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VIRGINIA:

IN THE COURT OF APPEALS

TERENCE JEROME RICHARDSON,

S/K/A

TERRENCE JEROME RICHARDSON,

Petitioner,

v. **Record No. 0361-21-2**

COMMONWEALTH OF VIRGINIA,

Respondent.

COMMONWEALTH'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ACTUAL INNOCENCE

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PRELIMINARY STATEMENT

Throughout this brief, references to Petitioner Terrence Richardson will be designated as "Petitioner." References to Respondent Commonwealth of Virginia will be designated as "the Commonwealth." References to the 5-page Petition for Writ of Actual Innocence and any accompanying exhibits will be designated as "Pet. __" or "Pet. Exh. __." References to the Brief in Support of Petition for Writ of Actual Innocence and will be designated as "Pet. Br. __." References to the November 1, 2021 Answer and any accompanying exhibits will be designated as "Comm. Ans. __" or "Comm. Exh. __." References to exhibits to the instant supplemental brief in opposition will be designated as "Comm. Supp. Exh. __."

PROCEDURAL HISTORY

On or about April 6, 2021, Petitioner filed the instant petition for a writ of actual innocence, along with a brief and exhibits in support. On June 3, 2021, this Court ordered the Office of the Attorney General to respond to the petition for writ of actual innocence within 60 days. On July 23, 2021, the Commonwealth filed an unopposed motion praying that the Court grant the Commonwealth an additional 30-day extension of time from the previous August 2, 2021 due date for its responsive pleading. The Court granted the Commonwealth such an extension and set the due date for the Commonwealth's response on September 1, 2021.

On August 25, 2021, the Commonwealth filed an unopposed motion praying

that the Court grant the Commonwealth an additional 30-day extension of time from the previous September 1, 2021 due date for its responsive pleading. The Court granted the Commonwealth such an extension and set the due date for the Commonwealth's response on October 1, 2021.

On September 27, 2021, the Commonwealth filed an unopposed motion praying that the Court grant the Commonwealth an additional 30-day extension of time from the previous October 1, 2021 due date for its responsive pleading. The Court granted the Commonwealth such an extension and set the due date for the Commonwealth's response on October 31, 2021.

The Commonwealth filed its Answer on November 1, 2021, in which it joined in the petition pursuant to Code § 19.2-327.10:1. On January 11, 2022, the Court confirmed that oral argument would be set on February 8, 2022.

Jason S. Miyares was inaugurated as Attorney General of Virginia on January 15, 2022. New counsel for the Commonwealth noticed their appearance in this matter on January 25, 2022, and two days later, the Commonwealth moved the Court to continue the February 8, 2022 oral argument. Petitioner filed an opposition to the motion to continue on January 28, 2022.[1] By January 31, 2022 order, this Court granted a 14-day continuance of the oral argument, which was rescheduled for

[1] The Commonwealth first learned that Petitioner had filed a written opposition to its motion to continue the oral argument on January 31, 2022, at which time it requested and received Petitioner's opposition via email.

February 22, 2022.

On February 4, 2022, the Commonwealth filed a letter with the Court indicating that it no longer adhered to many of the positions it had advanced in its November 2021 Answer and that a motion for leave to file a supplemental brief and exhibits would follow. The Commonwealth filed this motion on February 7, 2022. Petitioner also filed a responsive letter on February 7, 2022 asking the Court to reject any supplemental briefing and to order the appearance of former Attorney General Herring and his representatives to argue the Commonwealth's position.

On February 15, 2022, the Commonwealth filed a motion to strike Petitioner's request regarding the former Attorney General contained in his February 7, 2022 letter. The Commonwealth has not been served with a copy of Petitioner's response in opposition.[2]

On February 18, 2022, this Court granted the Commonwealth's motion for leave to file a supplemental brief and exhibits in support. The Court set deadlines for both parties' supplemental briefs and encouraged the parties to expedite their filings.

SUMMARY OF THE ARGUMENT

Petitioner's knowing, intelligent, and voluntary guilty plea to involuntary

[2] The Commonwealth first learned that Petitioner had filed a written opposition to its motion to strike in a news article published by WRIC-TV on February 18, 2022. As of the filing date of the instant supplemental brief, the Commonwealth has not received a copy of Petitioner's opposition to its February 15, 2022 motion to strike.

manslaughter, including the transcript of his statements during the plea colloquy and the evidence proffered by the Commonwealth's Attorney against him, is substantive evidence that creates a strong legal presumption in favor of the validity and sufficiency of Petitioner's conviction. The Court should view the instant proceeding through the lens of Petitioner's self-supplied conviction.

The Commonwealth withdraws its previous concession that the result of a separate federal case against Petitioner is "evidence" in this actual innocence proceeding. The Commonwealth now maintains that even if the result of Petitioner's federal case is "evidence," that evidence includes factual findings that further confirm Petitioner's guilt of the involuntary manslaughter offense challenged here.

The Commonwealth withdraws its previous concessions that the items referred to by Petitioner as the "Gay Statement" and the "Newby Photo Array" are newly discovered within the meaning of Code § 19.2-327.11(A)(iv) and (vi). Petitioner has failed to affirmatively prove that these items were not known to him or his counsel before his conviction became final. Furthermore, the record before this Court confirms that Petitioner knew of the existence and import of the two individuals allegedly implicated in the "Gay Statement" and the "Newby Photo Array" before his conviction became final, and he failed to make a diligent effort to contact and interview them. Petitioner has also failed to authenticate and prove the materiality of these items. The Commonwealth further withdraws its previous

request for an evidentiary hearing to determine the materiality of these items. The Commonwealth finally submits that new evidence demonstrates that even if these items are newly discovered, properly authenticated, and material, they are nonetheless cumulative, corroborative, or collateral to information known to the Petitioner himself on the day of his arrest, April 26, 1998.

The Commonwealth withdraws its previous concession that no rational fact finder would have convicted Petitioner on the record before this Court. The Commonwealth further withdraws from its previous position joining the petition for writ of actual innocence[3] and now submits that Petitioner has failed to satisfy his burden of proof under Code § 19.2-327.11(A).

ARGUMENT

I. Petitioner's Guilty Plea and the Evidence Given in Support Thereof Create a Strong Presumption that Sufficient Evidence Existed to Support Petitioner's Conviction

[3] Although the Commonwealth previously conceded that Petitioner should be granted a writ of actual innocence, this Court is not bound by concessions of law by any party. *See, e.g., Bush v. Commonwealth*, 68 Va. App. 797, 803 n.1 (2018). And even when the Commonwealth concedes that a writ of actual innocence should be granted, the Court still must consider whether the entire record before demonstrates that the petitioner has met his burden to prove the eight distinct showings under Code 19.2-327.11(A) by the preponderance of the evidence. *See id.* (commending the Attorney General for candor but noting the Court's obligation to "review the record independent of this concession of law."); *see also Copeland v. Commonwealth*, 52 Va. App. 529, 532 (2008) (accepting the Attorney General's concession that a writ of actual innocence should be granted while noting that "such a confession does not relieve this Court of the performance of the judicial function.").

Petitioner bears the burden of proving by the preponderance of the evidence that on the record before this Court, no rational factfinder would have convicted him. *See* Code § 19.2-327.11(A)(vii). The most significant part of the record before the Court is Mr. Richardson's guilty plea to involuntary manslaughter and the evidence proffered by the Commonwealth in support of the plea. *See* Comm. Sup. Exh. 1 (Conviction and Sentencing Orders); Pet. Exh. C at 5–10 (Plea Transcript).

A. Principles Regarding Guilty Pleas in the Actual Innocence Context

In July 2020, this Court was granted jurisdiction to consider petitions for writs of actual innocence from petitioners who had pled guilty or no contest. *See* 2020 Va. Acts chs. 993, 994. This change, along with the decrease in the burden of proof required of petitioners, was substantial. However, the legal and evidentiary standards in actual innocence cases are otherwise unaltered. The General Assembly's decision to permit petitioners who had pled guilty to bring actual innocence cases was a procedural change, not a legislative license to relitigate their cases *de novo* as if their guilty pleas never occurred.

The Supreme Court of Virginia holds that in actual innocence proceedings, the existence of a factually supported guilty plea creates a strong presumption in favor of the sufficiency and validity of a conviction:

> [W]e note that a guilty plea admits all the criminating facts alleged and the statutory elements of the offense charged. Stated differently, a guilty plea allows a reviewing court to presume that sufficient evidence existed to support the conviction. Such a presumption may be

> strengthened by taking evidence in conjunction with the guilty plea. While it is true that the primary purpose of hearing evidence in conjunction with a guilty plea is to determine whether an accused is guilty or not and the measure of guilt, such evidence has the ancillary effect of more fully developing the record, thereby providing a reviewing court with evidence against which any newly discovered evidence may be compared.

See In re Watford, 295 Va. 114, 126–27 (2018) (internal citations and quotation marks omitted). Still, "the existence" of a guilty plea is only one of many factors this Court must consider in evaluating the instant Petition. *See id.* at 126.

The record in *Watford* established only the mere "existence" of a guilty plea; it did not include a factual proffer or statement of facts supporting Watford's 1978 guilty plea to rape. *Id.* at 127. Watford's lenient suspended sentence for the serious crime of rape further diminished the Court's reliance on the mere existence of Watford's guilty plea. *Id*. Subsequent sworn victim testimony excluded Watford from the attack, and new DNA analysis decreased the possibility of Watford's involvement in the rape. *Id.* at 128–29. These unusual and compelling factual circumstances led the Court to grant a writ of actual innocence. *Id.* at 127–29.

In the same way that the Supreme Court examined the record of Watford's guilty plea and found it to be lacking, this Court can and should consider the substantial record of Petitioner's guilty plea, including Petitioner's statements during the plea colloquy and the evidence proffered against him.

B. Petitioner's Transcribed Guilty Plea Colloquy is Substantive Evidence Against Him in the Instant Actual Innocence Proceeding

Petitioner, although initially indicted for capital murder, pled guilty to the reduced involuntary manslaughter charge at issue here on December 8, 1999 in Sussex County Circuit Court. Pet. Exh. C at 1–2. Petitioner was accompanied by his retained attorney, David Boone, Esq. *Id.* at 1. Petitioner did not plead "no contest" or plead guilty while maintaining his innocence pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *Id.* at 2–3. The court clerk inquired twice regarding Petitioner's plea, and Petitioner responded "guilty" twice. *Id.* at 2–3. Petitioner pled guilty to the reduced charge of involuntary manslaughter "straight up," or without a plea agreement. Pet. Exh. D. at 3 (sentencing transcript).

After stating twice that he was pleading "guilty," the guilty plea hearing proceeded to the plea colloquy, during which Petitioner was asked eighteen questions by the presiding judge to determine whether he was entering his guilty plea knowingly, voluntarily, and intelligently. *See* Rules of the Supreme Court of Virginia 3A:8(b)(1) (requiring Virginia circuit court judges to determine before accepting a guilty or no contest plea that the plea is made voluntarily and with an understanding of the nature of the charge and the consequences of the plea). Petitioner confirmed his name, date of birth, and highest level of education. Pet. Exh. C at 3. Petitioner indicated that he was the person charged in the amended involuntary manslaughter indictment, that he understood the charge, and that he had

discussed the Commonwealth's burden of proof with his attorney. *Id.*

Petitioner agreed that he decided to plead guilty after discussing whether to plead guilty or not guilty with his attorney. *Id.* at 3–4. Petitioner further agreed that he was entering his guilty plea freely and voluntarily, and because he was in fact guilty. *Id.* at 4. Petitioner indicated that he understood that by pleading guilty, he waived his right to a jury trial, his Confrontation Clause rights, and his right to remain silent. *Id.* Petitioner agreed that that no entity such as the Commonwealth's Attorney or the police had forced him to plead guilty. *Id.*

Petitioner additionally agreed that he was entirely satisfied with the services of his attorney. *Id.* at 5. Petitioner confirmed that by pleading guilty, he might be waiving his right to appeal the Court's decision. *Id.* Petitioner acknowledged that he had understood all the Court's questions. *Id.* After the Commonwealth's Attorney proffered the facts that would have been presented at trial, the court accepted Petitioner's guilty plea, found him guilty of involuntary manslaughter, and found that the plea had been "freely, intelligently, and voluntarily entered with an understanding of the plea and its consequences." *Id.* at 11.

C. The Statement of Facts Proffered by the Commonwealth's Attorney and Agreed to by Defense Counsel is Substantive Evidence Against Petitioner in the Instant Actual Innocence Proceeding

After Petitioner completed his plea colloquy with the court, the Commonwealth's Attorney proffered the evidence that would have been presented

if the matter had gone to trial. *Id.* at 5–10. Those facts established, in relevant part, that Petitioner, co-defendant Ferrone Claiborne, and Shawn Wooden[4] went to Waverly Square Apartments to get some "dope" on April 25, 1998. *Id.* at 6. Petitioner and Claiborne instructed Wooden to be a lookout. *Id.* On-duty Waverly Police Officer Allen Gibson arrived at the Waverly Square Apartments, and Wooden gave Petitioner and Claiborne an audible signal to let them know the police were there. *Id.* Petitioner and Claiborne ran into the woods behind the apartment complex. *Id.* Wooden heard what sounded like a gunshot moments later. *Id.*

Wooden met up with Petitioner 15 minutes later, and Petitioner was out of breath, nervous, and concerned. *Id.* Some time later, Petitioner took Wooden outside and admitted to Wooden that he "accidentally shot the cop." *Id.* at 7. As Officer Gibson lay dying in the woods, he gave the best description of his attackers that he could. *Id.* at 7–8. The preliminary hearing transcript was introduced into evidence, page 68 of which showed that Petitioner threatened to harm Wooden and his family if he told anyone he had shot the officer. *Id.* at 10; Pet. Exh. A at 68.

Petitioner's trial counsel agreed that the evidence summarized by the

[4] Shawn Wooden maintained in a 2021 interview that "there was nothing that he had to offer or say that could help Richardson or Claiborne," and "[t]he only things he could say on the stand would be harmful to them, so he prefers not to say anything." Comm. Supp. Exh. 2. Wooden also noted that Petitioner's attorney "admonished him for his testimony and called him a liar," leading Wooden to tell Petitioner's attorney not to contact him again. *Id.*

Commonwealth's Attorney would have been the Commonwealth's evidence if the case were tried. *Id.* Petitioner's trial counsel did not contest any of the Commonwealth's evidence or provide any other proffers. *See id.*

D. Petitioner's Guilty Plea, the Plea Colloquy, and the Statement of Facts in Support Create a Strong Presumption of Petitioner's Guilt

The substantial record before the Court regarding Petitioner's guilty plea to involuntary manslaughter is distinguishable from the sparse record in *Watford*, in which the Supreme Court noted that "due to the limited record in this case, we only have Watford's guilty plea and its attendant circumstances to consider." *Watford*, 295 Va. at 126. This Court can and should consider Petitioner's express, unqualified admissions of guilt during the plea colloquy,[5] in which Petitioner claimed neither innocence nor mistaken identity while admitting there was proof beyond a reasonable doubt of his guilt of involuntary manslaughter.

The Court should place weight on Petitioner's express waivers of important constitutional rights as well his counsel's concession that the Commonwealth's trial evidence would have resulted in an involuntary manslaughter conviction, including evidence of Petitioner's confession to shooting Officer Gibson. Although the

[5] While defendants' statements during plea colloquies receive different standards of appellate review when challenged by pre- or post-conviction motions to withdraw guilty pleas, *see, e.g.*, *Howell v. Commonwealth*, 60 Va. App. 737 (2012), no such motion is properly before this Court. The Commonwealth submits that Petitioner's statements during the plea colloquy are subject only to the favorable presumption of weight and validity afforded them by *In re Watford*.

testimony of Shawn Wooden was subject to significant impeachment throughout the preliminary hearing, Pet. Exh. A at 70–87, the Court should also consider Wooden's testimony that Petitioner threatened harm to him and his family. The Court should therefore view this case through the strong legal presumption in favor of the validity of Petitioner's plea and conviction.

II. This Court Should Not Consider the Verdicts in Petitioner's Subsequent Federal Trial as "Evidence," but Even if it Does, the Totality of that Evidence Confirms Petitioner's Guilt of Involuntary Manslaughter

A. Petitioner's Federal Verdict is not "Evidence" within the Meaning of the Actual Innocence Statutory Scheme

The Commonwealth previously encouraged the Court to grant Petitioner a writ of actual innocence for the primary reason that "a federal jury found Mr. Richardson not guilty of the murder of Officer Gibson." Comm. Ans. 1; *see also* Comm. Ans. 1–3, 68–70, 73–77. The statutorily prescribed procedures for the writ of actual innocence, however, do not allow for the quasi-preclusive application of a separate verdict or holding to the underlying conviction. *Cf. Waller v. Commonwealth*, 70 Va. App. 772 (2019) (declining to apply holdings from two subsequently decided cases to an actual innocence proceeding, as such holdings were not "evidence" under the actual innocence statutes); *In re Rhodes*, 44 Va. App. 14 (2004) (similar reasoning). The Commonwealth now submits that the federal jury's acquittal of Petitioner should not be considered here because it is not "evidence."

This Court holds that "[e]vidence is something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact." *Knight v. Commonwealth*, 71 Va. App. 492, 518 (2020) (internal quotation marks omitted) (quoting *In re Pierce*, 44 Va. App. 611, 612 (2004)). The Court also holds that "[a] fact is '[a]n actual or alleged event or circumstance, as distinguished from its legal effect, or interpretation.'" *In re Neal*, 44 Va. App. 89, 90 (2004) (quoting Black's Law Dictionary 628 (8th ed. 2004)).

The federal jury's verdict acquitting Petitioner of two offenses and convicting him of another was not a statement as to whether certain facts at issue in Petitioner's state involuntary manslaughter trial were proven or disproven. Instead, it was the federal jury's interpretation of how the law it was instructed on applied to the facts, documents, and other evidence it heard during the trial. The verdict was a simultaneous synthesis of facts and application of those facts to the law, and the Commonwealth's prior argument incorrectly encouraged the Court to consider the legal effect of the acquittals. While Petitioner's federal verdicts are a unique circumstance in the procedural history of this case, they do not fit the definition of "evidence" that can be considered in actual innocence proceedings.[6]

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[6] The Commonwealth contends that the evidence developed and presented during Petitioner's federal trial is not newly discovered. Petitioner knew as early as his state sentencing hearing that the federal government was conducting its own preindictment investigation of the case, rendering his claim of after-discovered evidence unpersuasive. Pet. Exh. D at 41–42. The Commonwealth also submits that

While Petitioner asks the Court to consider his federal acquittal of murder in a subsequent federal prosecution as probative of his innocence here, Petitioner put no formal evidence regarding his federal case before the Court except certain factual proffers and the sentencing transcript. He did not list the federal verdict, or more appropriately, documents reflecting the federal acquittals, as items of evidence he wished the Court to consider as newly discovered. Pet. 1–2 (listing the "Gay Statement," "Newby Photo Array," and "911 Tip" as the sole items of allegedly newly discovered evidence before the Court).

The first formal request that the Court consider Petitioner's federal case as "newly discovered evidence" came from the Commonwealth, not the Petitioner. Comm. Ans. 68–70. The Commonwealth provided over 1,000 pages of documents related to the federal case on behalf of Petitioner. Comm. Exh. C, D. Petitioner, however, never requested leave to amend his petition to include any aspect of the federal case as an item of newly discovered evidence supporting his innocence. No party can unilaterally interpose a substantive amendment to a pleading on behalf of another party. The Commonwealth could not, and did not, place Petitioner's federal

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the evidence presented at Petitioner's federal trial, even if properly before the Court, is necessarily cumulative, corroborative, or collateral of the evidence then available in his state proceeding. *See* Code § 19.2-327.11(A)(viii).

acquittal before the Court as newly discovered evidence when Petitioner did not himself argue that the federal acquittal was newly discovered evidence.[7]

B. Even if Petitioner's Federal Verdicts Constitute "Evidence," they are Immaterial

If the Court determines that Petitioner's federal verdicts constitute evidence for actual-innocence purposes, the Commonwealth submits that they are immaterial because they relate to factual and legal circumstances which are dissimilar to his involuntary manslaughter conviction. The Commonwealth acknowledges the "truth" of Petitioner's acquittals. *See Dennis v. Commonwealth*, 297 Va. 104, 126 (2019) ("[T]o be 'material,' within the meaning of Code § 19.2-327.11(A)(vii), evidence supporting a petition for a writ of actual innocence based on non-biological evidence must be true.") (quoting *Carpitcher v. Commonwealth*, 273 Va. 335, 345 (2007)). However, "truth" is most relevant when the item of evidence at issue is a recantation. The Commonwealth submits that the traditional considerations of relevance and admissibility exclude evidence of Petitioner's federal verdicts from this proceeding.

i. Petitioner's Federal Verdicts are Immaterial Because They Invoke Matters Not Properly at Issue in the Instant Proceeding

Petitioner was charged in Sussex County Circuit Court with crimes only related to the shooting death of Officer Gibson; there were no drug charges involved.

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[7] The Commonwealth concedes that if the Court believes any of the evidence of the federal trial is material, such evidence would properly be part of the Court's analysis of the totality of the evidence under Code 19.2-327.11(A)(vii).

Comm. Ans. 4. The single reference to drugs in the state case was Shawn Wooden's testimony that he met Petitioner and Ferrone Claiborne to get some drugs. And Petitioner pled guilty to the Virginia common-law crime of involuntary manslaughter; there were no charges before the Sussex County Circuit Court related to drug trafficking.

In contrast, all of the charges in Petitioner's federal trial involved drug trafficking. The Commonwealth submits that evidence of a federal drug conspiracy that predated the killing of Officer Gibson by seven years and required proof of different elements, Comm. Exh. C, is immaterial because it invokes additional matters that were not properly at issue in Petitioner's involuntary manslaughter case. *Contra Turner v. Commonwealth*, 282 Va. 227, 250–51 (2011) (noting that in an actual innocence case, "[e]vidence that relates to a matter that is properly at issue in the case is said to be material.") (quoting C. Friend, The Law of Evidence in Virginia § 11–1 at 431 (6th ed. 2003)).

ii. Petitioner's Federal Verdicts Neither Factually nor Logically Preclude an Involuntary Manslaughter Conviction

Petitioner was acquitted of "murder of a law enforcement officer during drug trafficking and use of a firearm to commit murder during drug trafficking." These acquittals relate only to federal *murder* charges, an elevated grade of homicide with more exacting proof requirements than common law involuntary manslaughter. *See*

Commonwealth v. Gregg, 295 Va. 293, 297 (2018) (discussing the elements of common-law involuntary manslaughter).

Neither of the crimes of which Petitioner was acquitted in federal court were the legal or factual equivalent to involuntary manslaughter under Virginia law. And because the federal jury was not instructed on any lesser-included homicide offenses, its verdicts are immaterial to the question before this Court: whether Petitioner can prove by a preponderance of the evidence that no rational trier of fact would have found him guilty of the entirely different crime of involuntary manslaughter. *See* Comm. Exh. D at 1210–16 (transcript of federal jury instructions).

iii. Even if Petitioner's Federal Verdicts are Material Evidence, the Evidence Presented at His Federal Trial is Cumulative, Corroborative, or Collateral

Petitioner's federal murder acquittals do not translate to the facts or legal elements of his state guilty plea. But even if the federal verdicts were applicable to the instant proceeding, the evidence presented in the federal trial is necessarily "cumulative, corroborative, or collateral" to the already-decided issue of who killed Officer Gibson. Code § 19.2-327.11(A)(viii); *see In re Barron*, 44 Va. App. 536, 539 (2004) (excluding evidence of a hospital report that merely corroborated the Commonwealth's existing evidence and the testimony of another witness).

Review of the federal trial transcripts, Comm. Exh. D, indicates that the United States Government prosecuted Petitioner based on the same conduct that

resulted in Officer Gibson's death, adding only a later-substantiated drug trafficking allegation. Although Petitioner did not present a defense when he pled guilty to involuntary manslaughter in state court, his alibi defense at the federal trial was known and available to him before his guilty plea to involuntary manslaughter became final. Comm. Exh. N (noting that Petitioner's defense attorney had planned to present an alibi if there was a state trial). The evidence presented by Petitioner in his defense at his federal trial, including any alibi,[8] is therefore cumulative, corroborative, or collateral to information known and available to Petitioner before his involuntary manslaughter conviction became final.

iv. The Court Should Reject the Evidence of Petitioner's Federal Verdicts

No Virginia prosecutor would have been permitted by a trial judge to introduce evidence during the guilt phase of a homicide-only trial that the defendant had been convicted of a federal drug crime. Yet here, Petitioner makes a relatively unprecedented request that this Court consider traditionally inadmissible "other crimes evidence" for the limited purpose of collaterally attacking his state

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[8] Petitioner's alibi defense in his federal trial was rejected and found to be false. Comm. Exh. D at 845–1005 (defense evidence); *id.* at 1150, Defense Closing Argument ("First of all, we put on an alibi defense. Now, [defense attorney] Mr. Gavin told you in his opening statement it's not the strongest alibi."); *id.* at 1198–1199 (jury instructions regarding government's allegation of fabricated alibis); *United States v. Richardson & Claiborne*, 51 Fed. Appx. 90, 94 (noting that the district court based its finding that Petitioner and Claiborne killed Officer Gibson on, among other evidence, the men's false alibis).

conviction. The Court should decline to consider any of the circumstances of Petitioner's federal trial in this proceeding, as they would have been immaterial and inadmissible in any trial had in Sussex County Circuit Court. *See Haynesworth v. Commonwealth*, 59 Va. App. 197, 222 (2011) (Humphreys, J., dissenting) (arguing that evidence in actual innocence proceedings "must be evidence that would be admissible in court.").

C. <u>If Petitioner's Federal Verdicts are Material Evidence, they Confirm His Guilt of Involuntary Manslaughter</u>

The United States Court of Appeals for the Fourth Circuit affirmed all of the critical factual findings made against Petitioner by the federal district court, including the following:

> We conclude that the district court did not commit clear error in finding that [Petitioner and Ferrone Claiborne] killed Officer Gibson. The district court based this finding on Gibson's reasonably accurate description of [Petitioner and Claiborne] as his assailants, the corroborating testimony of Wooden and another eyewitness, [Petitioner and Claiborne's] guilty pleas in state court, and their false alibis. These facts amply support the finding that [Petitioner and Claiborne] murdered Gibson.
>
> Similarly, the finding of the district court that [Petitioner and Claiborne] killed Gibson with malice aforethought is not clearly erroneous. The district court emphasized that the three men struggled and that Claiborne pulled Gibson from the back while Richardson pulled him from the front. Further, the court noted that Gibson's firearm had a medium trigger pull and three safety features to prevent an accidental shooting, and that Richardson had the weapon in his hand after the shot was fired. This evidence supports the conclusion that Richardson intentionally shot Gibson. At the very least, malice was established because [Petitioner and Claiborne] engaged in reckless and wanton

conduct that presented a high risk of death or serious bodily harm to Gibson.

United States v. Richardson & Claiborne, 51 Fed. Appx. 90, 94–95 (4th Cir. 2002).

The Commonwealth submits that if the Court considers evidence of Petitioner's federal acquittals, the Court must also consider the incriminating factual findings made against Petitioner in the district court and affirmed on appeal, establishing that Petitioner murdered Officer Gibson by clear and convincing evidence. This factual finding alone, if accepted by the Court, precludes Petitioner from proving by the preponderance of the evidence that no rational fact finder would have convicted him of involuntary manslaughter.

III. The Evidence Petitioner Proffered is Not Newly Discovered

A. Summary of Proffered Evidence

Petitioner has proffered a pretrial letter from his trial investigator that placed his trial counsel on notice of, among other things, information regarding Leonard Newby's hairstyle and presence near the crime scene at the time of the offense. Pet. Exh. B. Petitioner has also proffered a handwritten statement he attributes to then 9-year-old Shannequia Gay, Pet. Exh. G,[9] a photo array he claims is evidence that Ms.

[9] Although Petitioner refers to Petitioner's Exhibit G as the "Gay Statement" throughout his pleadings, the Commonwealth maintains that this document has not been properly authenticated such that it can be attributed to any particular declarant. *See infra* Part IV.A.

Gay identified Leonard Newby as the murderer, Pet. Exh. H,[10] and notes related to a Virginia State Police 911 tip naming several others as allegedly being involved in Officer Gibson's death, Pet. Exh. I. In an attempt to establish that these items of evidence were unknown to Petitioner and his counsel before his conviction became final, Petitioner has attached affidavits from the trial prosecutor and his trial defense attorney. Pet. Exh. J, K. Petitioner has also proffered transcripts from the proceedings against Petitioner in Sussex County courts. Pet. Exh. A, C, D.

The Commonwealth proffered a Virginia State Police report regarding Ms. Gay predating Petitioner's conviction, Comm. Exh. E, as well as reports of Ms. Gay's interviews with the ATF after Petitioner's conviction became final, Comm. Exh. F, K. The Commonwealth further proffered evidence regarding unsuccessful attempts to locate Ms. Gay. Comm. Exh. G, I. The Commonwealth re-interviewed the trial prosecutor and the trial defense attorney. Comm. Exh. M, N. The Commonwealth also re-interviewed law-enforcement personnel who may have had contact with Ms. Gay before Petitioner's conviction became final. Comm. Exh. O, P, Q. The Commonwealth proffered additional evidence regarding Leonard Newby's whereabouts at the time Officer Gibson was killed. Comm. Exh. S, T, U,

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[10] Although Petitioner refers to Petitioner's Exhibit H as the "Newby Photo Array" throughout his pleadings, the Commonwealth maintains that this document has not been properly authenticated such that any of its context or import can be ascertained. *See infra* Part IV.A.

V. The Commonwealth proffered Virginia State Police file notes that apparently accompanied the 911 tip referenced in Pet. Exh. I. The Commonwealth additionally proffered two news articles regarding the case. Comm. Exh. L, W.

Both parties proffered portions of the transcripts of Petitioner's federal trial and other documents related to the federal case. Pet. Exh. E, F; Comm. Exh. C, D.

For the reasons more fully set forth below, the Commonwealth submits that the information contained in Petitioner's Exhibits B, J, and K, as well as Commonwealth's Exhibit N and Commonwealth's Supplemental Exhibits 4 and 5, render the Court's consideration of any other exhibits unnecessary.

B. Petitioner has Failed to Establish that the Proffered Evidence Regarding Shannequia Gay and Leonard Newby is Newly Discovered

Petitioner's main contention on brief is that previously unavailable evidence shows that witness Shannequia Gay identified Leonard Newby as the "man with dreads" who murdered Waverly Police Officer Allen Gibson: "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." Pet. Br. 7. Petitioner argues that previously undisclosed evidence establishes that Leonard Newby more closely matched Officer Gibson's description of his attackers. Pet. Br. 8. However, the record before this Court demonstrates that Petitioner has failed to prove that the proffered evidence he attributes to Gay and Newby is newly discovered within the meaning of Code § 19.2-327.11(A)(iv)(a).

i. The Proffered Information from Trial Counsel Fails to Establish that Any of the Proffered Evidence is Newly Discovered

1. Information from Trial Prosecutor Chappell

Former Sussex County Commonwealth's Attorney David Chappell declares that to the best of his recollection, he did not receive information that another person had killed Officer Gibson or information that someone had identified an alternate killer in a photo lineup. Pet. Exh. J at 2, ¶ 8. However, Chappell preliminarily qualified his affidavit by noting that he had a limited recollection of Petitioner's case. *Id.* at 1, ¶ 3. Chappell noted that he had prosecuted thousands of cases since Petitioner's, and he did not have access to his case file for the matter before compiling his affidavit. *Id.*

Chappell averred that his office used an "open file" discovery policy[11] in Petitioner's case and that the relationship between prosecution and defense was "collegial." *Id.* at 2, ¶ 6; Comm. Supp. Exh. 3 (letter from Chappell to Boone memorializing General District Court discovery and the "open file" policy). He also

[11] Undersigned counsel has reviewed the files maintained by the Sussex County Circuit Court Clerk regarding Petitioner and co-defendant Claiborne's proceedings in Sussex Circuit Court. Undersigned counsel has also consulted with employees of the Sussex County Circuit Court Clerk's Office and the current Sussex County Commonwealth's Attorney. After review, and upon information and belief, no records exist in the Sussex County Circuit Court Clerk's Office or the Sussex County Commonwealth's Attorney's Office showing a circuit court discovery request or the substance of what was disclosed in discovery. *But see* Comm. Ans. 65–66 (claiming, without providing supporting documentation, that attorney Boone "filed for discovery [and] filed for the disclosure of *Brady* material").

stated that he hosted a major discovery conference in which he and Mr. Boone went through "all the Commonwealth's collective evidence." Pet. Exh. J at 2, ¶ 7.

In a subsequent interview, Chappell stated that he did not specifically recall the name "Shannequia Gay," and he did not recall having subpoenaed Shannequia Gay until being confronted with documentation to the contrary. Comm. Exh. M at 1; *see* Comm. Supp. Exh. 4 (partial Circuit Court subpoena request letter, subpoena, and service return for Shannequia Gay and other witnesses). Chappell believes that the information regarding the "man with dreads" came from someone other than Shannequia Gay. Comm. Exh. M at 1.

2. Information from Trial Defense Attorney Boone

Petitioner's trial attorney David Boone avers that to the best of his recollection, he did not receive a copy of a photo lineup identifying a suspect or a handwritten statement identifying a suspect. Pet. Exh. K at 2, ¶¶ 6–7. However, Boone's recollection is based on his review of unknown portions of the record that either he or Petitioner deemed "relevant." *Id.* at 2, ¶ 9.

Boone stated in a September 2021 interview that as a result of a medical condition, he has memory issues. Comm. Exh. N at 1. Two years before Boone's 2021 interview, he was shown unknown documents by a member of the University of Virginia Innocence Project; these unknown documents apparently assisted Boone in recalling details of Petitioner's case. *Id.* Boone confirmed that he no longer had

"any of the documents produced by him or [Investigator] Davis relating to the Richardson case." *Id.*

3. Petitioner Has Failed to Prove that He Was Not Previously Aware of the Allegedly Newly Discovered Evidence

The Commonwealth does not ascribe bad faith or any improper motives to either trial counsel. Nevertheless, the information provided by both counsel is equivocal at best regarding the allegedly newly discovered evidence. Contrary to Petitioner's assertion, neither counsel had access to their trial files when they provided their affidavits, and neither counsel can affirmatively tell the Court that upon review of the files, the newly proffered documents were not present. *Contra* Pet. Br. 14 ("According, (sic) even the significant time that Mr. Boone and Mr. Chappell spent reviewing the evidence during the discovery process, the [allegedly newly discovered evidence] was still not discovered in either of their files."). Both counsel are providing information exclusively based on their memories of a case that occurred more than two decades and several thousand clients and cases ago.

Prosecutor Chappell noted that he has handled thousands of cases between Petitioner's case and the present day, and that his recollection of Petitioner's case is limited. Chappell did not even remember that he had subpoenaed Shannequia Gay to testify on behalf of the Commonwealth in Sussex County Circuit Court. Moreover, because defense attorney Boone has viewed unknown documents from multiple third-party sources that have colored his recollection, and he candidly

admits that he suffers from a memory issue related to a medical condition, it is unclear whether his recollections regarding the "newly discovered" evidence are based on materials that were ever part of this case.

Apart from the equivocal affidavits and interviews of trial counsel, the record otherwise lacks proof of the full scope of documents that Petitioner had access to before he pled guilty. Contradicting Petitioner's claims even further, the record establishes that attorney Boone "recalled the name Shannequia Gay and stated that he was aware of her prior to the plea agreement." Comm. Exh. N at 1. Attorney Boone also believes that the prosecutor "may have provided him with the name [Shannequia Gay] along with a summary of who she was and what she said." *Id.*

Despite claiming that he was never made aware of the "Gay Statement," attorney Boone independently related certain details that are substantially similar to those contained in the "Gay Statement," namely, that "Gay observed a male coming out of the woods and remembers that her cousin had a bicycle near the crime scene." *Compare* Comm. Exh. N at 1 *with* Pet. Exh. G ("Gay Statement") at 1 ("My aunt to[] me to go outside and play with "Quay." He is my three year old cousin."); 2 ("The noise I heard in the woods was the guy with the "dreads."); 2–3 ("I knew that "Quay" had forgotten his Bike, so I turned around and was thinking about going to get it. But that's when I saw the guy with "dreads" come back up the hill.").

Attorney Boone's ability to independently recall details contained in the "Gay

Statement" contradicts his claim that he has never seen or been made aware of the contents of the "Gay Statement." The Commonwealth submits that on these facts, Petitioner has failed to establish that any of the allegedly newly proffered evidence was not previously known to him or his counsel. Code § 19.2-327.11(A)(iv)(a).

ii. Even if the Proffered Documents are "Newly Discovered," Petitioner's Current Claim that He Did Not Match Officer Gibson's Description of His Attackers is Not

Assuming *arguendo* that the documents proffered by Petitioner and the Commonwealth are newly discovered under Code § 19.2-327.11(A)(iv)(a), any contention contained therein that Petitioner did not match the description given by Officer Gibson of his assailants is a contention that Petitioner and his counsel asserted and explored before his conviction became final. Commonwealth's Supplemental Exhibit 5 shows that when Petitioner was arrested the day after the shooting in 1998, he told the magistrate that he didn't know what was going on, that he had "braids not dreads," and that he insisted he was around "the Wire" near New Street until 1pm. *See supra* Part II.B.iii (noting that Petitioner's false alibi was known to him before his involuntary manslaughter conviction became final).

The transcript of the preliminary hearing held on October 15, 1998 in Sussex County General District Court also indicates that Petitioner's counsel inquired at length about the potential discrepancy between Officer Gibson's description and his client's appearance. Pet. Exh. A at 35–40. Petitioner's counsel specifically asked the

state trooper who overheard Officer Gibson's dying declaration if the trooper could describe Petitioner's hairstyle when he was arrested. *Id.* at 35. The presiding judge[12] interposed an unprompted objection to this line of questioning, noting that different people might interpret the term "dreadlocks" differently. *See id.*

At the conclusion of all the preliminary hearing evidence, and in the presence of Petitioner's attorney, the presiding judge noted the following:

> I agree with the officer's description, as I said earlier. It's -- it would be so subjective for a -- for a young officer. I mean he may see . . . see braids and think it's dreadlocks. I know what dreadlocks are. But they could be, for a person who is not familiar with hairdos, African-American hairdos, may say dreadlocks when they're thinking about braids. So the Court doesn't give that much credence to the testimony of the dying declaration.

Id. at 93.

Despite his professed non-involvement in the killing of Officer Gibson, Petitioner somehow knew within 24 hours of the shooting that, as he lay dying, Officer Gibson had described an attacker who did not fully match Petitioner's own description. Petitioner's trial counsel followed up on the discrepancy at the preliminary hearing, and the presiding judge validated his concern regarding the

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[12] The presiding judge was the Honorable Gammiel G. Poindexter, who served as the first African-American Commonwealth's Attorney for Surry County from 1975 to 1995 and was the first African-American judge of the Sixth Judicial Circuit. *See* Alpha Kappa Alpha Sorority, Incorporated, *Pioneering Members: Gammiel Gray Poindexter*,
http://akapioneers.aka1908.com/index.php/component/mtree/vocations/law-1/united-states-attorney-2/2399-poindexter-gammiel-gray?Itemid=.

potential subjectivity and inaccuracy of Officer Gibson's description of his attackers. Petitioner therefore knew well before his conviction became final that a "man with dreads" was described as an attacker, that he personally did not fully match that description, and that a colorable discrepancy regarding the subjectivity of Officer Gibson's description of his attacker existed.

iii. Even if the Proffered Documents are "Newly Discovered," Petitioner's Current Claim that Leonard Newby is the "Man with Dreads" Described by Officer Gibson Is Not

Assuming *arguendo* that Petitioner's evidence regarding Leonard Newby is "newly discovered" and that the evidence affirmatively identifies Newby as a "suspect," Petitioner's own evidence shows that he was not only aware of Leonard Newby's existence in August 1998, but that he was exploring Leonard Newby as a person of interest. Pet. Exh. B. Petitioner's trial investigator Jack Davis wrote a letter to trial counsel David Boone dated August 6, 1998, in which Davis informed Boone of the following regarding Leonard Newby:

> Waverly Officer Ken Russell, and former brother-in-law of Officer Allen Gibson, having seen Leonard Newby, who did have actual dredlocks[sic], in the Sussex Trace Apartments, a short distance from where the shooting took place in the Waverly Village Apartments, on the morning of the shooting. This information had come from Chief Sturrup. I spoke with Officer Russell and he said he had not seen Newby, but had been told by a woman in the Waverly Village Apartments, whom he believed to be Hope Pierce, that she had heard that someone had seen Newby in Sussex Trace that morning (4/25/98). When Joe Higgins and I were in Sussex and Surry Counties last Friday, we interviewed Ms. Pierce. She didn't even remember having told Officer Russell about having been told by someone about Leonard

Newby being seen in Sussex Trace, until prompted.

Pet. Exh. B at 1.[13]

Petitioner's investigator notably reported to attorney Boone that Leonard Newby had "actual dredlocks." The qualifier "actual" before "dredlocks" indicates that Petitioner's team knew that Petitioner's hairstyle did not completely match Officer Gibson's description of his attackers in his dying declaration. Petitioner's Exhibit B shows that he was actively gathering evidence regarding Leonard Newby, whom he clearly believed in August 1998 was a closer match to Officer Gibson's description of his attackers. His claim in the instant petition that Leonard Newby was unknown to him is therefore meritless.

iv. This Court Should Follow its Holdings in Tyler v. Commonwealth *and Impute Pretrial Knowledge of the "Gay Statement" and the "Newby Photo Array" to Petitioner*

Petitioner's "Gay Statement" and "Newby Photo Array" occupy similar legal footing as the evidence recently discussed by this Court in *Tyler*. As the Court charged Tyler with imputed knowledge of Rodgrick's testimony, the Court should also charge Petitioner with imputed knowledge of the "Gay Statement" and the "Newby Photo Array."

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[13] Further undermining Petitioner's current claim that evidence regarding Leonard Newby is newly discovered and material, Petitioner's investigator ended the paragraph about the information collected regarding Newby with the sentence "**This initial information appears to be extremely flawed.**" Pet. Exh. B at 1 (emphasis in original).

Petitioner Tyler, convicted of felony strangulation, petitioned the Court for a writ of actual innocence, producing an affidavit in support thereof from a witness called Rodgrick. *Tyler v. Commonwealth*, 73 Va. App. 445, 456 (2021). Rodgrick did not testify at Tyler's trial, but he had been in the car with Tyler and the victim when the strangulation occurred. *Id.* at 455–56. Rodgrick claimed in the affidavit that he never saw Tyler choke the victim while they were all together in the car. *Id.* The Court found that Rodgrick's affidavit, although previously "unknown" in a technical sense to Tyler and his trial counsel, was not newly discovered under Code § 19.2-327.11(A)(iv)(a):

> Although in some sense Rogdrick's current version of events may have been unknown to Tyler and his counsel at the time of trial, Rogdrick's existence, identity, and his role as an eyewitness were known. Tyler knew who Rogdrick was and knew that he was present in the car. Thus, in a very real sense, Rogdrick's version of events was knowable at the time of trial; he simply needed to be called as a witness.

Id. at 463–64.

The facts regarding Tyler's witness Rodgrick are so similar to the circumstances regarding Shannequia Gay that the above quotation remains true after substituting "Gay" for "Rodgrick" and "Richardson" for "Tyler."

Petitioner and his counsel were similarly aware before trial of the existence of Leonard Newby, including the fact that Newby may have been near the scene of the shooting and possibly matched the description of the shooter more closely than Petitioner. Pet. Exh. B. For the same reasons that apply to the "Gay Statement," and

assuming *arguendo* that the "Newby Photo Array" is what Petitioner claims it is, Petitioner is charged with pretrial knowledge of the "Newby Photo Array" by operation of the Court's holding in *Tyler*.

v. Even if the "Gay Statement" and the "Newby Photo Array" are Newly Discovered, Petitioner Fails to Prove He Made a Diligent Effort to Acquire the Items Before His Conviction Became Final

Assuming *arguendo* that the "Gay Statement" and the "Newby Photo Array" are newly discovered under Code § 19.2-327.11(A)(iv)(a), Petitioner has still failed to carry his burden to prove to the Court that these items "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." Code § 19.2-327.11(A)(vi)(a).

This Court holds that to satisfy the "diligence" requirement in Code § 19.2-327.11(A)(vi)(a), an actual innocence petitioner must demonstrate that he has made a "devoted and painstaking application" to acquire the evidence he now claims is newly discovered. *Tyler,* 73 Va. App. at 464 (quoting *Madison v. Commonwealth*, 71 Va. App. 678, 702 n.14 (2020)). The Court held in *Tyler* that even assuming that Rodgrick's affidavit was previously unknown to Tyler under Code § 19.2-327.11(A)(vi), Tyler had still failed to establish that a diligent attempt to obtain Rodgrick's testimony before his conviction became final. *Tyler,* 73 Va. App. at 464. Tyler's trial counsel knew of Rodgrick's existence before the trial; however, counsel

did not know where Rodgrick was or how to find him. *Id.* at 455. Tyler's trial counsel did not explain any of the steps taken to locate Rogdrick. *Id.*

In finding the absence of "diligence" in *Tyler*, this Court noted similar circumstances regarding "diligence" in a 2020 actual innocence case. *Id.* at 464 (citing *Madison v. Commonwealth*, 71 Va. App. 678, 701–02, 702 n. 14 (2020)). The Court noted the following:

> In *Madison*, a petitioner claimed that an uncooperative eyewitness' version of events was unavailable to him at his trial. Given that the eyewitness' address was known, we concluded that the petitioner's failure to speak with him before trial and/or reliance on a subpoena that had been issued by the Commonwealth did not meet the diligence standard.

Tyler, 73 Va. App. at 464 (citing *Madison*, 71 Va. App. at 702 n. 14).

The record in the instant case indicates that Shannequia Gay, like the witness in *Madison*, was at least "unresponsive" in that multiple attempts by the Commonwealth to interview her failed. Comm. Exh. I. The record also confirms that Shannequia Gay's general location was known and publicly available before trial. Comm. Supp. Exh. 4. Petitioner's failure to speak to Shannequia Gay before trial on these facts is analogous to Madison's failure to exercise diligence. Similarly, this Court found that Tyler's counsel's statement that he "had tried and failed to locate Rogdrick" was not "diligence" under Code § 19.2-327.11(A)(vi). The Commonwealth submits that Petitioner's investigator's single assertion that he "attempted to locate and meet with [Shannequia Gay] but was unsuccessful"

similarly fails to establish the required diligence.[14]

Despite his pretrial knowledge of Shannequia Gay, Leonard Newby, and the evidence they might provide, Petitioner has provided this Court with no evidence regarding his attempts to obtain the testimony or account of Shannequia Gay or Leonard Newby before his conviction became final. The only evidence supplied by either party regarding Petitioner's pretrial attempts to contact either witness was provided by the Commonwealth. Comm. Ans. 55 ("Boone indicated that he and his investigator discussed 'the young girl' in 1998. Boone said his investigator attempted to locate and meet with her but was unsuccessful.) (citations omitted); Comm. Exh. N. And because there is no evidence before the Court regarding any diligent effort to locate or contact Leonard Newby, Petitioner has similarly failed to demonstrate a "diligent" pretrial effort to learn of the existence and import of the "Newby Photo Array."

IV. Even if the "Gay Statement" and "Newby Photo Array" are Newly Discovered, they are Immaterial

Assuming *arguendo* that the "Gay Statement" and the "Newby Photo Array"

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[14] The Commonwealth submits that Shannequia Gay's testimony was even more "knowable" than that of Rodgrick or the witness in *Madison*. Gay was subpoenaed as a witness for the Commonwealth in Circuit Court. Comm. Supp. Exh. 4. The subpoena service record, which is file-stamped "November 19 1999" and is part of the documents publicly available in the Sussex County Circuit Court Clerk's Office, indicates that substituted service was obtained on Shannequia's father. Additionally included is a partial reproduction of a subpoena request form publicly filed by trial prosecutor Chappell in the Sussex County Circuit Court on November 5, 1999.

are newly discovered within the meaning of Code § 19.2-327.11(A)(iv) and (vi), Petitioner has failed to demonstrate their materiality for multiple reasons.

A. The "Gay Statement" and "Newby Photo Array" are Improperly Authenticated and Violate the Best Evidence Rule

An actual innocence petitioner is entitled to present any evidence he believes satisfies the requirements of Code § 19.2-327.11(A); this may include affidavits, transcripts of interviews, police reports, and other evidence not subject to the traditional adversary test of cross-examination. In response, the Commonwealth is similarly entitled to present evidence "not included in the record of the case, including evidence that was suppressed at trial." *Id.* § 19.2-327.11(C).

Despite the relaxed standards regarding admissibility of evidence in actual innocence proceedings, the Commonwealth submits that the before considering a document in the actual innocence context, the Court should require a threshold showing that a proffered item of evidence is what the proponent claims it to be. *See, e.g.*, *Jackson v. Commonwealth*, 13 Va. App. 599, 602 (1992) (citation omitted) ("Authentication is merely the process of showing that a document is genuine and that it is what its proponent claims it to be.). Although "the general standard for authentication of a document is not particularly strict," *id.*, the authentication standard can be difficult to satisfy when years or even decades have passed since the creation of a document. The four methods of authentication under Virginia law are direct evidence, handwriting identification testimony, admission, and waiver. *Id.* at

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602, 602 n. 1 (citing C. Friend, *The Law of Evidence in Virginia* § 180 (3d ed. 1988)).

The "Gay Statement" and the "Newby Photo Array" are not properly authenticated on the record before this Court. As to the first of the four authentication methods, there is no competent direct evidence properly before the Court regarding the authenticity of the documents. Although Detective Greg Russell acknowledged that he wrote a statement while Shannequia Gay dictated her recollection to him, Comm. Exh. H, there is no evidence before the Court as to whether Petitioner's Exhibit G, the "Gay Statement," is the same thing or is substantially similar.

Additionally, Petitioner's attorney is the sole fact witness to the discovery of the documents. Pet. 2–3. Petitioner admits that the photocopies of these documents "sat in inmate storage" in an unnamed federal prison between 2007 and 2018. Pet. Br. 7. As such, it is unclear who may have had access to the documents during those eleven years. And because the originals are unavailable, Petitioner cannot prove that the photocopies attached to his Petition are in the same or substantially similar condition as they were when they were created, and that they have not been altered or damaged since their creation. The record is similarly unclear as to whether the "Gay Statement" was written at or near the time the writer observed or heard the account of Ms. Gay's alleged statement such that the writer's memory was fresh. While these questions may probe only the weight of the evidence and not its admissibility, the Commonwealth submits that the litany of unanswered questions

regarding these documents must exclude them from consideration.

The "Gay Statement" and the "Newby Photo Array" do not qualify for consideration under the second and third[15] methods of authentication. There is no affirmative evidence on this record other than bare assertions as to whose handwriting is on the "Gay Statement," a fact previously acknowledged by the Commonwealth. *See* Comm. Ans. 56 (referring to "the handwritten statement purportedly signed by Shannequia"). While there is technical evidence that Shannequia Gay's handwriting may be on the "Newby Photo Array," no competent evidence exists to give context to what the initials mean. Comm. Exh. J at 2 ("The officers are unclear whether this indicated any identification or whether it indicated that she recognized the photo from the earlier single photo identification process."); Comm. Ans. 62 (noting the Commonwealth's inability to determine who was depicted in the "Newby Photo Array" and whether Shannequia was identifying a suspect or someone who was merely similar to a suspect).

The "Gay Statement" and the "Newby Photo Array" similarly fail under the fourth method of authentication by circumstantial evidence. As admitted in the Commonwealth's Answer, the record is so conflicted as to the context and import of

[15] The "Gay Statement" and "Newby Photo Array" fail to qualify under the third method of authentication, admission, because there is no admission on the record before the Court as to their authenticity.

these documents that the Commonwealth previously requested an evidentiary hearing to resolve the conflicts. Comm. Ans. 56–58, 60–64. The Commonwealth now withdraws from that request. Unlike cases involving live witness testimony or recantations, this Court has the full ability as it sits in its original jurisdiction to determine the materiality and veracity of documentary evidence without further factual findings. The Commonwealth submits that the totality of the conflicting and contradictory circumstantial evidence before the Court regarding the context and veracity of the "Gay Statement" and the "Newby Photo Array" render Petitioner unable to satisfy the Court that documents are what he claims they are.

The handwritten "Gay Statement" and the written markings on the "Newby Photo Array" similarly run afoul of Virginia's best evidence rule. Because the documents are photocopies of originals that ostensibly exist or existed at some point, the Commonwealth submits that in order for the Court to consider them for their truth in an actual innocence proceeding, Petitioner must either produce the original writings or otherwise sufficiently account for their absence. *See Bradshaw v. Commonwealth*, 16 Va. App. 374, 379 (1993) (citations and internal quotation marks omitted) ("In Virginia, the best evidence rule provides that where the contents of a writing are desired to be proved, the writing [the primary evidence] itself must be produced or its absence sufficiently accounted for before other evidence of its contents can be admitted."). Petitioner has produced no evidence as to whether the

original "Gay Statement" and "Newby Photo Array" exist, or a sufficient explanation for their absence such that the presentation of copies is appropriate.

The Commonwealth submits that when the Court considers the trial record against any newly proffered evidence, fundamental fairness and basic evidentiary principles should require the newly proffered evidence to satisfy similar standards in order for the newly-proffered evidence to be deemed "material." *See Haynesworth,* 59 Va. App. at 222 (2011) (Humphreys, J., dissenting) (arguing that evidence in actual innocence proceedings "must be evidence that would be admissible in court.").

The legislative intent of the actual innocence statutes is "to provide relief only to those individuals who can establish that they did not, as a matter of fact, commit the crimes for which they were convicted." *Carpitcher*, 273 Va. at 345 (2007). The writ is unavailable to "individuals who merely produce evidence contrary to the evidence presented at their criminal trial." *Id.* And the Commonwealth submits that the writ must be unavailable to individuals whose petitions rest solely on documentary evidence of dubious weight and veracity.

News articles containing incomplete recitations of facts and other opinions about ultimate issues of fact are plainly inadmissible. Comm. Exh. L, W. One-sided affidavits, police reports, and interview statements not subject to the common adversary test of cross-examination violate the Confrontation Clause and could

never be introduced over a criminal defendant's objection. Comm. Exh. E, F, G, H, M, N, O, P, Q, S, T, U, V. Photocopies of unavailable original writings that cannot be properly authenticated would be inadmissible in a trial. Pet. Exh. G, H. Incomplete transcripts omit potentially important context and may distort the perception of a proceeding. *E.g.,* Comm. Exh. D at 5–6 (Federal trial transcript from June 4, 2001 skips from page 5 to page 165); 962–63 (Federal trial transcript from June 8, 2001 skips from page 3 to page 25).

Trial-tested evidence admitted subject to the rules of evidence and other due process considerations, including a transcribed concession of its accuracy and sufficiency by the Petitioner at his guilty plea hearing, should not be relegated to a position below ex parte affidavits, one-sided interview transcripts, and decades-old photocopies offered without explanation as to the location or contents of the original. The Commonwealth submits that arguably inadmissible or otherwise inauthentic evidence such as the "Gay Statement" and the "Newby Photo Array" is immaterial, and it should not form the basis of the Court's decision whether to declare a person actually innocent of a serious crime.

B. Petitioner has Failed to Prove That The "Gay Statement" and "Newby Photo Array" Relate to His Guilt or Innocence

Even viewed in the light most favorable to Petitioner, the "Gay Statement" and the "Newby Photo Array" have no demonstrable relationship to Petitioner's guilt or innocence. *See Altizer v. Commonwealth*, 63 Va. App. 317, 327–28 (2014)

(implicitly overruled on other grounds by *In re Watford*, 295 Va. 114 (2018)). Petitioner has failed to establish that the newly discovered evidence is "material to a factual conclusion regarding the elements of the offense(s) for which the petitioner was convicted . . ." *Altizer*, 63 Va. App. at 327–28.

The "Gay Statement" establishes that a policeman followed a man with dreads into the woods, and after a loud noise, the man with dreads ran back out of the woods. No reasonable or logical reading of the "Gay Statement" leads to Petitioner's desired conclusions that (1) Shannequia Gay witnessed the murder; (2) that the "man with dreads" was an alternate suspect; (3) that the "man with dreads" was Leonard Newby; or, (4) that the "man with dreads" was someone different than Petitioner.

Petitioner's arguments regarding the materiality of the "Gay Statement" and the testimony of Shannequia Gay are further undermined by the fact that despite his counsel's pretrial knowledge of Gay's potential eyewitness testimony, Comm. Exh. N, Gay was only ever subpoenaed as a witness for the Commonwealth to give incriminating evidence against Petitioner. *See* Comm. Supp. Exh. 4.

Even after the federal prosecutor publicly filed exculpatory information regarding Gay, Comm. Exh. J, Petitioner did not bother to call Gay as a witness. *See* Comm. Exh. D;[16] Pet. Exh. E, F (transcripts of federal trial containing no reference

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[16] Shannequia Gay's presence at the scene of the shooting was likely implicitly referenced at the federal trial. Comm. Exh. D. at 924, Testimony of John Bolen

to Shannequia Gay). Petitioner's course of conduct regarding Gay before his guilty plea in Sussex County Circuit Court and during his federal trial demonstrates that he likely deemed the materiality of any testimony Gay had to offer to be minimal. Petitioner's statements to the contrary decades later are unpersuasive.

V. Even if the Newly Proffered Evidence is Material, Petitioner Fails to Show that the Totality of the Evidence Proves that No Rational Trier of Fact Would Have Found Proof of Guilt Beyond a Reasonable Doubt

The writ of actual innocence is available "only to those individuals who can establish that they did not, as a matter of fact, commit the crimes for which they were convicted." *Carpitcher*, 273 Va. at 345 (2007). Petitioner cannot so prove. He has previously admitted at length that he committed the involuntary manslaughter offense he now challenges, and the factual finding that Petitioner's killing of Officer Gibson was murder was affirmed on appeal.

Evidence that Petitioner was acquitted of a different homicide offense with heightened factual requirements is irrelevant. Furthermore, Petitioner's federal acquittal of murder was not an implied acquittal of involuntary manslaughter that affects the instant conviction. Because the "Gay Statement" and the "Newby Photo Array" do not identify an alternate suspect, they have no bearing on Petitioner's guilt or innocence and have no weight in the "totality of the evidence" analysis. The

("And there was a little girl, a young lady I might say. She went over there and said, there is a man laying over there, officer laying over there.)

Commonwealth maintains its previous argument that Petitioner's "911 Tip," Pet. Exh. I, is of no value because it is anonymous, it is of dubious veracity, and is contradicted by other credible evidence. Comm. Ans. 66.

A guilty plea is not an exercise of convenience or a mere bargaining chip. It requires significant, incriminating admissions from a person that are not made lightly. In the actual innocence context, a properly supported guilty plea such as Petitioner's gives rise to a strong legal presumption that Petitioner remains guilty of the crime for which he voluntarily admitted guilt. The Commonwealth submits that even if Petitioner's proffered evidence is properly before this Court, it fails to overcome the overwhelming evidence of Petitioner's guilt that he self-supplied. Petitioner has not established by the preponderance of the evidence that no rational fact finder would have convicted him on this record.

CONCLUSION

Petitioner cannot satisfy this Court of his innocence on the instant record, and to grant a writ of actual innocence on these facts would be to ignore the fact that Petitioner pled guilty to being the man Officer Gibson described as his killer. Petitioner has established, at best, that a federal jury did not find proof beyond a reasonable doubt that the killing of Officer Gibson was murder. Moreover, even if the federal verdict acquitting Petitioner of murder was material here, the United

States Court of Appeals for the Fourth Circuit found by clear and convincing evidence that Petitioner and his co-defendant murdered Officer Gibson.

At best, and assuming the proffered evidence is properly before the Court, Petitioner has established that a 9-year-old girl saw a "man with dreads" come out of the woods where Officer Gibson was shot, and that the girl may have initialed a photo array. Petitioner knew who this 9-year-old girl was and what she may have seen before he pled guilty in Sussex County Circuit Court. Even after learning more exculpatory information about the 9-year-old girl during his federal case, Petitioner did not attempt to locate or subpoena the girl.

Petitioner similarly knew before he pled guilty in Sussex County Circuit Court that the man allegedly identified in the photo array by the 9-year-old girl had been at or near the scene of the shooting at the time it occurred. Petitioner also knew before his guilty plea that this man had "actual dredlocks" (sic) that apparently more closely fit Officer Gibson's description of his attackers. None of the proffered evidence is newly discovered or material, and it is unlikely to be admissible at trial.

As the Court sits in its original jurisdiction during actual innocence cases, the Court can and should evaluate the materiality of documentary evidence using the same standards that a proponent of trial evidence would have to satisfy. While issues involving recantations and live witness testimony generally require a circuit court to make credibility determinations this Court cannot, the Court has the authority *and*

the ability to resolve questions regarding the authenticity and admissibility of documentary or tangible evidence in actual innocence proceedings can be analyzed and disposed of by this Court using basic evidentiary principles, and without further factual findings. The Commonwealth therefore contends that this Court can resolve the materiality, veracity, and authenticity of the documentary evidence presented without an evidentiary hearing.

No criminal investigation is perfect, and human error often causes unintentional deviations from best practices. The Commonwealth acknowledges that the record of the investigation of this case is irregular and confusing, and that there are allegations of law-enforcement misconduct. While questions regarding *Brady* and other due process violations cannot be addressed in the limited vehicle of the writ of actual innocence,[17] the Commonwealth does not condone intentional

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[17] The legal arguments advanced throughout Petitioner's brief demonstrate his intent to use the writ of actual innocence to address procedural concerns long since defaulted by virtue of his guilty plea. *Contra Bush*, 68 Va. App. at 803 n.1 (noting the Court's gatekeeper function to ensure that "the writ of actual innocence does not evolve into an omnibus substitute for the carefully crafted procedures of the habeas corpus writ . . . or impinge upon the Governor's exclusive power over executive clemency . . ."); *see* Pet. Br. 7 (legal argument regarding the propriety of Petitioner's federal sentence); Pet. Br. 7 – 8, 16, 18–20 (legal argument regarding alleged *Brady* violations); Pet. Br. 9–10, 20 (legal argument regarding the voluntariness of Petitioner's guilty plea); Pet. Br. 16–17 (legal argument regarding the effect of law-enforcement misconduct on the admissibility of evidence).

Petitioner's legal arguments cannot be considered by this Court in the actual innocence context. *See Tyler*, 73 Va. App. at 456 n.8 (noting the Court's inability in an actual innocence case to consider a legal argument based on the sufficiency of the evidence); *In re Neal*, 44 Va. App. 89, 90 (noting the Court's inability in an actual

misconduct by prosecutors or law-enforcement under any circumstances. And the record before this Court shows no such intentional misconduct.

The record before the Court shows that the unprecedented murder of a police officer in a small, close-knit town rocked the community and caused rumors and accusations to spread like wildfire. While some of these unfounded rumors and accusations made their way into the investigation, there is no competent evidence before this Court suggesting that Petitioner was denied any fundamental rights. *But see* Comm. Supp. Exh. 6 (noting the Commonwealth's opposition to electronic media coverage of the preliminary hearing because of threats made to witnesses).

The trial prosecutor's relatively unusual reduction of a capital murder charge to involuntary manslaughter demonstrates that he and Petitioner's counsel both knew that on the available evidence, there was ample opportunity for impeachment of the quality of the investigation and the descriptions of Officer Gibson's assailants. The record contains ample evidence that Petitioner knew the case against him had irregularities and inconsistencies when he pled guilty. He was not forced to admit that he was the person who the Commonwealth's evidence would establish had confessed to shooting the police officer. The Commonwealth submits that the fact of Petitioner's guilty plea remains a knowing, intentional, and voluntary admission

innocence case to consider legal arguments based on the sufficiency of the evidence and double jeopardy principles).

that Petitioner shot and killed Officer Allen Gibson. The Court should not disturb the Commonwealth's lawful conviction of Petitioner for killing a police officer.

WHEREFORE, for the reasons stated and on the authorities cited, the Commonwealth, by the Attorney General, moves this Court to dismiss and/or deny the instant petition for writ of actual innocence without ordering an evidentiary hearing, and for any other relief deemed appropriate by the Court in its discretion.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein

JASON S. MIYARES,
Attorney General of Virginia

/s/ Brandon T. Wrobleski
By: ______________________________
Counsel

Brandon T. Wrobleski
Special Assistant to the Attorney General for Investigations
Virginia State Bar No. 89697
bwrobleski@oag.state.va.us
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Phone (804) 786-2071
Fax (804) 371-0151

CERTIFICATE OF SERVICE

On February 28, 2022, a copy of the foregoing Supplemental Brief in Opposition to Petition for Writ of Actual Innocence, and the Exhibits attached thereto, was filed with the Clerk of this Court using the VACES system pursuant to Rules 1:17 and 5A:1(c), and contemporaneously emailed to Jarrett Adams, Esquire at jadams@jarrettadamslaw.com, and Michael HuYoung, Esquire, mhuyoung@barnesfamilylaw.com, counsel for petitioner.

/s/ Brandon T. Wrobleski

Brandon T. Wrobleski
Special Assistant to the Attorney General
for Investigations

VIRGINIA:

IN THE COURT OF APPEALS

TERENCE JEROME RICHARDSON,

S/K/A

TERRENCE JEROME RICHARDSON,

Petitioner,

v. **Record No. 0361-21-2**

COMMONWEALTH OF VIRGINIA,

Respondent.

EXHIBITS TO COMMONWEALTH'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ACTUAL INNOCENCE

VIRGINIA: IN THE CIRCUIT COURT OF SUSSEX COUNTY

COMMONWEALTH OF VIRGINIA

v. Felony - Involuntary Manslaughter

Terrence Jerome Richardson Case No. 98-314

This day came the Attorney for the Commonwealth and Terrence Jerome Richardson, who appeared in Court according to the condition of his recognizance, having been indicted for a felony, to-wit: Murder, committed on or about 25 April 1998, and came also David E. Boone, the attorney of his own choosing.

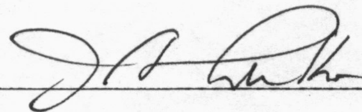
Whereupon, the Attorney for the Commonwealth moved the Court to amend the indictment from a felony, to-wit: Murder, to a felony, to-wit: Involuntary Manslaughter, which motion the Court doth hereby sustain and the indictment is so amended. Thereupon, the accused was arraigned and after private consultation with and being advised by David E. Boone, his counsel, entered a plea of guilty to Involuntary Manslaughter, as charged in the amended indictment, which plea was tendered by the accused in person. The Court, having made inquiry and being of the opinion that the accused fully understood the nature and effect of his plea and of the penalties that may be imposed upon his conviction, and of the waiver of trial by jury and of his right to appeal, proceeded to hear and determine the case without the intervention of a jury, as provided by law, and having heard the evidence and argument of counsel, doth find the defendant guilty of Involuntary Manslaughter, as charged in the amended indictment.

It is ordered that the defendant, having been convicted of a felony, cooperate fully and promptly in the taking of a blood sample for DNA analysis and individual identification as provided and required by law.

The Court, upon motion of the defendant, by counsel, before fixing punishment or imposing sentence, doth direct the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law on 8 March 2000 at 9:00 A.M. and this case is continued until said date and time.

The Attorney for the Commonwealth moved the Court to revoke the bond of the defendant which motion is sustained and the defendant is hereby remanded to jail.

ENTER THIS ORDER this 8th day of December, 1999.



______________________________, JUDGE

James A. Luke

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF SUSSEX COUNTY

Federal Information Processing StandardsCode: 183

Hearing Date: March 8, 2000
Judge: The Honorable James A. Luke

COMMONWEALTH OF VIRGINIA

v.

TERENCE JEROME RICHARDSON, DEFENDANT

The following case came again before the Court for sentencing of the defendant, who was led to the bar in the custody of the jailer of this Court, and came also the attorney of his own choosing, David E. Boone. The Commonwealth was represented by Lyndia Person, Deputy Commonwealth's Attorney.

On 8 December 1999, the defendant was found guilty of the following offense(s):

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR98-314	Involuntary Manslaughter(F)	04/25/98	18.2-30

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code Section 19.2-299.

Pursuant to the provisions of Code Section 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court SENTENCES the defendant to:
Incarceration with the Virginia Department of Corrections for a period of ten (10) years for Involuntary Manslaughter. The total sentence imposed is ten (10) years.

The Court SUSPENDS five (5) of the ten (10) years imposed for

Involuntary Manslaughter, upon the following condition(s):

Good behavior. The defendant shall keep the peace and be of good behavior for a period of twenty-five (25) years from the date of his release from incarceration.

Community-based Corrections System Program. none

Supervised probation. The defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer for a period of two (2) years, or unless sooner released by the Court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

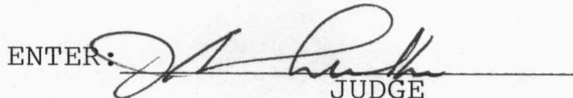
Post-release supervision. Pursuant to Section 19.2-295.2 of the Code of Virginia, the defendant is sentenced to a period of two (2) years of post-release supervision. In the event the defendant fails to comply with the terms of his probation, including random drug screenings, this period will be terminated and the defendant will be recommitted to the Department of Corrections.

Costs. The defendant shall pay all court costs.

Restitution. none

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code Section 53.1-187.

March 8, 2000 ENTER:
DATE



JUDGE

DEFENDANT IDENTIFICATION:
Alias: none
SSN: 224-19-2679 DOB: 05/23/71 Sex: Male

SENTENCING SUMMARY:
TOTAL SENTENCE IMPOSED: Ten (10) years
TOTAL SENTENCE SUSPENDED: Five (5) years

MEMORANDUM
(PRIVILEGED AND CONFIDENTIAL – WORK PRODUCT)

TO: Richardson/Claiborne Team

FROM: Kyle Richards

RE: Witness Interview

DATE: 05/14/2021

Shawn Lydell Wooden
Augusta Correctional Center
1821 Estaline Valley Road
Craigsville, VA 24430

I met with Shawn Wooden at the Augusta Correctional Center. Having identified myself and explained the role of the CIU, I made Wooden aware that he was free to end the conversation at any point. After the introduction, Wooden stated that he was not going to go to court for this case. He added that if he were forced to go to court, he would not say anything while on the stand.

Wooden stated that he has known Terence Richardson since they were both in their 20s. Wooden's grandmother lived on Dogwood Street in Waverly and Richardson also lived on Dogwood. He added that he knew Ferrone Claiborne but not as well as he knew Richardson. Wooden said that Claiborne was known to go to Hopewell to get drugs but Wooden was not sure if Claiborne was selling the drugs. Richardson was using and selling drugs.

Wooden conceded that he was living with the mother of one of his children at the time of Officer Gibson's murder. He added that he was working for a "bark company" in Waverly called "Summit….". Wooden was unable to recall the full name of the business. He was a laborer who spread mulch.

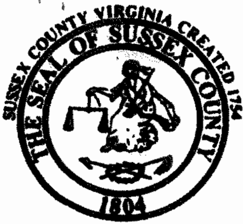
Wooden declined to give much information about the day in question stating that in 2019 or 2020 he had received a call from the Innocence Project. He informed me that he told the IP that he did not want to be involved. Sometime in 2018, while incarcerated at Green Rock Correctional Center in Pittsylvania County, Virginia, Jarrett Adams got in touch with Wooden over the phone through his counselor at the prison. Wooden recalls that Mr. Adams admonished him for his testimony and called him a liar. Wooden reportedly told Mr. Adams not to contact him again.

Wooden did mention that his hair style at the time was "low cut" with no braids or dreadlocks. He believes that Leonard Newby had dreadlocks and states that was the reason

he gave Newby's name to law enforcement as a possible suspect. Wooden added that Richardson had a "plaits" hairstyle at the time of the shooting but was unsure about Claiborne hair.

Wooden stated he originally lied to law enforcement to protect his friend, Terence Richardson. When asked why he changed his story, Wooden said that he had to serve five years for his lies and did not want anymore time. He declined that he received any money or promises for his testimony/information. Wooden added that anyone who said otherwise was lying.

When I began to question Wooden about specifics of his testimony and the day in question, he declined to answer. Several times during our conversation, Wooden said that there was nothing that he had to offer or say that could help Richardson or Claiborne. The only things he could say on the stand would be harmful to them, so he prefers not to say anything. At this point Wooden stated that he wanted to end the conversation as he had nothing helpful to say.



J. DAVID CHAPPELL
COMMONWEALTH'S ATTORNEY

COMMONWEALTH OF VIRGINIA
COUNTY OF SUSSEX
Office of the Commonwealth's Attorney

COPY

15080 COURTHOUSE ROAD
POST OFFICE BOX 1347
SUSSEX, VIRGINIA 23884
804/246-5511 ext. 3043
FAX 804/246-2630

July 24, 1998

Mr. David E. Boone, Esquire
Boone, Beale, Cosby and Long
27 North 17th Street
Richmond, VA 23219-3607

IN RE: Commonwealth of Virginia v. Terence Richardson
Motion for Discovery

Dear David:

Please find enclosed discovery information pursuant to your formal motion for the same under Rule 7C.5.

As this office maintains an open file policy with respect to discovery matters, the enclosed represents the substantive contents of my case file with respect to your client's pending matter as of this date. You will be provided supplemental information as soon as practicable when any such material comes to my attention.

In addition, feel free to contact me anytime should you desire to discuss any aspect of this case. It is my understanding that your Investigator has already met several times with Detective Cheek and has been previously provided with a good bit of "informal discovery" in this case.

Please let me know if I can be of further assistance.

Very truly yours,

David Chappell

J. David Chappell
Commonwealth's Attorney
Sussex County

JDC/jbh
Enclosures
✓ cc: Ms. Frances M. Fountain, Clerk

RECEIVED AND FILED
SUSSEX GENERAL &
JUVENILE AND DOMESTIC
RELATIONS DISTRICT COURTS

JUL 24 1998

TIME 3:09 PM
TESTE: M Fountain
CLERK/ ~~DEPUTY CLERK~~
DATE: 7/24/98

C. W. WARTHEN CO. INC. LYNCHBURG, VIRGINIA Form No. 204-C—Subpoena for Witness

The Commonwealth of Virginia,

To the Sheriff *of the* County *of* Sussex, *Greeting:*

WE COMMAND YOU, That you summon ---KENNY BARROW, 528 Moore St., Waverly, VA; SHAWN WOODEN, 229 Robert Wilkins Ave., Waverly, VA; FERNANDO LEWIS, 219 Locust St., Waverly, VA; and SHANNEQUIA GAY, Waverly Village Apts., Waverly, VA----

to appear before the Judge of our Circuit Court of the County of Sussex, at the Courthouse thereof, on the 8th day of December, 1999, at 9:00 o'clock A. M., to testify and the truth to say in behalf of the COMMONWEALTH, in a certain matter of controversy in our said Court, before the said Judge, depending and undetermined, between the Commonwealth of Virginia, Plaintiff, and Terence Richardson & Ferrone Claiborne, Defendants.

And have then there this writ.

WITNESS, Gary M. Williams, Clerk of our said Court, at the Courthouse, this 5th day of November, 1999, and in the 224th year of the Commonwealth.

GARY M. WILLIAMS, CLERK

By: [signature], Deputy *Clerk.*

SUSSEX COUNTY CIRCUIT COURT
P. O. Box 1337
Sussex, VA 23884

A TRUE COPY
GARY M. WILLIAMS, CLERK
SUSSEX COUNTY CIRCUIT COURT
BY ____________ D.C

Kenneth R. Barrow
James E. Turner

Executed in Sussex County, Virginia this 12TH day of NOV, 1999 by delivering a true copy of the within summons to KENNY BARROW in person.

E.S. Kitchen Jr., Sheriff of Sussex County
By C.W. Gray, D.S.

Executed in Sussex County, Virginia this 12th day of Nov., 1999 by delivering a true copy of the within summons to FERNANDO LEWIS in person.

E.S. Kitchen Jr., Sheriff of Sussex County
By [illegible], D.S.

Executed in Sussex County, Virginia this 12TH day of NOV, 1999 by delivering a true copy of the within summons to JAMES E TURNER in person.

E.S. Kitchen Jr., Sheriff of Sussex County
By C.W. Gray, D.S.

SHANNEQUIA GAY IS A JUVENILE
SERVED ON FATHER

Shawn Wooden not found
is not an inhabitant of ... county ... NOV 16
1999
E.S. Kitchen Jr, Sheriff of Sussex County
By S. Barr, D.S.

FILED NOV 19 1999
GARY M. WILLIAMS, CLERK
SUSSEX COUNTY CIRCUIT COURT
BY [illegible] D.C

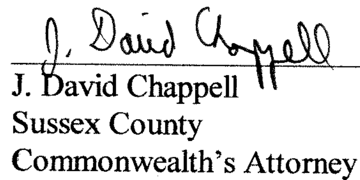
COMM. SUPP. EXH. 4

Shannequia Gay
Waverly Village Apts.
Waverly, VA 23890
(Sussex County)

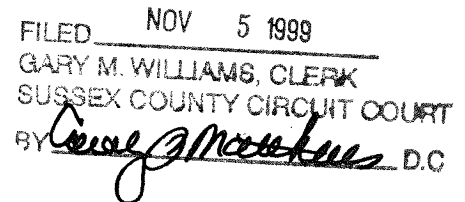
Ann D. Jones, Forensic Scientist
Division of Forensic Science
700 N. 5th St.
Richmond, VA 23219
(City of Richmond)

Douglas H. DeGaetano, Forensic Scientist
Division of Forensic Science
700 N. 5th St.
Richmond, VA 23219
(City of Richmond)

Demetrice Jones
616 W. Main St.
Waverly, VA 23890
(Sussex County)



J. David Chappell
Sussex County
Commonwealth's Attorney



CHECKLIST FOR BAIL DETERMINATIONS

NAME OF ACCUSED Richardson Terence Jerome

NATURE AND CIRCUMSTANCES OF THE OFFENSE very good

WEIGHT OF THE EVIDENCE very good

LENGTH OF TIME IN COMMUNITY 9 or 10 years

PLACE OF EMPLOYMENT unemployed HOW LONG 4 years

FAMILY TIES yes - dad

INVOLVEMENT IN EDUCATION High School Graduate

FINANCIAL RESOURCES allowence from Mom, Grandma and aunt

PENDING CHARGES 18.2-31 capital murder of a Police officer

WAS A FIREARM ALLEGEDLY USED IN THE OFFENSE? ☐ NO ☒ YES

CURRENTLY ON PROBATION OR PAROLE?

☒ NO ☐ YES (explain)

PRIOR CRIMINAL RECORD A+B on Police Officer ☐ Check if more information is on back

☒ PRESUMPTION PURSUANT TO VA. CODE § 19.2-120 APPLIES AND HAS NOT BEEN REBUTTED.

PRIOR CHARGES OF FAILING TO APPEAR NONE - NEVER

OTHER INFORMATION CONSIDERED says he doesn't know what is going on he states he has Braids not dreads. Insists he was around the "Wire" (near New Street) till about 1PM. He

OTHER INFORMATION CONSIDERED volunteered to take Polygraph test

BAIL SET $4,000,000.00 secured Bail

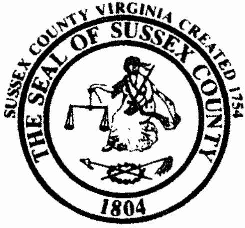
SPECIAL INSTRUCTIONS OR CONDITIONS

DATE 4/26/98

[signature] ☒ MAGISTRATE ☐ JUDGE

FORM DC-327 7/96 (114:6-010 5/96)

COMM. SUPP. EXH. 5



J. DAVID CHAPPELL
COMMONWEALTH'S ATTORNEY

COMMONWEALTH OF VIRGINIA

COUNTY OF SUSSEX

Office of the Commonwealth's Attorney

15080 COURTHOUSE ROAD
POST OFFICE BOX 1347
SUSSEX, VIRGINIA 23884
804/246-5511 ext. 3043
FAX 804/246-2630

August 6, 1998

Mr. David E. Boone, Esquire
27 North 17th Street
Richmond, VA 23219-3607

By Fax: (804) 648-6211
And regular mail

IN RE: Commonwealth of Virginia vs. Terence Richardson
Sussex County General District Court
Preliminary Hearing Date: August 10, 1998
Cameras in the courtroom

Dear David:

Judge Gammiel Poindexter requested me to write this letter to you on the above subject.

It is the Commonwealth's position to oppose any electronic media and still photography coverage of the above referenced hearing. Several witnesses have received threats during the pendency of this case and the Commonwealth believes that such coverage would be inappropriate in light of the above.

Should your position on the above be to the contrary, Judge Poindexter has requested that you notify her as soon as possible.

Thank you for your assistance.

Very truly yours,

David Chappell

J. David Chappell
Commonwealth's Attorney
Sussex County

JDC/jbh
cc: The Honorable Gammiel Poindexter