't file it. I can't tell you today what that reason is, other than it's something that Jeff and I discussed with Derck and decided based upon whatever he told us, that it wasn't a -- it wasn't a fertile ground or a valid ground. But I can't tell you today, six years later, what that reason was.

(Tr. pg. 135.) He also admitted that every statement a defendant makes to a police officer is "extremely significant." (Tr. pp. 185-6). Crank's notes were in the Court's file for more than three years before the second trial; they were in Mr. Broccoletti's file. A motion to suppress for violation of the petitioner's right to silence could have been presented without revealing trial tactics. No reason has been offered for the failure to file the motion.

To establish prejudice:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ...
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

466 U.S. at 694-5. The evidence against the petitioner at his second trial was his confession, co-defendant Dick's testimony, and the physical evidence (which both corroborated and contradicted petitioner's confession). There was no fingerprint, DNA, or other scientific evidence against him; no independent eyewitnesses implicated him; no physical evidence directly implicated him.

False confessions do occur, but most people believe (and rightly so) that a person does not usually confess his involvement in a murder unless he is guilty. There is probably no stronger evidence against a criminal defendant in the eyes of a jury than his confession. The law of evidence recognizes this. Only slight corroborative evidence is necessary to show the truthfulness of a confession. Powell v. Commonwealth, 267 Va. 107, 145, 590 S.E. 2d 537, 560 (2004). Reading only a transcript I cannot say how effective a witness Dick was, but Mr. Broccoletti's cross-examination of him seems quite damaging. I find there is a reasonable probability the jury would have acquitted the petitioner if his confession had not been admitted into evidence.

At the conclusion of the hearing I inquired if I should consider the petitioner's other confessions in determining whether he had been prejudiced by the failure to suppress his first confession. I believe Strickland answers that inquiry. In determining the existence of prejudice the court must "consider the totality of the evidence before the ... jury." 466 U.S. at 695.

The Supreme Court has broadened this restriction in deciding ineffectiveness claims concerning counsel's performance in the sentencing phase of a capital case by considering mitigation evidence defense counsel did not introduce. Williams v. Taylor, supra; Wiggins v. Smith, 539 U.S. 510 (2003). However, I am aware of no case in which a court has considered prosecution evidence relevant to a defendant's guilt that the jury did not receive. There is probably a good reason for this. It would be difficult to evaluate defense counsels' effectiveness by considering prosecution evidence they did not confront.

Ruling on a claim such as this already involves much speculation. Would the confession have been suppressed? Would the jury have convicted in the absence of the confession? To compound the speculation by deciding if the prosecution would have offered other statements, whether they would have been admissible, and what effect they might have had (and this without an opportunity for the defense to cross-examine the witnesses relating the other statements) would extend the speculative to the metaphysical.

The "assistance of counsel" was originally understood to abrogate the ancient common law prohibition of representation in criminal cases and to allow an accused to employ counsel. It was not understood to compel the government to provide

counsel. The appointment of counsel was in some cases provided by statute or by the practice of the courts. See Betts v. Brady, 316 U.S. 455 (1942); 4 Blackstone, Commentaries on the Laws of England 355-6 (1765). From the ratification of the Bill of Rights until well after the ratification of the Fourteenth Amendment, the Bill of Rights applied only to the federal government. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (1869); Brown v. New Jersey, 175 U.S. 172 (1899). In a series of decisions culminating in Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court construed the Sixth Amendment "assistance of counsel" to require the appointment of counsel and it imposed the requirement on the states. With the holding in Strickland, a convicted defendant who has received competent counsel and a fair trial in a state court may now use the Sixth Amendment to attack his conviction. As the late Justice Powell once observed, we have "a revisionist concept of federal *habeas corpus* that bears little or no relationship to the historic purpose and function of the Great Writ." Remarks on the 200th Anniversary of the Supreme Court of Virginia (August 30, 1979), 220 Va. ix, xvii. Nonetheless, this is the law as decreed by the highest court of the land and I am bound to follow it.

The writ has issued and a copy is attached. Mr. McCullough shall prepare the appropriate final order.

Sincerely yours,

Everett A. Martin, Jr.
Judge

EAMJr/nm
Enc.
cc: The Honorable John R. Doyle
James O. Broccoletti, Esq.
Jeffrey R. Russell, Esq.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

DEREK E. TICE,
Petitioner

v.

At Law No.: CL05-2067

GENE M. JOHNSON, *etc.*,
Respondent.

Writ of *Habeas Corpus ad Subjiciendum*

To Gene M. Johnson, Director Sussex II State Prison – Greeting:

We command you, that the body of Derek E. Tice detained by you and under your custody, as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called, you have before our Circuit Court of the City of Norfolk, in the court-room thereof, on the 20th day of December, 2006, at 9:30 a.m. to do, submit to and receive all and singular those things which shall then and there be considered of him in this behalf. And have then and there this writ.

Done at the court-house thereof, in the City of Norfolk the 27th day of November in the year of our Lord 2006 and of the Commonwealth the 231st.

Judge

Office of
)RGE E. SCHAEFER
Clerk of the
Circuit Court
orfolk, Virginia