IN THE
COURT OF APPEALS OF VIRGINIA

Record No. ---

TERRENCE RICHARDSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF ACTUAL INNOCENCE BASED ON NON-BIOLOGICAL EVIDENCE

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I. INTRODUCTION

A. The Murder of Officer Gibson in Waverly, Virginia

On the morning of April 25, 1998, at approximately 11:00 AM, Officer Allen W. Gibson ("Officer Gibson") was shot in the woods behind the Waverly Village apartment complex in Waverly, Virginia. Responding officers made it to the scene within minutes and, when they did, they found Officer Gibson laying on the ground. Officer Gibson had been shot in the abdomen and his gun lay a few feet away from him. While Officer Gibson was barely clinging to consciousness, he was still able to give a description of his alleged attackers, a description that he repeated multiple times: two black males, one tall and skinny with "dreadlocks", a white t-shirt and an "old blue baseball cap," and the other as medium build who was short and balding.[1] *Commonwealth v. Ferrone Claiborne,* Sussex County Circuit Court, Case No. 98-313, *Commonwealth v. Terrence Richardson,* Sussex County Circuit Court, Case No. 98-314, October 15, 1998 State Court Preliminary Hearing Transcript ("Preliminary Hearing Tr."), attached to the Petition as Exhibit "A", at 15, 19. Officer Gibson also stated that he was shot by the tall skinny one as a result of the struggle with him. *Id.*

B. Petitioner and Co-Defendant Ferrone Claiborne[2] Do Not Match the Description Provided by Officer Gibson

Despite the detailed description of the suspects given by Officer Gibson, authorities undertook what can only be described as a round-up of young black men in the area. Every young black male in Waverly, Virginia was gathered and interrogated until they provided investigators with any random name as allegedly being connected with the shooting or submitted to a lie detector test. Although Mr. Richardson (the "Petitioner") lived in the area, it is still unclear from the record how his name came up in the investigation. As noted by the

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[1] *See* October 15, 1998 State Court Preliminary Hearing Transcript ("Preliminary Hearing Tr."), attached to the Petition as Exhibit A, at 15, 19.

[2] Mr. Claiborne has simultaneously filed a Petition for Writ of Actual Innocence Based on Nonbiological Evidence under Record No._____.

description above, Officer Gibson had provided specific descriptions of his two assailants. Officer Gibson stated that he was shot with his own weapon after a physical altercation with his assailant, a tall and skinny African-American male with dreads. Officer Gibson also described the second assailant, an African-American male that was short in stature, as having a medium build and was balding. Petitioner matched neither of these descriptions nor did Mr. Claiborne, who is 6'00" tall, had a bald haircut, and weighed 165 pounds.

At the time of Officer Gibson's murder, Petitioner wore his hair in closely cropped cornrows, braided towards the back of his head and cornrows are not dreads and can be easily distinguished. Accordingly, not having dreads as Officer Gibson described, Petitioner could not have been the shooter. In addition, Petitioner was at the time of the shooting, 5'8", Letter from Jack Davis to David E. Boone, dated August 6, 1998 ("Davis Letter") annexed to the Petition as Exhibit "B", and thereby physically shorter in stature than Officer Gibson, who was 5'11". *Id.* Petitioner, being shorter than Officer Gibson could not be the "tall" man that was responsible for shooting Officer Gibson. It defies common sense that Petitioner could have remotely been a suspect not only because he did not have his hair in dreads (as set forth above), but also because Petitioner was shorter than Officer Gibson.

Given the descriptions provided by Officer Gibson, Mr. Richardson could not have been either of the two assailants. Nonetheless, on April 26, 1998, Mr. Richardson was arrested and charged with the capital murder of Officer Gibson. *Commonwealth v. Richardson,* Circuit Court of Sussex County, Case No. 98-314.

C. Advised By Counsel and Facing the Death Penalty, Petitioner Pleaded Guilty Even Though He Was Innocent

At arraignments, Petitioner pleaded not guilty to the charges lodged against him. However, Petitioner's lawyer, Mr. Boone, after assessing evidence provided to them by the Commonwealth's Attorney, David Chappell ("Mr. Chappell), advised Petitioner that he could face the death penalty if he was found guilty following trial. Accordingly, Petitioner, not

having the means to launch a defense to the unfair prosecution and advised by Mr. Boone, chose the common route of accepting plea deal.

On December 8, 1999, Mr. Richardson pled guilty to involuntary manslaughter (Va. Code Ann. §18.2-36), a Class 5 felony. *Commonwealth v. Richardson,* Circuit Court of Sussex County, Case No. 98-314, December 8, 1999, Plea Transcript ("Richardson Plea Tr."), annexed to the Petition as Exhibit "C".

On March 8, 2000, Petitioner was sentenced. *Commonwealth v. Richardson,* Circuit Court of Sussex County, Case No. 98-314 ("Sentencing Tr."), annexed to the Petition as Exhibit "D". Mr. Richardson was sentenced to ten (10) years in the state penitentiary with five (5) years suspended, to be followed by two (2) years on probation.

D. Petitioner Was Subsequently Charged in Federal Court and Acquitted on the Murder Charge, but Sentenced to Life Imprisonment Based on Guilty Plea in State Court

Although Petitioner took a plea in the Circuit Court of Sussex County, public outcry over what was perceived to be a lenient plea deal led federal prosecutors to launch their own investigation into the same exact crime to which Petitioner already pled guilty. Accordingly, on November 21, 2000, Petitioner was indicted on federal charges related to the same shooting of Officer Gibson and charged with two counts of conspiracy to distribute crack cocaine (21 U.S.C. 846) (one of which was ultimately dismissed by the prosecution), one count of aiding and abetting using a firearm to commit a murder during drug trafficking (18 U.S.C. 924(c), 18 U.S.C. 924(j), 18 U.S.C. 2), and one count of aiding and abetting murder of a law enforcement officer during drug trafficking (21 U.S.C. 848(e)(1)(B)). *United States v. Richardson and Claiborne*, Crim. No. 3:00CR00383, (E.D. Va.).

After a full and complete jury trial, which included the entirety of the evidence both the Commonwealth and Federal governments had obtained in support of their case against the Petitioner, the jury unanimously and unequivocally found Petitioner to be innocent of the

murder charges pertaining to Officer Gibson (aiding and abetting use of a firearm to commit murder and murder of a law enforcement officer). Transcript of Verdict in *United States v. Richardson and Claiborne*, Crim. No. 3:00CR00383, dated June 13, 2001 ("Federal Verdict Tr."), at 27-8, annexed to the Petition as Exhibit "E". Petitioner was only convicted on the remaining drug trafficking count. *Id.*

On September 27, 2001, Petitioner was sentenced by U.S. District Court Judge Robert E. Payne to a term of life imprisonment to be followed, should he ever be released, by five (5) years supervised release, and a fine was imposed. Transcript of the Sentencing in *United States v. Richardson and Claiborne*, Crim. No. 3:00CR00383, dated September 27, 2001 ("Federal Sentencing Tr."), annexed to the Petition as Exhibit "F". During the sentencing, the Court specifically noted the following:

> I find that the guilty pleas in the state courts constitute judicial admissions of participation in the event and presence at the event. I recognize that there may have been reasons why the pleas may have been entered because they may have received favorable treatment, the defendants may have received favorable treatment.
>
> But the fact of the matter is there was admitted into evidence the statement of facts and the text of the guilty pleas, and in both of those instances, these defendants admitted being present and participating in one way or another, albeit different than what is accused here by the United States in the killing of Officer Gibson.

Id. at 9.

The Court had calculated Petitioner's sentence by imposing an upward departure from the guidelines based on Judge Payne's own finding of guilt for the murder and an application of a cross reference to his state court convictions regarding Officer Gibson's death. This was a very unusual application of enhanced sentencing based on criminal activity, especially due to the acquittal by the jury in Judge Payne's own court. *Id.* Petitioner's level was at 43, thereby mandating him to life imprisonment pursuant to the United States Sentencing Guidelines.[3]

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[3] *See* United States Sentencing Commission, 2001 Federal Sentencing Guidelines Manual, available at -

Judge Payne's sentence was the functional equivalent of issuing a life sentence for a murder of which the jury had found them innocent. In fact, if not for Judge Payne's use of the upward departure and the cross-reference enhancing the sentence to life imprisonment, Petitioner would have been released almost a decade ago. This cannot be said to be anything less than an extreme miscarriage of justice.

E. Recent Investigation Reveals that Exculpatory Evidence Was Never Turned Over to Defense Counsel in violation of *Brady v. Maryland*

Three key pieces of exculpatory evidence ("New Exculpatory Evidence") were never turned over to Petitioner's counsel during the course of Petitioner's proceedings in State Court thereby constituting a *Brady v. Maryland* violation. First, in November 2007, many years after both of Petitioner's state and federal court convictions, John B. Boatwright, III ("Mr. Boatwright"), the federal trial counsel for Petitioner, sent five boxes of documents to Petitioner. However, because Petitioner was currently in a federal penitentiary, the file sat in inmate storage until 2018 when Petitioner retained present counsel who obtained the files and uncovered the handwritten statement of Miss Shannequia Gay ("Miss Gay"), an eyewitness to the scene of the crime, stating a "man with dreadlocks" was present at the crime scene following the shooting and that this "man with dreadlocks" fled the scene of the crime. Handwritten Statement of Shannequia Gay, dated April 25, 1998 ("Gay Statement"), annexed as Exhibit "G" to the Petition[4]. This Gay Statement explicitly identifies an alternate suspect, a "man with dreads" (as opposed to cornrows or having a bald haircut) as responsible for murdering Officer Gibson.

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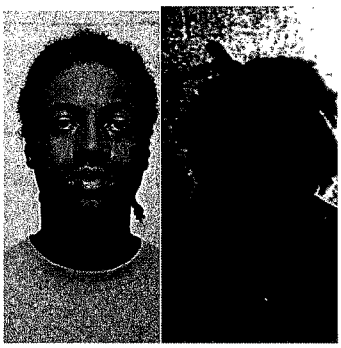
https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-5 (last visited January 18, 2021). The cross reference under the federal drug offense guideline mandated, at the time, that if a victim was killed under circumstances that would constitute first degree murder during the drug transaction, then the first-degree murder guideline would be used in calculating the defendant's sentence instead of the drug offense guideline which resulted in a life imprisonment sentence for Petitioner.

[4] Mr. Michael HuYoung (Mr. Boatwright's co-counsel) and Charles A. Gavin and Jeffrey L. Everhart (counsel for Petitioner's co-defendant, Mr. Ferrone Claiborne) have never seen a copy of the Gay Statement prior to the year 2020.

Second, in May 2020, an investigation by present counsel uncovered a photo array identification procedure conducted by state investigators in which Miss Gay identified Leonard Newby as the "man with dreadlocks." Photo Line-Up Identification of Leonard Newby by Miss Gay, dated April 25, 1998, annexed as Exhibit "H" to the Petition ("Newby Photo Array"). The individual identified by Miss Gay in the Newby Photo Array bears no resemblance to Petitioner, as indicated by the following side-by-side comparison of Mr. Richardson's booking photo (on the left) with a "man with dreads", aka Leonard Newby (on the right):



Third, in November 2020, an investigation by present counsel uncovered that an anonymous caller left a message on the State police answering machine on April 30, 1998 with a tip that identified "Leonard Newby" as a person involved, that Leonard had dreads, and that Leonard Newby had since cut his dreads. Message on State Police Answer Machine Identifying Leonard Newby, April 3, 1998 ("911 Tip"), annexed to the Petition as Exhibit "J".

This New Exculpatory Evidence constituting of the Gay Statement, the Newby Photo Array, and the 911 Tip were never turned over to Petitioners' counsel, *see* Affidavit of David E. Boone ("Boone Aff.") annexed as Exhibit "J" to the Petition, nor the Commonwealth's Attorney, David Chappell, *see* Affidavit of David Chappell ("Chappell Aff.") annexed as Exhibit "L" to the Petition. The failure of law enforcement investigators to turn over the New Exculpatory Evidence to the Commonwealth's Attorney and to Petitioner's counsel is a blatant *Brady v. Maryland* violation because the New Exculpatory Evidence provides three crucial pieces of evidence that point to a suspect, a "man with dreads" name Leonard Newby, that the

Commonwealth's Attorney should have and would have investigated had he been aware of it. Ultimately, the New Exculpatory Evidence also proves what Petitioner has maintained for over twenty years – that he is innocent of the crime with which he was charged.

F. Instant Petition

Mr. Richardson now hereby respectfully petitions this Court pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code, § 19.2-327.10 *et seq.*, for the issuance of a Writ of Actual Innocence Based on Nonbiological Evidence with respect to his conviction as a result of a guilty plea in order to remedy this miscarriage of justice. This brief is submitted in support of his Petition.

II. SUMMARY OF THE ARGUMENT

Petitioner pleaded guilty to a crime for which he is innocent based on the advice of counsel and without knowledge of material exculpatory information. Petitioner's plea was based on counsel's appraisal of the prosecution's case, a case that did not include any of the New Exculpatory Evidence, specifically, Leonard Newby, the "man with dreads" as an alternate suspect. As a result of law enforcement's failure to turn over the New Exculpatory Evidence to him, the Commonwealth's Attorney failed to investigate Leonard Newby as an alternate suspect and also failed to turn over this crucial *Brady v. Maryland* evidence to Petitioner's counsel. Not only is integrity of the Commonwealth's prosecution now called into question, but Petitioner's fundamental constitutional rights have been patently violated. Petitioner's guilty plea must be withdrawn as it was not made knowingly and voluntarily.

The failure of the Commonwealth and its agents to turn over the New Exculpatory Evidence is a violation of Petitioner's constitutional rights pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963) such that Petitioner's guilty pleas must be withdrawn. *United States v. Fisher*, 711 F.3d 460, 462 (4th Cir. 2013) (district court erred in denying defendant's motion to vacate his plea on the grounds that a law enforcement officer lied in an affidavit that formed the sole

basis for searching the defendant's home). Without full knowledge of the New Exculpatory Evidence during plea negotiations, Petitioner's guilty pleas cannot be deemed "intelligent and voluntary". Petitioner's plea was entered without his knowledge of the New Exculpatory Evidence, which is unequivocally material to the case in that it provides not just one, but three pieces of evidence identifying an alternate suspect – Leonard Newby as the "man with dreads" – who matched the physical description of the assailant provided by Officer Gibson's dying declarations. *Sanchez v. United States,* 50 F.3d 1448, 1453 (9th Cir. 1995) ("A waiver cannot be deemed 'intelligent and voluntary' if 'entered' without knowledge of material information withheld by the prosecutor.").

Furthermore, Petitioner was denied effective assistance of counsel in violation of *Strickland v. Washington,* 466 U.S. 668 (1984). Had Petitioner's counsel received the New Exculpatory Evidence, he would have never advised his client to plead guilty and would have worked towards exonerating his client. Mr. Boone, attorney for Petitioner's co-defendant, Mr. Richardson, attests that he was never provided with the New Exculpatory Evidence. Ex. K ("Boone Aff.") at ¶¶ 6-8. Mr. Boone further states that, having now seen this New Exculpatory Evidence, he would have never advised his client to take the guilty plea and would have changed his defense strategy from negotiating a favorable plea to working towards exonerating his client. *Id.* at ¶ 11.

The New Exculpatory Evidence constitutes admissible, new material evidence in light of which no rational trier of fact would find proof of Petitioner's guilt beyond a reasonable doubt and proves that Petitioner is innocent of the crime for which he plead guilty. This New Exculpatory Evidence calls into question the entire prosecution because it provides multiple pieces of evidence that another perpetrator, Leonard Newby, was the assailant, and that the Commonwealth's Attorney did not investigate this because he had no knowledge of this information. The New Exculpatory Evidence includes a handwritten statement by an

eyewitness, Miss Gay, who describes a "man with dreads" fleeing the crime scene; Miss Gay's identification in a photo-array procedure conducted by state investigators of Leonard Newby as this "man with dreads"; and a message was left on the Sussex County tip line identifying Leonard Newby as the perpetrator and that Leonard Newby had dreads but recently cut them. Exs. G-I. Thus, the New Exculpatory Evidence provides two witnesses who have identified Leonard Newby as the assailant.

Based on this powerful new evidence, the Court should issue the Writ of Actual Innocence for Nonbiological Evidence for the Petitioner. Petitioner alleges under oath, and describe more fully below, that he satisfies all of the requirements of Va. Code Ann. § 19.2-327.11:

(i) Petitioner was convicted of involuntary manslaughter on Allen W. Gibson, Jr.;
(ii) Petitioner is actually innocent of the crimes for which he was convicted;
(iii) The previously unknown or unavailable evidence supporting his innocence is described below and includes:
(1) handwritten statement of Miss Shannequia Gay ("Miss Gay") identifying the perpetrator as a man with dreads;
(2) a photo array identification by Miss Gay identifying Leonard Newby, a man with dreads, as the perpetrator; and
(3) an anonymous 911 call identifying Leonard Newby as the perpetrator.
(iv) This evidence was previously unknown or unavailable to Petitioner or his attorney at the time the conviction became final in the circuit court;
(v) After investigation, the Petitioner became aware of (1) the existence of the handwritten statement of Miss Gay in November 2007; (2) the photo array identification procedure conducted by State investigators where Miss Gay identified Leonard Newby in May 2020; and (3) the 911 call identifying Leonard Newby as the perpetrator in November 2020;
(vi) The evidence could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court;
(vii) The evidence is material, and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and
(viii) The evidence is not merely cumulative, corroborative or collateral.

Because Petitioner shows by a preponderance of evidence that he satisfies the requirements of § 19.2-327.11, he respectfully requests that this Court find that no rational trier of fact would have found proof of guilt beyond a reasonable doubt, grant the writ, and vacate

his conviction. Va. Code Ann. § 19.2-327.13.

III. STATEMENT OF FACTS

A. Virginia State Court Conviction by Guilty Pleas

On December 9, 1999, even as he maintained his innocence, Petitioner pleaded guilty to involuntary manslaughter, a class 5 felony in the Circuit Court of the County of Sussex before the Honorable James A. Luke. Ex. C. Petitioner was advised by his attorney that he could face the death penalty if he was found to be guilty following a jury trial. Mr. Boone, having reviewed all the evidence provided by the Commonwealth's Attorney, law enforcement officials, and his own investigation (evidence that did not include the New Exculpatory Evidence), believed the best course of action was to negotiate a favorable plea for his client – involuntary manslaughter. When agreed to by Mr. Chappell, Petitioner did what many reasonable young African-American men would have done in his situation, when he could not afford bail and when he did not have sufficient funds to launch a defense -- plead guilty to a crime of which he was innocent.

On March 8, 2000, Petitioner was sentenced to ten years in state penitentiary. Ex. C, Sentencing Tr., at 53.

B. No Appeal of State Court Convictions

Because of Petitioner's guilty plea, made unknowingly and unintelligently, he could not appeal his case.

IV. ARGUMENT

A. Petitioner Satisfies the Requirements for a Nonbiological Writ of Actual Innocence Pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code

Petitioner satisfies all the requirements for the issuance of a Writ of Actual Innocence Based on Nonbiological Evidence. A petitioner must allege the following:

(i) the crime for which the petitioner was convicted or the offense for which the petitioner was adjudicated delinquent;

(ii) that the petitioner is actually innocent of the crime for which he was convicted or the offense for which he was adjudicated delinquent;
(iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence;
(iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction or adjudication of delinquency became final in the circuit court;
(v) the date the previously unknown or unavailable evidence became known or available to the petitioner and the circumstances under which it was discovered
(vi) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency by the circuit court
(vii) that the previously unknown, unavailable, or untested evidence is material and, when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and
(viii) that the previously unknown, unavailable, or untested evidence is not merely cumulative, corroborative, or collateral.

Va. Code Ann. § 19.2-327.11(A). The Court of Appeals may grant the Writ "upon a finding that the petition has proven by a preponderance of evidence that all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt..." *Id.* Additional requirements for the form of the petition are provided in § 19.2-327.11(B)-(C) and Rule 5A:5(b) of the Rules of the Supreme Court of Virginia.

Petitioner has truthfully asserted all of the allegations in subsection A of § 19.2-327.11 in his Petition and this accompany Brief. *See* Petition, ¶¶ 1-15. Moreover, as discussed *infra*, Petitioner has proven by a preponderance of evidence the allegations contained in clauses (iv) through (viii).[5] If this previously unknown and unavailable evidence had been available to Petitioner at the time of his conviction, it would have been established the following facts:

- Miss Shanniqua Gay had provided a handwritten statement to state investigators that identified as a "man with dreads" as the perpetrator;
- Miss Gay identified Leonard Newby as the "man with dreads" in a photo array identification conducted by state police; and

[5] "Preponderance of the evidence" is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true. Legal Information Institute, available at https://www.law.cornell.edu/wex/preponderance_of_the_evidence.

- A 911 call to the Sussex County tip line identified Leonard Newby as the perpetrator and that Leonard Newby had dreads which he then cut.

Presented with these facts, and considering that Petitioner's guilty plea was based on evidence that did not include the aforementioned New Exculpatory Evidence and was based primarily on suspect witness statements and the lack of forensic and DNA evidence tying Petitioner to the scene of the crime, no rational trier of fact would find Petitioners guilty beyond a reasonable doubt. In fact, as further stated in Section I.D above, even without the New Exculpatory Evidence, after the full resources of the federal government was invested in investigating Petitioner and prosecuting him for the murder, a federal jury trial found the Petitioner innocent of the murder. Ex. F.

B. The Evidence Was Previously Unknown to the Petitioner at the Time the Conviction Became Final, and Could Not Have Been Discovered Before the Expiration of 21 Days Following the Entry of the Final Order of Conviction

The New Exculpatory Evidence in question was not known to Petitioner at the time the Petitioner's conviction became final nor could it have been discovered or obtained before the expiration of 21 days following the entry of the final order of conviction by the Court. Petitioner was sentenced on March 8, 2000, and it was only many years after the sentencing that Petitioner learned of the New Exculpatory Evidence. First, in November 2007, Mr. Boatwright had turned over five boxes to Petitioner but because Petitioner was in a federal penitentiary, those boxes remained in inmate storage until 2018, when present counsel reviewed the boxes and the Gay Statement was discovered. Second, it was only through extensive investigation by present counsel that Petitioner became aware that law enforcement had failed to turn over the New Exculpatory Evidence to the Commonwealth's Attorney, who then failed to turn it over to Petitioners' counsel in accordance with *Brady v. Maryland.* Therefore, Petitioner satisfies § 19.2-327.1 l(A)(iv) and (vi).

Finally, Affidavits from Mr. Boone and Mr. Chappell dated in the year 2020 confirm that the New Exculpatory Evidence was unknown to Petitioner at the time his conviction

became final. As stated above, Mr. Boone attested that he had not received any of the New Exculpatory Evidence, Ex. J. In addition, Mr. Boone further stated that if he did, he would have changed his trial strategy from reducing the murder charge to involuntary manslaughter, and launched an identification defense in attempt to exonerate his client. *Id.* at ¶¶ 4, 11 (emphasis added). Further, Mr. Boone stated that had he received this information, he would have not advised his client to not withdraw his guilty plea. *Id.* at ¶ 10.

Mr. Boone's affidavit is further buttressed by the fact that the Commonwealth neither provided the identification procedure to Petitioner's counsel nor listed Miss Gay as a witness with exculpatory evidence. Mr. Chappell attests that he does not recall receiving any of this information from the state investigators. Ex. K. Specifically, Mr. Chappell noted the following:

> I had a specific recollection of a major discovery conference that occurred at my request at the Sussex County Courthouse...Both defense counsel attended, as did the Commonwealth's investigators who brought their investigative file. I brought my case file as well, and recall going through it piece of paper by piece of paper. My purpose in having this meeting was to ensure that defense counsel had access to all the collective Commonwealth's evidence. The meeting lasted for several hours ... At the conclusion of that meeting, I was fully convinced that defense counsel had the same case information that the Commonwealth had.

Id. at ¶ 7. Mr. Chappell further noted:

> In my prosecution of these cases based on the evidence I had available to me at the time, I did not believe there was any issues as to the identities of the two criminal agents in these matters, and they were the defendants. To the best of my recollection, I do not recall receiving information that any person identified someone other than the defendants in a photo lineup as the perpetrator in the death of Officer Gibson or any accompany statements reflecting that.

Id. at ¶ 8. According, even the significant time that Mr. Boone and Mr. Chappell spent reviewing the evidence during the discovery process, the New Exculpatory Evidence was still not discovered in either of their files. It was not until the past few years that the unlawful actions of the law enforcement came to light when present counsel discovered that the New Exculpatory Evidence was never turned over to Petitioner's Counsel. Ex. J-K.

C. The Previously Unknown or Unavailable Evidence Is Material and When Considered with All of the Other Evidence in the Current Record, Will Prove that No Rational Trier of Fact Would Have Found Proof of Guilt Beyond a Reasonable Doubt

"[W]hen considering whether evidence in criminal prosecution was subject to disclosure as being exculpatory under the holding of *Brady v. Maryland*, 373 U.S. 83 (1963), the term 'material' refers to evidence that would have created a 'reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'." *Carpitcher v. Commonwealth*, 273 Va. 335, 641 S.E.2d 486 (Va. 2007) (*citing United States v. Bagley*, 473 U.S. 667 (1986); *Workman v. Commonwealth*, 272 Va. 633, 636 S.E.2d 368 (2006). In cases involving a guilty plea, previously unknown or unavailable evidence is material when but for the evidence, the defendant would not have pleaded guilty and he otherwise would not have been found guilty. *See State v. Randall,* 59 N.C. 885, 817 S.E.2d 219 (2018).[6] In making the determination of whether evidence is material, the trial court should "consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case." *Id.* at 221.

In *United States v. Fisher*, 711 F.3d 460 (4th Cir. 2013), a law enforcement officer falsely testified in his sworn search warrant affidavit that he targeted the defendant after a reliable confidential informant told him that defendant distributed narcotics from his residence and vehicle and had a handgun in his residence. *Id.* at 466. On the basis of this affidavit, the search warrant was secured, and this search warrant enabled the search of Defendant's home, where evidence forming the basis of the charge to which he pled guilty was found. *Id.* One year later, this law enforcement officer admitted that the search warrant was based on a false

[6] On April 9, 2020, the Virginia Governor signed into law the amendments removing the requirement that a petitioner filing a petition for writ of actual innocence plead not guilty and the law took effect on July 1, 2020. Accordingly, Petitioners look to laws from other states in determining the context under which materiality may be proven when filing a case of actual innocence following a plea of guilty regarding what constitutes "material" in the context of conviction by guilty plea as opposed to a conviction following trial.

affidavit in that he had lied about the confidential information, who "had no connection to the case." *Id.*

The Fourth Circuit Court of Appeals held that knowledge of this misconduct would have changed the defendant's decision to plead guilty. *Id.* at 469. Further, the *Fisher* Court also considered the statement of counsel that a "key consideration in deciding whether to enter a guilty plea or proceed at trial was the role of that [law enforcement officer's] credibility would play at trial. *Id.* Accordingly, the Court held that defendant had shown a reasonable probability that he would not have pled guilty had he known about the officer's misconduct, and that the defendant's plea was involuntary and violated his due process rights. *Id.*

Similarly, here, Petitioner would not have pled guilty if he had known about the misconduct of the law enforcement in turning over the New Exculpatory Evidence which identified a different suspect; and had Petitioner proceeded to trial, there is no doubt that a reasonable trier of fact would have found him not guilty. In fact, as set forth above in Section I.E., Petitioner was subject to a federal investigation and prosecution for the same exact offense and was acquitted of the crime of murder. Ex. F.

a. The Petitioner Would Not Have Pled Guilty If the Exculpatory Evidence Were Available At the Time of Trial

Similar to the defendant in *Fisher,* Petitioner has set forth in his Petition that the New Exculpatory Evidence demonstrates misconduct by law enforcement officials in failing to turn over exculpatory evidence that would have changed the outcome of the case. Specifically, Petitioner would not have pled guilty had he been aware of this New Exculpatory Evidence because the evidence pointed to an alternate suspect – Leonard Newby. One piece of evidence identifying an alternate suspect would be significant – collectively, the three pieces of evidence making up the New Exculpatory Evidence are not just coincidences and warranted further investigation.

Further, Mr. Boone, Petitioner's counsel stated that after seeing this New Exculpatory Evidence last year, he would have changed his strategy and focused on exonerating his client. Ex. J. Mr. Boone specifically stated that as part of the defense strategy, "an identification defense was never raised because we had no information that anyone else was a suspect in the case." Ex. J at ¶ 4. Mr. Boone specifically stated that he "explained to [Petitioner] that it was in his best interest to not withdraw his guilty plea, because there was no credible evidence to support his claim that he was not at the scene of the crime." *Id.* at ¶ 10. Finally, Mr. Boone stated:

> If I had information that someone else was identified as running from the crime scene, I certainly would have mentioned that in my letter to Mr. Richardson. Further, it would have definitely changed my defense of Mr. Richardson. Instead of a plea agreement, I would have used the identification evidence in an effort to exonerate my client.

Id. at ¶ 11.

b. Considering All of the Evidence in the Current Record, No Rational Trier of Fact Would Have Found Proof of Guilt Beyond a Reasonable Doubt Because of the Reasonable Doubt Created by the Exculpatory Evidence

"[I]n most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Missouri v. Frye*, 566 U.S. 134 (2012). In Petitioner's case, the assessment is patently clear. In fact, following a federal trial for which Petitioner was being charged with the same offense to which he pleaded guilty in his state case, Petitioner was acquitted of any charges related to the murder of Officer Gibson. Ex. F. Federal investigators and federal prosecutors have greater resources to make out a case against the Petitioner, but, yet, following a jury trial, Petitioner was acquitted of the murder of Officer Gibson.

Accordingly, if the New Exculpatory Evidence had been available to Petitioner, given all of the other evidence in the current record, especially the fact that Petitioner was acquitted

by a federal jury of murder charges, no trier of fact would have found Petitioner guilty beyond a reasonable doubt.

D. The Previously Unknown or Unavailable Evidence Is Not Merely Cumulative, Corroborative, or Collateral

The New Exculpatory Evidence is not merely cumulative, corroborative, or collateral. This element of the statute is intended to ensure that defendants are not re-litigating issues already raised at trial. *See Moore v. Commonwealth,* 53 Va. App. 334, 347, 671 S.E.2d 429, 435 (2009) (finding that where the victim's credibility was tested at trial by varying accounts and recantations, an additional recantation "would be merely cumulative of evidence already in the record"). In fact, the New Exculpatory Evidence provides grounds upon which Petitioner can withdraw his guilty plea. Here, the New Exculpatory Evidence calls into question the identification evidence that led to the Petitioner pleading guilty and actually casts doubt on the entire investigation and prosecution. While the evidence in *Moore* involved a recantation, the evidence here is much stronger exculpatory evidence identifying Leonard Newby as the perpetrator.

The Supreme Court of Appeals of West Virginia has granted a petitioner's writ of habeas petition when the State failed to disclose exculpatory DNA evidence. *Buffey v. Ballard,* 236 W.Va. 509, 782 S.E.2d 204 (2015). In *Buffey,* Joseph Buffey pleaded guilty to two counts of sexual assault and one count of robbery in West Virginia pursuant to a plea agreement. *Id.* at 206. Before Buffey entered his plea, the State failed to disclose that a "Joseph Buffey is excluded as the donor of the seminal fluid identified [from the rape kit] cuttings." *Id.* at 208. The Supreme Court of Appeals of West Virginia found that the State's failure to disclose this evidence was a *Brady* violation by concluding that, if this evidence had been disclosed, (1) Buffey would neither have pleaded guilty nor been told to plead guilty; and (2) the jury would not have convicted him. *Id.* at 220-21. With regard to the first part of the analysis, the Court credited post-conviction testimony by Buffey and his attorney that Buffey would have

proceeded to trial if he knew about the DNA evidence. *Id.* And, with regard to the second part of the analysis, the Court concluded that "[i]f this case had proceeded to trial, the DNA evidence could have been used by the Petitioner to cast a reasonable doubt upon his guilt on the sexual assault charges." *Id.* Similarly here, the New Exculpatory Evidence would have cast reasonable doubt on Petitioner's guilt.

In addition, in order for a guilty plea to be considered "voluntary", a defendant must make it "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742 (1970). A waiver of the right to trial "cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution'." *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995). "Permitting a defendant to move to withdraw a guilty plea he entered without having been given exculpatory evidence in the government's possession comports with the purpose of the prosecution's *Brady* obligation" *Buffey,* 236 W.Va. at 520, 782 S.E.2d at 215 (W. Va. 2015). Here, without awareness of the New Exculpatory Evidence, Petitioner's guilty plea must be withdrawn because it was not made voluntarily, and his Writ of Actual Innocence should be granted.

V. CONCLUSION

Mr. Richardson's Petition is based on non-biological exculpatory evidence was withheld by the state law enforcement officials. The evidence is compelling and has been found persuasive by the prosecuting Commonwealth's Attorney. For all of the reasons herein stated, Petitioner respectfully requests this Court to issue a Writ of Actual Innocence, vacate Petitioner's conviction, and correct the grave injustice that has been committed.

(COUNSEL SIGNATURES ON NEXT PAGE)

Respectfully Submitted
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2021, I hand-delivered first class, postage prepaid, a true copy of the foregoing Brief in Support of Petition for Writ of Actual Innocence to Mark R. Herring, Attorney General of Virginia, Office of the Attorney General, 202 North Ninth Street, Richmond, Virginia 23219 and Vincent L. Robertson, Sr., Commonwealth's Attorney for Sussex County, 15080 Courthouse Road, Sussex, VA 23884.

_____
Michael HuYoung

2-17-21
Date

TERRENCE RICHARDSON

Commonwealth/State of Virginia
County of ~~Sussex~~ Prince George

Subscribed and sworn to/affirmed before me on this date by the above-named person.

2/17/2021
Date

JENNIFER THOMAS
COMMONWEALTH OF VIRGINIA
REG. NO. 7228950
EXPIRES 7/31/2024
NOTARY PUBLIC

Notary Public

My commission expires: 7/31/2024

Date

Jarrett Adams, Esq., admitted *pro hac vice*

Date

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