

**VIRGINIA:**

**IN THE COURT OF APPEALS**

**TERRENCE JEROME RICHARDSON,**

**Petitioner,**

**v.**

**RECORD NO. 0361-21-2**

**COMMONWEALTH OF VIRGINIA,**

**Respondent.**

**COMMONWEALTH'S ANSWER  
TO PETITION FOR WRIT OF ACTUAL INNOCENCE**

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Pursuant to Virginia Code § 19.2-327.11(C), the Commonwealth, by the Attorney General, states as follows in Answer to the Petition for Writ of Actual Innocence:

The petitioner, Terrence Jerome Richardson, (“Mr. Richardson”), seeks a writ of actual innocence to vacate his 1999 conviction from the Circuit Court for Sussex County for one count of involuntary manslaughter for the killing of Officer Allen Gibson, Jr. (“Officer Gibson”) of the Waverly Police Department. In light of the fact that a federal jury found Mr. Richardson not guilty of the murder of Officer Gibson, the Commonwealth submits that Mr. Richardson should be granted a writ of actual innocence.

## SUMMARY OF ARGUMENT

Mr. Richardson should be granted a writ of actual innocence based upon the unique set of circumstances presented in his case. Initially charged with capital murder of a police officer, Mr. Richardson pled guilty to involuntary manslaughter in December 1999. Shortly after his guilty plea, he was indicted by federal prosecutors for the murder of a law enforcement officer during drug trafficking for the same homicide to which he pled guilty in state court. Federal prosecutors presented their best case to the jury, which included the same information that the Commonwealth relied upon in support of Mr. Richardson's guilty plea plus additional evidence. Mr. Richardson was ultimately acquitted of the murder by a federal jury.

It is clear from the record that some information and evidence presented in Mr. Richardson's federal trial was unavailable to him when he pled guilty in state court, including information that a key witness lied to state investigators and lied during the preliminary hearing. This 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. Based upon those facts, the new evidence presented in his

federal trial and the federal jury's acquittal, Mr. Richardson is entitled to a writ of actual innocence.

If this Court finds that Mr. Richardson is not entitled to a writ of actual innocence based upon the evidence presented in his federal trial and the federal jury acquittal, an evidentiary hearing is warranted to assess the materiality of the evidence presented by Mr. Richardson. In support of his petition, Mr. Richardson relies upon two documents attributed to a young witness who allegedly saw one of the perpetrators shortly after Officer Gibson was shot. One is a handwritten statement signed by the witness in which she describes the appearance of a perpetrator, which was inconsistent with Mr. Richardson's appearance at the time of the shooting. The second is a photo lineup in which Mr. Richardson claims the witness identifies someone else as the perpetrator. As detailed below, the Commonwealth submits that additional information is needed to assess the materiality of these two documents. The witness has never testified in a proceeding relating to Mr. Richardson's case, and additional information is needed from the witness to determine if the information she provided implicates an alternate suspect. If this Court finds that Mr. Richardson is not entitled to a writ of actual innocence based upon his acquittal in federal court, then the Commonwealth respectfully

requests an evidentiary hearing to assess the materiality of these documents attributed to the witness.

## **I. PROCEDURAL HISTORY**

### **A. State Court Proceedings**

Mr. Richardson was indicted by the Grand Jury for Sussex County for one count of capital murder for the murder of a law enforcement officer, Officer Allen Gibson, and one count of possession of a firearm during the commission of a felony. Comm. Exh. A. On December 8, 1999, the Commonwealth amended the capital murder indictment to change the charge to involuntary manslaughter. Pet. Exh. C, page 2. Mr. Richardson subsequently pled guilty to one count of involuntary manslaughter before the Honorable James A. Luke, Circuit Court Judge. Pet. Exh. C. The Commonwealth nolle prosecuted the firearms charge on December 8, 1999. Comm. Exh. B.

On March 8, 2000, Judge Luke sentenced Mr. Richardson to ten years incarceration with five years suspended. Pet. Exh. D, page 53.

Prior to the filing of this petition, Mr. Richardson did not file any challenges to this conviction in state or federal court.

## **B. Federal Proceedings**

On December 19, 2000, Mr. Richardson was indicted for one count of conspiracy to distribute crack cocaine, one count of use of a firearm to commit murder during drug trafficking, and one count of murder of a law enforcement officer (Officer Gibson) during drug trafficking. Comm. Exh. C. Mr. Richardson and his co-defendant, Ferrone Claiborne (“Claiborne”),<sup>1</sup> were tried by a jury before the Honorable Robert E. Payne, United States District Judge, in the United States District Court for the Eastern District of Virginia on June 4-13, 2001.<sup>2</sup> On June 13, 2001, the jury found Mr. Richardson not guilty of the charges of murder of a law enforcement officer during drug trafficking and use of a firearm to commit murder during drug trafficking. Fed. Vol. VI, Tr. 27. Mr. Richardson was convicted of conspiracy to distribute crack cocaine. Fed. Vol. VI, Tr. 27.

On September 27, 2001, Mr. Richardson was sentenced to life in prison on the conviction of conspiracy to distribute crack cocaine.<sup>3</sup> Fed. Sent. Tr. 158. After

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<sup>1</sup> Claiborne was also indicted for the same three charges. Comm. Exh. C.

<sup>2</sup> Excerpts of the federal trial transcript are attached to this response as Commonwealth’s Exhibit D. The citations to the federal trial transcript are denoted by “Fed. Vol.”, with citations to the volume of the transcript and page number.

<sup>3</sup> The transcript to the federal sentencing proceeding was attached to Mr. Richardson’s petition as Pet. Exh. F. The citations to the federal sentencing hearing transcript are denoted by “Fed. Sent.” with the page number.

noting that *United States v. Watts*, 519 U.S. 149 (1997), and federal sentencing guidelines permit a sentencing judge to take into consideration acquitted conduct, the Honorable Robert E. Payne found “by clear and convincing evidence and perforce by a preponderance of the evidence that both defendants participated in the killing of Officer Gibson.” Fed. Sent. Tr. 118. This finding led to an enhancement of the sentencing guidelines to life in prison without probation, the maximum sentence for the offense. Fed. Sent. Tr. 123.

Mr. Richardson appealed his federal conviction. On October 29, 2002, the United States Court of Appeals for the Fourth Circuit affirmed the conviction and sentence. *United States v. Richardson*, 51 Fed. Appx. 90 (4th Cir. 2002).

Mr. Richardson subsequently challenged his conviction and sentence by filing a motion pursuant to 28 U.S.C. § 2255. By Order and Memorandum Opinion entered on August 10, 2005, Judge Payne denied the motion. *United States v. Claiborne*, 388 F. Supp. 2d 676, 689 (E.D. Va. 2005).

Mr. Richardson appealed the denial of his motion pursuant to 28 U.S.C. § 2255. In an opinion entered on March 6, 2006, the United States Fourth Circuit Court of Appeals dismissed the appeal without granting a certificate of appealability. *United States v. Richardson*, 169 F. App'x 792, 793 (4th Cir. 2006).

### **C. WAI Petition**

On April 6, 2021, Mr. Richardson, through counsel, filed a Petition for Writ of Actual Innocence in this Court. Mr. Richardson asserts his innocence based on three pieces of evidence: the April 1998 statement of Shannequia Gay (“Shannequia”), the April 1998 photo array shown to Shannequia, and an April 1998 anonymous tip alleging Leonard Newby (“Newby”) was involved in the murder of Officer Gibson. On June 3, 2021, this court directed the Attorney General to file a response to the petition.

## **II. STATEMENT OF FACTS**

### **A. Information presented in State Court Proceedings**

#### ***1. Testimony at the Preliminary Hearing.***

A joint preliminary hearing for Mr. Richardson and Claiborne was held on October 15, 1998. At that hearing, Virginia State Police Trooper Jarrid Williams (“Trooper Williams”) testified that he responded to a Sussex County dispatch that indicated an officer had been shot behind the Waverly Village Apartments in Waverly, VA. Pet. Exh. A, Tr. 10-11. When he arrived at the apartment complex, he spoke with Chief Warren Sturrup (“Chief Sturrup”) of the Waverly Police Department, who advised Trooper Williams that the injured officer was behind the apartments in the woods. Pet. Exh. A, Tr. 11. Trooper Williams went to the woods

and found Cpl. Rick Aldridge (“Cpl. Aldridge”) of the Sussex County Sheriff’s Office attending to Officer Gibson. Pet. Exh. A, Tr. 12. Trooper Williams testified that he observed what appeared to be a bullet hole that was approximately an inch above Officer Gibson’s navel. Pet. Exh. A, Tr. 13. He saw no external bleeding. Pet. Exh. A, Tr. 14. While Trooper Williams was assisting Officer Gibson, Officer Gibson described the assailants.

One sort of medium build with short, balding hair. Real short, narrow. He described one as tall and skinny. He described one of them with hair that would resemble dreadlocks pulled back into a ponytail[sic]. He said they were both wearing dark jeans. One of them had on a white T-shirt. One of them had on an old blue baseball cap. He said that he had got in a scuffle with them and one of them got his gun. He referred to the one that had the gun as the skinny one. He said that he was fighting with him and he was -- he was trying to move his hands and show me. He said I tried to move the gun away from me and he said they shot me with my own gun.

Pet. Exh. A, Tr. 15, lines 12-23; *see* Tr. 19.

Shawn Wooden (“Wooden”) testified that Mr. Richardson stayed at his residence for approximately one week in April 1998. Pet. Exh. A, Tr. 48-9. According to Wooden, he and Mr. Richardson met with Claiborne at Peace Funeral Home in Waverly on the morning of April 25th. Pet. Exh. A, Tr. 49. They were supposed to go to Petersburg to get some drugs, but Claiborne indicated the trip to Petersburg was unnecessary. Pet. Exh. A, Tr. 50. The three men then went to the Waverly Village Apartments. Pet. Exh. A, Tr. 51-2.

Wooden testified that Claiborne told him they were going to meet a guy at the back of the apartment complex. Pet. Exh. A, Tr. 55. Wooden also indicated that Mr. Richardson instructed him to serve as a lookout. Pet. Exh. A, Tr. 55-6. Mr. Richardson and Claiborne then walked around to the back of the apartment complex near the wooded area. Pet. Exh. A, Tr. 56-7. Wooden later saw a Waverly police car pull up shortly after Mr. Richardson and Claiborne were around the back building of the apartment complex. Pet. Exh. A, Tr. 58. The officer pulled his vehicle to the side, got out, and then walked to the back of the apartment complex. Pet. Exh. A, Tr. 59-60. Wooden testified that when he saw the officer walk behind the apartment complex, Wooden screamed out “Skoo doo.” Pet. Exh. A, Tr. 61, line 4. Wooden then saw Mr. Richardson look around the corner of the building. Pet. Exh. A, Tr. 61. According to Wooden, Mr. Richardson then went back around the building. Pet. Exh. A, Tr. 62. Wooden testified that he left the area shortly after he saw Mr. Richardson go in the other direction. Pet. Exh. A, Tr. 62-3. While he was leaving, Wooden heard a gunshot. Pet. Exh. A, Tr. 63. Wooden stopped for a minute, and then he headed towards his grandmother’s house. Pet. Exh. A, Tr. 64. Wooden eventually returned to his residence. Pet. Exh. A, Tr. 64-5.

Wooden testified that Mr. Richardson came to his residence shortly thereafter. Pet. Exh. A, Tr. 65. According to Wooden, Mr. Richardson was nervous. Pet. Exh.

A, Tr. 66. Wooden noted that someone stopped by his residence to use the phone, and that individual noted that a police officer was shot. Pet. Exh. A, Tr. 67. According to Wooden, during that discussion, Mr. Richardson noted that the new cop was shot. Pet. Exh. A, Tr. 67-8. A little later, Mr. Richardson told Wooden that the shooting was an accident. Pet. Exh. A, Tr. 68. Wooden testified that Mr. Richardson stayed around the house, and Mr. Richardson went with Wooden any time Wooden left the residence. Pet. Exh. A, Tr. 69.

Wooden admitted that he lied to investigators twice during the investigation. Pet. Exh. A, Tr. 73-8, 81-3. Wooden also noted that in the first version of events that he relayed to law enforcement, he told them that Newby may be involved because other people were mentioning Newby's name. Pet. Exh. A, Tr. 85-7.

## ***2. Guilty Plea Hearing.***

On December 8, 1999, Mr. Richardson pled guilty to one count of involuntary manslaughter. During the plea hearing, the Commonwealth presented the following facts to support Mr. Richardson's guilty plea:

This matter occurred on April 25th, 1998, in the County of Sussex, a Saturday morning. It involved Officer Allen Gibson, who was an officer with the Waverly Police Department. At the time he was patrolling in the Waverly Village Apartment area of Waverly.

Judge, the Commonwealth's evidence would come from several sources. The initial witness, Shawn Wooden, the Commonwealth would have called. Shawn Wooden would have indicated to the Court

that Terence Richardson was staying with him at the time of the offense. Terence Richardson indicated to Shawn Wooden that morning that he was going to get some dope with Ferrone Claiborne, a codefendant. And for Shawn Wooden to come along with them.

They in fact did that, went to the Waverly Village Apartments. Terence Richardson and Ferrone Claiborne went to the back of the apartment complex. Furthermore Shawn Wooden's testimony would be that he was instructed to be a lookout if he saw anything that occurred. In fact Officer Gibson pulled up at that general time frame and at that particular time frame Terence Richardson, after he got a signal, an audible signal from Shawn Wooden, in fact did run behind the complex into a wooded area behind the apartment complex, as did the codefendant, Ferrone Claiborne.

Several moments went by and Shawn Wooden would testify that he heard what he thought was a shot ring out. Upon hearing that shot, Shawn Wooden left on his bicycle, left the area, and went back to his house in another part of Waverly. Approximately about fifteen minutes later Shawn Wooden would testify to the Court that Terence Richardson came back to the house looking out of breath, nervous, and concerned. After some period of time -- at that time Shawn Wooden would indicate to the Court that Terence Richardson took him outside and indicated to him that Terence Richardson had shot, accidentally shot the cop.

Judge, we would also produce a witness from the Commonwealth's perspective, Jervona Jones, who was the girlfriend of Shawn Wooden, who would corroborate in many respects the testimony of Shawn Wooden.

Your Honor, the Commonwealth's next series of witnesses would have been two law enforcement officers who arrived at the scene very shortly after Officer Gibson was shot. Would be in the nature of dying declarations. The initial statement would be from Cpl. Rick Aldridge, who came to the apartment complex about 11:30 a.m. that morning and got the message that an officer was down. When he reached the area in the back of the complex, he saw Officer Gibson lying on the ground. Would testify to the Court that he was in and out of consciousness.

Deputy -- excuse me, Cpl. Aldridge would testify that they observed a wound in the abdomen area of Officer Gibson around his navel.

Officer Gibson was able to give Cpl. Aldridge a description of the assailant/assailants, indicating they were wearing blue jeans and white shirts and that one had dreadlocks. Further Officer Gibson told Cpl. Aldridge that the tall, thin one wrestled with him over his gun when the gun went off.

Next the Commonwealth would have produced Trooper Jarred Williams, who also came to the scene shortly after Officer Gibson was shot. And after Cpl. Aldridge got there. Again this was around 11:30 a.m. on the -- on the morning in question. He also noticed a hole, a bullet hole about one inch above Officer Gibson's navel. Officer Gibson told Trooper Williams that he believed he was dying and proceeded to give him other identifying information on his assailants. Officer Gibson told Trooper Williams that he had chased a black male into the woods and got into a scuffle with two black males who were attempting to get his gun. He described to Trooper Williams one was tall and skinny with dreadlocks. The other was short with bald on top hair.

Trooper Williams would further testify that Officer Gibson told him that he was fighting with the tall, skinny one. The tall, skinny one got the gun and the gun just went off.

Officer Gibson died at approximately 2:30 p.m. And the cause of death was a gunshot wound to his abdomen. And Judge, at this point I'd like to introduce the autopsy report to establish the death, and that's in the Court's file.

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Judge, the Commonwealth would also have called forensic scientist Ann Jones, which a certificate of analysis is also on file, Judge. I believe the front of the file. . . .

The crux of that, Your Honor, is that Miss Jones would testify that the bullet involved was from Officer Gibson's duty service revolver. That only one shot was fired. There were other bullets from the firearm that were not fired. Miss Jones, through examination of the

hole in the front panel of Officer Gibson's shirt, and the gunshot residue, was able to determine that the muzzle of the firearm was not in contact -- would not have been a contact wound, but it was up to eighteen inches, the muzzle of the firearm, from Officer Gibson's shirt, or the wound. So in other words the distance of the pistol to Officer Gibson's body was less than an arm's length. Ms. Jones would testify that it could have been as close as three inches from Officer Gibson's body, more likely it was between six and twelve inches from his body.

Judge, I would also introduce that certificate of analysis which I believe has been pulled for the Court – [ ] Commonwealth's Exhibit "2".

Judge, also I would also move for introduction of the preliminary hearing transcript which also has some additional details.

Pet. Exh. C, Tr. 5, line 15 – Tr. 10, line 15.

## **B. Information Presented During Federal Proceedings**

### ***1. Testimony and Evidence Presented at Federal Trial.***

Officer Allen Gibson joined the Waverly Police Department on February 6, 1998. Fed Vol. I, Tr. 323. At the time of his death on April 25, 1998, Officer Gibson was on duty and in uniform. *Id.* He carried a Glock Model 21, .45 ACP semiautomatic pistol. *Id.*

#### **a. Shawn Wooden Implicates Mr. Richardson and Claiborne in the Shooting of Officer Gibson.**

##### ***i. Wooden Implicates Mr. Richardson in the Shooting.***

Wooden testified pursuant to a plea agreement with the United States.<sup>4</sup> Fed. Vol. III, Tr. 58-9. According to Wooden, Mr. Richardson stayed with him the week of the shooting until the Sunday after the shooting. Fed. Vol. III, Tr. 71. On the day before the shooting, Mr. Richardson was wearing a plaid shirt, a t-shirt with a marijuana leaf, and blue jeans. Fed. Vol. III, Tr. 73. Mr. Richardson's hair was in corn rows. Fed. Vol. III, Tr. 75.

Wooden confirmed that Mr. Richardson spent the night before the shooting at Wooden's residence. Fed. Vol. III, Tr. 81. Mr. Richardson slept in Wooden's living room. *Id.* When Wooden walked into the living room after 9 a.m., Mr. Richardson was awake. Fed. Vol. III, Tr. 81-2.

Wooden testified that he left the residence with Mr. Richardson to go meet Claiborne. Fed. Vol. III, Tr. 82. Wooden and Mr. Richardson left the residence on a bicycle. Fed. Vol. III, Tr. 83. The two met Claiborne at Dobie's Store. Fed. Vol. III, Tr. 83-4, 85. After the group left Dobie's Store, they stopped by Wooden's grandmother's residence. Fed. Vol. III, Tr. 86. Eventually, they went to the Waverly

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<sup>4</sup> Wooden pled guilty to obstruction of justice. Fed. Vol. III, Tr. 58. He was sentenced to ten years incarceration, and he was testifying in the hopes that his sentence would be reduced as a result. Fed. Vol. III, Tr. 59.

Village Apartments. Fed. Vol. III, Tr. 88. Mr. Richardson and Claiborne were walking, and Wooden was riding a bicycle behind them. Fed. Vol. III, Tr. 88.

Wooden noted that Claiborne went around one apartment; Wooden and Mr. Richardson walked around two other apartments, and when they met up with Claiborne again, he had approximately a quarter of an ounce of crack cocaine. Fed. Vol. III, Tr. 89-92. The three walked down a little path in the woods. Fed. Vol. III, Tr. 90. While in the woods, Wooden asked Claiborne for some crack. Fed. Vol. III, Tr. 92. Claiborne gave Wooden some of the crack. Fed. Vol. III, Tr. 92. As Wooden started to smoke the crack, he heard a police officer say "halt." Fed. Vol. III, Tr. 93. The police officer, Officer Gibson, grabbed Mr. Richardson. Fed. Vol. III, Tr. 93.

According to Wooden, Mr. Richardson tried to get away, and Claiborne assisted Mr. Richardson in his effort to get away. Fed. Vol. III, Tr. 94. When they were struggling, Wooden saw Officer Gibson's weapon. Fed. Vol. III, Tr. 94. Officer Gibson had a hold of Mr. Richardson by Mr. Richardson's right shoulder. Fed. Vol. III, Tr. 95. Claiborne was reaching towards Officer Gibson. Fed. Vol. III, Tr. 96. Somehow, Mr. Richardson got his hand on the gun, and Wooden heard the gun when it went off. Fed. Vol. III, Tr. 96. Wooden did not see the shot fire. Fed. Vol. III, Tr. 96.

Wooden testified that Officer Gibson went down to the ground, and at that time, Mr. Richardson had Officer Gibson's gun in his hand. Fed. Vol. III, Tr. 96. Wooden only heard one shot. Fed. Vol. III, Tr. 96. After he saw Mr. Richardson with the gun, Wooden took off running. Fed. Vol. III, Tr. 96. Wooden did not see where either Claiborne or Mr. Richardson ran. Fed. Vol. III, Tr. 97.

Wooden eventually made it back to his residence: he testified that he took off his clothes and got back into bed with his girlfriend with the hopes that she would not know that he was gone. Fed. Vol. III, Tr. 100. Later that day, Mr. Richardson showed up at Wooden's residence. *Id.* Mr. Richardson did not have on the t-shirt that he was wearing earlier that morning. *Id.* Wooden described Mr. Richardson as being shaken up and nervous. Fed. Vol. III, Tr. 101. Wooden told Mr. Richardson that he needed to leave, and he advised Mr. Richardson to go to Mr. Richardson's mother's house in Williamsburg. Fed. Vol. III, Tr. 101-02.

Wooden testified that Joe Mack's ("Mack") girlfriend called his residence around 12:27 p.m. Fed. Vol. III, Tr. 104-05. She called again around 1 p.m. Fed. Vol. III, Tr. 105. During the second phone call, Mack relayed that his girlfriend indicated that a police officer had been killed in Waverly. Fed. Vol. III, Tr. 105.

Wooden testified that after Mack left, Mr. Richardson said that the two should go down to Waverly Village to pretend like they were "just being nosey." Fed. Vol.

III, Tr. 106-07. The two then went to Waverly Village Apartments. Fed. Vol. III, Tr. 107.

According to Wooden, Mr. Richardson got “sloppy drunk” that evening. Fed. Vol. III, Tr. 112-13. Mr. Richardson spent that evening at Wooden’s residence. Fed. Vol. III, Tr. 114. That next day, Wooden told his girlfriend, Jovanna Jones (“Jones”), that if police asked to say that he was at home with her all day. Fed. Vol. III, Tr. 116-17.

*ii. Wooden Provided Conflicting Information during the Investigation and during Court Proceedings.*

Wooden testified that he lied to law enforcement on the day he was arrested and first interviewed. Fed. Vol. III, Tr. 119-20. Wooden also indicated that he lied when he told two other individuals, Lewis Langford and Khalid Abdullah, that Mr. Richardson did not kill Officer Gibson when he talked with them at the Ramada Inn in Petersburg a few days later. Fed. Vol. III, Tr. 121.

When Wooden met with law enforcement a few weeks after the shooting, he told them that Mr. Richardson and Claiborne were the ones involved in the shooting. Fed. Vol. III, Tr. 122. Wooden noted that he did not tell law enforcement about his presence at the scene. Fed. Vol. III, Tr. 123. Wooden also indicated that at the preliminary hearing in state court, he testified to the same story that he told the jury, except that he indicated he was the lookout at that time. Fed. Vol. III, Tr. 124.

Wooden also noted that investigators in Sussex helped him get a job at a box plant in an effort to get him cleaned up. Fed. Vol. III, Tr. 125, 126.

In his first interview with FBI Special Agent Robert Ritchie (“Agent Ritchie”), which was after Mr. Richardson and Claiborne pled guilty in state court, Wooden indicated he did not want to be involved anymore. Fed. Vol. III, Tr. 126. Eventually, he admitted to the version that he told the jury. Fed. Vol. III, Tr. 126.

In his May 1998 statement to law enforcement, Wooden stated that Mr. Richardson and Claiborne were trying to trade something to a guy from Hopewell in return for crack cocaine. Fed. Vol. III, Tr. 144. At trial, Wooden admitted that was a lie. *Id.* Wooden also admitted that he maintained for a while that he did not know who shot Officer Gibson. Fed. Vol. III, Tr. 145. Wooden testified that he told law enforcement that they should look at Newby, and that Newby had dreads and a ponytail. Fed. Vol. III, Tr. 146.

**b. Officer Gibson describes the assailants to two of the first responders who arrived after the shooting.**

Cpl. Aldridge arrived on the scene by 11:18 a.m. in response to a 911 call. Fed. Vol. I, Tr. 260-64. Cpl. Aldridge found Officer Gibson in a wooded area that was at the rear of the Waverly Village apartment complex. Fed. Vol. I, Tr. 269-70. Officer Gibson was approximately 100 feet away from the back of building six of the apartment complex. Fed. Vol. I, Tr. 271. Officer Gibson was by himself: his feet

were in the direction of the berm that goes along the back side of the apartment building. Fed. Vol. I, Tr. 272. Officer Gibson's head was facing towards the woods. *Id.*

Cpl. Aldridge did not see anyone presenting a threat when he found Officer Gibson. Fed. Vol. I, Tr. 275. Officer Gibson was initially unconscious. *Id.* Cpl. Aldridge did not know where Officer Gibson was shot. Fed. Vol. I, Tr. 276. Officer Gibson's firearm was on the ground, approximately eight to ten feet from Officer Gibson's feet in the direction of the apartment building. Fed. Vol. I, Tr. 276, 306. Officer Gibson's pulse was weak. Fed. Vol. I, Tr. 279. When Officer Gibson regained consciousness, he told Cpl. Aldridge that he was shot in the stomach. Fed. Vol. I, Tr. 280-81. Cpl. Aldridge subsequently removed Officer Gibson's gun belt and bulletproof vest. Fed. Vol. I, Tr. 282.

According to Cpl. Aldridge, Officer Gibson stated that while he was driving around the apartments, he saw two black males enter the woods behind the apartments. Fed. Vol. I, Tr. 285. The two appeared to be engaged in a drug transaction. *Id.* Officer Gibson told Cpl. Aldridge that he parked his car and walked around to the back of the apartment complex to intervene in this drug transaction. *Id.* Officer Gibson did not know either of the two men; it was his first time seeing either of them. *Id.* Officer Gibson said to Cpl. Aldridge, "[t]hey had dreadlocks, and

one possibly had a ponytail. Both were wearing blue jeans and white shirts.” Fed. Vol. I, Tr. 285, lines 19-21; *see* Fed. Vol. I, 304. Cpl. Aldridge noted that Officer Gibson did not specify what type of shirts the two were wearing. Fed. Vol. I, Tr. 285. Officer Gibson described one of the assailants as tall and thin. Fed. Vol. I, Tr. 285, 304. Officer Gibson indicated that he was fighting with the tall, thin assailant over Officer Gibson’s gun when the gun fired. Fed. Vol. I, Tr. 289, 291, 304.

Troopers Williams and E.L. Jones (“Trooper Jones”) also responded to the 911 call. Fed. Vol. II, Tr. 25-9. Shortly after arriving on scene, Troopers Williams and Jones went to Officer Gibson’s location. Fed. Vol. II, Tr. 35. When they arrived, Officer Gibson was conscious and able to talk. Fed. Vol. II, Tr. 36. Trooper Williams saw what appeared to be a bullet hole approximately 1-2 inches above in line with his naval. Fed. Vol. II, Tr. 36.

Officer Gibson told Trooper Williams<sup>5</sup> that he chased a black male back into the woods. Fed. Vol. II, Tr. 37. Officer Gibson indicated that he got into a scuffle with two black males. *Id.* One male was tall, skinny, and had dreadlocks. Fed. Vol. II, Tr. 37, 48. That male was wearing an old blue baseball cap, and his dreadlocks were in a ponytail. Fed. Vol. II, Tr. 37, 48-9, 54. The second male was medium build

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<sup>5</sup> Trooper Williams noted that he remembered going over Officer Gibson’s recollection three times. Fed. Vol. II, Tr. 41.

with short, maybe bald on top hair. Fed. Vol. II, Tr. 38, 55. Officer Gibson said that both men were wearing white t-shirts with old blue jeans. Fed. Vol. II, Tr. 38.

Officer Gibson got into a scuffle with the two men. Fed. Vol. II, Tr. 38. They tried to get Officer Gibson's gun, and Officer Gibson wrestled with them. *Id.* When the two men got his gun, Officer Gibson tried to point it away from him. Fed. Vol. II, Tr. 38, 56. Trooper Williams noted that Officer Gibson stated, "[t]hey shot me. They shot me with my own damn gun." Fed. Vol. II, Tr. 38, lines 18-19.

### **c. Chief Sturupp Creates Issues at the Scene**

According to Cpl. Aldridge, when Chief Sturupp arrived at the scene, Chief Sturupp picked up Officer Gibson's firearm and then disappeared. Fed. Vol. I, Tr. 280. When Trooper Williams arrived at the apartment complex, there was a crowd of people in the area around a dumpster. Fed. Vol. II, Tr. 31. The parking lot was full of people, and Trooper Williams saw Chief Sturupp standing in front of the crowd. *Id.* Chief Sturupp had one weapon in his hand and another weapon in his holster. *Id.*

Eric Garrett ("Garrett"), who lived with his grandmother near the Waverly Village Apartments, had interacted with Officer Gibson earlier that morning. Fed. Vol. II, Tr. 251-55. Garrett spoke with Officer Gibson in the woods behind Waverly Village Apartments. Fed. Vol. II, Tr. 253-56. According to Garrett, Officer Gibson

asked Garrett if he saw anyone in the woods. Fed. Vol. II, Tr. 256. Garrett told Officer Gibson that he had not seen anyone. *Id.* The two conversed for a few more minutes, and then Garrett went through the woods as a shortcut to his cousin's residence; Garrett was picking up a lawn mower from his cousin. Fed. Vol. II, Tr. 257.

Later that morning, Chief Sturrup came to Garrett's house, handcuffed him, and took him to Waverly Village Apartments. Fed. Vol. II, Tr. 258. Chief Sturrup took Garrett in handcuffs to Officer Gibson's location. Fed. Vol. I, Tr. 293; Fed. Vol. II, Tr. 42, 259-60. Officer Gibson noted that Garrett was not the person that shot him. Fed. Vol. II, Tr. 42, 260. Garrett was cleared as having any involvement in the shooting at the scene. Fed. Vol. I, Tr. 294.

**d. Physical Evidence Did Not Connect Mr. Richardson to the Shooting.**

No latent prints of value were found on the gun. Fed. Vol. II, Tr. 64. The bullet retrieved from Officer Gibson was fired by Officer Gibson's gun. Fed. Vol. II, Tr. 163. Mr. Richardson was 5'8" and weighed 150 lbs. when he was arrested on April 26, 1998. Fed. Vol. II, Tr. 371. Fibers recovered from the white t-shirt that was retrieved from Mr. Richardson's father's residence could not be associated with the fibers composing Officer Gibson's uniform shirt and pants due to differences in physical and optical properties. Fed. Vol. V, Tr. 49-50.

DNA found in two stains on Officer Gibson's t-shirt did not originate from the same individual whose DNA was found in a stain on the shirt Mr. Richardson was wearing at the time of his arrest. Fed. Vol. V, Tr. 51. Both Mr. Richardson and Claiborne were eliminated as possible contributors to the genetic material found on Officer Gibson's t-shirt. Fed. Vol. IV, Tr. 53. Mr. Richardson, Claiborne, and Officer Gibson were all eliminated as possible contributors to hair fragments found on Officer Gibson's clothing and on the jeans that were worn by Mr. Richardson on the day he was arrested. Fed. Vol. IV, Tr. 54-55

**e. Evette Newby Claims that She Saw Mr. Richardson and Claiborne Struggle with Officer Gibson**

Evette Newby ("Evette")<sup>6</sup> testified that she was living at the Waverly Village Apartments with her two sons and their father on the day Officer Gibson was shot. Fed. Vol. II, Tr. 277. She knew Officer Gibson. *Id.* That morning, her children's father, Tony White ("White"), let her know that Officer Gibson was riding around the apartment parking lot. Fed. Vol. II, Tr. 277-78. Evette saw Officer Gibson in his vehicle driving around when she opened her kitchen window. Fed. Vol. II, Tr. 278. Officer Gibson drove around, but he parked a door down from Evette's apartment a little later. *Id.* Evette testified that Officer Gibson went around to the side of her

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<sup>6</sup> Evette is one of Leonard Newby's sisters. Fed. Vol. II, Tr. 323.

apartment building. *Id.* Evette saw Officer Gibson come back to his car, get on his radio, and then proceed back to the back of the apartment building. *Id.*

Evette testified that she then saw Officer Gibson in the woods. Fed. Vol. II, Tr. 281. She noted that she saw Mr. Richardson, Claiborne, and another black male head into the woods the first time that Officer Gibson drove through the apartment complex. Fed. Vol. II, Tr. 282. When Officer Gibson went into the woods, Mr. Richardson, Claiborne, and the third male were already there. *Id.*

Evette saw Officer Gibson talking to somebody. Fed. Vol. II, Tr. 284. She then saw Officer Gibson struggling with Mr. Richardson and Claiborne. Fed. Vol. II, Tr. 285. As they were struggling, Evette heard the gun fire. Fed. Vol. II, Tr. 285-86. She did not see who fired the shot. Fed. Vol. II, Tr. 286. After the shot was fired, Evette saw the unknown black male run to the right side. *Id.* Evette testified that she did not see where Claiborne went, but she did see Mr. Richardson come to the top of the berm in the woods. Fed. Vol. II, Tr. 286-87. Evette testified that Mr. Richardson appeared to have a black item in his hand; she noted that it might have been a gun. Fed. Vol. II, Tr. 287. She described Mr. Richardson as wearing blue jeans, a white t-shirt with a green leaf plant right at the bottom, and another shirt on top. *Id.* Evette also indicated that Mr. Richardson had what appeared to be a scarf on his head, and his hair was in braids in the back. Fed. Vol. II, Tr. 289.

Evette testified that Mr. Richardson looked very stunned when he was at the top of the berm. Fed. Vol. II, Tr. 290. According to Evette, Mr. Richardson turned around and fled. *Id.*

After she saw Mr. Richardson flee, Evette finished getting dressed, and she and her children ran downstairs. Fed. Vol. II, Tr. 291.

Evette testified that she saw Mr. Richardson again at the Waverly Village Apartments later that day. Fed. Vol. II, Tr. 292. He was sitting by his cousin's house in the front. Fed. Vol. II, Tr. 292-93. Evette also testified that she saw Wooden at the apartment complex later. Fed. Vol. II, Tr. 293. She could not say that Wooden was the third black male that she saw in the woods earlier that morning. Fed. Vol. II, Tr. 293.

Evette also testified that she saw Mr. Richardson and Wooden at Dobie's Store later in the afternoon. Fed. Vol. II, Tr. 294. She heard Mr. Richardson talking to Wooden; according to Evette, Mr. Richardson said, "I got that mother fucker." Fed. Vol. II, Tr. 294, lines 19, 21.

Evette testified that she denied knowing anything about the shooting when she was first interviewed by law enforcement at her house. Fed. Vol. II, Tr. 295, 303. Later in the day, she was interviewed again. During the second interview, she told investigators that there were a couple of black males in the woods. Fed. Vol. II, Tr.

296, 303-04. Evette admitted that she did not tell those investigators everything that she said in court. *Id.* On the following day, Evette spoke with Investigator Tommy Cheek (“Investigator Cheek”) of the Sussex County Sheriff’s Office. Fed. Vol. II, Tr. 296. During that interview, she indicated that she saw Mr. Richardson at the scene. Fed. Vol. II, Tr. 296, 332. Evette also indicated that she saw a man named Coop, who at trial she stated was Claiborne. Fed. Vol. II, Tr. 296-97, 332-333. Evette later acknowledged that Investigator Cheek was the one that told her it could not have been the individual known as Coop because Coop was incarcerated on April 25th. Fed. Vol. II, Tr. 306. Evette did not recall telling two federal investigators in January 2000 that Coop Faltz was in front of the Waverly Village Apartments with Mr. Richardson, Claiborne, Wooden, and several others. Fed. Vol. II, Tr. 308.

Evette testified that she refused to go to court for the state proceedings. Fed. Vol. II, Tr. 299. She also refused to show up twice for the federal grand jury pursuant to subpoenas. Fed. Vol. II, Tr. 299, 312.

Evette noted that she has been dealing with serious problems with her use of crack cocaine for over ten years. Fed. Vol. II, Tr. 300. Evette also recalled that she told Chief Sturup that Investigator Cheek was pressuring her to say that she saw Mr. Richardson shoot Officer Gibson. Fed. Vol. II, Tr. 302. She noted that she would not agree to that. *Id.*

Evette noted that Sussex County Sheriff's investigators provided her with food money for her and her kids amounting to \$27 on one occasion, and \$50 on another occasion. Fed. Vol. II, Tr. 269. She also received additional food money from ATF Special Agent Michael B. Talbert ("Agent Talbert") on a couple of occasions. *Id.*

**f. Mr. Richardson's Statements to Law Enforcement about the Day of the Shooting.**

*i. Statement After Arrest*

Mr. Richardson was arrested on April 26, 1998. Fed. Vol. II, Tr. 368. He was interviewed by Special Agent James Huddle ("Agent Huddle") of the Virginia State Police shortly after his arrest. Fed. Vol. II, Tr. 368-69.

In his interview with Agent Huddle, Mr. Richardson stated that he was at Wooden's house on the day Officer Gibson was shot. Fed. Vol. II, Tr. 371. Mr. Richardson had spent approximately a week at Wooden's residence, and on the day of the shooting, Mr. Richardson woke up at approximately 9 a.m. Fed. Vol. II, Tr. 371-72. Mr. Richardson, who had slept on the sofa, got up and went to the bathroom. Fed. Vol. II, Tr. 372. When he returned to the sofa, Wooden's children were in the living room watching television. *Id.* At approximately 10 a.m., Mack stopped by Wooden's residence. *Id.* Mack had a conversation with Wooden, and then he left.

*Id.* Mack's girlfriend called Wooden's residence later that day; she was the one that informed Mr. Richardson and Wooden that a police officer had been shot. *Id.*

Mr. Richardson stated that he and Wooden left the residence between 1 p.m. and 2 p.m., and they went to his grandmother's house. Fed. Vol. II, Tr. 372. Mr. Richardson indicated that they stopped at Dobie's Store to get a cold beer. *Id.* Then, the two went to Mr. Richardson's grandmother's house. *Id.* From there, the two rode bicycles to Waverly Village Apartments, where they arrived at approximately 3 p.m. *Id.*

*ii. Interview with FBI Agent Ritchie on October 26, 2000*

Mr. Richardson was later interviewed by Agent Ritchie on October 26, 2000. Fed. Vol. II, Tr. 377-78. During that interview, Mr. Richardson noted that on Friday, April 24th, he woke up late morning or early afternoon. Fed. Vol. II, Tr. 386. Mr. Richardson told Agent Ritchie that he met up with Wooden at approximately 1:30 p.m. Fed. Vol. II, Tr. 387. Mr. Richardson spent the evening sleeping on Wooden's couch. Fed. Vol. II, Tr. 388.

Mr. Richardson told Agent Ritchie that he woke up between 9:30 a.m. and 10 a.m. the next morning. Fed. Vol. II, Tr. 388. Mr. Richardson went to the bathroom and washed up. *Id.* The children were up, and they began watching cartoons. *Id.* Mr. Richardson outlined the shows that they watched. Fed. Vol. II, Tr. 388-89. He

recalled that Wooden got up and came into the living room around 11 a.m. Fed. Vol. II, Tr. 389.

Mr. Richardson told Agent Ritchie that Mack stopped by Wooden's residence around noon. Fed. Vol. II, Tr. 390. Mr. Richardson also noted that a tow truck stopped by the residence around 11:15 or 11:20 a.m., and it left with Mack's vehicle at 11:30. Fed. Vol. II, Tr. 390; *see* Fed. Vol. III, Tr. 30. Mr. Richardson indicated that Mack's girlfriend called Wooden's residence at 11:30 a.m. Fed. Vol. II, Tr. 393. According to Mr. Richardson, Mack's girlfriend told them about the police officer being shot at Waverly Village during that phone call. Fed. Vol. II, Tr. 394.

Mr. Richardson indicated to Agent Ritchie that he and Wooden left Wooden's residence around 1 p.m. Fed. Vol. III, Tr. 7. The two went to Dobie's Store and purchased beer. *Id.* While there, Mr. Richardson met Claiborne; Mr. Richardson told Claiborne that he was going to Waverly Village to see what happened. Fed. Vol. III, Tr. 8. After Wooden and Mr. Richardson left Dobie's Store, they went to Wooden's great grandmother's house. Fed. Vol. III, Tr. 9. Sometime between 2 and 2:30 p.m., Wooden and Mr. Richardson left and headed towards Waverly Village Apartments. *Id.*

Mr. Richardson indicated that he was in contact with Alonzo Scott at Waverly Village Apartments. Fed. Vol. III, Tr. 9. Mr. Richardson believed that he left Waverly Village Apartments around 3 p.m. Fed. Vol. III, Tr. 9-10.

Mr. Richardson indicated that he went back to Wooden's residence. Fed. Vol. III, Tr. 11. That evening, Mr. Richardson and Wooden parted ways. *Id.* Mr. Richardson went to Dobie's Store several times that evening to buy beer. *Id.* Later that night, between 11 p.m. and 2 a.m., Mr. Richardson went to John Brown's residence. Fed. Vol. III, Tr. 15.

During the interview, Mr. Richardson noted that he was glad that he did not fit the description of the shooter: Mr. Richardson had corn rows, and the description of the suspect indicated that the suspect had dreads. Fed. Vol. III, Tr. 10-11.

*iii. Interview with Agent Ritchie on November 8, 2000*

In an interview with Agent Ritchie on November 8, 2000, Mr. Richardson maintained his recollection of events for the day. Fed. Vol. III, Tr. 16.

**g. Other Witnesses Claim that Mr. Richardson Made Incriminating Statements.**

Ronald "Booty" Williams ("Williams") testified that he saw Mr. Richardson later in the day after the shooting: he saw Mr. Richardson on a bicycle on Railroad Avenue. Fed. Vol. IV, Tr. 43-44. Williams also testified that he spoke with Wooden some days after the shooting. Fed. Vol. IV, Tr. 44, 50-1. According to Williams,

Wooden told him that Mr. Richardson “had told him that they had done it. They had killed the cop.” Fed. Vol. IV, Tr. 46, lines 6-7. Williams also noted that on the day of the shooting, Wooden told him that he and Mr. Richardson were at Wooden’s residence at the time of the shooting. Fed. Vol. IV, Tr. 47, 50.

William Ellsworth (“Ellsworth”), who had prior convictions for abduction, felony hit and run, and accessory after the fact of larceny, saw Mr. Richardson at a convenience store after Mr. Richardson’s grandmother’s funeral in February 1999. Fed. Vol. II, Tr. 196-200, 205-06, 207-08. According to Ellsworth, Mr. Richardson said “that he didn't mean to shot[sic] the officer, and if he could take it back, he would. If he could die in his place, he would.” Fed. Vol. II, Tr. 202, lines 10-3. Ellsworth further testified that the only thing Mr. Richardson said was “that he didn't mean it. It was an accident. He didn't mean to kill the officer. He didn't mean to shoot the officer.” Fed. Vol. II, Tr. 203, lines 11-3. Ellsworth also admitted that he was an alcoholic, and that he suffers from memory lapses. Fed. Vol. II, Tr. 214. Ellsworth also potentially had charges for possession of a firearm by a convicted felon in state court dropped as a result of his cooperation with federal prosecutors. Fed. Vol. II, Tr. 215; *but see* Fed. Vol. II, Tr. 217.

Keith Jackson (“Jackson”), who was incarcerated for three counts of distribution of cocaine and for a parole violation for a prior conviction for a shooting,

testified about his knowledge of Mr. Richardson’s and Claiborne’s involvement in drugs in Waverly. Fed. Vol. III, Tr. 260-78. Jackson testified that he saw Mr. Richardson late in the evening on April 25th. Fed. Vol. III, Tr. 283. Jackson noted that Mr. Richardson and a guy named Brandon Gilchrist (“Gilchrist”) got into an argument. *Id.* According to Jackson, Gilchrist threatened Mr. Richardson. In response to the threat, Mr. Richardson stated, “whatever, you don't want to fuck with me. I done killed one. I’ll kill another.” Fed. Vol. III, Tr. 284, lines 18-20. Jackson immediately noted that he did not know what Mr. Richardson was talking about, and that Mr. Richardson had never done anything like that. Fed. Vol. III, Tr. 285.

#### **h. State Court Guilty Pleas**

In the federal trial, the prosecution also presented the terms of both Mr. Richardson’s and Claiborne’s guilty pleas in the Circuit Court for Sussex County. In doing so, the federal prosecutor read the factual recitation presented at the plea hearings to the federal jury. Fed. Vol. II, Tr. 96-114.

#### **i. Mr. Richardson’s Defense During the Federal Trial**

Malcolm Westbrook (“Malcolm”), Mr. Richardson’s uncle, testified Mr. Richardson lived with him while he was on bond in 1999. Fed. Vol. IV, Tr. 289. He recalled attending the funeral services for Mr. Richardson’s maternal grandmother. Fed. Vol. IV, Tr. 290. Malcolm testified that Mr. Richardson rode back with him to

his home in Chesterfield after the gathering after the funeral. Fed. Vol. IV, Tr. 291-92. In contrast to Ellsworth's testimony, Malcolm noted that they did not stop at any convenience stores on the way home, and it took between forty-five minutes to an hour to get home. Fed. Vol. IV, Tr. 292.

Annie Westbrook ("Annie"), Mr. Richardson's mother, testified that she did not believe there was an opportunity for Mr. Richardson to go to a convenience store on the day of her mother's funeral. Fed. Vol. IV, Tr. 322-23. Annie also did not recall seeing Ellsworth on the day of the funeral. Fed. Vol. IV, Tr. 393. According to Annie, Mr. Richardson had corn rows in April 1998. Fed. Vol. IV, Tr. 325-26. She noted that his hair was not long enough to be pulled into a ponytail. Fed. Vol. IV, Tr. 326. Annie also indicated that Wooden told her on several occasions that Mr. Richardson did not kill Officer Gibson. Fed. Vol. IV, Tr. 333, 343. Wooden told her that Mr. Richardson was on the sofa in Wooden's living room at the time. Fed. Vol. IV, Tr. 333.

Lewis Goodwyn, who was at the Waverly Village Apartments on the day of the shooting, testified that he did not see either Mr. Richardson or Claiborne either before or after he heard the gunshot in the woods behind the apartment complex. Fed. Vol. IV, Tr. 351-54. John Bolen, another resident at the Waverly Village

Apartments who was present on the day Officer Gibson was shot, also saw no one around the time of the shooting. Fed. Vol. IV, Tr. 368-69.

Nathan Westbrook (“Nathan”), Mr. Richardson’s father, testified about the search that led to law enforcement’s retrieval of the white t-shirt with a marijuana emblem from Mr. Richardson’s bedroom. Fed. Vol. IV, Tr. 288-302.

### **III. NEW EVIDENCE**

#### **A. Evidence Presented by Mr. Richardson**

Mr. Richardson asserts there are three new pieces of evidence in his case and, had they been considered, no reasonable trier of fact would have found him guilty beyond a reasonable doubt. Mr. Richardson refers to these three pieces of evidence as the “Gay Statement,” the “Newby Photo Array,” and the “911 Tip.” For continuity, the Commonwealth will use these titles when referencing these pieces of evidence. In support of his claim that this evidence was previously unknown, Mr. Richardson attached affidavits from his trial counsel, David Boone (“Boone”), and from the prosecuting Commonwealth’s Attorney, David Chappell (“Chappell”), to his petition. Pet. Exh. J and K, respectively.

##### ***1. The Gay Statement***

Shannequia was nine years old in April 1998 and stayed the night at her aunt’s home at the Waverly Village Apartments on April 24, 1998. She was playing outside

her aunt's apartment at the time of the shooting. On April 25, 1998, Shannequia signed a handwritten statement describing the individual alleged to have shot Officer Gibson.<sup>7</sup> Specifically, it states:

[T]hat's when I saw the man with the "dreads" peeking around the other end of the building. He was watching the policeman. Im [illegible] not sure what kind of clothes he had on but I know he had a white shirt. He was kind of fat and he had hair on his chin.

Pet. Exh. G, pages 1-2 (internal quotations in original). Shannequia then described seeing this man run into the woods with Officer Gibson following him, hearing a loud noise, seeing Officer Gibson with blood on his stomach, and the man with dreads running away. *Id.*

The statement is signed by "Shannequia Gay," "Sharon Gay Turner," "Greg Russell," "SAA TStevens", and "Dep. V.P. Ricks." Pet. Exh. G, page 3. The document indicates the statement was "given on 4-25-98 at 9:46 p.m." *Id.*

Boone denied receiving a copy of this statement, stating: "I also do not recall receiving a handwritten statement from a witness identifying another suspect running from the scene of the crime." Pet. Exh. J. Chappell more generally stated: "[T]o the best of my recollection, I do not recall receiving information that anyone

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<sup>7</sup> Detective Gregory Russell stated that the handwritten statement was written by him based upon the information that Shannequia provided and was signed by Shannequia. Comm. Exh. K.

other than the defendants were responsible for the death of Officer Gibson.” Pet. Exh. K.

### ***2. The “Newby” Photo Array***

Mr. Richardson avers that on the same day Shannequia signed the above statement, she also “identified Leonard Newby as the ‘man with dreadlocks’” in a photo array. Petition, page 8. Mr. Richardson includes a side by side of his booking photo and the photo of the “‘man with dreads,’ aka Leonard Newby.” *Id.* The photo array is initialed “SG,” signed “Shannequia Gay,” and initialed “TS” beneath photo number 2. Pet. Exh. H. The document also contains a handwritten date and time of “4/25/98” at “1159.” *Id.*

In reference to this claim, Boone states: “I did not receive a copy of a photo line-up from the prosecutor, investigating authorities or my investigator Jack Davis, that indicated that another suspect had been identified in two separate photo identifications, as the man running from the scene of the crime.” Pet. Exh. J. As quoted above, Chappell generally denies receiving information that another suspect was identified. Pet. Exh. K.

### ***3. The 911 Tip***

The final piece of evidence Mr. Richardson proffers as new is a phone message left on a Virginia State Police answering machine in which the caller

“identified ‘Leonard Newby’ as the person involved, that Leonard had dreads, and that Leonard Newby had since cut his dreads.” Petition, page 8, *citing* Pet. Exh. I. The phone message log also indicates three other people were identified as being involved, having dreads and cutting them off. Pet. Exh. I. These three people are H. Dickerson, White, and Herman Newby. *Id.*

In reference to this phone message, Boone states: “I also do not recall receiving information that the same suspect who had been identified in the photo lineup, was named as the perpetrator on a Sussex County Tip Hotline 4 days after the crime.” Pet. Exh. J. Chappell again generally denied possessing information inculcating anyone other than Mr. Richardson and his co-defendant, Claiborne. Pet. Exh. K.

## **B. New Evidence Presented by Commonwealth**

### ***1. Shannequia Gay interviews***

#### **a. Virginia State Police interview on May 13, 1998**

On May 13, 1998, Virginia State Police Special Agent Terry Ann Stevens (“Agent Stevens”) interviewed Shannequia at the Virginia State Police Waverly Area Office. Comm. Exh. E. On the morning on April 25, 1998, Shannequia was at her aunt’s apartment at the Waverly Village Apartments. *Id.* She went outside to play with her three-year-old cousin Jacques, who she called Quay, and some other

children. *Id.* The children were playing and riding bicycles in front of Shannequia's aunt's apartment building. *Id.* Shannequia saw Garrett walk from the playground across the parking lot towards the rear building. *Id.* A police car pulled up as Garrett walked around the side of the rear building, where Evette lived, towards the woods. *Id.* Shannequia described Garrett as a "tall black male with dark skin, bald, and he was wearing a dark blue silk shirt with long sleeves and blue jeans with grass stains." *Id.*

The police officer exited his car and followed Garrett around the building while talking into a radio. Comm. Exh. E. The other children went into their respective homes but Shannequia and Quay continued to play outside. *Id.* When Shannequia was in front of her aunt's house, she heard a gunshot. *Id.* Shannequia said Quay ran towards the hill and she followed. *Id.* They rode their bikes to the top of the hill and looked into the woods towards the direction of the gunshot. *Id.*

Shannequia heard someone say help and saw the officer on the ground. Comm. Exh. E. She heard "someone coming from deep in the woods running toward the police officer." *Id.* Shannequia described this person as "a black male, with dark skin, his hair was black with long corn rows that were flat on his head with like braids going down the back...some plats too." *Id.* He was wearing "black pants like long shorts and a white tee shirt." *Id.* The shirt "was dirty and dingy with brown dirt

on parts of it,” “was torn by the shorts,” and “had red on it, kinda in the middle toward the bottom.” *Id.* The man was “medium height” and wearing black boots and a necklace with “something shiny hanging from it like a ring.” *Id.* Shannequia was unsure if he had facial hair. *Id.* She saw the man holding an object in one hand, possibly a bottle or a gun, as he ran. Comm. Exh. E. She was unsure which hand. *Id.* The object was “black, metal looking.” *Id.*

Quay ran back down the hill towards the apartment building and Shannequia followed. Comm. Exh. E. Quay dropped his bike at the rear building but continued running. *Id.* Shannequia parked her bike at her aunt’s apartment and went back to retrieve Quay’s bike. *Id.* Shannequia saw “the guy with corn rows (like dreads)” running again. *Id.* The man ran to the top of the hill and stood there. *Id.* Shannequia did not see anything in his hands but believed she may have seen blood on his hands. *Id.* She said he had “braids on his head, thick and pulled back.” *Id.* She was unsure if he wore a hat but “saw his braids.” Comm. Exh. E. The man turned and ran back into the woods “toward where the police officer was laying.” *Id.* Shannequia saw what she thought was “black writing on the back of his shirt.” *Id.*

#### **b. FBI interview on October 29, 2000**

On October 29, 2000, Shannequia was interviewed at the United States Attorney’s Office in Richmond, VA. Comm. Exh. F. Although Agent Talbert wrote

the report and presumably was present for the interview, it is unclear if other investigators were present. The summary indicates that agents showed Shannequia pictures, but those pictures are not described nor included in the copy of the interview provided to undersigned counsel.

During that interview, Shannequia recalled that she stayed at her Aunt Carolyn's apartment the night of April 24, 1998. Comm Exh. F. On the morning of April 25, she woke up, took a bath, ate breakfast, then went outside to play with her friend Juquay. *Id.* Shannequia remembered seeing "Taneka and Hope"<sup>8</sup> outside and later Garrett. *Id.* "Hope and Taneka" were still present when Officer Gibson arrived but Garrett had left the apartment complex through the woods. *Id.*

Shannequia saw Officer Gibson park and then exit his police cruiser. Comm Exh. F. Officer Gibson entered the woods where Garrett had earlier entered. *Id.* Shannequia stated that she and Juquay were on the other side of the apartment building; they watched Officer Gibson walk down the hill and into the woods. *Id.* Shannequia then heard a gunshot "moments later." *Id.* Shannequia ran to her aunt's apartment, told her aunt what she heard, and then went back outside. *Id.* She walked behind the apartment building towards the woods. *Id.* She saw Officer Gibson laying

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<sup>8</sup> Based on other documents and interview summaries, "Taneka and Hope" appear to be Kaneka Jackson and Hope Pierce.

on the ground and a black male she had never seen before standing twelve feet away. *Id.* She described the man as a “thin dark skinned black male, with a scruffy beard, wearing black shorts and a white t-shirt.” Comm Exh. F. He “wore his hair in corn rows” that were “long, about collar length.” *Id.* Shannequia said he had blood on his shirt and something in his hand. *Id.* The man ran away and Shannequia went back to her aunt’s apartment. *Id.* Shannequia told her aunt a police officer had been shot, and her aunt called 911. *Id.*

**c. Shannequia Would Not Agree to Meet with the Office of the Attorney General.**

Kyle Richards, Investigator with the Office of the Attorney General (“Investigator Richards”), attempted to contact Shannequia on several occasions to discuss her involvement in the investigation of Officer Gibson’s death. Investigator Richards was able to reach Shannequia’s mother, Sharon Gay Turner (“Turner”), who indicated that Shannequia was traumatized by what she observed and would potentially not participate in an interview. Comm. Exh. G. Investigator Richards attempted several other times to reach Shannequia and Turner. Comm. Exh. H. Altogether, those attempts were unsuccessful.

**2. Photos Shown to Shannequia**

Shannequia was shown photos on several occasions by both local and federal investigators.

City of Richmond Detective Gregory Russell (“Detective Russell”), formerly a deputy with the Sussex Sheriff’s Office, was interviewed on August 20, 2021 by Investigator Richards and undersigned counsel. Comm. Exh. I. Detective Russell recalled that he showed a single photo of Mr. Richardson to Shannequia the night of April 25, 1998 during an interview at the home of Sussex County Deputy Valerie Patterson Ricks (“Deputy Patterson Ricks”). *Id.* Shannequia gasped when she saw the photo and said the man in the photo was one of the men in the woods at the time Officer Gibson was shot. *Id.* Detective Russell said he was reprimanded for this incident and recognized it was improper to show a single photo to a witness. *Id.* Detective Russell said other investigators present at the interview were Deputy Patterson Ricks, Investigator Cheek, and Agent Stevens. *Id.* Detective Russell was recalling the incident from memory, and the Commonwealth has not been able to corroborate the account either through documentation or witness interviews.

The Commonwealth is in possession of a document titled “Notice Regarding Shannequia Gay” (“the Notice”) which was drafted by AUSA David Novak (“Novak”).<sup>9</sup> Comm. Exh. J. It is unclear if this Notice was filed as a formal pleading

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<sup>9</sup> This document was provided to the Commonwealth by Mr. Richardson’s counsel. It was not included in the documents provided to the Commonwealth by the U.S. Attorney’s Office for the Eastern District of Virginia. Almost all of the documents

in the federal criminal prosecution. In this Notice, Novak states that Shannequia was interviewed by Detective Russell on April 25, 1998, and during this interview, he showed her a single picture of “Leonard Newby, an early suspect in the case.” *Id.* Novak states that while Shannequia did not identify Newby at the time, she became afraid when she saw the picture. *Id.* Novak asserted that after Shannequia was shown the single photo of Newby by Detective Russell, she was shown a photo spread later that night by Investigator Cheek. *Id.* This photo spread contained a photo of Newby in position two and Shannequia initialed below that photo. *Id.* Novak notes that while Shannequia initialed below this photo, it is not clear if she identified him as a perpetrator or if she recognized him from the single photo show-up completed earlier in the evening. *Id.* Undersigned counsel have not located any documentation to indicate how Novak obtained the information contained within the Notice.

The summary by Agent Talbert from Shannequia’s interview on October 29, 2000, discusses two previous occasions when photos were presented to Shannequia. Comm. Exh. F. Both occasions were conducted at the home of Deputy Patterson Ricks. *Id.* At the first occasion, Shannequia was shown photos and “asked if any of them resembled the man she saw.” *Id.* Shannequia “saw one picture that looked like

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provided by the U.S. Attorney’s Office were documents that were filed with the Clerk of Court for the U.S. District Court for the Eastern District of Virginia.

the man in his facial features but his hair was different.” *Id.* The summary indicates that “Detective Greg Russell and another female officer” showed the pictures to Shannequia. *Id.* On the second occasion, Shannequia was shown a photo lineup by Investigator Cheek. *Id.* Shannequia informed Deputy Patterson Ricks that “the person depicted in picture number eight might have been the person she saw behind the apartments.” *Id.* The summary by Agent Talbert does not have any date(s) for when the photos were shown to Shannequia. Undersigned counsel have not located documentation to indicate how Agent Talbert obtained the information contained within the summary.

On September 19, 2000, Shannequia was interviewed by Agents Talbert and Ritchie at the United States District Court in Richmond, Virginia. Comm. Exh. K. Shannequia was presented with two photo spreads, labeled Hair I and Hair II. *Id.* Each spread contained pictures of six males with varying hair styles. *Id.* Agents informed Shannequia that none of the individuals were suspects in the murder of Officer Gibson. *Id.* However, she was asked to identify the individual with hair similar to the man Shannequia saw on the berm the day Officer Gibson was shot. *Id.* Shannequia chose picture number five from the second set of pictures, Hair II. *Id.* The individual in this picture had “corn rows.” *Id.*

### ***3. The Federal Trial Transcript and Jury Verdict***

As detailed in the procedural history, Mr. Richardson and his co-defendant, Claiborne, were tried in the United States District Court for the Eastern District of Virginia on June 4-13, 2001. Comm. Exh. D. On June 13, 2001, the jury acquitted Mr. Richardson of the murder charge and of the firearms charge. Fed. Vol. VI, Tr. 27. In an interview with a news reporter years later, one juror noted in recalling jury deliberations that, “no one ever really thought they were guilty of murder.” Kerri O’Brien, *8News Investigates: Not Guilty? Sentenced to life*, WRIC News (Jan. 8, 2017) <https://www.wric.com/news/8news-investigates-not-guilty-sentenced-to-life>. Comm. Exh. L.

## **PETITION FOR WRIT OF ACTUAL INNOCENCE**

### **DECISIONAL STANDARD**

A writ of actual innocence based upon non-biological evidence can be issued by this Court upon the petition of a person who was convicted of a felony. Va. Code § 19.2-327.10.<sup>10</sup> The petitioner’s burden in actual innocence proceedings is well-established; the petitioner must prove that:

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<sup>10</sup> Prior to the enactment of 2020 Va. Acts, c. 994 (eff. July 1, 2020), non-biological petitions were only available to those petitioners who had entered a plea of not guilty to a felony.

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

Va. Code § 19.2-327.11 (2021). That burden must be carried in light of all the evidence of the record, as well as any proffered by the Commonwealth in response.

*See* Va. Code § 19.2-327.11(A)–(C); *Johnson v. Commonwealth*, 273 Va. 315, 324 (2007). A petitioner must prove each element by a preponderance of the evidence.

*See* Va. Code § 19.2-327.13 and 2020 Va. Acts, c. 994 (eff. July 1, 2020). “[T]he

preponderance standard is satisfied when the evidence convinces a factfinder that a particular fact in dispute was ‘more probable than not[.]’” *Tyler v. Commonwealth*, 73 Va. App. 445, 461 (2021) (quoting *Lysable Transp., Inc. v. Patton*, 57 Va. App. 408, 419, 702 S.E.2d 596 (2010)). “[M]ore likely than not proof is now sufficient to carry a petitioner's burden in a writ of actual innocence proceeding.” *Tyler*, 73 Va. App. at 461-62 (internal quotation and citation omitted).

## **A. Standard of review**

### ***1. New/Due Diligence***

To constitute “new” evidence supporting a petition for actual innocence, the proffered evidence must satisfy a two-prong test. First, the evidence must have been unknown or unavailable at the time of conviction; and second, the previously unknown or unavailable evidence must not have been able to be unearthed through the use of due diligence. *Tyler*, 73 Va. App. at 463 (“To constitute ‘new’ evidence that will support a petition for actual innocence, the substance of [the evidence] must satisfy two distinct requirements. First, it must have been ‘unknown or unavailable to [Tyler] or his trial attorney . . . at the time the conviction . . . became final in the [trial] court[,]’ Code § 19.2-327.11(A)(iv)(a). Additionally, it also must constitute evidence that ‘could not, by the exercise of diligence, have been discovered or obtained before’ his conviction became final in the trial court. Code § 19.2-

327.11(A)(vi)(a).”) (second and third alteration in original); *see also Johnson v. Commonwealth*, 72 Va. App. 587, 597 (2020) (“[T]he writ of actual innocence is statutorily limited to the late discovery of previously unknown or unavailable evidence that could not have been gained through diligent efforts at the time of trial and that would cause no rational trier of fact to find the petitioner guilty had it been available.”); *In re Walker*, 44 Va. App. 12, 13 (2004) (denying writ of actual innocence where counsel received psychological reports before conviction became final); *see also In re Adams*, 44 Va. App. 266, 268 (2004) (petition summarily dismissed “because the petitioner has proffered no evidence that was previously unknown or unavailable, as required by Code § 19.2-327.11”); *In re Neal*, 44 Va. App. 89 (2004) (same).

As a gateway consideration, and prior to any other further analysis of the evidence, it must be demonstrated that the “Gay Statement,” the “Newby Photo Array,” the “911 Tip,” or the “Federal Acquittal” satisfy this two-prong test. As more fully explained below, the Commonwealth is satisfied these four pieces of evidence were either unknown or unavailable at the time Mr. Richardson’s conviction became final and could not have been discovered through the exercise of due diligence.

## 2. *Materiality*

Under Va. Code § 19.2-327.11(A)(vii), a petitioner must prove that the evidence is material. Much like the elements required to demonstrate “newness,” materiality lends itself to a two-prong test. Stated succinctly, the materiality test is met when the new evidence is true *and* establishes that no rational trier of fact would have convicted the petitioner when the new evidence is evaluated in light of all the evidence. *Moore v. Commonwealth*, 53 Va. App. 334, 345 (2009) (noting that the statutory elements “are stated in the conjunctive”).

Evidence that is not true cannot be material. *Turner v. Commonwealth*, 282 Va. at 250. A petitioner seeking a writ of actual innocence must show that “if provided with all of the evidence, both old and new,” a reasonable fact-finder would be “obliged to conclude” that the petitioner is factually innocent. *Altizer v. Commonwealth*, 63 Va. App. 317, 328 (2014). Great deference is given to the factfinder’s decision. “The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented.” *Sandoval v. Commonwealth*, 20 Va. App. 133, 138 (1995) (citing *Schneider v. Commonwealth*, 230 Va. 379, 382 (1985); *Carter v. Commonwealth*, 223 Va. 528, 532 (1982)). “The fact finder, who has the opportunity to see and hear the witnesses, has the sole responsibility to determine their

credibility, the weight to be given their testimony, and the inferences to be drawn from proven facts.” *Hamilton v. Commonwealth*, 279 Va. 94, 105 (2010) (citation omitted). “A verdict resulting from a trial, during which the evidence has been tested by the adversarial process, is presumed to be correct, and, thus, a heavy burden is placed upon those seeking to overturn it.” *Carpitcher v. Commonwealth*, 47 Va. App. 513, 526 (2006). “It is not enough for a petitioner to merely establish the existence of some conflicting evidence that introduces the possibility of reasonable doubt.” *Watford*, 295 Va. at 124. “Instead, a petitioner's evidence ‘must establish such a high probability of acquittal, that [the reviewing court] is reasonably certain that no rational fact finder would have found him guilty.’” *Madison v. Commonwealth*, 71 Va. App. 678, 707-08 (2020) (quoting *Watford*, 295 Va. at 124).

As more fully explained below, the Commonwealth submits that the federal trial and acquittal is material and that this is sufficient and dispositive in this matter. In the alternative, should the Court not find the federal jury’s not guilty verdict dispositive, an evidentiary hearing is needed to assess the materiality of the “Gay Statement” and the “Newby” Photo Array. Testimony is needed from Shannequia to determine the veracity of the statement and of the identification made on the photo array. It is unlikely that Mr. Richardson can establish the 911 Tip is material;

evidence in this record contradict the allegations made in the tip, and there is not a way to determine the veracity of the statement made by an anonymous source.

### ***3. Cumulative, Corroborative, Collateral Evidence***

“Cumulative testimony is repetitive testimony that restates what has been said already and adds nothing to it. It is testimony of the same kind and character as that already given.” *Bush v. Commonwealth*, 68 Va. App. 797, 809-10 (2018) (quoting *Massey v. Commonwealth*, 230 Va. 436, 442 (1985)). Evidence challenging identity is not contained anywhere in the record. As such, the “Newby Photo Array,” the “Gay Statement” and the “911 Tip” are not cumulative of other evidence. The federal acquittal is similarly not cumulative because it is the only evidence of its kind.

Corroborative evidence is evidence that strengthens the defendant’s testimony but does not come from him. *Bush*, 68 Va. App. at 810 (2018); *Massey*, 230 Va. at 443 (“Corroborative evidence ‘is evidence that does not emanate from the defendant's mouth, does not rest wholly upon the defendant's credibility, but . . . adds to, strengthens, and confirms [the] defendant's testimony.”). Mr. Richardson presented no testimony or evidence concerning the shooting at his guilty plea hearing. Thus, the new evidence presented in this action cannot fit the definition of corroborative evidence because there is no evidence to strengthen, add to, or confirm.

Collateral evidence is evidence that does not illuminate a fact at issue. *Bush*, 68 Va. App. at 810 (quoting *Helmick v. Commonwealth*, 38 Va. App. 588, 564 (2002)). Identity is an inherent element in every criminal prosecution; it is always an issue and it must always be proven. This Court specifically endorsed this inherent element concept in *Settle v. Commonwealth*, 55 Va. App. 212 (2009):

[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In every criminal prosecution the Commonwealth must establish beyond a reasonable doubt all elements of the offense and that the accused did commit it. The identity of the perpetrator is an essential element of the offenses; thus, the Commonwealth must prove that fact beyond a reasonable doubt.

*Id.* at 225 (internal citations and quotations omitted). As such, any evidence that sheds light on the identity of the person who shot Officer Gibson cannot be considered collateral. The evidence proffered by Mr. Richardson, the “Newby Photo Array,” the “911 Tip,” and the “Gay Statement,” are all pieces of evidence which illuminate the element of identity. These pieces of evidence are not collateral. Additionally, the federal acquittal cannot be fairly said to be collateral. The materiality analysis requires a determination of what a rational fact finder would do. A federal jury surely qualifies as a rational fact finder. Their determination illuminates a fact at issue, specifically the issue of Mr. Richardson’s guilt.

## IV. ANALYSIS

### A. The Handwritten Statement Attributed to Shannequia Gay

#### 1. *The statement likely constitutes previously unknown or unavailable evidence.*

Based upon the information and evidence reviewed by the Commonwealth, the handwritten statement attributed to Shannequia was previously unknown and unavailable to Mr. Richardson. Affidavits by both Chappell and Boone indicate that they do not specifically remember any evidence of a suspect other than Mr. Richardson and Claiborne. Chappell wrote “[t]o the best of my recollection, I do not recall receiving information that anyone other than the defendants were responsible for the death of Officer Gibson.” Pet. Exh. K, page 3, ¶8. However, Chappell indicated, due to the age of the case, that he has “limited recollection of specific events involving these matters.” Pet. Exh. K, page 1, ¶3. Chappell recalls that he “employed an ‘open file’ discovery policy in these cases.” Pet. Exh. K, page 2, ¶6. Boone wrote that he “do[es] not recall receiving any handwritten statement from a witness identifying another suspect running from the scene of the crime.” Pet. Exh. J, page 2, ¶7.

On August 18, 2021, Investigator Richards and undersigned counsel interviewed Chappell. *See* Comm. Exh. M. During the interview, Chappell discussed the discovery meeting held with Boone and Michael Morchower, Claiborne’s

counsel, prior to the December 1999 trial date. *Id.* Chappell could not specifically recall if the handwritten statement signed by Shannequia was provided to defense counsel at the discovery meeting or any other time. *Id.* He also did not recall whether the handwritten statement was in his case file in 1998 or 1999. *Id.* Chappell no longer has access to the file as he is no longer with the Sussex County Office of the Commonwealth's Attorney. *Id.*

Investigator Richards and undersigned counsel interviewed Boone on September 13, 2021. Comm. Exh. N. Boone stated that he recalls being informed of a young girl who said she witnessed part of the offense. *Id.* Boone stated Chappell may have provided this information to him. *Id.* Boone said his investigator Jack Davis ("Davis") did attempt to locate and talk to Shannequia. *Id.* However, Davis was not successful because she was "never made available." *Id.* He could not recall why. *Id.* Boone stated he did not receive the handwritten statement as part of discovery in the case. *Id.*

The record indicates that Mr. Richardson's trial counsel was aware Shannequia was a possible witness to the shooting, but counsel was not provided the handwritten statement. Chappell states that due to the age of the case and his limited recollection, he does not recall the handwritten statement or if it was provided to Boone.

The Commonwealth has reviewed the files provided by the different agencies involved in the state investigation and prosecution, including the Sussex County Sheriff's Office, the Virginia State Police, and the Sussex County Commonwealth's Attorney Office. The handwritten statement was located within the files of the Sussex County Sheriff's Office and the Virginia State Police, but not in the Sussex County Commonwealth's Attorney's file.

Boone indicated that he and his investigator discussed "the young girl" in 1998. Comm. Exh. N. Boone said his investigator attempted to locate and meet with her but was unsuccessful. *Id.* Even if the investigator had located and talked to Shannequia about the offense, she could not have provided the handwritten statement dated April 25, 1998. This document was in the possession of investigators who took the statement, not Shannequia herself. Furthermore, it does not appear that a discussion with Chappell would have produced this document since it could not be located in the Sussex County Commonwealth's Attorney's file. Therefore, based upon available evidence, the handwritten statement was unknown and unavailable to Mr. Richardson and could not have been obtained by the exercise of diligence prior to his conviction becoming final.

2. *An evidentiary hearing is needed to determine if the statement is material.*

It is unclear if the handwritten statement purportedly signed by Shannequia is material. Mr. Richardson relies upon the statement to assert that Shannequia stated she saw a man with “dreads” in the woods and on the berm at the Waverly Village Apartments at the time of the shooting. Pet. Exh. G. However, other evidence indicates that Shannequia shortly thereafter provided a different description of the man in the woods and informed investigators that he worn corn rows, a hairstyle worn by Mr. Richardson at the time of the offense. *See* Comm. Exh. E, F, K.

Agent Stevens interviewed Shannequia on May 13, 1998. Comm. Exh. E. In this interview, Shannequia stated that after she heard the gunshot she went to the edge of the woods. *Id.* She saw a “black male” running and described him as wearing “long corn rows that were flat on his head with like braids going down the back.” *Id.* Shannequia saw the man standing on the berm a short time later. *Id.* She described his “corn rows (like dreads)” and that she “got a good look at his braids on top of his head, thick and pulled back.” *Id.*

Shannequia was also interviewed twice in 2000 by federal agents. Both interviews took place after Mr. Richardson had been convicted in state court. On September 19, 2000, Shannequia was interviewed by Agents Talbert and Richie. Comm. Exh. K. Shannequia was shown two photo spreads, Hair I and II, to

determine the type of hair worn by the man in the woods. *Id.* Shannequia chose picture number five from the second set of pictures, Hair II. *Id.* The individual in this picture had “corn rows.” *Id.*

On October 29, 2000, Shannequia was again interviewed by Agent Talbert. Comm. Exh. F. Shannequia said after hearing the gunshot, she ran to the woods and saw a black male she had never seen before standing near Officer Gibson. *Id.* The man “wore his hair in corn rows” that were “long, about collar length.” *Id.*

Shannequia was nine years old at the time of the offense. She was interviewed multiple times concerning a traumatic event and provided differing statements concerning the description and hair style of the man she saw in the woods. However, her initial description of the person she saw in the woods just a few hours after the offense was that of a man with “dreads.” *See* Pet. Exh. G. Furthermore, she chose a man with dreadlocks from a lineup soon after providing that description. Pet. Exh. H. In a later interview, Shannequia said the individual in the woods was someone she had never seen before. *See* Comm. Exh. C. This contradicts other evidence that suggests Mr. Richardson was a frequent visitor of the apartment complex and could have been someone known to Shannequia.

Undersigned counsel were unable to confirm the veracity of the handwritten statement signed on April 25, 1998. As already noted, Shannequia would not agree

to an interview as part of the Commonwealth's investigation in this action. Shannequia has never testified in any hearing or trial related to this case. It is not clear from the record if the handwritten statement is a true and accurate account of what Shannequia observed on April 25. Thus, the Commonwealth respectfully submits that an evidentiary hearing is warranted to determine whether the handwritten statement is an accurate account of Shannequia's observations and to assess Shannequia's credibility. "In 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." *Dennis v. Commonwealth*, 297 Va. 104, 130 (2019).

**B. The "Newby" Photo Lineup**

***1. The photo lineup may constitute previously unknown or unavailable evidence.***

Based on the information currently available, the photo lineup attached to Mr. Richardson's petition was previously unavailable and unknown to him. Undersigned counsel has reviewed the files provided by the different agencies involved in the state investigation and prosecution, including the Sussex County Sheriff's Office, the Virginia State Police, and the Sussex County Commonwealth's Attorney Office. After a thorough review of those files, undersigned counsel has been unable to locate

the photo lineup attached to Mr. Richardson's petition in any of those files. Further, Chappell stated in his affidavit that "to the best of my recollection, I do not recall receiving information that any person identified someone other than the defendants in a photo lineup as the perpetrator in the death of Officer Gibson or any accompanying statements reflecting that." Pet. Exh. L.

Boone likewise has no recollection of, possession of, or even knowledge of this photo array: "To the best of my recollection, prior to the guilty plea, I did not receive a copy of a photo line-up from the prosecutor, investigating authorities or my investigator Jack Davis, that indicated that another suspect had been identified in two separate photo identifications, as the man running from the scene of the crime." Pet. Exh. J. In a recent interview, Boone reiterated that, to the best of his recollection, he had no knowledge of the existence of this photographic lineup or had ever seen the lineup. Comm. Exh. N. Chappell only had limited recollections of specific events regarding the case, and he has made no statements regarding his recollection of the existence of a photo lineup. Pet. Exh. K. Chappell also did not have access to his case file to review. *Id.*

Shannequia was subpoenaed for trial by Chappell. Boone, through his investigator, attempted to locate and speak with her, but he was not able to do so because she was unavailable to him. Comm. Exh. N. Even if Boone had been

successful in speaking with Shannequia, he would have been unable to obtain a copy of the lineup from her. There is no indication in this record that Shannequia was provided with a copy of any lineup that she was shown. As such, based upon available evidence, the photo lineup that Mr. Richardson relies upon in his petition was both unknown and unavailable to Mr. Richardson.

**2. *An evidentiary hearing is needed to determine if the photo lineup is material.***

It is unclear from this record and from the files reviewed by the Commonwealth if the photo lineup is material. There are no allegations or evidence that Shannequia was anything other than honest in her recounting of what she observed and in her participation in reviewing the photo array. However, two things remain unknown: the identity of the person in the photo and what Shannequia meant when she initialed below the photo. Without this information, a proper analysis of materiality cannot be completed.

While this photo array has been dubbed the “Newby Photo Array” by Mr. Richardson, the Commonwealth has not been able to confirm the identity of the person in the photo in question. In an interview conducted on August 20, 2021, Detective Russell indicated that he was not present for the lineup but believed that Investigator Cheek created the photo lineup that was shown to Shannequia. Comm. Exh. I. In an interview on August 23, 2021, Investigator Cheek denied that he was

involved in compiling or showing a photo lineup to Shannequia. Comm. Exh. O. Investigator Cheek also stated that he did not meet Shannequia. *Id.* Both Deputy Patterson Ricks and Agent Stevens denied having any part in creating the lineup or showing it to Shannequia. *See* Comm. Exh. P, Q.

Conversely, the Notice drafted by Novak states that Shannequia was interviewed by Detective Russell on April 25, 1998, and during this interview, he showed her a single picture of “Leonard Newby, an early suspect in the case.” Comm. Exh. J. Novak asserted that after Shannequia was shown the single photo of Newby by Detective Russell, she was shown a photo spread later that night by Investigator Cheek *Id.* This photo spread contained a photo of Newby in position two and Shannequia initialed below that photo. *Id.* Novak noted that while Shannequia initialed below this photo, it is not clear if she identified him as a perpetrator or if she recognized him from the single photo show-up completed earlier in the evening. *Id.* Undersigned counsel have not located any documentation to indicate how Novak obtained the information contained within the Notice. The Notice does not mention any photos of Mr. Richardson shown to Shannequia by Detective Russell or any other investigator.

The Commonwealth has not located any documentation that corroborates Detective Russell’s account or the Notice. There were no documents in any of the

local or state investigation files provided to undersigned counsel discussing any photo array or single photos shown to Shannequia. In recent interviews conducted by Investigator Richards, no investigator confirmed creating the lineup or showing it to Shannequia. Furthermore, no investigator confirmed Detective Russell's account or the version provided in the Notice.

If the photo is Leonard Newby, as reflected in the Notice, the materiality analysis is dependent upon facts not known at this time, specifically what Shannequia meant when she initialed the photo. Further, if Shannequia's initials under the photo were an identification of the person as a perpetrator, and that person is Newby, the evidence is quite clearly material. If the initials were merely an indication that the person had similar qualities to those of the perpetrator, the evidence is not material.

A summary of a later interview with Shannequia on October 29, 2000 by Agent Talbert provides little clarity. Comm. Exh. F. Agent Talbert states that Shannequia was shown photos at the home of Deputy Patterson Ricks but provides no date or dates of when that occurred. *Id.* According to this document, Shannequia was first shown individual photos by Detective Russell and an unidentified female deputy. *Id.* They asked Shannequia "if any of them resembled the man she saw" and she "saw one picture that looked like the man in his facial features but his hair was

different.” *Id.* On the second occasion, a photo array was shown to Shannequia by Investigator Cheek and she said, “the person depicted in picture number eight might have been the person she saw behind the apartments.” *Id.* The “Newby” Photo Array appears to be two “6 packs” of photos, for a total of 12 photos. The initials “SG” appears below photo number 2 in the six-pack that appears first in the scanned document. While it is possible that the order of the photo arrays was switched prior to scanning, and the reference to photo “number eight” indicated photo number two in the second six-pack, the Commonwealth cannot find any information that supports drawing this conclusion. According to Deputy Patterson Ricks, Shannequia was interviewed at her home only once. *See* Comm. Exh. P.

To further complicate this issue, Shannequia was also shown two six-pack photo arrays on September 19, 2000. Comm. Exh. K. These two photo arrays were conducted to determine the perpetrator’s hair style, as there was conflicting evidence from Shannequia if the person had dreadlocks or cornrows. Shannequia selected photo number five from the second lineup, which was a photo of a person who had cornrows. The photo from the “Newby” Photo Array that was selected appears to be a photo of someone with dreadlocks, not cornrows.

Given the lack of clarity, the materiality of the “Newby” Photo Array cannot be determined without further development of the facts. As such, if the Court finds

the other new evidence outlined in Mr. Richardson’s petition for relief and in this Response do not satisfy the statutory requirements for issuing a writ of actual innocence, the Commonwealth would respectfully request an evidentiary hearing to resolve whether Shannequia made an identification in the photo lineup attached to Mr. Richardson’s petition, why she made the identification, and whether Shannequia can confirm if the photograph was Mr. Richardson or Leonard Newby. “In 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.” *Dennis*, 297 Va. at 130.

**C. 911 Tip**

***1. The 911 tip constitutes previously unknown or unavailable evidence.***

Undersigned counsel has reviewed the files provided by the different agencies involved in the state investigation and prosecution, including the Sussex County Sheriff’s Department, the Virginia State Police, and the Sussex County Commonwealth’s Attorney Office. The handwritten 911 Tip was in the files received from the Sussex County Sheriff’s Office. Comm. Exh. R. The same handwritten note does not appear in the Sussex County Commonwealth’s Attorney Office file. Chappell states in his affidavit that “to the best of my recollection, I do not recall

receiving information that any person identified someone other than the defendants in a photo lineup as the perpetrator in the death of Officer Gibson or any accompanying statements reflecting that.” Pet. Exh. K. Boone also did not “recall receiving information that the same suspect who had been identified in the photo lineup, was named as the perpetrator on a Sussex County Tip Hotline 4 days after the crime.” Pet. Exh. J. Boone also stated in a recent interview that he did not have in his possession the 911 Tip during his representation of Mr. Richardson. Comm. Exh. N.

Based on the available information, it is clear the 911 Tip was unknown to Mr. Richardson when his conviction became final. Boone utilized the services of an experienced investigator and there is no evidence on the record that impugns his investigation into the facts of the case, nor his representation generally. The 911 Tip was a handwritten communication that existed solely in the Sheriff Office’s file. Chappell does not recall the 911 Tip or any of the information contained in it. Law enforcement files cannot be subpoenaed. Va. Sup. Ct. Rule 3A:12(i) (“Nor may a subpoena duces tecum be used to obtain material from an agency or entity participating in, or charged with responsibility for, the investigation or prosecution of a criminal case such that the agency and its employees are deemed agents of the Commonwealth.”). Boone filed for discovery, filed for the disclosure of *Brady*

material, and employed a veteran FBI agent to investigate the case. Given these facts, it is unreasonable to believe that a more diligent effort by Boone would have unearthed this 911 Tip.

**2. *Mr. Richardson cannot establish that the 911 tip was material.***

Mr. Richardson's assertion that the 911 Tip is material cannot be established by a preponderance of the evidence. It is unclear if the information in the 911 Tip is truthful. There is no information identifying the source of the call, and there is no way of assessing the veracity of the allegations made in the tip. In light of other information available regarding at least one aspect of the tip, it is unlikely that the 911 Tip can be shown to be true.

The Sussex County Sheriff's Office file contained not only this handwritten note regarding the 911 Tip dated April 30, 1998, it also contained a handwritten statement by Newby given in the early morning hours of April 26, 1998, giving his whereabouts the day of the incident. Comm. Exh. S. Newby stated that after he completed his work shift at around 12:45 a.m., he went to his sister's house in Smithfield. *Id.* He went to sleep around 2:30 a.m., woke up around 10 a.m., and went to Seaborne's Barber Shop around 11 a.m. to have his beard and mustache trimmed. *Id.*

On April 27, 1998, his barber, Troy Seaborne, was interviewed. Comm. Exh. T. Seaborne stated that Newby came in after lunch, between 2:00-3:00 p.m., the day Officer Gibson was killed. *Id.* Seaborne was interviewed again two days later on April 29, 2020. Comm. Exh. U. During this interview, he stated that upon further reflection, he believed Newby actually came in before 12:45 p.m. because the game came on at 1:00 p.m. *Id.* There is no indication that Seaborne was ever asked if Newby cut his dreads off during this appointment nor is there any information regarding Newby's appearance during the investigation.

Lorenda Taylor ("Taylor"), one of Newby's sisters, was interviewed on May 4, 1998. Comm. Exh. V. Taylor stated that Newby was at her home in Smithfield, VA, when she received a phone call from a friend around 7 a.m. on the morning of the shooting. *Id.* Around 10:30 a.m., Newby asked someone visiting Taylor's house for a ride to the barber shop. *Id.* Newby eventually left with someone to go to the barber shop between 10:30 and 10:45 a.m. *Id.* Taylor stated that they returned from the barbershop around 11:45 a.m. *Id.* Taylor, Newby, and other members of the family then went to Newport News around 12:30 p.m. *Id.*

There is no evidence in the record that the other three suspects listed in the tip were involved in the shooting. Mr. Richardson has not pointed to any additional information that implicates either H. Dickerson, Tony White, or Herman Newby as

being involved in the shooting. Since the provider of the information contained in the tip was not identified and there is no additional information in the tip that reflects how the person reporting that these four individuals were involved learned of the information, there is insufficient information to support a finding that the allegations made in the tip are true. Thus, Mr. Richardson has failed to establish the 911 Tip is material.

**D. Federal Trial and Acquittal on Murder and Gun Charge.**

***1. The federal trial and the jury's acquittal on the murder charge and gun charge was previously unavailable to Mr. Richardson.***

The verdict in Mr. Richardson's federal trial supports his claim of actual innocence in this petition. The testimony presented in his federal trial and the jury's acquittal of Mr. Richardson on the murder and gun charges in federal court was unavailable to Mr. Richardson at the time his conviction in the circuit court became final on March 8, 2000. The federal investigation into the homicide did not begin until after Mr. Richardson pled guilty; he was not indicted by the United States until December 19, 2000; he was acquitted by the jury on June 13, 2001. Similarly, the acquittal could not have been discovered by the exercise of due diligence within twenty-one days following entry of the final order of conviction. Mr. Richardson would have become aware of the acquittal on the date it occurred.

**2. *The federal trial and the federal jury acquittal are material.***

The Commonwealth submits that the records from the federal jury trial and the federal jury's verdict are material. The jury in Mr. Richardson's federal trial had the opportunity to assess the witnesses and evidence that the Commonwealth indicated it would have presented had Mr. Richardson pursued a trial. The jury heard testimony from the Commonwealth's primary witness, Shawn Wooden. Fed. Vol. III, Tr. 58-171. The jury also heard testimony from Cpl. Aldridge of the Sussex County Sheriff's Office and Virginia State Trooper Williams, both of whom testified consistently in federal court with the information provided to the circuit court in the state proceedings. Fed. Vol. I, Tr. 260-308, Fed. Vol. II, Tr. 24-56. The federal jury also heard testimony and stipulations establishing that Officer Gibson was shot by his own gun and that he died as a result of a single gunshot wound. Fed. Vol. I, Tr. 321, Fed. Vol. II, Tr. 163. The federal jury also heard the factual recitation from the state plea colloquy. Fed. Vol. II, Tr. 100-07.

The federal jury also heard additional incriminating evidence not mentioned in the plea colloquy. For instance, the federal jury heard testimony from Evette Newby, who claimed that she saw Mr. Richardson and Claiborne in a struggle with Officer Gibson over his firearm. Evette also indicated that she saw Mr. Richardson standing in the woods with a black item in his hand shortly after she heard the

gunshot. The federal jury also heard from additional witnesses who claimed that Mr. Richardson made admissions that he was involved in the shooting. The fact that Mr. Richardson was acquitted by a jury of being involved in the homicide in federal court of the same homicide for which he pled guilty is strong evidence that the case against Mr. Richardson was weak. Furthermore, in light of the jury's role to determine the truth of facts presented to it at trial, Mr. Richardson's acquittal is clearly material.

**E. No rational trier of fact would have found proof of Mr. Richardson's guilt beyond a reasonable doubt with this record.**

When considering all of the evidence in this record, including the new evidence presented by Mr. Richardson in his petition and by the Commonwealth in this response, no rational trier of fact would have found proof of Mr. Richardson's guilt beyond a reasonable doubt. This case is unique in that it is clear what a rational trier of fact would have found had it been presented with the evidence that was outlined by the Commonwealth during the guilty plea colloquy. Mr. Richardson was acquitted by a jury in federal court, even though federal prosecutors presented the information relied upon for the guilty plea and additional incriminating evidence.

In the plea colloquy, the Commonwealth noted that it would present testimony from Shawn Wooden, who would state that he served as lookout for Mr. Richardson and Claiborne that morning. Pet. Exh. C, Tr. 5-6. The Commonwealth indicated that Wooden would testify that he heard a shot ring out, and he left. Wooden would also

testify that he saw Mr. Richardson approximately fifteen minutes later, that Mr. Richardson was out of breath and nervous, and that Mr. Richardson would admit to him that he shot the police officer. Pet. Exh. C, Tr. 6-7. In the federal trial, Wooden's testimony was far more incriminating. Wooden indicated that he actually saw the physical confrontation between Officer Gibson, Mr. Richardson, and Claiborne. Fed. Trial Vol. III, Tr. 94. At trial, Wooden noted that Mr. Richardson got a hold of the gun. Fed. Trial Vol. III, Tr. 96. Wooden did not see the shot as it was fired. *Id.*

In the plea colloquy, the Commonwealth also indicated that it would present testimony from Cpl. Aldridge and Trooper Williams. Cpl. Aldridge would have testified in state court about Officer Gibson's condition, including the fact that Cpl. Aldridge observed that Officer Gibson had a wound to his abdomen. Cpl. Aldridge was also expected to testify about Officer Gibson's description of the assailants. Pet. Exh. C, Tr. 7-8. Trooper Williams was also expected to testify about seeing Officer Gibson's wound. Trooper Williams was also going to share the recounting of the shooting that Officer Gibson shared with Trooper Williams, including Officer Gibson's description of the assailants. Pet. Exh. C, Tr. 8-9. During the federal trial, both Cpl. Aldridge and Trooper Williams testified. Both shared the same information that was outlined in the state plea colloquy with the jury, including

Officer Gibson's description of the assailants and Officer Gibson's account of how he was shot. Fed. Vol. I, Tr. 270-90; Fed. Vol. II, Tr. 31-43.

In the plea colloquy, the Commonwealth introduced the autopsy report and noted that Officer Gibson died as a result of the gunshot wound to his abdomen. Pet. Exh. C, Tr. 9. During the federal trial, the autopsy report was admitted by stipulation. Fed. Vol. I, Tr. 321.

Overall, the Commonwealth's case against Mr. Richardson was weak. Chappell admitted as much when he explained his reasoning for amending the charge from capital murder to involuntary manslaughter when talking to the media after the plea. According to a news report filed the week after the guilty plea, Chappell stated,

“the risks in going to trial with a jury were just astronomical” because the murder case was compromised.

One of the first officers to reach the scene was Gibson's boss, Waverly Police Chief Warren Sturrup. Sturrup later acknowledged he had been so upset that he had unthinkingly picked up Gibson's gun - the homicide weapon - from the ground and held onto it while angrily ordering a crowd of onlookers to tell him who had shot Gibson. Sturrup's handling of the gun had wiped out any fingerprints that might have been on it.

And the only witness who could tie the defendants to the killing was an acquaintance of one of the accused men, Terence Richardson, who said Richardson had admitted to him that he “accidentally” shot Gibson. But the acquaintance was a convicted felon and had previously denied knowing anything about the killing, Chappell said.

*Prosecutor Explains Decision to Bargain in Cop-Killing Case*, Newport News Daily Press, Dec. 12, 1999; Comm. Exh. W. Chappell's assessment of the weakness in the case is borne out by the results in the federal trial.

At Mr. Richardson's federal trial, the jury heard the full plea colloquy. Fed. Vol. II, Tr. 96-114. This included the additional information the Commonwealth stated that it would produce, including the testimony of Ann Jones, the analyst from the Department of Forensic Science who examined Officer Gibson's clothing and bulletproof vest and determined that Officer Gibson was less than arm's length away from his pistol when the shot was fired; and the fact that Wooden's girlfriend, Jovanna Jones, would corroborate some of his testimony.

Federal prosecutors presented their strongest case of Mr. Richardson's guilt, which included the case that the Commonwealth outlined during the plea colloquy. Federal prosecutors presented testimony from Evette Newby, who indicated that she saw Officer Gibson engaged in a struggle in the woods with Mr. Richardson and Claiborne; Evette indicated that she saw Mr. Richardson with a black item in his hand shortly after she heard the shot. Fed. Vol. II, Tr. 285-87. Ronald Williams testified that Wooden told him that Mr. Richardson confessed to being involved in the shooting. Fed. Vol. IV, Tr. 46-7. William Ellsworth testified that he heard Mr. Richardson admit that he shot Officer Gibson months after the shooting, and that

Mr. Richardson said that he did not mean to shoot the officer. Fed. Vol. II, Tr. 202-03. Keith Jackson testified that Mr. Richardson stated that he had already killed someone during a confrontation with another individual on the night after Officer Gibson was killed. Fed. Vol. III, Tr. 282-85.

Even though federal prosecutors presented their strongest case against Mr. Richardson, the jury found that Mr. Richardson was not guilty of the murder of Officer Gibson and not guilty of possession of a firearm during the commission of a murder. The federal jury had the opportunity to assess the credibility of the witnesses who would have testified against Mr. Richardson had he proceeded to trial in state court. Further, the federal jury had access to information that would have been unavailable at the time of Mr. Richardson's plea hearing, including Wooden's admission that he lied about his level of involvement when he testified at the preliminary hearing. Fed. Vol. III, Tr. 124. One juror later noted that, "no one ever really thought they were guilty of murder." Kerri O'Brien, *8News Investigates: Not Guilty? Sentenced to life*, WRIC News (Jan. 8, 2017) <https://www.wric.com/news/8news-investigates-not-guilty-sentenced-to-life>.

Comm. Exh. L.

There is no stronger proof that no rational trier of fact would have found proof of Mr. Richardson's guilt than the verdict of the federal jury, a rational trier of fact

tasked with assessing Mr. Richardson’s guilt of the same homicide that is the basis of his state conviction. “Trial court judges and juries, who benefit from actually seeing and hearing the witnesses testify, have the ability appellate courts lack to observe tone and body language that are so important to the assignment of the credibility and weight to be given witness testimony.” *Altizer*, 63 Va. App. at 327. “A verdict resulting from a trial, during which the evidence has been tested by the adversarial process, is presumed to be correct.” *Carpitcher*, 47 Va. App. at 526. “The fact finder, who has the opportunity to see and hear the witnesses, has the sole responsibility to determine their credibility, the weight to be given their testimony, and the inferences to be drawn from proven facts.” *Hamilton*, 279 Va. at 105. In light of the federal jury’s verdict, Mr. Richardson meets his burden of establishing this element.

If this Court disagrees that the federal jury acquittal and the information that emanated from the federal trial was sufficient to establish that no rational trier of fact would have found Mr. Richardson guilty based on the entire record, the Commonwealth submits that an evidentiary hearing is warranted to assess the weight that should be afforded the additional evidence presented by Mr. Richardson with his petition. As already noted, an evidentiary hearing is warranted to assess the materiality of Shannequia’s statement and the photo lineup. For similar reasons, an

evidentiary hearing would be necessary for a final determination to be reached as to whether no rational trier of fact would have found Mr. Richardson guilty.

### **CONCLUSION**

Considered against the entire record, Mr. Richardson is entitled to a writ of actual innocence based upon non-biological evidence. His acquittal in federal court for being involved in the same homicide to which he pled guilty in state court along with some of the evidence presented during his federal trial are new, material evidence that conclusively establish that no rational trier of fact would have found Mr. Richardson guilty if that evidence was presented in a future proceeding. If this Court disagrees that the evidence presented in the federal trial and the federal acquittal are sufficient for a grant of a writ of actual innocence, the Commonwealth submits that an evidentiary hearing is warranted. It is unclear from this record if the handwritten statement from Shannequia and the photo lineup in which she allegedly identifies a different suspect as the one who was involved are material. Since it is unclear from the record if the contents of the statement are true and if the photo lineup reflects her selection of an individual other than Mr. Richardson as the person she saw in the woods with Officer Gibson on April 25, 1998, the Commonwealth respectfully requests this Court exercise its statutory discretion pursuant to Va. Code

§ 19.2-327.12 to resolve the question of whether those two pieces of evidence would be considered material under Va. Code § 19.2-327.11(vii).

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 1, 2021, a copy of the foregoing pleading was sent to **Jarrett Adams, Esquire, at jadams@jarrettadamslaw.com, and Michael HuYoung, Esquire, at mhuyoung@barnesfamilylaw.com**, counsel for petitioner.

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