RECORD NO. 171599

IN THE
SUPREME COURT OF VIRGINIA

NATHANIEL DENNIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW 2

STATEMENT OF FACTS 4

I. An attack at the Daily Press. 6

II. Nathaniel Dennis becomes a suspect. 8

III. Abdul Al-Musawwir starts confessing to the crime. 12

IV. Evidence implicating Al-Musawwir piles up. 15

A. Koneta Walker—the getaway driver—describes picking up an anxious, bloody Al-Musawwir from the crime scene. 15

B. Al-Musawwir confesses to his fellow inmates. 18

ARGUMENT 20

I. The Court of Appeals erred by ignoring two affiants. 22

II. The Court of Appeals erred by relying entirely on inadmissible evidence to counter Dennis's evidence and dismiss his petition. 25

III. The Court of Appeals erred by failing to consider the reliability of both sides' evidence before deciding what of it was true. 27

IV. The Court of Appeals misapplied this Court's rule that evidence merely contrary to the trial evidence cannot establish actual innocence, when the rule has no application here. 32

V. The court erred by ignoring evidence corroborating the getaway driver's testimony, and instead rejected that testimony based on a typo. 36

VI. The court abused its discretion by dismissing Dennis's petition without an evidentiary hearing 41

CONCLUSION 44

CERTIFICATE PURSUANT TO RULE 5:26(h) 46

TABLE OF AUTHORITIES

Page(s)

CASES

Altizer v. Commonwealth,
63 Va. App. 317, 757 S.E.2d 565 (Va. Ct. App. 2014) 33

Carpitcher v. Commonwealth,
273 Va. 335, 641 S.E.2d 486 (2007) 23, 24, 26, 27, 33, 34, 36

Haas v. Commonwealth,
283 Va. 284, 721 S.E.2d 479 (2012) 30, 41, 42, 43, 44

Haynesworth v. Commonwealth,
59 Va. App. 197, 717 S.E.2d 817 (2011) 26, 34

In re Watford,
295 Va. 114, 809 S.E.2d 651 (2018) 23, 24, 31, 40

Montgomery v. Commonwealth,
62 Va. App. 656, 751 S.E.2d 692 (2013) 23

STATUTES

Va. Code § 19.2-327.10 22

Va. Code § 19.2-327.11 31

Va. Code § 19.2-327.12 ..... 30, 41

Va. Code § 19.2-327.13 ..... 20, 30

RULES

Va. R. Evid. 2:802 25

ASSIGNMENTS OF ERROR[1]

On a Petition for a Writ of Actual Innocence, Petitioner Nathaniel Dennis presented new and material evidence that he is innocent of the crimes for which he was convicted. In dismissing Dennis's petition, the Court of Appeals committed the following errors:

1. The Court of Appeals erred by ignoring two of the affidavits Dennis presented in support of his petition.

2. The Court of Appeals erred by relying entirely on inadmissible evidence to counter Dennis's evidence and dismiss his petition.

3. The Court of Appeals erred by failing to consider the reliability of both sides' evidence before deciding what of it was true.

4. The Court of Appeals misapplied this Court's rule that evidence merely contrary to the trial evidence cannot establish actual innocence, when the rule has no application here.

5. The Court of Appeals erred by ignoring evidence corroborating the getaway driver's testimony, and by instead rejecting that testimony based on a typo.

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[1] Because each of these errors arises from the decision of the Court of Appeals acting in its original jurisdiction, this is Dennis's first opportunity to challenge them. He is therefore unable to cite preservation references under Supreme Court Rule 5:27(c).

6. The Court of Appeals abused its discretion by dismissing Dennis's petition without an evidentiary hearing.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Nathaniel Dennis seeks a Writ of Actual Innocence Based on Non-biological Evidence to exonerate him of three felony convictions for a violent attack he did not commit. Dennis filed his petition in the Court of Appeals on May 18, 2017, with supporting evidence including affidavits implicating the real perpetrator of the attack, Abdul Hasib Al-Musawwir.

Dennis provided five affidavits from witnesses to whom Al-Musawwir confessed his guilt while incarcerated; a corroborated witness statement from Al-Musawwir's getaway driver showing that Al-Musawwir was at the crime scene, anxious, bloody, bragging about having just "f***ed up some n*****," and carrying a bag of money; plus facts and evidence supporting the reliability of this evidence.

The Court of Appeals decided it would not summarily dismiss the petition and ordered the Commonwealth to respond. The Commonwealth filed a Motion to Dismiss the Petition, and Dennis filed a Reply brief.

The Court of Appeals then dismissed Dennis's petition solely on the written record. It did not hold a hearing or refer the case to the circuit court for further fact-finding.

The court dismissed Dennis's petition without addressing much of the evidence presented. It ignored two out of five inmate affidavits and rejected the other three based on denials from *the alleged perpetrator*—which the Commonwealth had procured after Dennis filed his petition—plus other new, inadmissible hearsay evidence. The court assumed without explanation that the Commonwealth's new, untested evidence was true, overruling Dennis's evidence. It misapplied this Court's precedent and treated the lack of a victim recantation as dispositive. It even ignored an affidavit corroborating Dennis's most important witness, Al-Musawwir's getaway driver. These errors were the basis for dismissal.

Dennis timely filed a Petition for Appeal to this Court. This Court granted the appeal on May 24, 2018. On June 5, 2018, this Court granted Dennis's motion to extend the time to file his opening brief and appendix until August 2, 2018. Dennis now timely files this brief.

STATEMENT OF FACTS

This case centers on the beating and shooting of Lynwood Harrison at the Newport News Daily Press office, where he and Nathaniel Dennis both worked. The crime had the hallmarks of a robbery: the attacker had paused mid-attack to search and ransack Harrison's office, several hundred dollars had gone missing, and a car had been seen speeding from the scene shortly after the crime. Contemporaneous police notes even stated that the assailant would be charged with robbery once he was caught.

Yet there would never be a robbery case. The eventual case against Nathaniel Dennis would be based on a theory that he attacked Harrison out of jealousy over his former girlfriend. This theory never quite fit. Dennis—in charge of the night cleaning crew—had been at the Daily Press all night and even dropped by the security desk just before and after this ultraviolent crime, apparently looking unflustered since he was asked to man its security cameras while the guards investigated reports of a shooting. The Commonwealth has never addressed these discrepancies.

Though Harrison miraculously survived the attack, he initially had "no idea" of his attacker's identity beyond a general description. Harrison later became convinced that Dennis—who fit Harrison's general description, and who had previously dated Harrison's then-girlfriend—was his attacker. Following Harrison's identification of Dennis, what looked like a robbery was instead prosecuted as a crime of passion. And, based on Harrison's testimony at trial, Dennis was convicted.

In the years following Dennis's conviction, evidence has mounted that Harrison's identification was wrong, that the crime really was a robbery, and that the true perpetrator was Abdul Hasib Al-Musawwir. Al-Musawwir looks very much like Dennis, also worked at the Daily Press, and was already a convicted double murderer at the time of the Daily Press attack.

After the attack on Harrison, Al-Musawwir would go on to shoot his girlfriend in the head at close range. She, too, miraculously survived, and now admits to driving a bloody and anxious Al-Musawwir, with a bag of money in tow, away from the Daily Press that night. Al-Musawwir returned to prison, where he has confessed to at least five

fellow inmates that he was the one who robbed and attacked Harrison that night.

Dennis has maintained his innocence over the past two decades.

I. An attack at the Daily Press.

Lynwood Harrison was working late in his Daily Press office on the night of Wednesday, October 8, 1997. J.A. at 167–168 (Trial Tr. 31:24–32:6).[2] He worked alone in a small building set apart from the rest of the Daily Press facility. J.A. at 165 (Trial Tr. 29:4–20). The building and inside offices were kept locked at night, except for the side door to Harrison's office, which he unlocked for contractors who would be returning from various sales locations. J.A. at 170 (Trial Tr. 33:10–12); J.A. at 172 (Trial Tr. 36:5–8).

Shortly before midnight, the cleaning crew came to clean Harrison's office. J.A. at 169 (Trial Tr. 33:16–24). The crew cleaned and left at around 12:15 a.m., locking the door behind them. J.A. at 171 (Trial Tr. 35:14–25). The cleaning crew that night included three young women and their supervisor, Nathaniel Dennis. J.A. at 303–304 (Trial Tr. 168:1–2, 168:23–169:4).

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[2] Citations to "J.A." refer to the Joint Appendix filed contemporaneously with this brief.

Meanwhile, Harrison went to unlock the side door to his office for the contractors. J.A. at 172 (Trial Tr. 36:1–8). He then saw someone come through the locked front door. J.A. at 172 (Trial Tr. 36:11–15). Before Harrison could say anything, he was smashed in the face with a metal pipe. J.A. at 172 (Trial Tr. 36:16–19). After three or four blows, Harrison and his attacker struggled into the hallway, where another pipe blow knocked out one of Harrison's teeth. J.A. at 175 (Trial Tr. 39:5–10); 176 (Trial Tr. 40:1–4). The attacker pulled a gun and continued beating Harrison. J.A. at 172–173 (Trial Tr. 36:24–37:4); 176–178 (Trial Tr. 40:10–42:17).

Then the attacker stopped and left, telling Harrison, "Stay here and you might just live through this." J.A. at 179 (Trial Tr. 43:23–24). He went towards Harrison's office, in the back of the building, and Harrison heard the sound of doors in his office opening and closing. J.A. at 179 (Trial Tr. 43:14–18). Jerry Oxenburg, a contractor who happened upon the scene, saw that "Lynwood's office was turned upside down." J.A. at 232 (Trial Tr. 96:4). A security report taken later that night noted that the "office had been ransacked." J.A. at 91.

As soon as Oxenburg left, the attacker shot Harrison three times in the head and fled. J.A. at 181–182 (Trial Tr. 45:23–46:1). Harrison stumbled out of the building, and Oxenburg found him and called authorities at around 12:45–1:00 a.m. J.A. at 182–183 (Trial Tr. 46:15–47:12); 238 (Trial Tr. 102:3–5); A492[3] (call log showing a shooting reported at 1:00 a.m.).

About 20 minutes later, Dennis was at the Daily Press's security command post, several buildings away. J.A. at 358 (Trial Tr. 224:5–18). The guard asked him to watch the security cameras while she responded to reports of a shooting. J.A. at 358–359 (Trial Tr. 224:5–225:15). Later, after police interviewed Dennis (J.A. at 653 ¶ 5), he was tasked with cleaning up the scene of the crime he would eventually be accused of committing. J.A. at 347 (Trial Tr. 212:21–24).

II. Nathaniel Dennis becomes a suspect.

When Jerry Oxenburg found Lynwood Harrison outside on the ground, Harrison first described his attacker: "black male, tall, thin build." J.A. at 237–238 (Trial Tr. 101:24–102:2). Later that night, at the hospital, Harrison said he had "no idea who [his attacker] was," but

[3] Citations to page numbers beginning with "A" refer to the four-volume Appendix filed by Dennis in the Court of Appeals.

he gave a physical description: "very tall, over six feet, probably six feet, two, dark skin, his face was shaven." J.A. at 185–186 (Trial Tr. 49:10–13; 49:23–50:2).

Later that week, police asked whether Harrison knew anyone named Nathaniel Dennis. J.A. at 197 (Trial Tr. 61:18–24). Harrison recalled having seen Dennis's name on his girlfriend's caller ID. J.A. at 197–198 (Trial Tr. 61:22–62:10). Apparently, she had previously dated Dennis. J.A. at 256–258 (Trial Tr. 121:16–123:9). When his girlfriend later described Dennis as "tall, dark skinned, [and] slim," Harrison thought the description resembled his attacker and sought a picture from the police. J.A. at 200 (Trial Tr. 64:7–11). At that point, he learned Dennis was already a suspect. J.A. 200–201 (Trial Tr. 64:11–65:12).

The following week, police conducted a brief interview in which Harrison stated that Dennis was his attacker. J.A. at 94–97. Harrison then identified Dennis as his attacker from a photo array after about 30 to 45 seconds. J.A. at 202 (Trial Tr. 66:3–5); 95 (Statement of Harrison).

Dennis was soon charged with (1) aggravated malicious wounding, (2) use or display of a firearm during the commission of a felony, and (3) attempted murder. J.A. at 141–143 (Trial Tr. 4:18–6:10). Dennis was not charged with robbery, however, even though money from the Daily Press's vending machines was kept in Harrison's office, J.A. at 213 (Trial Tr. 77:5–20), and even though about $390.00 went missing from an office lock box that night.[4] Harrison told the detective that his attacker "saw the money" he was counting at the time he was attacked. J.A. at 219 (Trial Tr. 83:10–12). The attacker had also stopped beating Harrison to return to Harrison's office—where the money was kept—opening and closing doors there, and leaving the office "turned upside down" and "ransacked." J.A. at 179 (Trial Tr. 43:14–18); 232 (Trial Tr. 96:4); 91 (Police Incident Report).

Dennis pleaded not guilty and faced trial two months later in the Circuit Court of Newport News. J.A. at 142–143 (Trial Tr. 5:3–6:12). Dennis's trial rested on Harrison's identification, plus the fact that a key had gone missing, which was used to explain how Dennis could

[4] J.A. at 122 ("On October 10, 1997, I was notified by the Daily Press personnel that there may have been $390.00 in Mr. Harrison's office at the time of the attack. At this time the money can not [sic] be located.").

have unlocked the front doors. J.A. at 152 (Trial Tr. 16:7–23); 155 (19:20–25); 180 (Trial Tr. 44:14–16). It was undisputed that, while Dennis had signed out a set of keys to Harrison's office as part of his cleaning responsibilities on the night of the crime, he had returned those keys before the crime occurred. J.A. at 100–101. Dennis therefore could have been the attacker only if he had used different keys. Another set of keys had gone missing, but Dennis's trial counsel was not provided with proof that it was actually *Dennis* who had reported those keys missing a week before the attack. J.A at 135.

No physical evidence or other eyewitnesses tied Dennis to the crime.[5]

Dennis was convicted after about two hours of jury deliberation. J.A. at 432 (Trial Tr. 298:16–18).

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[5] There was also evidence that Dennis told coworkers after the crime that Harrison was an "arrogant black man." J.A. at 319 (Trial Tr. 184:11–23); J.A. at 338–339 (Trial Tr. 203:19–204:4). Dennis's sentiment appears to have related to a statement Harrison had made criticizing the cleaning crew's vacuuming to a group of people that, Harrison did not know, happened to include Dennis (who was part of the cleaning crew). J.A. at 111.

III. Abdul Al-Musawwir starts confessing to the crime.

Abdul Hasib Al-Musawwir, formerly known as William Grant, is a 67-year-old African-American male serving multiple life sentences, currently housed at River North Correctional Center (DOC #1174610). He was a Daily Press truck driver at the time of the attack. J.A. at 659.

Police records describe Al-Musawwir as a "[c]olored male, 6' 1" tall and weigh[ing] approximately 164 pounds." A460. He "has black hair, brown eyes, a slim build and dark complexion." *Id.* This is consistent with Harrison's descriptions of his attacker. J.A. at 185–186 (Trial Tr. 49:23–50:2) ("[V]ery tall, over six feet, probably six feet, two, dark skin."); J.A.at 237–238 (Trial Tr. 101:24–102:2) ("[B]lack male, tall, thin build.").

Al-Musawwir has a violent criminal history. In 1970, he was convicted of burglary with intent to commit a felony and of shooting into an occupied dwelling. J.A. at 83–84. Three years later, he was convicted on two counts of murder (for having broken into a home in the middle of the night while two couples were sleeping, shooting one man as he got out of bed, then shooting another occupant after being confronted), as well as an abduction from the same home. J.A. at 82–83. He spent

about 20 years in prison before being released on parole. J.A. at 484. Al-Musawwir subsequently denied, under oath, that he had broken into the home where the murders occurred, or that he abducted anyone. A704–08 (Al-Musawwir Trial Tr. 167:10–171:3).

Just two weeks after Dennis's conviction, police responded to a shooting in Al-Musawwir's sister's driveway. J.A. at 446. Al-Musawwir had shot his girlfriend, Koneta Walker, in the head while she sat in his passenger seat. *Id.* He claimed the gun had fired accidentally. *Id.*

Walker survived. When she woke up from surgery, she told police that, in fact, Al-Musawwir had placed the gun against the back-left side of her head and fired. J.A. at 449. Al-Musawwir was then arrested, tried, convicted, and sentenced to life in prison for aggravated malicious wounding. J.A. at 445. At trial, Al-Musawwir changed his story, claiming he had been trying to shoot someone else outside the car and had accidentally hit Walker's head. A694 (Al-Musawwir Trial Tr. 157:10–23). Al-Musawwir has continued to deny responsibility for shooting Walker, and he filed habeas petitions as recently as 2014 attempting to overturn his conviction. A764–76.

Once back in prison, Al-Musawwir began telling fellow inmates about a robbery he had committed that had been blamed on another man. J.A. at 553–554; 638; 646–647; 639; 642. One prisoner, George Holley, reached out to a Hampton police officer, who contacted Newport News Homicide Detective Darryl Williams, who had been involved in the original investigation and arrest of Dennis. J.A. at 653 ¶ 5, 8.

Detective Williams found Holley's account compelling and reopened the case. J.A. at 654 ¶¶ 13–14. Following his renewed investigation, Detective Williams became "confident that the attack upon Lynwood Harrison was committed by Abdul Hasib Al-Musawwir, not Nathaniel Dennis." J.A. at 657. The Commonwealth's Attorney also wrote in an affidavit that he believed Holley was telling the truth about Al-Musawwir's confession, stating that Dennis's guilt was questionable and that investigation into Dennis's conviction should continue. J.A. at 555.

Meanwhile, Harrison sued Dennis for assault and battery in 1999. A450–55. Before trial, Dennis's civil attorney learned of some of the early evidence implicating Al-Musawwir. J.A. at 648 ¶ 4. Dennis's

lawyer told Harrison's counsel that he intended to introduce this new evidence at trial. *Id.* Harrison dropped the suit. *Id.*

IV. Evidence implicating Al-Musawwir piles up.

Detective Williams left the police department in January 2002. J.A. at 655 ¶ 15. But subsequent investigation provided further evidence establishing that Al-Musawwir, not Dennis, committed the crime.

A. Koneta Walker—the getaway driver—describes picking up an anxious, bloody Al-Musawwir from the crime scene.

Koneta Walker was Al-Musawwir's girlfriend at various times in the late 1990s. J.A. at 659. She has no connection with the inmate affiants in this case or with Dennis.[6] On the night of the attack, Al-Musawwir called her, telling her that he needed to be picked up early from work at the Daily Press. *Id.*[7] She picked him up from the back of

[6] For simplicity, this brief will use the term "inmate" or "inmate affiant" to refer to each of the five individuals to whom Al-Musawwir confessed his guilt while incarcerated. Some of these individuals gave statements *after* their release from prison.

[7] Due presumably to a typographical error, Walker's affidavit states that these events occurred on October 13, 1997, rather than on October 8–9. Subsequently, Walker has acknowledged that she did not know the exact date of the attack, but that she was certain that the night she picked up Al-Musawwir was the same night as the attack on Harrison, which was highly publicized. *See* J.A. at 749 ¶ 2. Presumably, she would testify accordingly today if given the opportunity.

the building where the attack had just occurred. *Id.* Her narrative echoes trial testimony that a getaway car sped from the scene through the Daily Press parking lot just moments after the crime. J.A. at 350–351 (Trial Tr. 216:21–217:25).

When Walker arrived to pick up Al-Musawwir, he was "anxious and sweating profusely." J.A. at 659. "His knuckles were bloody and scraped up as though he had been in a fight." *Id.* He said he had just "f***ed up some n*****." *Id.* (Harrison is African-American.) And he was carrying a bag of coins (*id.*[8])—an important fact because money from the Daily Press's vending machines was kept in Harrison's office, and $390 is known to have gone missing during the crime. J.A. at 122. Later, Al-Musawwir told Walker he had stolen keys to the building (J.A. at 659)—also an important fact because, again, the attacker used a key

[8] Walker provided two nearly identical statements in this case, with the latter adding language to qualify it as a sworn declaration under Virginia law. J.A. at 747 ¶ 18. While one statement refers to "coins" and the other more broadly to "money," Walker recently confirmed that both statements were accurate, as she saw coins in Al-Musawwir's money bag. J.A. at 749 ¶ 7.

to enter the locked front doors of Harrison's office, and Dennis had reported the keys as missing.[9]

A few months after the Daily Press attack, Al-Musawwir shot Walker in the head. J.A. at 446. Though this shooting affected Walker's memory, specifically in terms of her ability to recall things she had learned in school and day-to-day tasks like turning off the stove, the Commonwealth relied on her as its primary witness during Al-Musawwir's trial. *See, e.g.*, A590–97 (Al-Musawwir Trial Tr. 53:2–21; 55:4–12; 59:24–60:6).

Walker did not initially tell Detective Williams about her knowledge of the Daily Press attack, out of fear of Al-Musawwir, but she did confide in her close friend Ellen Speller. J.A. at 740 ¶¶ 1–2; 660 ¶ 4. She told Speller that she picked up Al-Musawwir from the Daily Press, that he was agitated, and that (as Speller put it) Al-Musawwir had "killed someone or done something to a body." J.A. at 660 ¶ 4. Speller recalled that Walker was terrified of Al-Musawwir after that night. *Id.* at ¶¶ 4–5. A year later, Walker told Detective Williams

[9] J.A. at 152 (Trial Tr. 16:7–23); 155 (Trial Tr. 19:20–25); 180 (Trial Tr. 44:14–16); 89.

about the Daily Press attack, and her account has remained consistent ever since. J.A. at 655 ¶¶ 16–17; 740.

B. Al-Musawwir confesses to his fellow inmates.

While incarcerated for shooting Koneta Walker, Al-Musawwir discussed the Daily Press incident with at least five fellow inmates, who have all signed statements detailing what he told them. The inmate affidavits are not identical, but they are consistent on certain key facts:

- All five indicated that Al-Musawwir's motive was robbery, and Donald Poindexter correctly noted that money from Daily Press vending machines was kept in Harrison's office;
- All five mentioned that Al-Musawwir had beaten his victim, and four knew that it had been with a pipe;
- Three stated that Al-Musawwir had also shot the victim;
- Three recalled that Al-Musawwir had worked at the Daily Press in some capacity; and
- Three noted that Al-Musawwir's girlfriend had some involvement or knowledge of the events, including two that identified her as Al-Musawwir's getaway driver.

See J.A. at 553–554; 638; 646–647; 639–640; 642. Each affiant also provided additional information about how he knew Al-Musawwir, how the subject came up, and in some cases, additional details of the crime.

Donald Poindexter provided his affidavit when approached by investigators for the first time 12 years after serving with Al-Musawwir.

J.A. at 647 ¶ 10. Both Andre Wiggins and George Holley provided their affidavits after they had already been released from prison. J.A. at 638; 640.

After Dennis filed his writ petition and included these affidavits, a state police officer interviewed Al-Musawwir in prison. The Commonwealth's motion to dismiss relied on that interview, in which Al-Musawwir denied his involvement and produced oddly similar handwritten letters purportedly from two of the inmate affiants, Andre Wiggins and Andre Terry. These letters appear to allege that George Holley—the original witness who spoke with Detective Williams—made up the story about Al-Musawwir's guilt because Dennis promised him money. J.A. at 696. Al-Musawwir did not produce these letters when Detective Williams first interviewed him about the Daily Press attack, even though that interview took place after the date written on both of the letters—February 15, 1999. J.A. at 740 ¶ 4; 696. The statements of Holley, Wiggins, and Terry submitted in support of Dennis's petition also all post-date the purported letters. J.A. at 640; 638; 554.

Citing Al-Musawwir's denials and the letters, the Court of Appeals concluded that Dennis's inmate affidavits had not been shown to be true. It dismissed Dennis's petition without an evidentiary hearing.

ARGUMENT

When the General Assembly created the non-biological writ of actual innocence, it provided one shot at exoneration for prisoners who could present new evidence proving that "no rational trier of fact would have found proof of guilt . . . beyond a reasonable doubt." Va. Code § 19.2-327.13. Implicit in this enactment was a requirement that the petitioner's evidence would be heard and fairly considered before his one chance at exoneration would be extinguished by a dismissal. Nathaniel Dennis did not receive such consideration.

Dennis's petition contained evidence of actual innocence so compelling that the detective who arrested him, and who re-investigated his case for the Newport News Police Department, is himself "confident" that the Daily Press attack "was committed by Abdul Hasib Al-Musawwir, not Nathaniel Dennis." J.A. at 657.

The Court of Appeals failed to consider much of this evidence. It erred in three principal ways.

First, it simply ignored significant portions of Dennis's evidence, including two out of five inmate affidavits and a sworn declaration corroborating the sworn declaration of Al-Musawwir's getaway driver. (Assignments of Error I and V.)

Second, the court erred in accepting as true new, inadmissible evidence produced by the Commonwealth in its motion to dismiss. This evidence, never tested in court, was favored over Dennis's evidence without explanation. Denials and documents from *the alleged perpetrator* carried the day, without explanation, while the court gave no credence to seven mutually corroborating witness statements offered by Dennis. The court should have reached the opposite conclusion or, at the very least, conducted an evidentiary hearing allowing Dennis's counsel to challenge the Commonwealth's evidence before deciding it was true and Dennis's was not. (Assignments of Error II, III, and VI.)

Finally, the court rejected other testimony based on misapprehensions of the record or the law, by applying this Court's precedent in the exact opposite manner from what was intended (Assignment of Error IV), and by shortchanging the getaway driver's testimony in failing

to consider it in conjunction with the record as a whole, instead rejecting it based on a typographical error (Assignment of Error V).

This Court should make clear that an actual innocence petition cannot be dismissed without considering all the petitioner's evidence, that new evidence produced by the Commonwealth cannot be considered true and favored over a petitioner's evidence without explanation or an opportunity to challenge it in court, and that the petitioner's evidence must be considered alongside the whole record and not dismissed due to typos or other frivolous issues.

Based on the evidence produced by Dennis, this Court should reverse the judgment of the Court of Appeals and issue a writ of actual innocence, as authorized in Code Section 19.2-327.10. In the alternative, this Court should reverse and remand with instructions that the Court of Appeals order further fact-finding by the circuit court.

I. The Court of Appeals erred by ignoring two affiants.

The court's only consideration of two affiants who claimed Al-Musawwir had confessed to them, Donald Poindexter and Harry Cutchin, came in a sentence stating that Dennis "failed to establish that the allegations contained in the affidavits of Holley, Wiggins, Terry,

Poindexter, and Cutchin were true."[10] The court gave no reason for doubting the truth of Poindexter's or Cutchin's testimony. It said nothing more about either affiant. This cursory treatment cannot be consistent with Virginia law.

Dennis presented substantial reason to believe both affiants. Donald Poindexter told his story more than a decade after serving with

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[10] This Court held in *Carpitcher* that, for evidence to be "material" within the meaning of the actual innocence statute, it must be "true," *Carpitcher v. Commonwealth*, 273 Va. 335, 345, 641 S.E.2d 486, 492 (2007), and the Court of Appeals here applied that standard. *But see Montgomery v. Commonwealth*, 62 Va. App. 656, 673-74, 751 S.E.2d 692, 700 (2013) (suggesting the "truth" standard might be specific to recantation cases).

Carpitcher reached this conclusion based on its construction of the original version of the statute, which required a showing that "no rational trier of fact *could* have found proof of guilt beyond a reasonable doubt." 273 Va. at 347, 641 S.E.2d at 493 (emphasis added). *Carpitcher* held that the legislature's purpose was to limit relief to petitioners who "did not, as a matter of fact, commit the crimes for which they were convicted." *Id.* at 345, 641 S.E.2d at 492.

The statute was amended in 2013 to change the word "could" to "would." *See In re Watford*, 295 Va. 114, 122–24, 809 S.E.2d 651, 656 (2018). Under the new standard, a petitioner no longer must prove his factual innocence beyond a reasonable doubt; the inquiry focuses not on a jury's *ability* to convict in light of the new evidence, but rather its volition to do so. *Id.* at 122–25, 809 S.E.2d at 656–57. This Court has not addressed whether *Carpitcher*'s "truth" standard for materiality, derived from the legislative purpose of the former statute, must be reconsidered to fit the probabilistic approach directed by the amended statute.

Al-Musawwir. J.A. at 646–47 ¶¶ 1, 10. This enhances Poindexter's credibility, as it is not plausible that a conspiracy to implicate Al-Musawwir would include a prisoner memorizing false testimony and then sitting on it for more than a decade in case anyone reached out for an interview.

There was also no reason to disregard Cutchin's statement. The Commonwealth raised only two claims against it below—one trivial, one wrong. First, it called Cutchin out for claiming to have spoken with Al-Musawwir "[o]ver . . . two years" when the two were actually housed together for only one year and seven months between 2003 and 2005. Resp't's Mot. to Dismiss at 36 ¶ 70. Second, it erroneously claimed that Al-Musawwir would not have sought Cutchin's help on legal matters because Al-Musawwir's case was effectively over when they were housed together. *Id.* at 36–37 ¶ 71. In fact, Al-Musawwir's federal habeas petition was pending at that time, and he filed at least three more briefs or petitions while housed with Cutchin. *Id.* at 37 n.14.

On an appeal from the denial of a petition for a Writ of Actual Innocence, this Court reviews *de novo* the Court of Appeals' conclusions of law, or mixed conclusions of law and fact. *Carpitcher*, 273 Va. at 341–

44, 641 S.E.2d at 490–91 (also stating that factual findings certified by the circuit court are reviewed under a higher standard). Ignoring these two affiants was error under any standard of review, and it warrants reversal.

II. The Court of Appeals erred by relying entirely on inadmissible evidence to counter Dennis's evidence and dismiss his petition.

The court dismissed Holley, Wiggins, and Terry's affidavits as untrue based on denials from *the alleged perpetrator* (Al-Musawwir) and unauthenticated 19-year-old letters he happened to have on hand, allegedly from two of the affiants (Wiggins and Terry), claiming that a third (Holley) had intended to frame Al-Musawwir in exchange for payment from Dennis. J.A. at 80 (Ct. of App. Op. at 9).

All this evidence was inadmissible. Al-Musawwir's alleged denials—presented through a police interview memorandum—contain multiple levels of hearsay and are not admissible for their truth. Va. R. Evid. 2:802. Al-Musawwir's letters contain multiple levels of hearsay, too. *Id.*

The hearsay rule specifically guards against the use of unreliable statements that cannot be tested in court, and the Commonwealth's ev-

idence illustrates why. Al-Musawwir's interview was conducted *after* Dennis filed his petition in the Court of Appeals formally offering the evidence of Al-Musawwir's guilt, and it was only at this interview that Al-Musawwir produced the purported letters for the first time.

Dennis, by contrast, relied on admissible evidence in his petition. J.A. at 46–50 (Dennis's Pet. for Writ of Actual Innocence at 33–37). This is consistent with the statutory inquiry into what a "rational trier of fact would have" decided, because a trier of fact would evaluate only admissible evidence. *See, e.g., Haynesworth v. Commonwealth*, 59 Va. App. 197, 222, 717 S.E.2d 817, 829 (2011) (Humphreys, J., dissenting) (concluding that the decision to grant or deny a writ petition must rely on *admissible* evidence because "if the 'new' evidence were not admissible, no trier of fact would ever hear it, much less be swayed by it").

This Court reviews *de novo* the Court of Appeals' conclusions of law. *Carpitcher*, 273 Va. at 341–44, 641 S.E.2d at 490–91. The Court of Appeals made an error of law in permitting inadmissible hearsay evidence to trump the admissible evidence presented by Dennis. That decision should be reversed.

III. The Court of Appeals erred by failing to consider the reliability of both sides' evidence before deciding what of it was true.

The court below unquestioningly accepted the Commonwealth's evidence—Al-Musawwir's denials and letters—as true, and relied on it in summarily dismissing the inmate affiants' statements. This was error, as indicia of reliability—and of *un*reliability—were abundant, while Dennis was permitted no opportunity to challenge the evidence in court before it was accepted as true.

In reviewing the Court of Appeals' denial of a petition for a Writ of Actual Innocence, this Court applies two primary standards of review. Factual findings certified by a circuit court and approved by the Court of Appeals will be binding unless "plainly wrong or without evidence to support them." *Carpitcher*, 273 Va. at 343, 641 S.E.2d at 490. But conclusions of law, or mixed questions of law and fact, are reviewed *de novo*. *Id.* at 273 Va. at 343, 641 S.E.2d at 491. Because the Court of Appeals here did not refer any factual questions to the circuit court for findings, this Court's review is *de novo*. Both this Court and the Court of Appeals are equally capable of considering the purely written record that exists in this case.

That record establishes that Dennis's witnesses Andre Wiggins and George Holley provided their statements after their release from prison, when they had no incentive or pressure to lie. J.A. at 638; 640. Their statements, and that of Andre Terry, are from long *after* the dates on Al-Musawwir's letters allegedly from Wiggins and Terry. *Compare* J.A. at 640 (Holley, 2010), 638 (Wiggins, 2010), *and* 554 (Terry, 2002), *with* 699–702 (letters dated February 15, 1999).

As to those letters, the court did not acknowledge they were first revealed under dubious circumstances. As Dennis noted in the court below, the letters—both dated February 15, 1999—were purportedly written *before* Detective Williams's interview with Al-Musawwir about the Daily Press attack, yet Al-Musawwir did not mention the letters during that interview. Dennis's Reply to Commonwealth's Mot. to Dismiss (filed Sept. 20, 2017) at 15; J.A. at 740 ¶ 4 (Williams interviewed Al-Musawwir after Williams's March 1999 interview of Holley). This is undoubtedly why the Commonwealth's Attorney swore that he believed Holley was telling the truth about Al-Musawwir's confession, two years *after* the dates on the letters. J.A. at 555 ¶ 3. Al-Musawwir had never

given the Commonwealth the letters, even though he could have given them to Detective Williams if he had really had them at that time.

In accepting Al-Musawwir's denials as true, the court did not contend with the fact that Al-Musawwir is a comically non-credible witness. At his trial for shooting Walker, Al-Musawwir offered the defense that, when he pressed his gun directly to her head and fired, he had really been trying to shoot a person outside Walker's car window and her head had gotten in the way. A687–88 (Al-Musawwir Trial Tr. 150:23–51:18); A703 (Al-Musawwir Trial Tr. 166:7–11). Al-Musawwir offered this story after admittedly lying to police at the scene. A694 (Al-Musawwir Trial Tr. 157:10–25). He also denied, under oath, responsibility for other crimes he has committed. A704–08 (Al-Musawwir Trial Tr. 167:14–171:3). Yet the Court of Appeals here considered him truthful while disbelieving the woman he tried to kill: Koneta Walker.

The court credited Al-Musawwir and in the same breath explicitly rejected Dennis's many witnesses, based principally on Al-Musawwir's "consistent[] deni[al]" of his guilt and the two letters—the authenticity and provenance of which also rely solely on Al-Musawwir's untested say-so. J.A. at 80 (Ct. of App. Op. at 9).

Appellate courts sitting in original-jurisdiction cases have an inherent disadvantage in determining the credibility and reliability of witnesses. Sometimes, of course, this disadvantage is immaterial—a witness's testimony may be controverted by known facts, or the evidence obviously fabricated. Other times, however, a more searching inquiry is called for, and it would be appropriate to convene an evidentiary hearing, as the statute contemplates. Va. Code § 19.2-327.12; *see infra*, Section VI. This case called for the more searching review.

Al-Musawwir obviously did not testify at Dennis's trial, since he was unknown to both the prosecution and the defense at that time. Then, the police interview upon which the court relied occurred only after Dennis had submitted his writ petition. Though counsel for Dennis interviewed Al-Musawwir during their investigation of Dennis's claim, these were not adversarial interviews, nor were they under oath.

There is a fundamental unfairness in the Commonwealth's introducing a new witness and new documents in a motion to dismiss without giving an actual-innocence petitioner an opportunity to test the new evidence through cross-examination. *Cf. Haas v. Commonwealth*, 283 Va. 284, 292, 721 S.E.2d 479, 482 (2012) ("Where a new witness has

been found, who has not previously testified . . . reference to the circuit court for an evidentiary hearing might be appropriate . . . ."). The question posed by the actual innocence statute is whether the petitioner's new evidence, "when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt . . . beyond a reasonable doubt." Va. Code § 19.2-327.11(A)(vii). As this Court recently explained, the statute essentially asks the Court to contemplate "a hypothetical new trial in which a rational factfinder hears all of the evidence in the aggregate." *In re Watford*, 295 Va. at 125, 809 S.E.2d at 657. If Dennis were tried today, the trier of fact would hear not only Al-Musawwir's denials, but also the contrary testimony from Dennis's witnesses and a thorough cross-examination of Al-Musawwir himself.

If he were on the witness stand, Al-Musawwir would have to explain why his proffered letters carry identical dates from 1999 and describe the circumstances under which he acquired them. He might be asked why he sat silently for nearly two decades about their contents. He would be subject to numerous impeachment and credibility challenges. And the trier of fact could hear and see him as he protested that

he would not be "stupid enough to beat a man up and shoot him and take some money from the job I'm working on and they got cameras everywhere," J.A. at 696, while also considering that Dennis could make the exact same argument. The court below did not have the benefit of this live testimony because it did not order an evidentiary hearing, so its credibility determination was limited to a written record reflecting the self-serving statements of the alleged perpetrator.

In blindly accepting an accused person's denials and unauthenticated evidence as true, the Court of Appeals set a dangerous precedent. Its decision implies that any writ petition alleging third-party guilt can be dismissed if the third party denies his involvement and produces any evidence to support his denial, even in the face of multiple witnesses contradicting his testimony, and without any opportunity for the petitioner to confront the denial. This Court should clarify that this is not the law.

IV. The Court of Appeals misapplied this Court's rule that evidence merely contrary to the trial evidence cannot establish actual innocence, when the rule has no application here.

The Court of Appeals misapplied this Court's rule regarding contrary evidence, dismissing Dennis's inmate affidavits as "nothing more

than evidence contrary to the evidence presented at trial" because the victim has never recanted his identification of Dennis. J.A. at 80–81 (Ct. of App. Op. at 9–10) (citing *Carpitcher*, 273 Va. at 345, 641 S.E.2d at 492). As a mixed question of law and fact, this decision is subject to *de novo* review in this Court. *Carpitcher*, 273 Va. at 343, 641 S.E.2d at 491. It was error for two reasons.

First, Dennis's affidavits are contrary to the evidence at trial only in that they show that someone else is guilty. This is to be expected in any case alleging third-party guilt—it will inevitably contradict the trial evidence. It cannot be a basis for dismissal. This is not a recantation case in which a witness told one story at trial and is now telling another, as in *Carpitcher*, 273 Va. at 345–46, 641 S.E.2d at 492. Nor is it a case in which new evidence serves only to impeach a trial witness, as in *Altizer v. Commonwealth*, 63 Va. App. 317, 325–29, 757 S.E.2d 565, 569–70 (Va. Ct. App. 2014). The lower court's ruling guts the actual innocence statute and will muddle expectations for future cases unless it is corrected.

Second, the lower court's stated rationale for finding the inmate affiant evidence merely "contrary" seems to be that Harrison, the vic-

tim, has never recanted his identification of Dennis as his assailant. J.A. at 80–81 (Ct. of App. Op. at 9–10). This turns the *Carpitcher* standard on its head: In that case, a trial witness's recantation of prior testimony was *exactly* the evidence this Court held to be merely contrary to that presented at trial, and therefore insufficient to grant of the writ. *Carpitcher*, 273 Va. at 345–46, 641 S.E.2d at 492.

Recantation of an earlier identification is also not a prerequisite to granting the writ. In *Haynesworth*, for example, two victims positively identified Haynesworth as their attacker and never recanted, yet the Court of Appeals granted the writ based on evidence that Haynesworth was proved not to have committed *other*, similar crimes. *See* 59 Va. at 198–99, 717 S.E.2d at 818 (Elder, J., dissenting) (describing the facts of the case).

This innocence petition is stronger than in *Haynesworth*, because the evidence here goes directly to the crime at issue. And while the court below was free to consider Harrison's failure to recant, it should not have been treated as dispositive without consideration of the identification's accuracy. Misidentification is a frequent cause of known

wrongful convictions that have been established by DNA evidence.[11] Crime victims who misidentify their attackers are often certain but mistaken.[12]

Dennis has never questioned Harrison's sincerity, but has presented substantial reason to question his accuracy. Most prominently, Harrison initially said he had never seen his attacker before, J.A. at 380 (Trial Tr. 246:7–13), and only later said it was Dennis after prompting by a detective who administered a highly suggestive photo array. Harrison, of course, had seen Dennis's face before, even if he did not know him well, because Dennis worked at the Daily Press. Harrison's difficulty in identifying his attacker was understandable because he probably focused more on staying alive and watching his attacker's weapons (which were smashing him in the face) than memorizing his attacker's

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[11] *See, e.g.,* The Innocence Project, The Cases, https://www.innocenceproject.org/all-cases/#virginia,exonerated-by-dna (last visited August 1, 2018) (indicating that 15 of 16 DNA exonerations in Virginia involved eyewitness misidentification).

[12] *See, e.g.,* Jennifer Thompson, *'I Was Certain, But I Was Wrong,'* N.Y. Times, June 18, 2000, http://www.nytimes.com/2000/06/18/opinion/i-was-certain-but-i-was-wrong.html (describing the author's "completely confident" identification of a man as her rapist, before his eventual exoneration by DNA evidence).

face. These were ideal conditions for Harrison to make a well-intentioned mistake.

The court below erred in its analysis and application of the *Carpitcher* standard. This error caused it to incorrectly accord dispositive weight to the absence of a recantation by Harrison, when it should have considered it merely as part of the whole record, which also includes Dennis's witness statements and the circumstances under which Harrison's identification was made.

V. The court erred by ignoring evidence corroborating the getaway driver's testimony, and instead rejected that testimony based on a typo.

The court below minimized highly relevant and credible testimony from Al-Musawwir's admitted getaway driver—Koneta Walker—and it ignored evidence corroborating that testimony. The court's analysis of Walker's testimony implicates mixed questions of law and fact, and therefore is subject to *de novo* review by this Court. *Carpitcher*, 273 Va. at 343, 641 S.E.2d at 491.

The most glaring example of the court's erroneous approach was its conclusion that Walker's affidavit "lack[ed] probative value" because it misstated the date of the attack by a few days. J.A. at 81 (Ct. of App.

Op. at 10). This was an obvious typographical error; as Dennis explained in his reply brief below, Walker's statement must have been referring to the aftermath of the attack on Harrison. Reply Br. at 12. Confronted with this issue, Walker responded that she was certain the events she described occurred on the night of the well-publicized Daily Press attack, even though she did not recall the exact date of the attack—which happened over 20 years ago, and more than a decade before Walker gave any sworn statement about this case. J.A. at 749 ¶ 2 (Decl. of Don Stoop). The court ignored this argument. The court also did not acknowledge that Walker's testimony was corroborated by her friend Ellen Speller, in whom she confided, just days after the crime, that Al-Musawwir had committed a violent crime at the Daily Press. J.A. at 660 ¶¶ 3–4. A typo should not have been given controlling weight over this evidence.

Setting aside the date issue, the court concluded that Walker's statement was not evidence of Al-Musawwir's guilt (and Dennis's innocence) because (i) "Walker did not state that Al-Musawwir confessed to the crimes," and (ii) she "merely related some suspicious circumstanc-

es." J.A. at 81 (Ct. of App. Op. at 10). Both of these contentions were wrong.

Walker *did* state that Al-Musawwir confessed to the Daily Press attack. She said that, when she picked up Al-Musawwir at the scene, he told her that he had just "f***ed up some n*****." J.A. at 659. In other words, Al-Musawwir said he had just committed a violent act against a black person. Given that no other violent acts upon black people are known to have been committed around this time at the Daily Press, this is a confession.

Al-Musawwir, moreover, confessed to five of his fellow inmates, and those confessions were consistent with Walker's testimony. For instance, Al-Musawwir told three of them that his girlfriend was aware of the crime, and two knew she had been his getaway driver. J.A. at 646 ¶ 6 (Poindexter); 639 (Holley); 554 ¶ 9 (Terry). These confessions further corroborated Walker's testimony, and vice-versa.

As to the court's assessment that Walker's testimony "merely related suspicious circumstances," it is a dramatic understatement—or a serious misapprehension of her testimony. According to Walker, when she picked Al-Musawwir up from the back of the Daily Press, he was

bloodied, "sweating profusely," "anxious," "carrying a bag of money," and looking as though he had been in a fight—a point he confirmed by stating he had "f***ed up some n*****." A465. These are more than just "suspicious circumstances"; they alone would be sufficient to prosecute Al-Musawwir.

The court below also said nothing of the declaration of Ellen Speller, a "close personal friend" of Walker for 40 years. J.A. at 660 ¶ 2. Speller recalled that, in 1997, Walker told her the same essential facts about that night that Walker would later memorialize in her declaration in this case, decades after she told her story to Speller. *Id.* ¶ 4. This conversation happened before Al-Musawwir shot Walker. *Id.* Speller, a disinterested witness with no motivation to perjure herself to assist Dennis's claim, should have been seen as strong corroboration of Walker's account.

At bottom, the Court of Appeals erred by viewing pieces of Walker's testimony in isolation and deeming them individually insufficient. But a court reviewing an actual innocence petition must consider "the totality of the evidence," "in the aggregate," and draw reasonable conclusions about whether a rational trier of fact would have found Dennis

guilty beyond a reasonable doubt. *See Watford*, 295 Va. at 125, 809 S.E.2d at 657–58.

A hypothetical jury would be forced to reconcile Walker's testimony about serving as Al-Musawwir's getaway driver, and Ellen Speller's testimony corroborating Walker, with trial witness testimony that there was indeed a getaway car that sped from the scene (while Dennis remained at the Daily Press). J.A. at 350–51 (Trial Tr. 216:21–217:25); 358 (Trial Tr. 224:5–18). A jury would further compare Walker's recollection that money was stolen[13] with the abundant evidence that this crime was a robbery. *See e.g.* J.A. at 91; 122; 179 (Trial Tr. 43:14–18); 213; 232 (Trial Tr. 96:4). Finally, a jury would compare Walker's recollection that Al-Musawwir was bloodied and sweating profusely (as one would expect[14]) with Dennis's having paid a social call to the security desk right after the attack. J.A. at 358–59 (Trial Tr. 224:5–225:15).

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[13] Walker provided two nearly identical statements in this case, with the latter adding language to qualify it as a sworn declaration under Virginia law. J.A. at 747 ¶ 18. While one statement refers to "coins" and the other more broadly to "money," Walker has confirmed that both statements were accurate, as she saw coins in Al-Musawwir's money bag. J.A. at 749 ¶ 7.

[14] J.A. at 653 ¶ 6 (Detective Williams: "I would have expected Harrison's assailant to look flustered and severely agitated after such a brutal attack.")

No rational trier of fact faced with this complete record would have found Dennis guilty beyond a reasonable doubt.

VI. The court abused its discretion by dismissing Dennis's petition without an evidentiary hearing.

The decision below credited the Commonwealth's one self-interested witness (the alleged perpetrator) over Dennis's seven disinterested and mutually reinforcing witnesses, without explanation. This was error. The actual innocence statute provides a mechanism for the circuit court to conduct a fact-finding hearing to better inform the Court of Appeals' decision.[15] In this case, where the Commonwealth has offered new evidence in its motion to dismiss, and where both sides' evidence largely consists of new witness testimony, the court should not have dismissed the petition without first ordering a hearing to test that testimony.

The decision whether to refer a case to the circuit court is generally committed to the discretion of the Court of Appeals. *Haas*, 283 Va. at

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[15] Va. Code § 19.2-327.12. ("If the Court of Appeals determines . . . that a resolution of the case requires further development of the facts, the court may order the circuit court in which the order of conviction . . . was originally entered to conduct a hearing . . . to certify findings of fact with respect to such issues as the Court of Appeals shall direct.").

290–91, 721 S.E.2d at 481. In *Haas*, this Court held the Court of Appeals had not abused its discretion when it dismissed a case without referral to the circuit court. *Id.* at 483–84. The petition in *Haas* relied primarily on affidavits from the petitioner's three children recanting their trial testimony. *Id.* at 292–95, 721 S.E.2d at 480. As this Court explained, recantation evidence is generally viewed with "great suspicion," for it "merely amounts to an attack on a witness' credibility by the witness herself." *Id.* at 292, 721 S.E.2d at 482 (citing cases). In *Haas*, a child sex-abuse case, the original testimony had been "graphic and explicit," as well as "abundantly corroborated" at trial by other fact witnesses and by medical experts' examinations and photographs. *Id.* at 293, 721 S.E.2d at 482–83. The recantations could not overcome this record.

Haas recognized, however, that non-recantation cases "stand on a different footing." *See id.* at 482. "Where a new witness has been found, who has not previously testified . . . reference to the circuit court for an evidentiary hearing might be appropriate because of a trial judge's unique ability to see and hear the witness first hand and to

evaluate his credibility from his appearance and demeanor while testifying." *Id.*

This case stands on precisely the different footing *Haas* envisioned, many times over. *Seven* new witnesses who never previously testified provided statements implicating Al-Musawwir, and Al-Musawwir's guilt would make Dennis factually innocent. While two of the witnesses are now deceased, the other five are not and could testify at a hearing. Al-Musawwir, too, has never testified in relation to this case, even though his hearsay statement to the state police served as a major basis for dismissal.

The Court of Appeals' discretion to dismiss a case without a hearing cannot be limitless. This is exactly the sort of case that demands further factual development with live witness testimony—new witnesses on both sides with directly conflicting stories. The record reflects various unresolved factual conflicts, with: (i) several witnesses who would testify that Al-Musawwir confessed his guilt to them; (ii) Walker's testimony that she drove a bloody and anxious Al-Musawwir from the crime scene around the time of the attack; (iii) Ellen Speller's testimony corroborating Walker's; and (iv) a state

police interview in which Al-Musawwir denied the confessions and asserted a scheme to frame him.

The Court of Appeals unquestioningly adopted Al-Musawwir's denials, but his story has never been tested under oath, in the crucible of cross-examination. Neither, for that matter, have any of Dennis's witnesses. Because the two narratives—Al-Musawwir as perpetrator, or Dennis—are mutually exclusive, this case required the court to make substantial credibility determinations. Though Al-Musawwir was inherently not a credible witness, *see supra* Section III, the Court of Appeals *at minimum* should have referred the case to the circuit court for factual development. Had it done so, the conflicting testimony would have had the benefit of "a trial judge's unique ability to see and hear the witness[es] first hand and to evaluate [their] credibility from [their] appearance and demeanor while testifying." *Haas*, 283 Va. at 292, 721 S.E.2d at 482.

CONCLUSION

Dennis presented substantial evidence showing that Al-Musawwir is guilty and that Dennis is therefore innocent. The Court of Appeals failed to consider much of this evidence. The evidence it did review was

dismissed either without reasoning or based on erroneous conclusions of law and fact. This Court should reverse the judgment of the Court of Appeals and grant the writ of actual innocence, or in the alternative, remand with instructions to order fact-finding by the circuit court.

Respectfully Submitted,

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CERTIFICATE PURSUANT TO RULE 5:26(h)

I certify compliance with Rule 5:26 as follows:

(1) On August 2, 2018, an electronic version of this brief and the Joint Appendix were filed with the Clerk of the Supreme Court using the Virginia Appellate Courts eBriefs System (VACES). Three printed copies have been filed with the Clerk of the Supreme Court by FedEx next-day delivery.

(2) On August 2, 2018, copies of this brief and the Joint Appendix were served on counsel for the Appellee by electronic mail to the following address:

Matthew P. Dullaghan
MDullaghan@oag.state.va.us

(3) Exclusive of the Cover, Table of Contents, Table of Authorities, and Certificate, this Petition does not exceed 50 pages and is produced in Century Schoolbook size 14 font.

Respectfully submitted,

/s/ Andrew George
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