IN THE
SUPREME COURT OF VIRGINIA

Record No. 220499
Court of Appeals Record No. 0361-21-1

TERRENCE JEROME RICHARDSON,
S/K/A TERENCE JEROME RICHARDSON,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

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INTRODUCTION

Appellant Terrance Richardson shot and killed Waverly police officer Allen Gibson with Gibson's own gun after a drug deal gone wrong. He pled guilty to involuntary manslaughter in lieu of facing the death penalty for capital murder. Twenty-one years later, Richardson claimed to have discovered new evidence relating primarily to then-nine-year-old Shannequia Gay, who had previously been subpoenaed to testify against Richardson. Richardson's trial counsel knew of Gay's existence before the trial, and Richardson benefitted from an expansive open-file discovery meeting with the prosecutor and law-enforcement investigators. The Court of Appeals correctly found that Richardson failed to exercise diligence with respect to Gay and another witness previously known to his trial counsel, Leonard Newby.

Richardson's "newly discovered" evidence consisted entirely of documents, and it pertained entirely to witnesses of whom his trial counsel was aware. Because Richardson presented no new testimony of undetermined credibility, the Court of Appeals correctly dismissed his petition without an evidentiary hearing. The Court of Appeals also correctly found that Richardson failed to prove that no rational fact-finder would convict him. Finally, the Court of Appeals correctly permitted the Commonwealth to change multiple unsound positions contained in its prior briefing.

STATEMENT OF FACTS

On the morning of April 25, 1998, uniformed, on-duty Waverly Police Officer

Allen W. Gibson Jr. was found suffering from a gunshot wound to the stomach in the woods behind the Waverly Village Apartments in the town of Waverly, in Sussex County, Virginia. R. 33–36 (transcript of preliminary hearing); *see* R. 143 (admission of preliminary hearing transcript during Richardson's circuit court guilty plea). Officer Gibson identified and described two black males who fought with him and shot him with his own gun. R. 38. Officer Gibson had chased the men into the woods, apparently trying to arrest them, when the scuffle over the gun occurred. R. 39. Officer Gibson died from a single gunshot wound later the same day. R. 42–43.

One of Richardson's friends, Shawn Wooden, was with Richardson and his co-defendant, Ferrone Claiborne, at the time leading up to the shooting of Officer Gibson. R. 72–74. Richardson, Claiborne, and Wooden[1] went to Waverly Village Apartments on the morning of April 25, 1998 to buy some drugs. R. 73. Richardson and Claiborne instructed Wooden to be a lookout, and Richardson told Wooden to make a sound if he saw anybody coming. R. 78–80. Richardson and Claiborne walked around the back of the apartments toward the woods. R. 80.

A short time later, Officer Gibson pulled up to the apartment parking lot in a

[1] 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." R. 1990. Wooden also noted that Richardson's attorney "admonished him for his testimony and called him a liar," leading Wooden to tell Richardson's attorney not to contact him again. *Id.*

Waverly police vehicle. R. 81. Officer Gibson got out of his car and walked toward the area behind the apartments where Richardson and Claiborne had gone. R. 82–83. Wooden screamed "skoo doo" to alert Richardson and Claiborne. R. 84. Richardson looked around the corner and then went back around the building. R. 84–85. Wooden heard what sounded like a gunshot moments later. R. 86–87.

Wooden met up with Richardson a short time later at Wooden's house, and Richardson appeared nervous. R. 88–89. Wooden asked Richardson if he had gotten the drugs they were supposed to go get; Richardson said no. R. 89. An unidentified person came to Wooden's home to use the phone and began asking which police officer had been shot. R. 90. Richardson stated that it was a new cop that had been shot. *Id.* Richardson then told Wooden he wanted to talk to him and took Wooden outside. R. 91. Richardson told Wooden that he had accidentally shot the cop, and if Wooden were to tell anybody, something would be done to him and his family. *Id*

Richardson was arrested the next day, April 26, 1998, and was held in lieu of $4,000,000 bond. *See* R. 1996. After preliminary hearing on October 15, 1998, Richardson and Claiborne's cases were certified to the grand jury. R. 24, 127.

Richardson was initially indicted for capital murder, but he pled guilty to the reduced involuntary manslaughter charge at issue here in Sussex County Circuit Court. R. 135–138 (transcript of December 8, 1999 plea hearing); 44 –43 (sentencing order). The court clerk inquired twice regarding Richardson's plea, and Richardson

responded "guilty" twice. R. 135–36. Richardson pled guilty to the reduced charge of involuntary manslaughter "straight up," or without a plea agreement. R. 152 (transcript of March 8, 2000 sentencing hearing).

After Richardson stated twice that he was pleading "guilty," the trial court conducted a standard plea colloquy. R. 136–138; *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).

Richardson confirmed his name, date of birth, and highest level of education. R. 136. He agreed 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. R. 136–37. Richardson decided to plead guilty after discussing the decision with his attorney. R. 136–37. He entered his guilty plea freely and voluntarily, and because he was in fact guilty. R. 137. Richardson understood that by pleading guilty, he waived his right to a jury trial, his Confrontation Clause rights, and his right to remain silent. *Id.* No one connected with Richardson's arrest and prosecution, including the Commonwealth's Attorney or the police, forced him to plead guilty. *Id.*

Richardson was entirely satisfied with the services of his trial counsel. R. 138. He understood the effect his guilty plea had on his right to appeal. *Id.* He confirmed

that he understood the Court's questions during the plea colloquy. *Id.* The Commonwealth's Attorney then proffered the evidence that would have been presented if the matter had gone to trial, which added to but largely echoed the Commonwealth's preliminary hearing evidence. *See* R. 138–44. Without objection, the Commonwealth introduced Officer Gibson's autopsy report, R. 142, a certificate of analysis regarding primer residue on Officer Gibson's shirt, R. 142–43, and the preliminary hearing transcript, R. 143.

Richardson's attorney agreed that the evidence summarized by the Commonwealth's Attorney would have been the Commonwealth's evidence if the case were tried. R. 143–44. Richardson did not contest any of the Commonwealth's evidence or provide any other proffers. *See* R. 144. Richardson was sentenced to ten years with five suspended for involuntary manslaughter. R. 202.

Richardson was later federally indicted for three offenses related to drug trafficking and the killing of Officer Gibson, including murder of a law-enforcement officer during drug trafficking. *See Richardson v. Commonwealth*, 75 Va. App. 120, 128 (2022). Richardson was convicted of conspiracy to traffic a controlled substance and sentenced to life in prison upon the sentencing court's finding by clear and convincing evidence that Richardson had killed Officer Gibson intentionally and maliciously. *Id.* at 128–29. The United States Court of Appeals for the Fourth Circuit affirmed Richardson's conviction and life sentence while reiterating the reasonable

accuracy of Officer Gibson's identification of Richardson and the lower court's conclusion that Richardson committed murder. *Id.* at 129 (citing *United States v. Richardson*, 51 Fed. Appx. 90, 94-95 (4th Cir. 2002)). Richardson's federal habeas corpus and executive clemency efforts were unsuccessful. *Id.*

Richardson filed his petition for writ of actual innocence in the Court of Appeals on April 6, 2021. R. 418–23 (petition); 1–22 (brief in support of petition). The petition listed three items of physical documentary evidence as "newly discovered" under Code § 19.2-327.10: a handwritten statement, an alleged photo lineup, and an alleged 911 tip[2] and corresponding handwritten notes. R. 418–19.

The Attorney General initially supported Richardson's petition in a brief filed on the eve of Election Day 2021. R. 475–552. Following a change in administration, the Attorney General evaluated the Commonwealth's positions set forth in the November 2021 brief and determined that they were legally and factually erroneous. The Attorney General indicated the Commonwealth's intent to correct those positions and sought leave for supplemental briefing. R. 1908–14; 1916–20 (motion for leave to file supplemental brief and exhibits). The Court of Appeals granted leave,

[2] Richardson did not assign error to the Court of Appeals' finding that the 911 tip was immaterial because he failed to prove its truth. *Richardson*, 75 Va. App. at 139–40. Richardson has therefore waived any argument regarding the significance of the 911 tip.

R. 1930, and the Commonwealth filed a supplemental brief and exhibits in opposition to Richardson's petition. R. 1932–84 (supplemental brief); 1985–97 (supplemental exhibits). Richardson replied in opposition thereto. R. 2002–61. The Court of Appeals heard oral argument on May 6, 2022. R. 2062.

The Court of Appeals dismissed Richardson's petition in a published order on June 21, 2022. R. 2065–81; *Richardson*, 75 Va. App. 120. Richardson petitioned the Court of Appeals for rehearing *en banc*, R. 2082–2108; the Court of Appeals denied the petition over a dissent on July 21, 2022. R. 2109–10.

ARGUMENT

This Court should refuse the petition for appeal because the Court of Appeals' rulings below were correct in all respects.

I. The Court of Appeals correctly found that Appellant failed to demonstrate diligence.

The Court of Appeals' findings regarding diligence, along with all other conclusions of law and conclusions based on mixed questions of law and fact in an order dismissing a petition for writ of actual innocence, are subject to a de novo standard of review. *Dennis v. Commonwealth*, 297 Va. 104, 122–23 (2019) (citing *Johnson v. Commonwealth*, 273 Va. 315, 321 (2007)).

The Court of Appeals correctly held that Richardson failed to satisfy the Court of Appeals that his "previously unknown or unavailable evidence [was] such as could not, by the exercise of diligence, have been discovered or obtained before the

time the conviction . . . became final in the circuit court." Code § 19.2-327.11(vi)(a). This Court has previously found that "diligence" requires a "devoted and painstaking application to accomplish and undertaking." *Dennis v. Jones*, 240 Va. 12, 19 (1990); *see Tyler v. Commonwealth*, 73 Va. App. 445, 464 (2021) (quoting *Madison v. Commonwealth*, 71 Va. App. 678, 702 n.14 (2020)) ("In the context of the actual innocence statutes, we have defined diligence as a "devoted and painstaking application to accomplish an undertaking.").

Richardson ascribed his first item of allegedly newly discovered evidence, a handwritten statement, to a trial witness for the Commonwealth, nine-year-old Shannequia Gay. But Richardson's trial counsel David Boone knew who Gay was and what information she had before Richardson pled guilty:

> Boone recalled the name Shannequia Gay and stated that he was aware of her prior to the plea agreement. He believes [prosecutor] David Chappell may have provided him with the name along with a summary of who she was and what she said. Boone recalls that Gay observed a male coming out of the woods and remembers that her cousin had a bicycle near the crime scene. Boone stated that [defense investigator Jack] Davis attempted to speak with Gay, but she was never made available. He does not believe that Chappell interfered with his meeting Gay in any way.

R. 1865. Richardson's trial investigator's single attempt to speak to Gay is plainly insufficient under the diligence standard employed in actual innocence cases. *See Tyler*, 73 Va. App. at 465 (finding failure to subpoena a known witness was "far less than" the requisite diligence). Just as Tyler's trial counsel's assertion that he "tried

and failed to locate" an allegedly new witness was insufficient, *Tyler*, 73 Va. App. at 464, so were the efforts of Richardson's trial counsel and investigator.

Furthermore, Gay had been subpoenaed to testify on behalf of the Commonwealth well in advance of Richardson's trial. *Richardson*, 75 Va. App. at 135; R. 1993–95. Gay lived at the Waverly Village Apartments and had been located for service by the local sheriff. *Id.*; R. 1865. Richardson's failure to inquire further into the testimony of a witness his trial counsel knew about before trial, and upon whom the Commonwealth was able to obtain valid subpoena service, conclusively establishes a lack of diligence.

Richardson next alleges that Shannequia Gay identified a man named Leonard Newby as Officer Gibson's killer in a photo lineup that police allegedly suppressed. Petition for Appeal at 6–8. Richardson, however, failed to prove that the photo lineup even depicts Leonard Newby, much less that the photo lineup represents Shannequia Gay's identification of Leonard Newby as Officer Gibson's actual killer. The Court asked Richardson's counsel to specify what evidence existed in the record to prove that Shannequia Gay "signed [the photo lineup] because that was definitely the individual she saw, and that it [was] Leonard Newby." Oral Argument Audio at 7:59–8:43. Richardson's counsel did not answer the question, because there is no such evidence in the record. Regarding the photo lineup, the Court further noted that "the photo, as you know, what we have, what you sent us, you can't see a face, it's more

like a silhouette, basically." Oral Argument Audio at 8:43–8:51; R. 9 (darkened silhouette of unknown individual).

The question whether the photo lineup is what Richardson claims is ultimately irrelevant, because Richardson's counsel conceded at oral argument that Richardson had failed to exercise diligence with respect to the photo lineup:

> The Court: Mr. Adams, if in fact trial counsel had consulted with Ms., uh, Gay, and relates to what her anticipated testimony would have been at trial, would not it have been also due diligence for him to inquire whether she had made any identification?
>
> Mr. Adams: That is true, your Honor. That is absolutely true.

Oral Argument Audio at 5:46–6:02.

Richardson's arguments that the allegedly newly discovered evidence is "exculpatory," Pet. 9, and that law enforcement willfully concealed exculpatory evidence, Pet. 12, are unsupported. The Court does not have before it any discovery responses from which it can conclude that any evidence was withheld at trial. Indeed, the only portion of the record remotely relevant to this claim—statements indicating the best recollections of counsel 22 years later—indicate that that the trial prosecutor shared his entire file with Richardson's counsel. R. 1863–66 (statements of trial prosecutor and trial defense counsel); R. 1992 (letter from trial prosecutor to trial defense counsel indicating that "this office maintains an open file policy with respect to discovery matters").

And even though no *Brady* violation occurred in this case, a *Brady* claim is not cognizable in an actual innocence proceeding because it is not "evidence." *See Tyler*, 73 Va. App. at 456 n. 8 (citing *In re Neal*, 44 Va. App. 89, 90 (2004)) (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. at 90 (noting the Court's inability in an actual innocence case to consider legal arguments based on the sufficiency of the evidence and double jeopardy principles). In an actual innocence proceeding, a *Brady* claim is not new evidence, but rather, an inappropriate attempt to relitigate the issue of the petitioner's guilt. Under Virginia law, courts presume that actual innocence petitioners were properly convicted. *See Haas v. Commonwealth*, 74 Va. App. 586, 624 (2022) (citing *Tyler*, 73 Va. App. at 459) ("A person seeking a writ of actual innocence faces a daunting task; the process begins not with a presumption that a petitioner is innocent, but rather, that he or she is guilty.").

Richardson's claim that Shannequia Gay refuses to speak to him, Pet. 10, is of no moment because it is a difficulty that he created. Gay's mother, Sharon Gay Turner, told the Attorney General's investigator how she and her daughter had been "terrorized" since Richardson filed his petition. R. 1828. According to Ms. Turner,

> two people from Virginia Beach contacted her and another person, a man had contacted her. She stated that the man was rude, aggressive, and used curse words while on the phone with her. I asked Turner if the man's name was Jarrett Adams and she stated that it was.

Id.; *see also* R. 1990 (statement of material Commonwealth's witness Shawn Wooden that "Mr. Adams admonished him for his testimony and called him a liar," leading Wooden to tell Mr. Adams not to contact him again). There is no evidence that any party would have prevented Shannequia Gay from speaking with Richardson's trial counsel if such an attempt had been made.

In light of all these circumstances, the Court of Appeals correctly found a lack of diligence as to both items of allegedly newly discovered evidence to which Richardson assigned error. *Richardson*, 75 Va. App. at 138–39.

II. The Court of Appeals did not abuse its discretion by dismissing Appellant's petition without an evidentiary hearing.

Whether to refer an issue to a circuit court in the first instance . . . is a decision that lies within the Court of Appeals' "broad discretion." *Dennis*, 297 Va. at 123 (quoting *Haas v. Commonwealth*, 283 Va. 284, 291 (2012)). Although the Court of Appeals' discretion in this context is considerable, the Court still "abuses its discretion if it inaccurately ascertains [the] outermost limits" of the available range of choice. *Id.* at 128 (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 213 (2013)).

Richardson contends that this Court's *Dennis* decision "mandated" that the Court of Appeals remand this case for an evidentiary hearing. Pet. 2. *Dennis*, however, is completely distinguishable from this case, and the Court of Appeals did not abuse its discretion in declining to order an evidentiary hearing. In *Dennis*, five previously unknown witnesses came forward with statements alleging that someone

other than the petitioner had committed the crime with which the petitioner had been charged. *Id.* at 117–19. The newly identified alleged perpetrator's then-girlfriend and other supporting witnesses echoed his alleged involvement. *See id.* at 114. The Court of Appeals, however, dismissed the petition for a writ of actual innocence without ordering an evidentiary hearing to determine the new witnesses' credibility pursuant to Code § 19.2-327.12. *Id.* at 108. This Court reversed, holding that the Court of Appeals abused its discretion by declining to order an evidentiary hearing to test the credibility of the previously unknown witnesses. *Id.* at 132.

Dennis stands for the proposition that "[i]n heavily fact-dependent cases . . . that turn on the materiality of new evidence offered by *new witnesses* whose credibility is not apparent from the record, the Court of Appeals should err on the side of ordering a circuit court evidentiary hearing." *Id.* at 130 (emphasis added). This Court further noted in *Dennis* that "in this case, "new witness[es] ha[ve] been found, who ha[ve] not previously testified and who could not with due diligence have been discovered before the conviction became final." *Id.* at 130 (alterations in original) (quoting *Haas v. Commonwealth*, 283 Va. 284, 292 (2012)).

Unlike in *Dennis*, the instant case does not involve *testimony*, but rather, unauthenticated *documentary evidence* discovered by Richardson's own counsel after it sat in inmate storage in an unknown federal penitentiary since 2007. R. 8–9. Further distinct from *Dennis*, the "new" witnesses here, Gay and Newby, were known

to Richardson's trial counsel before trial, and a diligent pretrial effort could have discovered their testimony. *See supra* Part I (discussing Richardson's trial counsel's pre-conviction knowledge of Shannequia Gay's existence and testimony); R. 131 (letter from Richardson's trial investigator to trial counsel establishing pre-conviction knowledge that Leonard Newby might be a witness).

The Court of Appeals, sitting in its original jurisdiction, is competent to evaluate the authenticity and significance of documentary evidence presented in a petition for writ of actual innocence. *See Dennis*, 297 Va. at 127 (observing that actual innocence cases present "one of the rare situations in which the General Assembly has charged an appellate court with engaging in factual evaluation" such that the Court of Appeals in this context "has the same authority to weigh and evaluate documentary and physical evidence as a trial court would have" (quoting *Haas*, 283 Va. at 292)). Because none of the *Dennis* rationales for requiring an evidentiary hearing are present here, the Court of Appeals did not abuse its discretion in dismissing this petition without an evidentiary hearing.

III. The Court of Appeals correctly held that Appellant failed to prove that no rational fact-finder would have found proof of guilt beyond a reasonable doubt.

The Court of Appeals' finding that Richardson failed to prove that no rational fact-finder would have found proof of guilt beyond a reasonable doubt is subject to

a de novo standard of review. *Dennis*, 297 Va. at 122–23 (citing *Johnson v. Commonwealth*, 273 Va. at 321).

Richardson's petition, which followed his guilty plea to the class 5 felony of involuntary manslaughter, became permissible after legislative amendments permitted any petitioner who previously pled guilty to a felony to file for a writ of actual innocence. *See* 2020 Acts chs. 993, 994. When an actual innocence petitioner has previously pled guilty, that "[s]olemn declaration[] [during a plea colloquy] in open court carr[ies] a strong presumption of verity." *Parson v. Commonwealth*, 74 Va. App. 428, 445 (2022), *appeal docketed*, No. 220224 (Va. Apr. 14, 2022) (quoting *Smith v. Brown*, 291 Va. 260, 265 (2016)).

> In determining the weight that must be afforded [a] guilty plea, we 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.

In re Watford, 295 Va. 114, 126 (2018) (first quoting *Hobson v. Youell*, 177 Va. 906, 912 (1941); then citing *Starrs v. Commonwealth*, 287 Va. 1, 11 (2014)). The evidence presented at Richardson's guilty plea hearing provides "a record against which any newly discovered evidence may be compared." *Parson*, 74 Va. App. at 444 (internal quotation marks omitted) (quoting *Watford*, 295 Va. at 127). Those facts were ably recited by the Court of Appeals. *Richardson*, 75 Va. App. at 124–29.

The substantial record supporting Richardson's guilty plea to involuntary

manslaughter is distinct from the sparse record in *Watford*, in which this 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. The transcription of the evidence against Richardson, R. 24–130, 138–47, as well as of Richardson's sworn and unqualified admissions of guilt during the plea colloquy, R. 136–38, elevate the probative force of the evidence against Richardson above the limited record in *Watford* and establish that Richardson was correctly convicted. Richardson claimed neither innocence nor mistaken identity when he admitted to committing involuntary manslaughter against Officer Gibson.

The circumstances of Richardson's involuntary manslaughter conviction were also before the federal courts that reviewed Richardson's drug trafficking conviction. *See United States v. Richardson*, 51 Fed. Appx. at 94 (taking note of "Appellants' guilty pleas in state court"). The United States Court of Appeals for the Fourth Circuit's decision affirming Richardson's conviction is also properly part of this Court's record, namely, Officer Gibson's reasonably accurate description of Richardson and Claiborne as his attackers, the existence of other evidence in corroboration of the conviction, Richardson's false alibi, and that Richardson and Claiborne murdered Officer Gibson. *Id*. at 94-95. Richardson's 2021 petition notwithstanding, none of the material facts recited by either Court of Appeals have changed. An unsworn statement from a nine-year-old child who cannot be located, a blacked-out

silhouette of an unknown person, and an anonymous 911 tip are simply insufficient to compel the conclusion that no rational factfinder would convict Richardson.

Nor does Richardson's acquittal of distinct charges in federal court compel the conclusion that no rational factfinder would convict. Richardson's state conviction was for involuntary manslaughter, which is defined as "the accidental killing of a person, contrary to the intention of the parties, during the prosecution of an unlawful, but not felonious, act, or during the improper performance of some lawful act." *Gooden v. Commonwealth*, 226 Va. 565, 571 (1984). The federal homicide offense of which Richardson was acquitted bears no resemblance to Virginia common-law involuntary manslaughter, requiring proof that Richardson, "during the commission of, in furtherance of [a continuing criminal enterprise under 21 U.S.C. § 848] . . . .intentionally kill[ed] . . . or cause[d] the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties." 21 U.S.C. § 848(e)(1)(B). The only common element between the two offenses is the fact that a person is deceased.

The federal jury was not instructed on lesser-included homicide offenses or informed that it could find that Officer Gibson's killing was accidental. R. 1773–1777 (transcript of instructions to federal jury on the elements of the murder charge under 21 U.S.C. § 848(e)(1)(B)). Neither did this federal murder offense provide the possibility of a conviction on a lesser degree of homicide. *Id.* § 848(e)(1)(B). As

such, the fact that the federal jury acquitted Richardson of this federal homicide offense has no bearing on whether he is actually innocent of the distinct Virginia common-law involuntary manslaughter offense to which he pled guilty.

And even if a federal jury had acquitted Richardson of an identical involuntary manslaughter charge after considering exactly the same evidence and testimony as in the state case, Richardson could only show that *one* rational factfinder had acquitted him. This is a far cry from meeting his statutory burden to demonstrate that *no* rational factfinder would convict. Code § 19.2-327.13; *see Tyler*, 73 Va. App. at 469, 861 S.E.2d at 91 ("[I]t is not enough for [an actual innocence petitioner] to convince us that some, many, or even most rational factfinders would have acquitted him . . . [they] must prove that *every* rational factfinder would have done so.").

Richardson pled guilty to involuntary manslaughter because he was guilty, and his attempt to claim otherwise here subjects his credibility to further attack and impeachment. *See Parson*, 74 Va. App. at 445 ("The compelling implication of [Richardson's] new assertion of innocence is that he lied during his plea colloquy to secure the benefits of the plea bargain."). Richardson's actual innocence petition indicates that he either lied during his plea colloquy in Sussex County in 1999 or lied to the Court of Appeals when he filed his petition in 2021. It is "'highly unlikely' that a rational fact finder 'would have sympathy for [Richardson's] self-interested prevarication and trustingly accept his present protestations of innocence.'" *Id.*

(quoting *In re Brown*, 295 Va. 202, 231 (2018)). The Court of Appeals correctly found that Richardson failed to prove that no rational factfinder would convict, a finding this Court should not disturb.

IV. The Commonwealth appropriately corrected the erroneous positions set out in its prior briefing.

The Commonwealth's previous erroneous position provides no basis for a different result here. The unique statutory scheme for actual innocence proceedings allowed the Commonwealth to change its position, because the General Assembly has implicitly exempted actual innocence proceedings from the application of the approbate-reprobate doctrine. Code § 19.2-327.10:1 (permitting the Attorney General to reverse the Commonwealth's position in the trial court by supporting a petition for writ of actual innocence in the Court of Appeals); Code § 19.2-327.2:1 (similar provision pertaining to petitions based on biological evidence filed in this Court). Furthermore, the 2020 amendments to the nonbiological actual innocence statutes explicitly authorized all criminal defendants who pled guilty in the lower court to reverse their position. *See* 2020 Acts chs. 993, 994. By their nature, actual innocence proceedings are a form of legislatively authorized approbation and reprobation.

Richardson cites no original jurisdiction precedent permitting the application of the approbate-reprobate doctrine to bar the Commonwealth's position change in this original jurisdiction proceeding. It is undisputed that the approbate-reprobate doctrine applies to appeals, but a petition for a writ of actual innocence does not

invoke the Court's appellate jurisdiction. *But see* Pet. 23–25 (citing *Commonwealth v. Proffitt*, 292 Va. 626 (2016) (Commonwealth's appeal of an unfavorable sexually violent predator verdict in the trial court); *Collelo v. Geographic Services, Inc.*, 283 Va. 56 (2012) (cross-appeals from trial court verdict); *Rompalo v. Commonwealth*, 72 Va. App. 147 (2020) (appeal of criminal convictions).

This case does not invoke the Court's appellate jurisdiction and therefore does not implicate the approbate-reprobate doctrine. No existing precedent permits the application of the approbate-reprobate doctrine to original jurisdiction proceedings. In fact, owing to his unique constitutional role, the Attorney General may even change positions on appeal in certain situations. This Court has previously acknowledged that "unlike other parties in a case on appeal, the Attorney General may expressly "repud[iate] the earlier position erroneously taken by the Commonwealth's Attorney." *Crawford v. Commonwealth*, 55 Va. App. 457, 476 n.12 (2009) (en banc) (quoting *In re Department of Corrections*, 222 Va. 454, 465 (1981)).

Given the specific statutory scheme applicable to actual-innocence proceedings, Richardson's argument that general principles of appellate law constrained the Commonwealth to maintain an erroneous legal position must fail. *Cf. Crawford v. Haddock*, 270 Va. 524, 528 (2005) ("In a situation where 'one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute

prevails.'" (quoting *Gas Mart Corp. v. Board of Supervisors*, 269 Va. 334, 350 (2005))).

Moreover, the legal policy of the Commonwealth is set by the *elected* Attorney General, who is not obligated to adopt erroneous positions advanced by past administrations. And this Court is in any event under no obligation to accept an erroneous concession from an Attorney General on legal issues. *See, e.g.*, *Jones v. Commonwealth*, 293 Va. 29, 59 n.27 (2017) (observing that "the Attorney General's change of position" involved "purely legal issues on which [the Supreme Court] must give [its] de novo judgment"); *CVAS 2, LLC v. City of Fredericksburg*, 289 Va. 100, 117 n.5 (2015) ("[A] party cannot concede the law."); *Bush v. Commonwealth*, 68 Va. App. 797, 804 n.1 (2018) (noting that despite the Attorney General's concession that Bush was entitled to a writ of actual innocence, the Court of Appeals' "fidelity to the uniform application of law precludes [it] from accepting concessions of law made on appeal.").

Even if the approbate-reprobate doctrine does apply to this proceeding, the Commonwealth's position change does not run afoul of the doctrine. It is certainly true that "a party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory. Nor may a party invite error and then attempt to take advantage of the situation created by his own wrong." *Rowe v. Commonwealth*, 277 Va. 495, 502

(2009) (quoting *Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181 (2006)). But even if these principles could apply in this context, the Commonwealth's position change was proper. The Commonwealth did not invite error by restoring the position it held in the lower court, namely, that Richardson remained guilty of the charge to which he pled guilty. Rather, the Attorney General examined the Commonwealth's positions in the November 2021 brief and determined that they were legally erroneous.

For instance, that filing argued that a single verdict of acquittal on different charges compelled the conclusion that *no* rational factfinder would have convicted Richardson. R. 476 (quotation from November 2021 brief stating that "[t]his case is unique in that it is also clear that no rational factfinder would have found Mr. Richardson guilty had that information been presented in his proceedings in state court. The federal jury acquittal is conclusive in that regard."). But this position is legally incorrect. *See Tyler*, 73 Va. App. at 469, 861 S.E.2d at 91 ("[I]t is not enough for [an actual innocence petitioner] to convince us that some, many, or even most rational factfinders would have acquitted him . . . [they] must prove that *every* rational factfinder would have done so."); *supra* Part III. The Commonwealth's 2022 supplemental brief cured the factual and legal defects of its previous filing.

Richardson similarly overlooks the fact that the Commonwealth's position in the lower court was that he was guilty of involuntary manslaughter. In truth, the

Commonwealth's repudiation of its November 2021 positions restored the Commonwealth's legal position to the legally and factually sound status quo. Applying the approbate-reprobate doctrine to actual innocence proceedings would prevent the Commonwealth from ever joining in a petition for writ of actual innocence, nullifying the General Assembly's intent in enacting Code § 19.2-327.10:1 and § 19.2-327.2:1. This Court should reject Richardson's invitation to apply the approbate-reprobate doctrine in the actual innocence context and refuse his petition for appeal.

CONCLUSION

For the foregoing reasons, this Court should refuse the petition for appeal.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE

I certify that on September 6, 2022, this document was filed electronically with the Court through VACES. This brief complies with Rule 5:18(b) because the portion subject to that rule does not exceed 25 pages. Pursuant to Rule 5:1B(b), a true copy of this document was simultaneously emailed to counsel for Terrance Richardson, Jarrett Adams, Esq., at jadams@jarrettadamslaw.com, and Sarah Hensley, Esq., at sarah@jarrettadamslaw.com.

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