

LETTER TO CLERK AND ASSIGNED WRIT JUDGES OF COURT OF
APPEALS OF VIRGINIA

Re: Case number: 0290-22-3; Brian David Hill v. Commonwealth of Virginia et al.

THURSDAY, AUGUST 25, 2022

**ATTN: Clerk of the Court, judges
assigned to Emergency Motion for
extending word count by 1,007
words**

Court of Appeals of Virginia

109 North Eighth Street
Richmond, VA 23219-2321

CC: c/o Roberta Hill online filing representative serving with rbhill67@comcast.net: "Martinsville City Commonwealth's Attorney (ahall@ci.martinsville.va.us)" <ahall@ci.martinsville.va.us>, "OAG Criminal Litigation (oagcriminallitigation@oag.state.va.us)" <oagcriminallitigation@oag.state.va.us>, Hill, Justin B. <JHill@oag.state.va.us>

To Whom it may Concern,

I am having Roberta Hill to file two amended opening briefs on my behalf for the following circumstances if they happen.

I am filing PDF amended opening brief: "Amd-appeal-brief-aug-25-2022-1.pdf" if this Court grants my "EMERGENCY MOTION ASKING FOR A COMPROMISE OR DEAL IN ASKING FOR LEAVE OF COURT TO FILE AMENDED OPENING BRIEF OF APPELLANT IN EXCESS OF 1,007 WORDS ABOVE WORD LIMIT SET ON JUNE 6 OR EXTEND WORD LIMIT TO 14,537 WORDS TO CURE DEFICIENCIES". If the Court grants the emergency motion and allows the word count limit requested to meet the word count of file: "Amd-appeal-brief-aug-25-2022-1.pdf", then I ask the Clerk to accept this brief for filing and distribution to the authorized and assigned judges for this appeal case.

I am also filing the alternative PDF amended opening brief: "Amd-appeal-brief-aug-25-2022-2.pdf" if this Court denies my "EMERGENCY MOTION ASKING FOR A COMPROMISE OR DEAL IN ASKING FOR LEAVE OF COURT TO FILE AMENDED OPENING BRIEF OF APPELLANT IN EXCESS OF 1,007 WORDS ABOVE WORD LIMIT SET ON JUNE 6 OR EXTEND WORD LIMIT TO 14,537

WORDS TO CURE DEFICIENCIES” or keeps the word limit to the same as 13,530 words as ordered on June 6, 2022. It meets that word limit but there may be some issues in removal of paragraphs if the Clerk does a preliminary review and finds any compliance issues with what was removed.

To comply with the word limit of 13,530 words, I have had to remove some major paragraphs from the SUMMARY of the amended brief. That may include talk of what is being appealed. Page 21 of the PDF files of both versions are of the SUMMARY section.

Before I explain which sections were removed between the versions, I've read in the rules that the Court mainly takes notice of only the assignments of error. I did not want to remove an assignment of error to comply with the word limit, so I remove the introductory statements of the amended opening brief to protect the important and essential assignments of error in case the emergency motion is denied. I also did not want to remove any important and essential STATEMENTS OF THE FACTS because that could cripple the appeal brief and make it non-compliant with other court rules, and would stifle the effectiveness of the appeal brief. So certain paragraphs were removed from the summary beginning section of the brief after the table of contents, table of authorities, and glossary. Then the summary section of the pleading.

Here are the sections I am citing of what was removed from the alternative brief to make it compliant with the 13,530 word limit unless the EMERGENCY MOTION is granted:

Deleted section paragraphs are highlighted and below:

New evidence which further disproves the Commonwealth's charge by Martinsville Police Department (Record-pages 1-3). The Trial Court denied Appellant's motion for Judgment of Acquittal on the basis of not having jurisdiction to have considered the motion on its merits by misconstruing Appellant's motion as a Petition for the Writ of Actual Innocence pursuant to Chapter 19.2 or Chapter 19.3 of the Code of Virginia. The Motion did not invoke Chapter 19.2 or Chapter 19.3 or mention those statutes necessary to invoke the motion as a Petition for the Writ of Actual Innocence. See Assignment of Error 1 page 6-8 of this opening brief. Instead, the motion invoked Virginia Rules of the Sup. Ct. 3A:15; Virginia Code § 19.2-271.6; and Schlup v. Delo, 513 U.S. at 327 — 28. Settles v. Brooks, Civil Action No. 07-812, 18 n.6 (W.D. Pa. Jun. 26, 2008).

Specifically, it involves the statutory, evidential, and constitutional right to a judgment of acquittal in a criminal case or at least an evidentiary hearing over the matter when a Appellant has new evidence to further disprove the Commonwealth of Virginia's and City of Martinsville's flawed and erroneous prosecution against Appellant. Appellant submitted new evidence to the Trial Court to justify the necessary need for a Judgment of Acquittal in the best interest of justice. For many reasons, that judgment denying the motion on both mislabeling and misconstruing a motion as a petition without jurisdiction should be reversed, ordered and remanded with instructions in regard to how the motion should have been treated and the legal right of Appellant's request for a Judgment of Acquittal in his criminal case. (pages 1 and 2 of "Amd-appeal-brief-aug-25-2022-1.pdf" and removed in "Amd-appeal-brief-aug-25-2022-2.pdf").

The Trial Court said in its reasoning for denying the motion for a Judgment of Acquittal under Rule 3A:15(c) that: "UPON CONSIDERATION of the defendant's Motion for Judgment of Acquittal, which the Court treats as a Petition for Writ of Actual Innocence, it is ORDERED that said petition is hereby DENIED on the ground that the petition should have been filed in the Court of Appeals, and that this court, accordingly, lacks jurisdiction." See the Order on record 1550-1550.

The Trial Court improperly denied a motion properly filed under Rule 3A:15 - Motion to Strike or to Set Aside Verdict; Judgment of Acquittal or New Trial, Va. R. Sup. Ct. 3A:15 ("(c)Judgment of Acquittal or New Trial. The court must enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court must grant a new trial if it sets aside the verdict for any other reason.").

The Court had not held when they should have held whether the new evidence was sufficient or insufficient to disprove the Commonwealth's criminal prosecution and the very nature of his cause to have granted the motion requesting a Judgment of Acquittal. Instead it mainly relied on the ground that it lacked jurisdiction by misconstruing the Rule 3A:15 Motion as Petition for the Writ of Actual Innocence when the statutes governing such petitions was not invoked in the motion, while Rule 3A:15 was invoked in that denied motion (See RECORD 1029-1237). Therefore the Court did not make a ruling or sound discretion on the merits of that motion by such misconstruing of the motion, its merits, its spirit of the law, and its intent.

Arguably the new evidence could have been discovered in 2019, however the Trial Court could not consider it as evidence under the law at the time of conviction, therefore the Supreme Court of Virginia had reasoned in its case law that the new evidence

regarding “mental health” or mental illnesses at the time of the charged offense was not legally admissible as evidence as a matter of law. The evidence became admissible after the passage of Virginia Code § 19.2-271.6, on April 7, 2021, and the law went into effect on July 1, 2021.

The evidence would be considered new evidence after the final conviction because at the time of the conviction in the year of 2019, the Supreme Court of Virginia as well as Virginia law barred this evidence from being considered as evidence in any Court of the Commonwealth. See *Stamper v. Commonwealth*, 228 Va. 707 (1985).

In the year of 2021, the General Assembly nullified the ruling of *Stamper v. Commonwealth*, 228 Va. 707 (1985); by the passage of Virginia Code § 19.2-271.6. It was signed by the Governor and became codified into law on April 7, 2021, and that law went into effect on July 1, 2021. Almost 2-years after the final criminal conviction in the Circuit Court. See <https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HB2047>. Note: Link provided by family. The evidence becomes new to the Trial Court since the date of the passage of Virginia Code § 19.2-271.6 which would be April 7, 2021 or the date of the law coming into effect on July 1, 2021.

Also the finality of the criminal conviction was not made final until the CAV had made its final judgment affirming the conviction on September 2, 2021. See the final Writ Panel decision rendered in CAV case no. 1295-20-3, and the direct appeal of the criminal conviction was considered timely due to the unopposed motion for delayed appeal.

The ‘procedural’ and ‘substantial’ due process clauses in U.S. Const. amend. XIV of the U.S. Constitution and the Virginia Constitution’s Article I., Section 11 due process clause require that the Virginia Courts consider a motion attacking a conviction by requesting a judgment of acquittal based upon new evidence under the acceptable standards set by the highest Courts. In this case, that highest Court would be the Supreme Court of Virginia, and the higher court below that court would be the CAV. Due process requires that a Court follow the acceptable and recognized standards as set by the Supreme Court or of a higher Court in published opinions as well as set precedents. See Assignment of Error 5.

By denying that motion, the Trial Court had committed a grave miscarriage of justice, a fundamental miscarriage of justice by refusing to give Appellant a Judgment of Acquittal as requested in his motion. All assignments of error concern the final judgment (Record-pages 1550-1550) denying Appellant’s motion for Judgment of Acquittal. That issue is preserved on appeal as the ultimate fact of what final judgment aka the criminal conviction which the Motion for Judgment of Acquittal was attempting to challenge.

(pages 4, 5, and 6 of “Amd-appeal-brief-aug-25-2022-1.pdf” and removed in “Amd-appeal-brief-aug-25-2022-2.pdf”).

If the Court does not think that it was a good idea to remove these sections to comply with the 13,530 word limit, then they can grant Appellant's EMERGENCY MOTION asking for the extended word count and accept Appellant's filing of Amd-appeal-brief-aug-25-2022-1.pdf.

Otherwise, they can deny the EMERGENCY MOTION to file: “Amd-appeal-brief-aug-25-2022-1.pdf” at the word limit requested in that motion and accept “Amd-appeal-brief-aug-25-2022-2.pdf” with the SUMMARY paragraphs removed to comply with the approved word limit on June 6, 2022.

The Court has two amended briefs they can choose from. If they want to grant Appellant's EMERGENCY MOTION asking for the word count increase of only 1,007 words, then they can accept the filing of Amd-appeal-brief-aug-25-2022-1.pdf. Otherwise they have Amd-appeal-brief-aug-25-2022-2.pdf with removed paragraphs but complies with the ordered 13,530 word count.

Thank You. Respectfully filed with the Supreme Court of Virginia, this the 25th day of August, 2022.


Signed

Brian D. Hill

God bless you,
Brian D. Hill

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