**IN THE**

**SUPREME COURT OF VIRGINIA**

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**RECORD NO. 092064**

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**LINDSAY ALAN BLY,**

***Appellant,***

**v.**

**COMMONWEALTH OF VIRGINIA,**

***Appellee.***

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# BRIEF OF THE COMMONWEALTH

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**COMMONWEALTH OF VIRGINIA,**

**Appellee.**

---

**BRIEF OF THE COMMONWEALTH**

---

## STATEMENT OF THE CASE

On March 24, 2005, Lindsay Alan Bly was convicted in a bench trial in the Circuit Court of the City of Buena Vista of possession with intent to distribute an imitation controlled substance, in violation of Virginia Code § 18.2-248, and possession with intent to distribute methamphetamine, also in violation of § 18.2-248. Prior to sentencing, Bly filed a motion for a new trial. By order dated October 25, 2007, the circuit court denied the motion

for a new trial. In an order entered on December 13, 2007, the court sentenced Bly to concurrent terms in prison of five years and five years, with all but seven months suspended.

Bly appealed his convictions to the Court of Appeals of Virginia, which awarded an appeal on May 21, 2008. (Record No. 2948-07-3). After briefing and oral argument, a panel of the Court of Appeals, in a two to one vote, reversed Bly's convictions. Thereafter, however, the Court of Appeals granted the Commonwealth's petition for rehearing en banc and later issued an opinion affirming Bly's convictions. Bly v. Commonwealth, 55 Va. App. 1, 682 S.E.2d 556 (2009).

Bly filed a petition for appeal in this Court, after which the Commonwealth filed a brief in opposition and assignment of cross-error. On March 26, 2010, this Court awarded an appeal both on Bly's assignment of error and the Commonwealth's assignment of cross-error.

## ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT A NEW TRIAL WHEN IT WAS DISCOVERED THAT EXCULPATORY EVIDENCE WAS NOT DISCLOSED TO THE DEFENDANT PRIOR TO TRIAL.**

## ASSIGNMENT OF CROSS-ERROR

**THE COURT OF APPEALS, ALTHOUGH CORRECTLY FINDING NO PREJUDICE AS A RESULT OF THE NON-DISCLOSURE, ERRED BY FAILING TO ALSO FIND THAT BLY DID NOT ESTABLISH THE SECOND REQUIREMENT OF THE BRADY TEST: THAT THE NON-DISCLOSED INFORMATION EITHER WAS ITSELF ADMISSIBLE EVIDENCE OR WOULD HAVE LED TO EVIDENCE THAT WAS.**

## QUESTIONS PRESENTED

**I. HAS THE DEFENDANT DEFAULTED ON ANY CLAIM THAT THE COMMONWEALTH SUPPRESSED EXCULPATORY EVIDENCE BY HIS WHOLESALE FAILURE TO MENTION, MUCH LESS CONTEST, THE RULING OF THE COURT OF APPEALS UPHOLDING THE CIRCUIT COURT'S FACTUAL FINDING THAT HE HAD NOT BEEN PREJUDICED?**

**II. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE RECORD ESTABLISHED THAT THE DEFENDANT WAS NOT PREJUDICED BY THE COMMONWEALTH'S FAILURE TO DISCLOSE CERTAIN EVIDENCE RELATING TO ITS CONFIDENTIAL INFORMANT?**

**III. DID THE DEFENDANT FAIL TO ESTABLISH THAT THE NON-DISCLOSED INFORMATION EITHER WAS ITSELF ADMISSIBLE EVIDENCE OR WOULD HAVE LED TO THE DISCOVERY OF EVIDENCE THAT WAS MATERIAL AND ADMISSIBLE?**

## STATEMENT OF FACTS

On October 8, 2004, the Buena Vista grand jury returned indictments charging that Lindsay Bly feloniously distributed or possessed with intent to distribute an imitation controlled substance on **May 17, 2004** (CR04-115), and feloniously distributed or possessed with intent to distribute methamphetamine on **June 3, 2004** (CR04-116), both in violation of Code § 18.2-248. (App. 1, 2).

### DISCOVERY

On January 6, 2005, the Commonwealth's Attorney sent defense counsel his response to a discovery motion. The response included information about Robert Hoyle, the police confidential informant used in both "buys," and also stated that "there are audio CD recordings of the controlled drug purchases on May 17 and June 3, 2004" and informed defense counsel how he could review the recordings. (Add. 1-2).[1]

On March 18, 2005, the prosecutor provided a supplemental discovery response, stating that Hoyle had received $50 for each of the drug transactions involving the defendant. (Add. 3).

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[1] Several items from the trial record relevant to this appeal were inadvertently not included in the joint appendix. Consequently, the Commonwealth is including an addendum containing these items. References will be designated as "Add. ___."

## TRIAL

On March 24, 2005, the defendant waived a jury and was tried in the circuit court before Judge Humes J. Franklin, Jr. (App. 46, 51).

The Commonwealth's evidence established that during the spring of 2004 the Rockbridge Regional Drug Task Force included Investigators Slagle, McFaddin, Mays and Connor. The task force had been using Robert Hoyle as an undercover informant to buy drugs for about a year. (App. 79). Hoyle received $50 for every "buy" he made for the task force. (App. 89).

Hoyle had become involved with the police when arrested for possession of paraphernalia, which charge was subsequently dropped in exchange for his work in another case. (App. 90). He had never been convicted of a felony. (App. 92).

The two "buys" involved here took place on May 17 and June 3, 2004, at a house located at 1805 Walnut Avenue in Buena Vista. This house had four apartments, two upstairs and two down, and was owned by Pamela Lidick. (App. 54, 93). Lindsay Bly, Lidick's son, lived on the ground floor and acted as landlord. (App. 55). Bly was the task force target on both occasions. (App. 55). Both Bly and Robert Hoyle testified that they had a pre-existing relationship. (App. 79-80, 99-101).

***May 17, 2004***

The incidents of May 17 were the basis of Bly's conviction in CR04-115 involving an imitation controlled substance. (App. 1, 16).

Investigator Slagle testified that task force members met with Hoyle about 6:15 p.m. on May 17, when they searched him and determined he had no money or contraband. They then gave Hoyle $50 in marked money to make the "buy" and a digital recorder. Hoyle's orders were to go in, make the purchase and return as quickly as possible. (App. 55-56). Hoyle testified he had no drugs or money on his person when he arrived at the scene. (App. 81).

The team dropped Hoyle near the Walnut Avenue house at 6:34 p.m. (App. 57). Investigator Slagle watched as Hoyle entered through the back door of the house, stayed inside about three minutes and returned with a baggie of white powder. (App. 57).

Hoyle testified it had been raining on May 17 (App. 82) and that he had gone inside to Bly's apartment where Bly and his wife, Wendy, were present. He said he gave Bly the marked money he had received from the police and that Bly then gave him a baggie containing white powder that was supposed to be cocaine. (App. 83-84). Hoyle then returned directly to the waiting task force members. (App. 84). He gave them the powder,

which he said he had obtained from Bly. (App. 57). Slagle searched Hoyle again and found no money. (Id.).

Based on his experience, Investigator Slagle stated that the white powder Hoyle had brought out of the house "look[ed] like powder cocaine." (App. 58, 67). However, "[n]o controlled substance [was] found" when the state laboratory analyzed the powder. (App. 58, 141-142).

***June 3, 2004***

The incidents of June 3 were the basis of Bly's conviction in CR04-116 involving methamphetamine. (App. 2, 16). That day, task force members were involved in another controlled "buy" by Hoyle at the 1805 Walnut Avenue location. The target was again the defendant, Lindsay Bly. (App. 68-69).

The officers met with Hoyle around 11:00 a.m. They searched him and then gave him $100 in marked police money and a recorder. (App 68-69). It was not raining that day. (App. 85).

The officers drove Hoyle to within a block of the house and dropped him off. Officer Mays watched Hoyle walk down the alley towards the house, and then drove a bit closer and watched Hoyle go inside at 11:13 a.m. (App. 70-71) Although Officer Mays said that he did not "recall" seeing anyone else (App. 71), Hoyle testified that Bly was outside and that

they walked inside together. (App. 85). In addition, Investigator Slagle testified that on either May 17 or June 3 Bly, with whom he was familiar, and Bly's wife had been on the back porch when Hoyle had arrived and that Bly had accompanied him inside. (App. 56-57). Slagle also said that this had been the day it was not raining (App. 57), which was June 3. (App. 85).[2]

Hoyle, who testified that he had called Bly and told him he was coming, gave the defendant the money and Bly gave him a "pink substance" in "the corner of a baggie." (App. 86). Hoyle left the house at 11:22 a.m. and gave the officers a "small baggie of a rock-like substance" (App. 71), which Hoyle said was packaged and ready to go when he arrived, just as it had been on May 17. (App. 87). The "pink substance" was analyzed and determined to be .21 grams of methamphetamine. (App. 143-144).

Investigator Slagle interviewed Bly after his arrest. Bly "stated that he does buy drugs but he doesn't sell any, and he does smoke weed." (App. 60). He also said he knew his tenants Eugene Jordan and Jimmy Collins

[2] Of course, on appeal the evidence is viewed in the light most favorable to the party that prevailed at trial, here the Commonwealth. Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003).

had been selling drugs from the house and that he was trying to "clean that part of it up." (App. 60).

The defendant testified and claimed he never sold drugs, did not remember seeing Hoyle on May 17, 2004, and had had no interaction with him on June 3, 2004. (App. 98, 101). However, he admitted being home around 6:15 p.m. on May 17. (App. 105-106). Bly said he did not know Hoyle to sell or buy drugs (App. 99), and said, "I think [Hoyle] had a grudge against me for telling him not to come into the building anymore." (App. 101).

The judge denied the defense motion to strike made at the conclusion of all the evidence, convicted Bly of both charges, directed the preparation of a presentence report, and continued the case for sentencing. (App. 107-108).

## CHANGE OF COUNSEL

On November 14, 2005, defense counsel moved to withdraw due to his "strained" relationship with the defendant. (Add. 4-5). The circuit court appointed the Office of the Public Defender to represent the defendant on November 28, 2005. (App. 3).

## MOTION FOR NEW TRIAL

On March 2, 2006, Bly's new lawyer filed a Motion For New Trial, alleging that Robert Hoyle had been untruthful about the suspects in two unrelated cases in other jurisdictions and that the Commonwealth's failure to disclose this fact to Bly violated Brady v. Maryland, 373 U.S. 83 (1963). In support of the motion, counsel attached a copy of a letter dated August 17, 2005, from the Rockbridge County prosecutor to defense counsel in another case. (App. 8-10). Bly's motion did not proffer any additional evidence or ask the court to hold a hearing; the only relief sought was that the defendant be granted a new trial. (App. 6).

The letter in question stated, *inter alia*, that "[b]etween January, 2004, and August, 2004, Robert Hoyle made a total of ***83*** controlled buys for the Drug Task Force in Rockbridge County and the City of Buena Vista." (App. 8) (emphasis added). Bly focused on ***2*** of those ***83*** buys, to assert that the police were aware on November 12, 2004, which was after Bly's indictment but before his trial, that Jeffrey Breeden, a man who had been charged with selling controlled substances to Hoyle in Rockbridge County on June 14 and 16, 2004, had actually been in jail on those dates. The letter also stated that, another man from whom Hoyle said he had bought drugs at a

particular time and place in Buena Vista *may* have been seen elsewhere at that time by a task force officer. (App. 9).

In his motion, Bly asserted that the police "knew that Hoyle was lying about at least some of the buys he was claiming to have made." (App. 5). The defense, however, presented no evidence that Hoyle had ***lied*** to anyone; the motion did not state how this evidence would have been admissible at trial or proffer any admissible evidence to which it would have led.

On March 30, 2006, a hearing was held on the motion. New defense counsel indicated he had nothing to add to his motion and said, *inter alia*, "[m]y understanding is that [Bly] was convicted… pretty much solely based on [Robert Hoyle's] testimony," without any "confirming surveillance on the part of the Task Force members." (App. 113). Counsel also said that "I would not be making this argument if there was anything else to back up Hoyle's testimony, but my understanding is that there was not." (App. 115).

The prosecutor responded that "this information was chargeable to me and should have been disclosed," but argued this omission was "harmless." (App. 116-117). At another point, the prosecutor said that "the Breeden thing…should have been disclosed…." (App. 117).

Although not finding any Brady violation, the trial judge observed in passing that he was bothered by Bly's lack of a record coupled with the fact that some of Hoyle's cases had been dismissed. The judge took the motion under advisement and ordered the defendant onto supervised probation. (App. 120-121).

## PROBATION VIOLATION

Bly's probation officer wrote the circuit court on September 13, 2007, requesting a violation hearing. (App. 12-13). On October 24, 2007, the court held a hearing (App. 123--129), denied the Motion For New Trial and continued the case for sentencing. (App. 14-15).

## SENTENCING

On December 6, 2007, the circuit court sentenced Bly to serve concurrent 5 years terms for each conviction, but suspended all but 7 months of those sentences. The court also ordered Bly to be on supervised probation for 5 years upon release from incarceration. (App. 16-17). The circuit court entered its judgment on December 13, 2007. (App. 18).

## ARGUMENT

### I. THE DEFENDANT HAS PROCEDURALLY DEFAULTED ANY CLAIM THAT THE COMMONWEALTH SUPPRESSED EXCULPATORY EVIDENCE UNDER BRADY v. MARYLAND, 373 U.S. 73 (1963), AND ITS PROGENY, BY HIS COMPLETE FAILURE TO CHALLENGE ANY RULING OF THE COURT OF APPEALS.

On brief, Bly renews his argument that the trial court wrongly denied his motion for a new trial. Bly maintains the Commonwealth suppressed exculpatory evidence relating to the credibility of the confidential informant, Robert Hoyle, who testified regarding the two controlled buys he made from the defendant. The defendant, however, has committed an appellate default in this Court that bars review of his Brady claim. Accordingly, this Court need not reach the merits of the defendant's exculpatory evidence claim, but instead should reject it as procedurally barred.

The Court of Appeals made several rulings in concluding that the trial court had correctly denied the defendant's Brady claim and motion for a new trial. Specifically, the Court concluded — consistent with the principle that, absent clear evidence to the contrary, a trial court's judgment on appeal carries the presumption that the law was correctly applied to the facts — that the trial court had correctly applied the principles set forth in Brady and had made a factual determination that Bly had not been

prejudiced by the Commonwealth's non-disclosure of the information about the confidential informant contained in the letter of the Rockbridge prosecutor. (App. 37).

Further, the Court of Appeals held that, inasmuch as the trial judge had been both the trier of fact in the criminal trial as well as the judge on the post-trial Brady motion, an appellate court could "'know with certitude, from the factfinder himself, that the outcome of the proceeding would not have been different had the evidence been disclosed earlier.'" (App. 37). The Court of Appeals characterized the circuit court's finding of no prejudice as a factual finding, which the Court of Appeals concluded was enforceable on appeal because it was not patently unreasonable. (App. 37-38).

Moreover, the Court of Appeals held that there was no evidence in the record to support Bly's contention that Hoyle had concealed drugs or baking soda during the two controlled buys in this case. Instead, the Commonwealth had had to exclude only the reasonable hypotheses of innocence that flowed from the evidence, not those "'that spring from the imagination of the defendant.'" (App. 39). Finally, the Court of Appeals held that the trial judge's remark during the hearing on Bly's motion for a new trial about the defendant's lack of a criminal record and the dismissal

of certain unrelated cases in which Hoyle had been an informant did not undermine the circuit court's finding of no prejudice. (App. 39).

Yet, in his present appeal Bly does not mention any of these rulings, much less contest them. Indeed, on brief, the sole reference to the panel and en banc decisions on the Court of Appeals is a brief reference in the "Nature of the Case and Proceedings Below" portion of Bly's brief (which reference does not describe the nature of the panel and en banc decisions). (Def. Br. 2-3).[3] This Court has frequently rejected arguments as waived, because the Court of Appeals previously had rejected them on procedural or substantive grounds, and the appellant thereafter had not challenged those rulings.

For example, in Brown v. Commonwealth, 278 Va. 523, 685 S.E.2d 43 (2009), in affirming the defendant's involuntary manslaughter conviction, which resulted from his actions in a high speed chase in which a driver uninvolved in the incident had been killed, this Court stated that the defendant had not assigned error to the holding of the Court of Appeals that his conduct in driving his car was criminally negligent. Consequently, pursuant to Rule 5:17(c), "that holding is binding on appeal and we

[3] Similarly, in his conclusion, Bly merely requests this Court to remand the case to the trial court for a new trial. (Def. Br. 28). Again, the defendant neither mentions the judgment of the Court of Appeals nor asks this Court to reverse it.

consider only the remaining issue of proximate causation." 278 Va. at 529-530, 685 S.E.2d at 47.

Similarly, in Commonwealth v. Epps, 273 Va. 410, 641 S.E.2d 77 (2007), the Commonwealth appealed the ruling of the Court of Appeals in a contempt case that the circuit court judge who had testified against the defendant had not been a victim of the crime within the meaning of § 19.2-271 and thus was incompetent to testify at the contempt trial. 273 Va. at 414, 641 S.E.2d at 79. On appeal, this Court held, in part, that because the Commonwealth had not assigned error to the Court of Appeals's ruling that the matter "came before" the circuit court judge "'in the course of [her] official duties,'" as recited in § 19.2-271, that issue was not cognizable on appeal. 273 Va. at 414-415, 641 S.E.2d at 80 (alteration in original).

Likewise, this Court has regularly declined to address claims that the Court of Appeals had initially dismissed as procedurally barred, where the appellants in this Court did not challenge those default rulings. For example, in Ortiz v. Commonwealth, 276 Va. 705, 667 S.E.2d 751 (2008), the Court of Appeals held that the defendant's failure to renew his motion to strike amounted to a waiver of his sufficiency of the evidence claim. This Court held in Ortiz's second-tier appeal that his failure to assign error to the default ruling of the Court of Appeals thus barred review of his sufficiency

claim under Rule 5:17(c). Id. at 724, 667 S.E.2d at 762. See also Grattan v. Commonwealth, 278 Va. 602, 624 n.7 685 S.E.2d 634, 647 n.7 (2009) (claim that trial court ruling barring defendant's expert evidence in support of insanity defense unconstitutionally violated his right to call for evidence rejected, given uncontested default ruling of Court of Appeals that defendant had not presented argument in circuit court); Williams v. Commonwealth, 270 Va. 580, 582-583, 621 S.E.2d 98, 99-100 (2005) (Court of Appeals's procedural dismissal of two challenges to defendant's sentence, coupled with defendant's failure in appeal to this Court to assign error to default rulings, precluded their review under Rule 5:17(c)); Riner v. Commonwealth, 268 Va. 296, 309, 601 S.E.2d 555, 562 (2004) (appellant's failure to challenge procedural dismissal by Court of Appeals of his contention that trial court had applied improper legal standard in considering change of venue motion barred its review in this Court).

Consistent with these authorities, the appellant has waived the present Brady claim. In particular, his failure to even mention, much less challenge the holdings of the Court of Appeals that the trial judge, having been the trier of fact in the criminal case, had established "with certitude" that Bly suffered no prejudice under Brady by his denial of the motion for a new trial and that the trial court's ruling was a presumptively correct factual

finding removes any basis for review by this Court. Accordingly, based on Bly's wholesale default in this Court, no ground exists for reversing his convictions.

## II. THE COURT OF APPEALS CORRECTLY HELD THAT THE RECORD ESTABLISHED THE DEFENDANT WAS NOT PREJUDICED BY THE COMMONWEALTH'S FAILURE TO DISCLOSE CERTAIN EVIDENCE RELATING TO ITS CONFIDENTIAL INFORMANT.

### SUMMARY OF COMMONWEALTH'S ARGUMENT

The appellant in a Brady case has the burden to show that (1) the government failed to turn over information, (2) the information was ***materially exculpatory***, and (3) the information either would itself have been admissible or, if not, would have led to ***materially exculpatory evidence*** that was.

Here, the information was not disclosed, but there was no showing either that it would itself have been admissible or that its disclosure would have led to any *admissible* material *evidence*. A disclosure that would "not lead to admissible exculpatory evidence cannot violate Brady," because information that is "inadmissible at trial is not 'evidence' at all, for Brady

purposes." Soering v. Deeds, 255 Va. 457, 464, 499 S.E.2d 514, 417-518 (1998). (App. 37).

Even if this information had been admissible, moreover, a Brady claim cannot be based on speculation. The "'mere possibility that an item of undisclosed information might have helped the defense'" is insufficient to make out a constitutional violation. Workman v. Commonwealth, 272 Va. 633, 648, 636 S.E.2d 368, 377 (2006), quoting United States v. Agurs, 427 U.S. 97, 109-110 (1976).

The defendant here showed only that the information was not disclosed. He failed to satisfy his additional burden under Brady of establishing that it would have been admissible, or at least would have led to the discovery of admissible evidence, ***and*** that its non-disclosure prejudiced Bly.

Bly – who neither asked the trial court to hold an evidentiary hearing on his Brady claim nor proffered any evidence beyond the letter – nevertheless contends the trial court erred in not granting him a new trial based solely on his motion and oral argument that the Commonwealth committed a Brady violation by failing to disclose to the defense before trial allegedly exculpatory evidence concerning the confidential informant. However, the granting of a motion for a new trial based on after-discovered

evidence is addressed to the sound discretion of the trial court, and the court's "decision will not be reversed except for an abuse of discretion." Carter v. Commonwealth, 10 Va. App. 507, 514, 393 S.E.2d 639, 643 (1990). The Court of Appeals correctly upheld the circuit court's factual finding that the Commonwealth's failure to turn over certain evidence about its confidential informant/witness did not prejudice the defendant under Brady and its progeny.

It is rudimentary that an appellate court considers the evidence in the light most favorable to the prevailing party at trial, here the Commonwealth. Commonwealth v. Hudson, supra. The "light most favorable" to the appellee standard means that the trier of fact "'resolve[d] conflicts in the testimony" and "dr[e]w reasonable inferences from basic facts to ultimate facts.'" Harris v. Commonwealth, 53 Va. App. 494, 504, 673 S.E.2d 483, 488 (2009), (quoting Jackson v. Virginia, 443 Va. 307, 319 (1979)).

Finally, Virginia Code § 8.01-680 mandates that "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is ***plainly wrong or without evidence to support it."*** (Emphasis added). And, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

***BRADY***

When an exculpatory evidence claim is reviewed "[o]n appeal, the burden is on appellant to show that the trial court erred." Galbraith v. Commonwealth, 18 Va. App. 734, 739, 446 S.E.2d 633, 637 (1994). This Court has set out the applicable principles in considering whether a violation of Brady and its progeny has occurred:

> "There are three components of a violation of the rule of disclosure first enunciated in Brady: a) The evidence not disclosed to the accused 'must be favorable to the accused, either because it is exculpatory,' or because it may be used for impeachment; b) the evidence not disclosed must have been withheld by the Commonwealth either willfully or inadvertently; and c) the accused must have been prejudiced. [Strickler v. Greene, 527 U.S. 263, 281-82 (1999).] Stated differently, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Workman, supra, 272 Va. at 644-45, 636 S.E.2d at 374.

In order to make a successful Brady claim, all three elements must be satisfied. Lovitt v. True, 403 F.3d 171, 183 (4th Cir.), cert. denied, 546 U.S. 929 (2005). And, "[i]t is the [defendant's] burden to establish the three elements of a Brady violation. . . ." Fullwood v. Lee, 290 F.3d 663, 685 (4th Cir. 2002), cert. denied, 537 U.S. 1120 (2003).

Exculpatory "[i]nformation known to the police is information within the Commonwealth's knowledge [,] and the prosecutor is obliged to disclose [it] regardless of his actual knowledge." Moreno v. Commonwealth, 10 Va. App. 408, 418, 392 S.E.2d 836, 842-43 (1990). See Kyles v. Whitley, 514 U.S. 419, 437 (1995). Critical to Bly's Brady claim, however, is the rule that "'the mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense.'" Goins v. Commonwealth, 251 Va. 442, 456, 470 S.E.2d 114, 125 (1996), quoting Agurs, 427 U.S. at 109-10 .

"To prevail on appeal, defendants must 'demonstrate that the undisclosed evidence was [both] exculpatory and material' beyond mere speculation or possibility." Jefferson v. Commonwealth, 27 Va. App. 477, 487, 500 S.E.2d 219, 224 (1998) (citation omitted) (bracketed word in original). A defendant's mere "hope [ ] to find some exculpatory evidence" is the "type[ ] of speculative allegation[ ]" that is "inadequate to invoke the Brady mandate." Currie v. Commonwealth, 30 Va. App. 58, 68, 515 S.E.2d 335, 340 (1999) (citation omitted). See, e.g., Ramdass v. Commonwealth, 246 Va. 413, 420, 437 S.E.2d 566, 570 (1993) ("Ramdass's speculation that such statements [by his accomplices in their interviews] might contain

'potentially exculpatory evidence' imposes neither a duty of disclosure upon the Commonwealth, nor a duty of inspection in camera by the court.")

In sum, "a 'constitutional error occurs, and the conviction must be reversed, ***only*** if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.'" Teleguz v. Commonwealth, 273 Va. 458, 488, 643 S.E.2d 708, 727 (2007) (citation omitted) (emphasis added).

***THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR*.**

To establish a Brady violation, it must be shown either that the government failed to turn over admissible exculpatory evidence or that the non-disclosed information, while itself inadmissible, would have led to ***evidence*** that was admissible and that undermines confidence in the verdict. Workman, 273 Va. at 647, 636 S.E.2d at 376.

Here, the Commonwealth's Attorney stated in the circuit court that he should have disclosed the information because it was relevant to the confidential informant's credibility, but asserted any "error" was harmless. (App. 116). The Attorney General, however, does not concede that any error occurred because the letter in question was not, in fact, "material."

The panel majority found in its initial opinion that the Commonwealth was bound by the prosecutor's concession of law because the Attorney

General's disavowal amounted to an attempt to "approbate and reprobate." However, the "approbate and reprobate" rule forbids a party from "invit[ing] error . . . and then . . . tak[ing] advantage of the situation created by its own wrong." Fisher v. Commonwealth, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988). Here, of course, the prosecutor had not invited error and the Attorney General sought to *uphold* the ruling of the trial court, not reverse it.[4]

Ultimately, however, there is no significant difference between the prosecutor's substantive position and the Attorney General's. The prosecutor said that while he should have turned over the letter, his failure to do so was "harmless error." In other words, as even the initial panel majority agreed, the prosecutor effectively argued that, while there may have been a technical violation of Brady, Bly had not been prejudiced. (App. 26). This is much the same as the Commonwealth now argues[5].

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[4] Moreover, the en banc Court of Appeals did not adopt the panel's conclusion that the Commonwealth's argument in that Court amounted to approbate and reprobate. On appeal to this Court, Bly neither mentions nor objects to this fact. See pp. 13-18 of this brief.

[5]What the prosecutor's "concession" overlooked is that there is no such thing as a technical violation of Brady; the mere failure to reveal evidence favorable to the defense is never, in and of itself, a violation of Brady, which rule applies only if the defendant was prejudiced by the failure to disclose. See Teleguz v. Commonwealth, 273 Va. at 488, 643 S.E.2d at 727. Moreover, even if the Court of Appeals's panel majority was correct that

In any event, this was not a case where the trial court based its ruling on the prosecutor's concession, see Kelly v. Commonwealth, 8 Va. App. 359, 366-67, 382 S.E.2d 270, 274 (1989), and an appellate court is "not bound by concessions of law by the parties." Epps v. Commonwealth, 47 Va. App. 687, 703, 626 S.E.2d 912, 919 (2006) (en banc). More to the point, this Court has held that "[t]he Commonwealth may not be estopped from repudiating the earlier position erroneously taken by the Commonwealth's Attorney…." In Re Dept. of Corrections, 222 Va. 454, 465, 281 S.E.2d 867, 863 (1981).

Furthermore, while it is true that "[t]he Brady disclosure requirements extend to information that can be used to impeach a witness' credibility," Lovitt v. Warden, 266 Va. 216, 245, 585 S.E.2d 801, 818 (2003), the initial panel majority of the Court of Appeals *agreed* with the Commonwealth that the information involved here would not itself have been admissible. (App. 23). See Gamache v. Allen, 268 Va. 222, 229, 601 S.E.2d 598, 602 (2004)

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the prosecutor's comment was a concession that exculpatory evidence had been suppressed (App. 25), the prosecutor still argued that Bly had failed to prove prejudice. Since all ***three*** elements of the Brady test must be established, even if the first two are conceded, the defendant still has the burden of proving "prejudice." See Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995) (no Brady violation occurred even though undisclosed polygraph results were arguably favorable to defense, because polygraph itself was inadmissible and no showing made that knowing the results would have led to any other exculpatory evidence that was admissible).

(impeachment evidence "may not include the commission of specific acts of untruthfulness or other bad conduct, even though these have bearing on veracity.") On brief, Bly does not argue otherwise. Even if alleged exculpatory evidence would not have been admissible, however, a Brady violation still may occur if the non-disclosed information would have led to other, admissible, evidence that "would have created a reasonable probability that the result of the proceeding would have been different." Workman v. Commonwealth, 272 Va. at 647-48, 636 S.E.2d at 376 (citations omitted).

Here, even assuming that the information should have been disclosed, the prosecutor was correct that his unintentional failure to do so did not render Bly's convictions unreliable. The defense's Motion For New Trial was based solely on a letter a prosecutor in another jurisdiction had sent to a lawyer in a different case. This letter stated, *inter alia*, that the investigators became aware on November 12, 2004, or more than four months before Bly's trial on March 24, 2005, that Jeffrey Breeden, a man who had been charged with selling controlled substances to Hoyle in another jurisdiction actually had been in jail on those dates. The letter further recited that a task force officer "thought [he] may have seen" a certain unnamed person, from whom Hoyle said he had bought drugs at a

particular time and place in Buena Vista, elsewhere at the time of the sale. (App. 8-9).

According to Bly, this meant that the police supposedly "knew that Hoyle was lying about at least some of the buys he was claiming to have made." (App. 5). But the defense presented no evidence below that Hoyle had knowingly lied about these sales to members of the task force. Obviously, merely because someone is mistaken about something does not necessarily mean he was lying. See Waldrop v. Commonwealth, 255 Va. 210, 215, 495 S.E.2d 822, 825 (1998) (in perjury prosecution, (Commonwealth must prove not only the statements under oath were false, but that defendant knew they were false when made). And this is especially true here, given that the defense failed to develop any additional facts to buttress its allegations or call any witnesses so the judge could make a credibility determination. Indeed, almost 19 months went by between the time Bly filed his motion for a new trial and the circuit court denied it, yet the defendant did nothing in the interim to develop his claims against Hoyle. (App. 4-7, 123-129). Instead, the defense chose to rest its claim solely on conclusory allegations. See Jefferson v. Commonwealth, 27 Va. App. at 487, 500 S.E.2d at 224 ("defendants must demonstrate that

the undisclosed evidence was [both] exculpatory and material beyond mere speculation").

Importantly, moreover, unlike Bly and Hoyle, who were already acquainted with each other, there was no evidence presented showing any pre-existing relationship between Hoyle and Jeffrey Breeden or between Hoyle and the defendants in the other 82 cases. Yet, by the time of the post-trial motion the defense knew that "[b]etween January, 2004, and August, 2004, Robert Hoyle made a total of **83** controlled buys for the Drug Task Force in Rockbridge County and the City of Buena Vista." (App. 8) (emphasis added). Thus, any misidentification of Breeden or the unnamed person in Buena Vista by Hoyle could have been innocent, because the record does not show Hoyle's prior familiarity with either.

It is noteworthy that Bly's counsel, who had not obtained a transcript of the defendant's trial,[6] admitted at the March 30, 2006, hearing on his motion that he was not familiar with the evidence presented at trial, but still claimed, incorrectly, that "Bly was convicted…pretty much solely on [Robert Hoyle's] testimony," supposedly without any "confirming surveillance on the part of the Task Force members." (App. 113). Indeed, defense counsel conceded at the hearing that "I would not be making this argument if there

[6] The trial transcript was not prepared until December 31, 2007. (App. 110).

was anything else to back up Hoyle's testimony," (App. 115), an implicit admission that such corroborating evidence would render Bly's trial fair, the non-disclosed material in the letter notwithstanding. However, Judge Franklin certainly knew as the trial judge that the officers had in fact observed Hoyle enter the house on both dates and return with the packaged substances and that Investigator Slagle testified that he had watched Hoyle and Bly enter the house together the day it was not raining.

The defendant did not proffer any admissible evidence, relevant to impeachment or otherwise to which the disclosure of the letter would have led. The defense could have used the post-trial hearing to delve into Hoyle's reputation for truthfulness but, again, did not do so. In sum, if the non-disclosed evidence itself would not have been admissible, which even the panel of the Court of Appeals agreed was the case here, then in order to violate Brady it must have led to something that was admissible.

The Commonwealth does not dispute that Bly preserved a Brady claim. What the Commonwealth does assert is that the defense failed to carry its burden of establishing that a Brady violation occurred, i.e., it did not proffer or put on any evidence satisfying the Brady "prejudice" criterion.

On brief, the only thing Bly points to as evidence that he would have uncovered if the two allegedly suppressed items had been disclosed was

Hoyle's alleged reputation for untruthfulness. (Def. Br. 20). Yet, the defendant does not offer a shred of evidence from the record to support this contention. Similarly, the panel majority did not identify any admissible evidence to which earlier disclosure of the letter allegedly would have led, but said that "if appellant had been aware of the two incidents where the informant gave unreliable information, he could certainly have used this to further investigate the informant's reputation for truth." (App. 24). But the relevant issue is not what the defense could investigate, but what admissible evidence such an investigation would have revealed.[7]

In any event, there is nothing in the record, or even a proffer, that any such investigation was undertaken, even though the defense had almost ***two years*** to do so post-disclosure if it had chosen, much less that it would have led to any ***admissible evidence***. Absent such evidence, any suggestion of the possible results of an attempt to "further investigate the informant's reputation for truth" is pure speculation. Surmise and

[7] The Court of Appeals of Virginia panel opinion also stated that "[t]he trial court was clearly bothered by the Commonwealth's failure to disclose the evidence regarding the informant" (App. 26), but the judge voiced no displeasure at all with the Commonwealth's actions or inactions and found no Brady violation. (App. 84-112). Particularly considering that the trial judge was aware of all this when he denied the defendant's motion, his observation about Bly having no record can hardly be used as a basis for finding prejudice from his view of the case. The judge could have so held, but he did not.

conjecture are not evidence, and "'the mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the [Brady] constitutional sense.'" Goins, 251 Va. at 456, 470 S.E.2d at 125.

Bly does cite two cases for the proposition that "suppressed impeachment evidence regarding a key witness of the state meets Brady doctrine materiality requirements." Workman, supra, and Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003). (Def. Br. 24-25). While the Commonwealth does not disagree that such impeachment evidence may be material under the facts of a given case, these cases did not involve the type of information upon which Bly grounded ***his*** motion. Indeed, he never contended in the trial court that Hoyle's alleged lies in other cases would have had any purpose other than to impeach Hoyle's veracity in this case, an impermissible use as previously discussed. He cannot now expand the basis for his argument. See Edwards v. Commonwealth, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (en banc) ("'On appeal, though taking the same general position as in the trial court an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court.'")

The defendant, moreover, consistently ignores the principle that "defendants must 'demonstrate that the undisclosed evidence was . . . material' beyond mere speculation." Jefferson v. Commonwealth, 27 Va. App. at 487, 500 S.E.2d at 224. For example, he mentions in his brief, as he did at the argument on his Motion For New Trial, that no audio CDs of the drug buys were introduced into evidence. (Def. Br. 23). However, the Commonwealth's Attorney told defense counsel about the CDs two months before the trial and offered him access to them. (Add. 1-2). The defense could have listened to them and then itself introduced them at trial or at the post-trial hearing, but chose not to do so. See McClellan v. Commonwealth, 39 Va. App. 759, 771-72, 576 S.E.2d 785, 791 (2003) (appellant's failure to proffer evidence at trial to substantiate supposition precludes reliance on such evidence or argument on appeal). And, of course, Hoyle suggested to defense counsel during cross that his testimony was verifiable from the tapes if there was any question about what he was saying. (App. 89-90).

On brief, the defendant engages in rank speculation that during both controlled buys Hoyle "probably kept [the buy money and imitation drugs] in his crotch area." (Def. Br. 23). Indeed, in argument on the motion for a new trial, virtually the only "proffer" the defense offered was that Hoyle had

on his person a baggie of baking soda and the buy money. (App. 117-118). The Commonwealth's Attorney rightly characterized this as a "whimsical theory" with "nothing to support that" and "pure fiction." (App. 119).

It is manifest error on appeal to view the evidence in the light most favorable to the ***appellant*** and to draw evidentiary inferences in ***his*** favor. See Commonwealth v. Hudson, 265 Va. at 513-516, 578 S.E.2d at 785. And, this is especially true when such factual conclusions are not based on affirmative evidence in the record, but on a trier of facts' ability to reject testimony. Commonwealth v. Vaughn, 263 Va. 31, 36-37, 557 S.E.2d 220, 223 (2002).

Finally, the defendant has not come close to showing that the Court of Appeals wrongly held that Bly did not establish he had been prejudiced by the Commonwealth's failure to disclose "the Breeden incident and the alleged misidentification incident." (Def. Br. 19).[8] In sharp contrast, for example, to the specific evidence adduced by the defendant in Workman in support of his motion for a new trial, which this Court concluded could have substantially aided the defendant in his claim of self-defense, 272 Va. at

[8] On brief, Bly makes several factual contentions about Hoyle's claimed drug sales to a Jeffrey Tomlin. (Def. Br. 13, 23). Suffice it to say that this goes beyond anything in the record, and the defendant does not claim that any of these facts were suppressed. (App. 9).

647-650, 636 S.E.2d at 876-878, the evidence here was neither specific nor particularly significant. First, the fact that a task force officer "thought" he "may have seen" elsewhere at the time "someone he (Hoyle) identified as a certain individual in Buena Vista" who had sold Hoyle an illegal drug was so vague and undeveloped as to count for virtually nothing. Again, during his argument on the motion for a new trial the Commonwealth's Attorney aptly described this item as so "vague and sketchy" as to "really amount…to nothing…." (App. 117).

Regarding the other item allegedly suppressed by the Commonwealth, the prosecutor proffered that "it was a case of mistaken identity of a sale from a man named Jeffery, who much later it was determined that it wasn't him, that he was in jail" (App. 116). Considering, however, that this involved two of a total of 83 controlled buys made by Hoyle, and that the defendant never even proffered that there were any irregularities in the remaining 81, the mere fact that Hoyle may have misstated or misremembered the dates and/or the seller of the drugs on two occasions would not likely have substantially undermined the Commonwealth's case.

This is all the more true, given that the defendant completely denied any interaction with Hoyle on either of the two dates in issue. (App. 98,

101). Yet, Investigator Slagle, who was previously acquainted with Bly, testified that on one of the two occasions Hoyle "was actually greeted by Mr. Bly," and the two then went into the residence. (App. 57). Thus, the defendant's exculpatory accounts were directly contradicted by unimpeached evidence of the Commonwealth, thereby entitling the trier of fact all the more to discredit the defendant's testimony and conclude that he was "lying to conceal his guilt." Commonwealth v. Compton, 267 Va. 277, 385, 593 S.E.2d 210, 215 (2004).

In this regard, the Court of Appeals properly gave great weight to the conclusion of the trial judge, who had first sat as the trier of fact in convicting Bly and then denied his motion for a new trial, that no Brady violation had occurred. (App. 37). Quoting its own earlier decision in Deville v. Commonwealth, 47 Va. App. 754, 757, 627 S.E.2d 530, 532 (2006), the Court of Appeals stated that under the circumstances "we need not hypothesize how a reasonable jury would likely have reacted to the new information. We know with certitude, from the fact finder himself, that the outcome of the proceeding would not have been different had the evidence been disclosed earlier." (App. 37). See also Coley v. Commonwealth, 55 Va. App. 624, 634-635, 688 S.E.2d 288, 293-294 (2010).

This conclusion, which is utterly unchallenged by Bly on brief, is entirely reasonable. It is commonplace, for example, for the trial judge in a criminal case to later consider a habeas corpus petition arising from that criminal case. "The trial judge will have the advantage of having seen trial counsel's performance, which may be skillful or deficient, in the context of an adversary proceeding. The trial judge also will have heard the evidence and gauged the credibility of witnesses." Titcomb v. Wyant, 1 Va. App. 31, 39, 333 S.E.2d 82, 87 (1985) (citation omitted). And, the rule is the same in other jurisdictions. See, e.g., United States ex rel. Raygoza v. Bohler, 361 F.Supp.2d 779, 796-797 (N. D.Ill. 2005) ("fact that the same judge who conducted the bench trial also heard from all of the alibi witnesses and [defense counsel] at the post-trial proceeding lends significant weight to the conclusions reached at the state level" that counsel was not ineffective); Stroik v. State, 671 A.2d 1335, 1340 (Del. 1996) (because trial judge was same jurist who determined that withheld evidence was not prejudicial, "there is no logical possibility that disclosure of the criminal histories of [two prosecution witnesses] would have altered the outcome of the case"); State v. Kluppelberg, 628 N.E.2d 908, 917 (Ill. App. Ct. 1993) ("trial judge was in a unique position to evaluate all of the evidence and make a determination as to the effect of the new evidence" on ineffective counsel claim).

## III. THE COURT OF APPEALS ERRED IN NOT DECIDING WHETHER THE NON-DISCLOSED INFORMATION WAS ADMISSIBLE IMPEACHMENT EVIDENCE.

Despite the Commonwealth's argument that Bly failed to establish the admissibility of the non-disclosed information or that it would have led to other material and admissible evidence, the en banc Court of Appeals did "not decide whether the information in the letter was admissible impeachment evidence." (App. 36 n.2). This Court granted the Commonwealth's cross-appeal on this issue.

As previously noted, a defendant must establish ***all three elements*** of the Brady test. He thus has to show that the non-disclosed information was itself admissible or, if not, that its disclosure would have led to other material evidence that was. Workman, 273 Va. at 647, 636 S.E.2d at 376. If neither is established, then there is no Brady violation because "evidence that is inadmissible at trial is not 'evidence' at all, for Brady purposes." Soering v. Deeds, 255 Va. 457, 464, 499 S.E.2d 514, 518 (1998).

In Wood v. Bartholomew, 516 U.S. 1 (1995), for example, the Supreme Court found no Brady violation despite the non-disclosure of arguably exculpatory polygraph results because the results were

themselves not admissible and there was no showing that knowledge of this information would have led to any other admissible exculpatory evidence. Id. at 5-6.

The defendant simply assumed that the non-disclosed information in this case could have been used to impeach the informant. However, while Brady's "disclosure requirements extend to information that can be used to impeach a witness' credibility," Lovitt v. Warden, 266 Va. 216, 245, 585 S.E.2d 801, 818 (2003), impeachment evidence "may not include the commission of specific acts of untruthfulness or other bad conduct, even though these have bearing on veracity." Gamache v. Allen, 268 Va. 222, 229, 601 S.E.2d 598, 602 (2004). In fact, the defense failed to even proffer to the trial court how this information would have led to any admissible evidence. See Workman, 272 Va. at 648, 636 S.E.2d at 377 (defense must at least "proffer [ ] admissible evidence that would have been discovered" had it known the non-disclosed information).

The Court of Appeals declined to decide the second element of the Brady test. This failure was error prejudicial to the appellee: If the Court had decided this issue, there would have been no need for it to even address the "prejudice" prong. And, for the reasons previously advanced,

the Court of Appeals should have held Bly had not met the second prong of the Brady test.

## CONCLUSION

There having been no evidence presented to the trial judge establishing that the verdicts in the defendant's cases were not worthy of confidence, see Workman v. Commonwealth, 272 Va. at 644-45, 636 S.E.2d at 374, this Court should affirm the judgment of the Court of Appeals of Virginia affirming the judgment of the Circuit Court of the City of Buena Vista appealed herein. See Taylor v. Commonwealth, 41 Va. App. 429, 434-35, 585 S.E.2d 839 (2003) (information that "'does not lead to admissible exculpatory evidence cannot violate Brady because there is no 'reasonable probability' that its disclosure would have affected the trial.'") (citation omitted). [9]

Respectfully submitted,

[9] While the Commonwealth contends that both of Bly's convictions are "worthy of confidence," see Kyles, 514 U.S. at 434, because they were based, in some respects, on different evidence, the prejudice analysis under Brady could, theoretically, yield a different result in each case.

COMMONWEALTH OF VIRGINIA

By: _____
Counsel

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## CERTIFICATE OF TRANSMISSION AND SERVICE

On June 1, 2010, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and three copies of this brief were mailed to Ross S. Haine, Assistant Public Defender, 205 South Main Street, Lexington, Virginia 24450, counsel for the appellant.

The Commonwealth desires to present oral argument in this case.

_____
Robert H. Anderson, III
Senior Assistant Attorney General

# ADDENDUM

# Commonwealth of Virginia

OFFICE OF THE
COMMONWEALTH'S ATTORNEY
FOR THE CITY OF BUENA VISTA
P.O. BOX 150
2044 Sycamore Avenue
Buena Vista, Virginia 24416

CHRISTOPHER B. RUSSELL
Commonwealth's Attorney

(540) 261-8700
Fax (540) 261-5333

January 6, 2005

Stuart J. Pearson, Esquire
Weber Pearson, PC
2727 Electric Road, Suite 201
Roanoke, Virginia 24018

**Re: Commonwealth v. Lindsay Bly**

Dear Stuart:

This letter is the Commonwealth's written response to your Motion for Discovery filed in the above-captioned case as well as the Order which I endorsed providing for discovery.

1) In response to your request for written or recorded statements or confessions made by your client, I am not aware of any written or recorded statements or confessions. Regarding the substance of any oral statements or confessions made by your client to any law enforcement officer, please be advised as follows:

   a) On October 12, 2004, your client was arrested on two indictments returned by the grand jury dated October 8, 2004. He was subsequently interviewed at the Buena Vista Police Department. He was *Mirandized* by Investigator Tony McFaddin of the Rockbridge Regional Drug Task Force. Investigator McFaddin asked him about his involvement with drugs and selling drugs. He stated "I smoke weed. I buy drugs; I don't sell drugs." He further mentioned that Jimmy Collins and Eugene Jordan are known to him to have some involvement in drugs. He further stated "I know they deal drugs in the apartments; I'm trying to clean it up."

2) In response to your request for copies of scientific reports, etc., enclosed please find a copy of a Certificate of Analysis dated September 14, 2004 bearing FS Lab #: W04-5637. This certificate lists 1 item with no controlled substances found. Also

enclosed is a copy of a second Certificate of Analysis dated October 13, 2004 bearing FS Lab #: W04-6219. This certificate lists 1 item, methamphetamine.

3) I believe there are audio CD recordings of the controlled drug purchases on May 17 and June 3, 2004. You can make arrangements to listen to the CDs and/or obtain a copy by contacting Cpl. Darrell Slagle, BVPD, 261-6174 or Investigator Tony McFaddin, RCSO, 463-7328, or call me and I will get in touch with the officers.

4) Other than the drugs, certificates, and perhaps the audio CD referenced above, there are no other tangible materials the Commonwealth intends to introduce at this time.

5) I am not aware of any evidence or information within the possession, custody or control of the Commonwealth which tends to exculpate the accused, or of any inconsistent statements made by material witnesses.

6) I note that your Motion requests a copy of the defendant's criminal record but the Order does not indicate that the record be provided. Mr. Bly does not appear to have any criminal record.

I believe this letter properly responds to the Motion and Order for Discovery in this case. If you are aware of any other information to which you believe you are entitled, or if you have further comments or questions regarding this case, please do not hesitate to contact me.

With kind regards, I am

Sincerely yours,

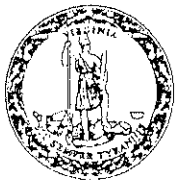
Christopher B. Russell

Enclosures

cc: Christopher W. Coleman, Clerk
Rockbridge Regional Drug Task Force

RECEIVED AND FILED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF BUENA VISTA, VA. ON
DATE 3/18/05 AT 2:00 P.M.
TEST Christopher Coleman CLERK/~~DEPUTY~~

# Commonwealth of Virginia



OFFICE OF THE
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March 18, 2005

Stuart J. Pearson, Esquire
Weber Pearson, PC
2727 Electric Road, Suite 201
Roanoke, Virginia 24018

**Re: Commonwealth v. Lindsay Bly**

Dear Stuart:

This letter is the Commonwealth's first supplemental written response to your Motion for Discovery filed in the above-captioned case as well as the Order which I endorsed providing for discovery.

1) Regarding exculpatory evidence as it may relate to witnesses for the Commonwealth, please be advised that the citizen informant in this case was paid $50. for his participation in each of the two transactions that led to the indictments in this case. Further, I anticipate that he will be paid expenses in connection with his travel time and appearance as a witness in this case.

Please call me if you have any questions. With kind regards, I am

Sincerely yours,

Christopher B. Russell

cc: Christopher Coleman, Clerk

RECEIVED AND FILED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF BUENA VISTA, VA. ON
DATE 3/18/05 AT 2:00 P.M.
TESTE Christopher W. Coleman CLERK/DEPUTY

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF BUENA VISTA

COMMONWEALTH OF VIRGINIA

V. Case No.: CR04000115 and CR04000116

LINDSAY BLY

**Motion to Withdraw as Counsel**

Comes now the defendant, Lindsay Bly, by and through his counsel of record, Stuart J. Pearson, Esquire, and files this motion and in support thereof states the following:

1. Defendant has requested that Stuart J. Pearson, Esquire, no longer represent him on this matter; and
2. Defendant desires to either retain new counsel or have counsel appointed for him; and
3. The relationship between defendant and counsel is strained to the point that it would be detrimental to the defendant for Stuart J. Pearson, Esquire, to remain as counsel of record.
4. Defendant is scheduled for sentencing on November 28, 2005, but requests a continuance so that he may either notify the court of new counsel or receive court-appointed counsel.

Wherefore, defendant and counsel respectfully request entry of an order allowing withdrawal from this matter.

WP
2727 Electric Road, Suite 201
Roanoke, VA 24018

Respectfully Submitted,

LINDSAY BLY

By: _____
Of Counsel

Stuart J. Pearson, Esquire (VSB No.: 46406)
WeberPearson, PC
2727 Electric Rd. Ste 201
Roanoke, VA 24018
540-776-6340
540-776-6341 Fax

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing was mailed first class, postage prepaid, to Christopher B. Russell, Esquire, Commonwealth's Attorney, Post Office Box 150, Buena Vista, Virginia 24416, this 9th day of November 9, 2005.

_____
Stuart J. Pearson

WP
727 Electric Road, Suite 201
Roanoke, VA 24018

11/14/05 11:00 A
Carol Boughner

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF BUENA VISTA**

**COMMONWEALTH OF VIRGINIA**

**V.** **Case No.: CR04000115 and CR04000116**

**LINDSAY BLY**

ORDER OF WITHDRAWAL

CAME THIS DAY the defendant upon a Motion to Withdraw filed by Stuart J. Pearson, Esquire, and it appearing there is no objection, it is hereby

ORDERED, DECREED and ADJUDGED that Stuart J. Pearson, Esquire, be and hereby is relieved as counsel of record for the defendant.

The Clerk is directed to forward a copy this Order to Stuart J. Pearson, Esquire.

Enter: 11/28/2005

Judge

We request this:

Stuart J. Pearson, Esquire

Lindsay Bly

Seen and not objected to:

Christopher B. Russell

WP
2727 Electric Road, Suite 201
Roanoke, VA 24018