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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 171599

NATHANIEL DENNIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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BRIEF OF THE COMMONWEALTH

SUMMARY OF ARGUMENT

Nathaniel Dennis sought a writ of actual innocence in the Court of Appeals of Virginia to vacate his 1998 convictions from the Circuit Court for the City of Newport News for aggravated malicious wounding, attempted murder, and using a firearm in the commission of a felony.

Dennis's petition alleged that an individual who looked "strikingly like" him and who also worked at the Daily Press, where the offenses occurred, "was the

culprit" who attacked the victim.[1] According to Dennis, the victim "made a mistake" in identifying Dennis as the perpetrator.[2] Dennis relied on affidavits from inmates who declared that another person had confessed to the crimes and from a person who declared that she had driven that person from the scene. The Commonwealth submitted investigative and court records as well as additional affidavits, including one from the person Dennis accused, denying the accusations.

The record as a whole and the governing case law dictated that his proffered evidence was not material and Dennis was not entitled to a writ of actual innocence.

STATEMENT OF THE CASE

By final order of May 20, 1998, Dennis was sentenced to life plus thirteen years' imprisonment and aggregate fines of $200,000.[3] The Court of Appeals of Virginia affirmed the judgment on direct appeal.[4] This Court refused his petition for appeal on June 11, 2001.[5]

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[1] JA 14.

[2] JA 15.

[3] JA 464-69.

[4] *Dennis v. Commonwealth*, Record No. 1285-98-1, 1999 Va. App. LEXIS 583, 1999 WL 1133668 (Va. App. Oct. 19, 1999).

[5] *Dennis v. Commonwealth*, Record No. 010689, (Va. June 11, 2001).

On October 17, 2000, Dennis filed a petition for writ of habeas corpus in the Supreme Court of Virginia, alleging among other claims, a denial of appeal.[6] This Court awarded Dennis a delayed appeal on March 9, 2001.[7] It refused Dennis's subsequent petition for appeal on June 11, 2001.[8]

On or about November 18, 2011, Dennis was extradited to Alabama to be tried for capital murder.[9] On information and belief, Dennis has not been tried on the Alabama charge to date.

On May 18, 2017, Dennis filed a petition for a writ of actual innocence in the Court of Appeals.[10] On October 31, 2017, that court dismissed the petition.[11] That court found that Dennis had not shown that his new evidence was true and, therefore, had failed to show that it was "material" as required by § 19.2-327.11.[12] It also held that the petition was insufficient because it merely presented evidence contrary to that adduced at trial.[13]

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[6] JA 530-41.

[7] Record No. 002462.

[8] Record No. 010689.

[9] JA 18.

[10] JA 1.

[11] JA 72.

[12] JA 79.

[13] JA 80.

ASSIGNMENTS OF ERROR

The Court granted Dennis's petition for appeal as to six claims of error:

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

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

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

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.

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

VI. The Court of Appeals abused its discretion by dismissing Dennis's petition without an evidentiary hearing.[14]

STATEMENT OF FACTS

Evidence at trial

On the night of Wednesday, October 8-9, 1997, Lynwood Harrison was working alone in his office in a sub-building (known as the "Signs" or "Muzak" building) of the Daily Press Newspaper plant in Newport News.[15] Harrison worked with contractors who provided papers to retailers and the racks on the

[14] Defendant's Opening Brief (hereinafter "Br.") at 1-2.

[15] JA 164, 166, 168-69, 304.

street.[16] Harrison's regular work hours were 8:30 a.m. to 5:30 p.m., but on Wednesday nights he stayed late—usually until 2:00 a.m. on Thursday.[17]

Other than Harrison's, all the offices were locked by 6:30 p.m. on the evening of October 8, 1997.[18] The only lights on in the building were in Harrison's office, the adjacent hallway, and the "computer room."[19] The building itself was also locked by 6:30 p.m.[20] Around 11:45 p.m., the cleaning crew, which included Patricia Farmer, Pat Levisy, Otelia Carrington, and Dennis, came to clean the Signs building.[21] Dennis was the night supervisor for the housekeeping contractors at the Daily Press.[22] None of the crew spoke to Harrison.[23] The crew members cleaned and left about 20 minutes after they had arrived, locking the door behind them.[24] The only person still in the Signs building was Harrison.[25]

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[16] JA 164.

[17] JA 121, 168-69, 231. Other single copy employees under Harrison's supervision worked late on other nights of the week. JA 168.

[18] JA 168.

[19] JA 168-69.

[20] JA 169.

[21] JA 169, 303-04, 306, 390-91.

[22] JA 390.

[23] JA 171, 304, 399.

[24] JA 107, 171, 304-05, 308-09, 393-94.

[25] JA 171, 304, 397.

After cleaning the Signs building, Farmer, Levisy, and Carrington went to the production building, and then "continued working in the main building."[26] Around 12:05 a.m., Dennis gave security guard Celestine Pinckney-Lloyd the keys to the Signs building.[27] Pinckney-Lloyd did not see Dennis's car leave or return.[28]

Shortly before 12:30 a.m., Harrison unlocked the side door of the Signs building so the contractors could enter and then returned to his office.[29] Harrison was standing at a table across from his desk when he noticed someone standing at the doorway coming from the front part of the building.[30] Harrison was certain that the intruder had not entered through the unlocked side door because it made a noise when it opened.[31]

Harrison started to say something but the intruder, whom Harrison ultimately identified to the police as Dennis, came toward Harrison with his arm raised and a three-foot length of pipe in his hand.[32] Harrison attempted to retreat

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[26] JA 305, 309-10.

[27] JA 100-01.

[28] JA 101. The next time Pinckney-Lloyd saw Dennis was at about 1:20 a.m., when he walked in and "just started talking." JA 102, 358-60; JA 102.

[29] JA 172, 205-06; JA 108.

[30] JA 108.

[31] JA 173.

[32] JA 172-74, 202; JA 108.

but Dennis struck him in the face.[33] Dennis struck Harrison again on the arm and the pair wrestled into the hallway, where another blow from the pipe knocked out one of Harrison's teeth.[34] When Harrison asked Dennis why he was attacking him, Dennis brandished a gun and replied, "If you resist any more, I will kill you."[35]

Dennis forced Harrison from the hallway to the "signs" area at the front of the building.[36] Once there, Dennis ordered Harrison to lie on the floor on his stomach with his arms and legs outstretched.[37] Dennis repeatedly struck Harrison's arms and legs with the pipe, as though he was chopping wood.[38] Harrison asked Dennis why he was doing this, but got no response.[39]

After the beating, Dennis warned Harrison, "Stay here and you might just live through this."[40] Dennis then walked toward Harrison's office and Harrison noticed the lights in the hallway dim.[41] Harrison stayed on the floor as ordered but

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[33] JA 172.

[34] JA 172, 175, 176; JA 123.

[35] JA 172-73, 176; JA 108, 117; *Dennis v. Commonwealth*, Record No. 1285-98-1, slip op. at 2, 1999 Va. App. LEXIS 583 at *2.

[36] JA 173, 176; JA 117.

[37] JA 176.

[38] JA 177-78; JA 108, 117.

[39] JA 179.

[40] JA 179; JA 108.

[41] JA 179.

heard some doors opening and closing, and another sound that he could not discern.[42] Several minutes later Dennis returned, took a key from his own pocket and unlocked the front doors, put the pipe just outside the door, and then asked Harrison the location of the keys to a truck that was parked outside.[43] Harrison told Dennis that the keys were in the office on his desk.[44] Dennis departed but returned "rather quickly," grabbed Harrison by the shoulder, and placed him against a counter.[45]

Contractor Jerry Oxenburg arrived around 12:45 a.m. and noticed that the lights were out in the building, which was unusual.[46] When Oxenburg looked in, he noticed a male figure "ducking out of sight."[47] Harrison heard Oxenburg call out but did not respond because Dennis had the gun pointed in his face.[48] As soon as Oxenburg left, Dennis shot Harrison in the face three times from a distance of

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[42] JA 179-80.

[43] JA 180, 194; JA 108; *Dennis v. Commonwealth*, Record No. 1285-98-1, slip op. at 2, 1999 Va. App. LEXIS 583 at *2.

[44] JA 180.

[45] JA 180.

[46] JA 230-31, 237.

[47] JA 231.

[48] JA 180-81; JA 108, 117; *Dennis v. Commonwealth*, Record No. 1285-98-1, slip op. at 2, 1999 Va. App. LEXIS 583 at *2-*3.

about a foot.[49] After the third shot, Harrison stated, "That's enough. That's enough . . . [I]t's time [for you to] get out of here," and Dennis fled.[50] Dennis did not take anything from Harrison and, as far as Harrison knew, nothing had been taken from his office.[51]

After Dennis fled, Harrison remembered that Dennis had unlocked the front door, so he left through the front door, and went around the building looking for Oxenburg.[52] Harrison saw the pipe by the front doors on his way out but did not stop because he was intent on finding Oxenburg.[53] Meanwhile, Oxenburg had gone to his car to retrieve his own gun because he "knew something wasn't right."[54] Harrison's office had been "turned upside down."[55] Oxenburg returned to the side entrance of the Signs building where he saw a tall figure with a gun

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[49] JA 181-83; JA 109.

[50] JA 182.

[51] JA 195, 301. Harrison confirmed that he had counted approximately $393 received from a vendor at some point on the night of the attack, which he had placed loose in his top desk drawer, but did not know what had happened to that money. JA 115, 212. There was also a bag of $1,200 worth of coins in his office that night, although it was not customary for there to be money in the Signs building. JA 213, 348. The crime scene tech found the bag of coins behind the door of Harrison's office while he was processing the scene. JA 123.

[52] JA 182.

[53] JA 182, 220; JA 115-16.

[54] JA 232; JA 121.

[55] JA 232.

pointed at him.[56] Oxenburg retreated toward the front of the building and found Harrison crawling on the ground.[57]

Oxenburg retrieved his cell phone, asked Harrison for a description of the assailant, and called the police.[58] Oxenburg testified at trial that Harrison described his assailant as a black male, tall, thin build.[59] Harrison testified that his initial "basic description" was: tall, approximately 6'2", dark skin, shaven, dark clothes, dark pants, wide belt, knit cap.[60]

The call from the Daily Press was logged at around 12:57 a.m. and the first officer arrived at the scene at 1:01 a.m.[61] Officer L.W. Johnson rode to the hospital in the ambulance with Harrison and asked him if he knew who had attacked him.[62] Harrison stated that he did not know who the perpetrator was but described the assailant to Officer Johnson as "about 6'2", dark skinned, clean shaven. . . . slope face, he was wearing all black.[63]

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[56] JA 232.

[57] JA 232; JA 121.

[58] JA 233-34, 237; JA 121.

[59] JA 237-38.

[60] JA 224.

[61] JA 121.

[62] JA 89-90, 121, 185, 377.

[63] JA 89, 185.

Newport News Detective Misty Mercer spoke to Harrison at Riverside Hospital before he was taken for surgery.[64] Harrison again stated that he did not know who had attacked him; that he had never seen the person before.[65] But Harrison told Detective Mercer that he would be able to "re-identify" the assailant and could provide the particulars for a composite drawing.[66] Harrison gave consistent accounts of the events to Detective Mercer and Officer Johnson.[67]

Newport News Detective Eugene Price went to Riverside Hospital on Friday, October 10.[68] Harrison's jaw was wired shut at the time.[69] Harrison reiterated that he did not know the assailant and had never seen him but that he would be able to recognize the assailant and was willing to do a composite.[70] Harrison again described the assailant as a tall black male, approximately 6'2", medium build and wearing all dark clothing.[71]

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[64] JA 188, 375.
[65] JA 376, 380.
[66] JA 377-78, 380.
[67] JA 377.
[68] JA 197, 279.
[69] JA 117, 270.
[70] JA 280, 285.
[71] JA 280.

Detective Price recalled that he received an initial description of a black male, slim, 6'1"-6'4", wearing all black with a knit cap[72] and realized that Dennis met the description.[73] Harrison told Detective Price that he did not know Dennis because the name was unfamiliar to him.[74]

But Harrison later recalled that he had seen the name Nathaniel Dennis on the caller ID of his "off and on" girlfriend, Bernadette Harris.[75] Harris later told Harrison that Dennis was one of the night supervisors for housekeeping at the Daily Press. When Harris confirmed that Dennis was tall, dark-skinned, and slim, Harrison said that he "sounds pretty close to the guy who did this" and resolved to contact Detective Price to see "if maybe we can get a picture."[76]

Detective Price returned to the hospital on Monday, October 13 and showed Harrison a six-photograph array.[77] Harrison readily picked Dennis from the array

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[72] JA 291-92.

[73] JA 281-82.

[74] JA 123, 197.

[75] JA 198-99, 225, 255. Harris and Harrison had dated "off and on" from 1992, but were not dating in 1997, although they maintained a friendship. JA 255-56.

[76] JA 198, 200, 208.

[77] JA 87, 95, 201-02, 280, 294; *cf.* JA 656.

because "he's the person I saw that night."[78] Harrison said he had never spoken to Dennis and did not know his name at the time of the attack.[79]

After his arrest, Dennis denied committing the offenses.[80] At trial, Dennis conceded that he knew Harrison "to a certain extent" and that he knew that Harrison worked in the Signs building.[81] Although he "very rarely" went to the Signs building, Dennis admitted that he had escorted the cleaning crew to the Signs building on October 8, the night of the offense.[82]

Harrison suffered a broken jaw and a broken right arm; both his legs were "shattered" and his right ankle bone was "pulverized."[83] Those injuries required the placement of numerous permanent rods, screws, plates and pins.[84] At the time of Dennis's trial, Harrison could only open his mouth halfway, had numbness in his tongue, had had to have another tooth removed because of the fracture of his

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[78] JA 95, 112, 122, 202, 281.

[79] JA 117, 186-87, 202, 475.

[80] JA 122.

[81] JA 390-91.

[82] JA 306, 391-92.

[83] JA 189, 240-42, 251.

[84] JA 188-89.

jaw, and still had been unable to return to work.[85] The jury convicted Dennis and imposed the maximum sentence for each offense.[86]

At sentencing, Dennis argued to the trial judge that he had never met nor spoken with Harrison.[87] Dennis insisted that people had left the crime scene; that a vehicle had sped away from the Daily Press at 35-40 miles per hour; that he did not own a gun; and that he had been sitting at the security desk when the attack on Harrison occurred.[88] Dennis claimed to the trial judge that he not only had no reason to harm Harrison but that "there is nothing in my body that would do any human being as bad as this situation seems, that I would do anything like that to anyone I never have in my life."[89] The trial judge observed to Dennis that "you told this to the jury. The victim told his side of the story. He identified you. They didn't choose to believe you."[90] The trial court imposed the sentences fixed by the jury.[91]

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[85] JA 196.

[86] JA 473; Va. Code Ann. §§ 18.2-10(d), 18.2-26(1), 18.2-32, 18.2-51.2, and 18.2-53.1.

[87] JA 475.

[88] JA 475-76.

[89] JA 475.

[90] JA 476.

[91] JA 477-78; *see also* JA 464-69.

Dennis's New Evidence

The "newly discovered" evidence included affidavits from five inmates: George Holley, Donald Poindexter, Andre Wiggins, Andre Terry, and Harry Cutchin. All of the statements purported to implicate another individual, Abdul H. Al-Musawwir, as Harrison's assailant.[92]

Dennis submitted a 2002 affidavit from Terry, which states that he was incarcerated with Al-Musawwir in the Hampton Roads Regional Jail, and that Al-Musawwir confessed to beating Harrison. Wiggins's 2010 affidavit states that while he, Holley, and Terry were playing dominoes one day at the Hampton Roads Regional Jail, Al-Musawwir stated that "he actually had attacked Lynwood Harrison at the Daily Press" and had "beaten Harrison with a pipe, then shot Harrison in the head."[93] Holley's 2010 affidavit states that Al-Musawwir gave him additional details.[94] Cutchin's 2011 affidavit states that Al-Musawwir approached him for help with his case and later confessed to a robbery at the Daily Press in Newport News.[95] Poindexter's 2012 affidavit stated that he was housed with Al-

[92] JA 15-16, 8-13.

[93] JA 638.

[94] JA 639.

[95] JA 642.

Musawwir at the Hampton City Jail, and that Al-Musawwir "opened up" and confessed to the robbery.[96]

Dennis also submitted an affidavit from his former girlfriend, Koneta Walker,[97] describing Al-Musawwir's appearance and statements he purportedly made when she says she gave him a ride from the Daily Press building, and an affidavit from Walker's friend, Ellen Speller,[98] vouching for Walker's affidavit.[99]

Other evidence pertaining to guilt

Al-Musawwir has denied any involvement in the attack on Harrison. On July 14, 2017, Special Agent Allen Boyd of the Virginia State Police traveled to Keen Mountain Correctional Center, where Al-Musawwir voluntarily spoke with Special Agent Boyd.[100] Al-Musawwir told Special Agent Boyd that he had been approached several times before about the allegation that he had committed the crimes at the Daily Press.[101] According to Al-Musawwir, George Holley made up the story implicating him because Dennis had promised Holley money if Dennis

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[96] JA 646.

[97] JA 659.

[98] JA 660.

[99] JA 660.

[100] *See* JA 696-706.

[101] JA 696.

was exonerated.[102] Al-Musawwir also provided Special Agent Boyd with purported handwritten statements from Andre Terry and Andre Wiggins in which both state that Holley hoped for financial gain if Dennis was exonerated.[103]

Al-Musawwir's felony convictions are for aggravated malicious wounding, use of a firearm in the commission of aggravated malicious wounding, abduction, two counts of first degree murder, burglary, and shooting into an occupied dwelling.[104] Al-Musawwir stated that he does not rob people, and that it would not make sense for him to commit a robbery at his place of employment — particularly considering that there were "cameras everywhere" and that he did not have access to the building.[105] Al-Musawwir told Special Agent Boyd that he does "the things I do out of anger."[106]

Al-Musawwir confirmed that he was working at the Daily Press the night of the attack as a delivery driver.[107] Like other employees that night, he was curious

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[102] JA 696.

[103] JA 699-702.

[104] *See* JA 82-84. None of Al-Musawwir's convictions involve crimes of moral turpitude.

[105] JA 696-97.

[106] JA 697.

[107] JA 696.

to know why the police were present.[108] Al-Musawwir thought that either Dennis or Harrison worked in maintenance, but he was not sure which one.[109]

Al-Musawwir told Special Agent Boyd he would tell him if he had committed the crimes against Harrison because "I already have life."[110]

STANDARD OF REVIEW

This Court has applied well-recognized principles for appellate review of decisions by circuit courts to its review of decisions by the Court of Appeals acting under its original jurisdiction to decide petitions for writs of actual innocence based on non-biological evidence. "We will be bound by the factual findings in the present record, as approved by the Court of Appeals, unless they are plainly wrong or without evidence to support them."[111] "The Court of Appeals' conclusions of law and its conclusions based on mixed questions of law and fact

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[108] JA 696.

[109] JA 697.

[110] JA 697.

[111] *Carpitcher v. Commonwealth*, 273 Va. 335, 343, 641 S.E.2d 486, 490 (2007). Dennis argues that, because *Carpitcher* involved a referral to the circuit court for findings, the standard it adopted applies *only* to findings by a circuit court, and not to findings by the court whose decision is appealed. Br. at 27. He suggests that, because "this Court and the Court of Appeals are equally capable of considering the purely written record that exists in this case," a *de novo* review of the facts is warranted. *Id.* But nothing in *Carpitcher* conditioned normal appellate review on a circuit court referral; it simply applied the usual standards to the record before it. The standard Dennis proposes would reduce the Court of Appeals decision to a try-out on the road.

. . . in accordance with general principles of appellate review, are subject to our de novo consideration."[112]

A question of statutory interpretation "is a question of law reviewed *de novo* on appeal."[113] In resolving those questions, this Court "give[s] statutory language its plain meaning."[114] On appellate review, reviewing courts "assume that the legislature chose, with care, the words it used when it enacted the relevant statute."[115] "When bound by the plain meaning of the language used, appellate courts are not permitted 'to add or subtract from the words used in the statute.'"[116] Statutes addressing the same subject are to be read *in pari materia*.[117] Thus, "statutes are not to be considered as isolated fragments of law, but as a whole, or as

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[112] *Id.,* 641 S.E.2d at 490-91.

[113] *Grimes v. Commonwealth*, 288 Va. 314, 318, 764 S.E.2d 262, 264 (2014).

[114] *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

[115] *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (internal quotation marks and citation omitted).

[116] *Nicholson v. Commonwealth*, 56 Va. App. 491, 503, 694 S.E.2d 788, 794 (2010) (quoting *Posey v. Commonwealth*, 123 Va. 551, 553, 96 S.E. 771, 771 (1918)).

[117] *See Lillard v. Fairfax County Airport Authority*, 208 Va. 8, 12, 155 S.E.2d 338, 342 (1967).

parts of a great, connected homogeneous system, or a single and complete statutory arrangement."[118]

ARGUMENT

I. The Court of Appeals did not err in its weighing of the evidence.

A. Dennis fails to demonstrate that the Court of Appeals ignored the two affidavits identified by Dennis; that court instead properly held that Dennis had failed to establish that the allegations in those affidavits were true. (Assignment of Error I)

In his first assignment of error, Dennis asserts that the Court of Appeals "erred by ignoring two of the affidavits" he submitted.[119] His own brief disproves that untenable assertion. Dennis instead contends that the "only consideration" the Court of Appeals gave to the affidavits from Donald Poindexter and Harry Cutchin was its holding "that Dennis has failed to establish that the allegations contained in the affidavits of Holley, Wiggins, Terry, Poindexter, and Cutchin were true."[120]

Dennis fails to specify where he objected to the analysis by the Court of Appeals, much less gave it any opportunity to consider the merits of any objection and correct any error. In particular, he filed no motion with that court to reconsider

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[118] *Id.*

[119] JA 750.

[120] Br. at 22 (quoting JA 80).

its decision. His present objection therefore is waived.[121] Moreover, the only "argument" in the body of Dennis's brief is his assertion that "[t]his cursory treatment cannot be consistent with Virginia law."[122] Dennis cites no authority for his claim.

> The provisions of Rule 5:17(c)(4) parallel the requirements of Rule 5A:20(e) by requiring a petition for appeal to this Court to contain "[t]he principles of law, the argument, and the authorities relating to each assignment of error." Rule 5:17(c)(4). And, the provisions of Rule 5:27 require an appellant's opening brief to conform to the requirements for a petition for appeal set forth in Rule 5:17(c). When an appellant fails to comply with Rule 5:17(c)(4), this Court generally treats the argument as waived.[123]

In an extended footnote, Dennis does develop a different argument, which does not, however, support his critique of "cursory treatment" or his assignment of error. In the footnote, Dennis instead objects to having to prove that the allegation in the affidavits were true in order for them to be "material" and questions whether, after *In re: Watford*,[124] that requirement under *Carpitcher* still is good law.[125] But that also was not the assignment of error for which the Court granted appeal.

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[121] Va. Sup. Ct. R. 5:25.

[122] Br. at 23.

[123] *Jay v. Commonwealth*, 275 Va. 510, 519-20, 659 S.E.2d 311, 316-17 (2008) (citing cases).

[124] 295 Va. 114, 809 S.E.2d 651 (2018).

[125] Br. at 23 n.10. In his petition for appeal to this Court, Dennis argued that this Court did not need to address whether the Court of Appeals properly considered

Indeed, this Court expressly refused to allow Dennis to amend his assignments of error "to assert that the Court of Appeals applied an erroneous standard of review in this case."[126] Under Dennis's denied assignment of error, he would have argued that this Court's recent decision in *Watford* "contradicts the rule applied by the Court of Appeals in this case."[127]

Moreover, Dennis's only argument that *Watford* might have modified *Carpitcher* is that *Watford* construed the 2013 amendments to § 19.2-327.3(A)(vii), enacted after *Carpitcher*.[128] But *Carpitcher*'s test for materiality construed the preceding requirement, that "the previously unknown or unavailable evidence is material."[129] *Carpitcher*'s holding that new evidence must be "true" to be "material" did not depend on the subsequently amended language of the second clause. Indeed, *Carpitcher* was careful to distinguish that the second clause imposes an entirely separate burden.[130] Nothing in *Watford* changes that analysis.

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whether the statements were true in assessing materiality: "Regardless, Dennis's evidence meets the 'truth' standard." Pet. App. at 18 n.10.

[126] "Motion For Leave To Amend Assignments Of Error And To Vacate And Remand" at 1 (Mar. 16, 2018), denied by Order (Apr. 11, 2018).

[127] Mot. at 1.

[128] Br. at 23 n.10.

[129] Va. Code Ann. § 19.2-327.11(A)(vii) (emphasis added).

[130] "The requirements of Code § 19.2-327.11(A)(vii) are stated in the conjunctive, requiring proof that 'the previously unknown or unavailable evidence is material *and* when considered with all of the other evidence in the current record,

The Court of Appeals did not err in determining that Dennis's new evidence was not material.

B. The Court of Appeals properly relied on evidence it expressly was authorized to consider under § 19-2-327.11(C). (Assignment of Error II)

Dennis argues that Al-Musawwir's denials, and the documents from Terry and Wiggins that he produced, "contain multiple levels of hearsay and are not admissible for their truth."[131] But he cites only this Court's Rule 2:802 in support of that argument, which states *in toto* only that "Hearsay is not admissible except as provided by these Rules, other Rules of the Supreme Court of Virginia, or by Virginia statutes or case law."[132] He fails to identify the offending hearsay, or state where he objected to it below.[133]

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will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' *Id.* (emphasis added). Therefore, to meet this statutory burden, Carpitcher was required to prove both that the recantation evidence was true and that, when considered with all the other evidence in the current record, no rational trier of fact could have found him guilty of the crimes. Because Carpitcher failed to meet his burden of establishing the first component of this two-part statutory burden, he failed to satisfy his burden of proof under the statute." *Carpitcher*, 273 Va. at 347, 641 S.E.2d at 493.

[131] Br. at 26.

[132] Va. Sup. Ct. R. 2:802.

[133] Dennis filed a reply to the motion to dismiss, the pleading which submitted Al-Musawwir's denials. "Petitioner's Reply to Commonwealth's Motion to Dismiss," *Dennis v. Commonwealth,* No. 0774-17-1 (Va. Ct. App. Sept. 30, 2017). His reply asserted that the letters from Wiggins and Terry were hearsay, but he argued only

Dennis also fails to address the relevant statute: "The response [to the petition] may contain a proffer of any evidence pertaining to the guilt or delinquency or innocence of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial."[134] The statute specifically contemplates that the Court of Appeals will accept, and weigh, otherwise inadmissible evidence pertaining to guilt. The submissions of Al-Musawwir's denials, and the evidence corroborating them, fall well within the scope of the statute.

Dennis asserts that his petition "relied on admissible evidence."[135] But he relies expressly on hearsay from each of his inmate affidavits – the alleged confessions by Al-Musawwir. His brief invokes no exception to the same hearsay bar he seeks to erect for Al-Musawwir.[136]

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that they should in consequence be given less weight than his proffered affidavits, not that they were inadmissible. Dennis did not assert that Al-Musawwir's denials included any other hearsay. *See* Reply at 15. Accordingly, he failed to raise his present argument below, and it is barred on appeal. Va. Sup. Ct. R. 5:25.

[134] Va. Code Ann. § 19.2-327.11(C).

[135] Br. at 26 (citing Pet. at 33-37, JA 46-50).

[136] Dennis's petition in the Court of Appeals had argued that his hearsay could be admissible under Rule 2:804(b)(3)(B), *see* JA 26, but he cannot rely on arguments not made in his brief. *See* Rule 5:26 (g) ("Attempts to incorporate arguments made below by reference to pleadings, motions, memorandum, or other filings are prohibited."). Too, that argument depended on assuming that at any hypothetical trial, Al-Musawwir would claim his Fifth Amendment right against compelled self-incrimination and refuse to testify. But Al-Musawwir has spoken freely about his

Nor was there any likelihood that the accusations would be admissible at trial. "Proffered evidence that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted."[137] Here, there was no "trend of facts and circumstances tending clearly to point" to Al-Musawwir's guilt.[138] For example, no evidence establishes that Al-Musawwir had access to the "baling room" that the pipe came from.[139] Instead, Dennis asks this Court to pile inference upon inference based on the unreliable witness statements.[140] Given such an unstable foundation, the proffered evidence of Al-Musawwir's guilt is not admissible.

Dennis failed to preserve the arguments he seeks to present to this Court, and those arguments ignore that the statute authorizes the very sort of evidence to

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denial of any criminal conduct, and there is no evidence to suggest he would not testify consistent with those denials at any hypothetical trial. Dennis did alternately argue that the inmate affidavits could still be used in that case to impeach Al-Musawwir's hypothetical testimony, under Rule 2:801(d)(1). JA 36. But such impeachment is not admissible as truth of the allegedly inconsistent statement. *Gray v. Rhoads*, 268 Va. 81, 89, 597 S.E.2d 93, 98 (2004).

[137] *Elliott v. Commonwealth*, 267 Va. 396, 424, 593 S.E.2d 270, 287 (2004).

[138] *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919).

[139] JA 697.

[140] *Cf. Oliva v. Commonwealth*, 19 Va. App. 523, 452 S.E.2d 877 (1995) (witness testified that defendant was not the person he saw fleeing).

which he would object. The Court of Appeals did not err in relying on the Commonwealth's evidence as authorized by statute.

C. Dennis fails to demonstrate that the Court of Appeals failed to consider the reliability of both parties' evidence; that court instead properly held Dennis to his burden to establish that the allegations in his proffered affidavits were true. (Assignment of Error III)

Dennis asserts that the Court of Appeals "unquestioningly accepted the Commonwealth's evidence—Al-Musawwir's denials and letters—as true."[141] He fails to point to any portion of that court's decision that demonstrates such unquestioning acceptance. Instead, the Court of Appeals discussed Al-Musawwir's credible explanations that he would not commit such a crime where he believed he was being watched by camera, and that he had nothing to lose if he did admit involvement because he already was serving a life sentence.[142] It described the documents Al-Musawwir provided to corroborate that others were trying to frame him.[143] The ultimate weighing of Al-Musawwir's statements by the Court of Appeals reflected careful consideration of the information before it:

> Al-Musawwir has been confronted with allegations regarding the Daily Press incident numerous times. He has consistently denied involvement in the crimes, as well as making admissions about the incident to fellow inmates. Around the time the allegations first arose,

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[141] Br. at 27.

[142] JA 78.

[143] JA 78.

> Wiggins and Terry wrote Al-Musawwir about Holley's intention to frame Al-Musawwir for Dennis' crimes.[144]

Although Al-Musawwir's denial to Special Agent Boyd would be unremarkable — perhaps predictable — in many cases, here it is a circumstance that is wholly inconsistent with Dennis's proffers and argument that Al-Musawwir routinely confessed to other inmates.[145] Moreover, the notion that any individual would routinely confess to a crime at the same time that he hoped he would not be discovered defies common human experience, as Al-Musawwir himself aptly noted.[146]

In addition, Al-Musawwir has been consistent in denying culpability for the crimes against Harrison. Detective Williams's August 8, 2000 letter confirms that Al-Musawwir already had denied making any statements to Holley.[147] Detective Williams also documented in 2000 that Holley wanted $400 for the information he had provided,[148] just as Al-Musawwir reported to Special Agent Boyd.[149]

Dennis argues that the decision "was error, as indicia of reliability—and of *un*reliability—were abundant, while Dennis was permitted no opportunity to

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[144] JA 80.

[145] JA 32, 55.

[146] JA 697.

[147] JA 548.

[148] JA 551.

[149] JA 696.

challenge the evidence in court before it was accepted as true."[150] But Dennis had such an opportunity, and pursued it. He filed a reply to the Commonwealth's motion to dismiss, presenting his arguments that Al-Musawwir's account was not reliable. Indeed, on other points, such as Koneta Walker's affidavits,[151] Dennis chose to submit new affidavits with his reply[152] – affidavits which the Commonwealth then could not answer. If there had been such evidence for any of Dennis's current arguments, such as questioning the authenticity of the letters Al-Musawwir produced, Dennis certainly had an opportunity to submit it. And while Dennis asserts a "fundamental unfairness in the Commonwealth's introducing a new witness and new documents in a motion to dismiss,"[153] none of his affiants were subjected to cross-examination either, even though he bears the burden to prove all the elements require by the statute.

Dennis's present argument also ignores the circumstances that the Court of Appeals had to weigh in evaluating the reliability of his contrary affidavits. The

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[150] Br. at 27; *see also* Br. at 30-31. *But see Yeatts v. Murray* 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995) (confirming that the legislature may properly authorize courts hearing collateral proceedings "to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures." (quoting *Murray v. Carrier*, 477 U.S. 478, 487 (1986)).

[151] *See* Section II.D., *infra*.

[152] *See* JA 660-65, 740-49.

[153] Br. at 30.

considerable delay in bringing the claim — during which two of his purported witnesses have died[154] — weighs against the materiality of the proffered evidence.[155]

The five inmate affiants had been convicted of felonies so their veracity was subject to impeachment.[156] In particular, George Holley was convicted of robbery, maiming, and grand larceny.[157] Donald Poindexter was convicted of eight counts of abduction, three counts of robbery, and eleven counts of use of a firearm.[158] Andre Wiggins was convicted of rape, two counts of robbery, and failing to register as a violent sex offender.[159] Andre Terry was convicted of shoplifting,

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[154] Dennis stated that Andre Terry and Harry Cutchin have died. JA 38-39.

[155] See *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013). *Cf. Haas v. Commonwealth*, 283 Va. 284, 292, 721 S.E.2d 479, 482 (2012) (noting that skepticism regarding recantations "increases with the passage of time" because the delay "places the opposing party at a disadvantage").

[156] *See, e.g.*, *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982) (noting that the jury was entitled to know both the number and the nature of witness's felony convictions, "in order to evaluate his testimony and determine what credit it should be given").

[157] *See* Newport News Circuit Court Record Nos. CR97037690, CR97037692, CR9703695.

[158] *See* Hampton Circuit Court Record Nos. CR98000649-00, through CR98000649-22.

[159] *See* Hampton Circuit Court Record Nos. F027819, CR97001017-00, -01 and Newport News Circuit Court Record No. CR02049308.

third offense and petit larceny, third offense.[160] Harry Cutchin was convicted of robbery, third offense.[161]

Moreover, contrary to the express requirements of § 19.2-327.11(A)(v), Dennis did not allege when—or how—the information reported in each of the statements "became known or available" to him. Dennis also has not explained the circumstances under which each of the proffered statements was obtained.[162] Those omissions also weigh against the reliability of the statements.

While Dennis certainly disagrees with the weighing of the evidence by the Court of Appeals, he is not entitled to start over in this Court. His disagreement over the weight of the evidence fails to demonstrate any error in the decision by the Court of Appeals.

D. Dennis fails to demonstrate that the Court of Appeals ignored evidence supposedly corroborating his former girlfriend's accusations. The Court of Appeals instead properly held that the affidavits did not establish that a third party committed the crimes. (Assignment of Error V)

The Court of Appeals carefully considered the affidavit Dennis submitted from Koneta Walker. In this Court, Dennis emphasizes an affidavit from Ellen

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[160] *See* Hampton Circuit Court Record No. CR98000548-00 and Williamsburg/James City County Circuit Court Record No. CR01011672-00.

[161] *See* Charlottesville Circuit Court Record No. CR99000240-00.

[162] Va. Code Ann. § 19.2-327.11(A)(v).

Speller that *postdates* his petition,[163] and that he submitted only with his reply to the Commonwealth's motion to dismiss.[164] The affidavit was a last effort to shore up the deficiencies the Commonwealth had identified in Walker's own affidavits, but it is nothing more than twenty-year-old hearsay and adds nothing of substance to Walker's affidavits. It failed to overcome the fundamental problems identified by the Court of Appeals:

> Walker's statements lack probative value because they describe events that occurred on October 13, 1997, which was not the night the attack occurred. Even so, Walker did not state that Al-Musawwir confessed to the crimes. She merely related some suspicious circumstances about Al-Musawwir's appearance and demeanor on a night she picked him up early from work. She stated that Al-Musawwir shot her because he knew she planned to break off their relationship, not because she knew of evidence incriminating him in the crimes against Harrison.[165]

Walker was Al-Musawwir's former girlfriend.[166] The proffered affidavit, dated September 28, 2015, asserts that Walker picked up Al-Musawwir from the Daily Press on October 13, 1997, at the "Signs/Muzak Building."[167] According to the statement, Al-Musawwir was "anxious," "sweating profusely," appeared as though he had been in a fight, made a statement to the effect that he had beaten

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[163] Br. at 39-40.

[164] JA 660.

[165] JA 81.

[166] JA 659.

[167] JA 659.

someone, and "was carrying a bag of money, which he said were [sic] from a vending machine he had broken into."[168] Al-Musawwir also purportedly admitted to Walker a short time later that "he had stolen some keys from the Daily Press building."[169]

But circumstances undermine the reliability of Walker's statement. First, Walker suffers from memory loss as a consequence of her traumatic brain injury in 1998.[170] When interviewed by Detective Williams on or about March 29, 1999, Walker "did remember Al-Musawwir telling her about the incident at the Daily Press, [but] she couldn't remember who he said told him about it."[171] Detective Williams noted that Walker "has a difficult time with her memory, because of the head trauma."[172] Walker's vague statement to Detective Williams suggests merely that Al-Musawwir had heard about the attack and repeated what he had heard to Walker. Further, that statement stands in stark contrast to the later, detailed affidavit. It is well-recognized, however, that memories fade over time rather than become clearer.[173]

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[168] JA 659.

[169] JA 659; see JA 550.

[170] JA 484, 548; *see also* Victim Impact Statement, JA 488-89.

[171] JA 551.

[172] JA 551; *see also* JA 548.

[173] *Haas v. Commonwealth*, 283 Va. 284, 292, 721 S.E.2d 479, 482 (2012).

Second, as noted, the proffered affidavit is not the only version of Walker's statement. She executed a similar affidavit five years earlier, in 2010.[174] Interestingly, Walker reports her age as 53 years old in both versions.[175] The only substantive difference between the two affidavits is what Al-Musawwir purportedly stole from the Daily Press. In the 2010 version:

> Al-Musawwir was carrying a bag of coins, which he said were from a vending machine he had broken into.[176]

By contrast, in the 2015 version:

> he was carrying a bag of money, which he said were [sic] from a vending machine he had broken into.[177]

The discrepancy is notable because although the trial record left open the possibility that a bag of coins had been stolen from Harrison's office, the contemporaneous police records squarely foreclosed that possibility because the crime scene technician found the bag of coins in Harrison's office, exactly where it was supposed to be.[178] So, there was no theft of the single bag of coins from

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[174] JA 641.

[175] JA 659; JA 641.

[176] JA 641.

[177] JA 659.

[178] JA 123, 212-13, 273-74.

Harrison's office.[179] The alteration to conform the statement to the later-disclosed police report does not suggest that it provides a reliable account.[180]

Third, the statement is inconsistent with Walker's testimony at Al-Musawwir's trial. Walker testified that she had broken up with Al-Musawwir about a year to a year and a half before he shot her on April 12, 1998.[181] Although they remained friends, Walker only saw Al-Musawwir "occasionally" after the break-up.[182] Thus, by Walker's own prior sworn account she was *not* Al-Musawwir's girlfriend when Harrison was attacked on October 9, 1997.[183] Moreover, Walker expressly testified that Al-Musawwir shot her because he was angry.[184] When specifically challenged about Al-Musawwir's motive for shooting

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[179] JA 123, 213.

[180] *See Turner v. Commonwealth*, 282 Va. 227, 248-49, 717 S.E.2d 111, 122 (2011) (existence of variant versions of affidavit undermines credibility).

[181] Petitioner's Appendix (hereinafter "App.") at 582-83, *Dennis v. Commonwealth,* No. 0774-17-1 (Va. Ct. App. May 18, 2017). Dennis did not include the transcript of Al-Musawwir's trial in the Joint Appendix, but cites it in his brief. *See* Br. at 13, 17, and 29. It was included in the appendix he filed in the Court of Appeals. The Commonwealth will follow Dennis's practice and cite to that transcript by citing the corresponding page of the Court of Appeals appendix.

[182] App. 583-84.

[183] App. 582-83, 600-01.

[184] App. 586-87.

her, Walker never suggested that she had any damaging information about Al-Musawwir or that he had committed any other offense.[185]

Finally, in both affidavits, Walker avers that the events she reports occurred on *October 13, 1997*.[186] The record conclusively establishes that the attack on Harrison occurred early on *October 9, 1997*.[187] Dennis tries to minimize the error as "a typo,"[188] but it is prominent, and consistent, in both affidavits, executed five years apart. The Court of Appeals was not persuaded Dennis's same characterization of the different date as "a typo" when Dennis advanced it in his reply to the motion to dismiss.[189] And minimizing his own affidavit hardly discharges his substantial burden under the statute to show actual innocence. Walker's proffered statement has no probative value because it purports to describe events that occurred on a date *other than* the date that Harrison was attacked. Conversely, assuming Walker accidentally supplied the same wrong date, twice, her claim that she picked up Al-Musawwir "around midnight" would mean that he left the Daily Press premises nearly an hour before Harrison was attacked.[190]

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[185] App. 586-87, 603.

[186] JA 641, 659.

[187] JA 105, 121-23, 164, 171-72.

[188] Br. at 37.

[189] Br. at 37.

[190] JA 172, 205-06, 213, 219, 230, 237.

Because it is not reliable and not relevant to the events at issue,[191] the Court of Appeals did not err in finding that the proffered Walker statement was not probative.

II. The Court of Appeals properly applied this Court's rule that evidence that is merely contrary to the trial evidence is insufficient to require relief. (Assignment of Error IV)

The Court of Appeals correctly applied its previous holding in *Altizer v. Commonwealth*, 63 Va. App. 317, 328, 757 S.E.2d 565, 570 (2014)*:*

> "The statutes governing writs of actual innocence based on non-biological evidence considered as a whole, and Code § 19.2-327.11 in particular, were *not intended to provide relief to individuals who merely produce evidence contrary to the evidence presented at their criminal trial*." Id. at 346, 641 S.E.2d at 492 (emphasis added). A petitioner must "affirmatively establish that he is *factually innocent* of the crime for which he was convicted . . . ." [192]

That holding is not modified by *Watford*:

> It is not enough for a petitioner to merely establish the existence of some conflicting evidence that introduces the possibility of reasonable doubt. Rather, the petitioner must prove, by clear and convincing evidence, that "no rational trier of fact would have found proof of guilt beyond a reasonable doubt."[193]

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[191] *See Turner v. Commonwealth*, 282 Va. at 250-51, 717 S.E.2d at 123 ("Of course, in order to be material, the evidence must be true. Additionally, '[e]vidence that relates to a matter that is properly at issue in the case is said to be material.'").

[192] JA 80 (quoting *Altizer v. Commonwealth*, 63 Va. App. 317, 328, 757 S.E.2d 565, 570 (2014)).

[193] *Watford*, 295 Va. at 124, 809 S.E.2d at 657.

Dennis argues that "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."[194] But he fails to appreciate that his failing instead is that his affiants "merely" contradict the trial evidence. The Court of Appeals held that they fell short of "affirmatively establishing," by clear and convincing evidence, that Dennis "is *factually innocent* of the crime for which he was convicted."[195] It is not enough to point the finger at someone else; Dennis must establish his own innocence.

Dennis states that he "has never questioned Harrison's sincerity, but has presented substantial reason to question his accuracy."[196] Indeed, Dennis argued the accuracy at length in his petition[197] and again in his reply to the motion to dismiss. The Court of Appeals had the benefit of those arguments; it simply was not persuaded by them. And while Dennis acknowledges that "the court below was free to consider Harrison's failure to recant, he argues that "it should not have been treated as dispositive without consideration of the identification's

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[194] Br. at 33.

[195] JA 80-81 (quoting *Altizer*, 63 Va. App. at 328, 757 S.E.2d at 570).

[196] Br. at 35.

[197] JA 58-68.

accuracy."[198] But the Court of Appeals did consider strength of the identification: "Within days of the attack, Harrison selected Dennis' photograph from a lineup and identified Dennis. Harrison testified unequivocally at trial that Dennis was the perpetrator. When questioned again in 2000 after Dennis' conviction, Harrison confirmed that he had correctly identified his assailant."[199] When Darryl Williams re-interviewed Harrison as part of Williams's efforts to exonerate Dennis, Harrison confirmed his prior identifications of Dennis, including his trial testimony.[200]

Because Dennis's affidavits "merely" contradicted Harrison's consistent identification, the Court of Appeals did not err in holding that Dennis did not carry his burden.

III. The Court of Appeals did not abuse its discretion by dismissing Dennis's petition without an evidentiary hearing. (Assignment of Error VI)

Dennis concedes that *Haas v. Commonwealth* established that "[t]he decision whether to refer a case to the circuit court is generally committed to the discretion of the Court of Appeals."[201] But following his concession, he quotes only selectively from *Hass*. Dennis relies on its dicta about what "might be

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[198] Br. at 34.

[199] JA 81.

[200] JA 657.

[201] Br. at 41-42 (citing *Haas*, 283 Va. at 290-91, 721 S.E.2d at 481).

appropriate" if a new material witness, who had been unavailable at trial, later came forward.[202]

Dennis tries to fit his case within the dicta of *Hass*, claiming that "*Seven* new witnesses who never previously testified provided statements implicating Al-Musawwir."[203] But Walker and Speller were not unavailable at trial. Other than Walker's account of giving Al-Musawwir a ride, all the other statements relied on by Dennis are hearsay. And the proffered evidence of third-party guilt would not be admissible for the reasons described above. Dennis offered no previously unavailable material witnesses.

Nor does Dennis address the holdings of *Haas* affirming the scope of the discretion actually given to the Court of Appeals.

> Thus, while the Court of Appeals is vested with authority to refer a case brought under this chapter back to the circuit court for an evidentiary hearing if, in its discretion, it deems that the facts require further development, it is not required to do so. The Court of Appeals is vested with broad discretion in determining whether the facts require further development. *Turner*, 282 Va. at 247, 717 S.E.2d at 121; *Johnson v. Commonwealth*, 273 Va. 315, 325, 641 S.E.2d 480, 486 (2007).
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> The provisions of Code § 19.2-327.13, quoted above, give the Court of Appeals clear authority to decide such a petition on the basis of matters contained in the record. Those may include the record of the

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[202] Br. at 42-43.

[203] Br. at 43. Dennis does not name seven witnesses, but he relies in his brief on the affidavits from the five inmates, Walker, and Speller.

> original trial as well as records of all post-trial proceedings including the petition for a writ of actual innocence [204]

And the Court of Appeals is entitled to weigh evidence like any other trier of fact:

> The Court of Appeals was entitled to assume that the witnesses called by Haas in support of his petition would testify consistently with their affidavits, accord to that evidence the weight, if any, to which it was entitled, and balance that against the weight of all other evidence in the record.[205]

For all the foregoing reasons, the Court of Appeals was well able to decide Dennis's petition on the record before it. It did not abuse its discretion by choosing not to refer questions to the circuit court when it could resolve the issues without such assistance.[206]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

MARK R. HERRING

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[204] *Haas*, 283 Va. at 291, 721 S.E.2d at 481-82.

[205] *Id.* at 295, 721 S.E.2d at 483.

[206] *See Yeatts*, 249 Va. at 288-90, 455 S.E.2d at 20-21.

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_____/s/_____

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CERTIFICATE

On September 10, 2018, the required number of copies of this brief were hand-delivered and emailed to the Clerk of this Court and mailed and emailed to **Andrew George, BAKER BOTTS, L.L.P., 1299 Pennsylvania Ave., N.W., Washington, DC 20004-2400**, andrew.george@bakerbotts.com, counsel for the appellant.

In accordance with Rule 5:6, I certify that this document contains 8,399 words, in compliance with Rules 5:26(b) and 5:28.

The Commonwealth desires to present oral argument in this case.

/s/
Matthew P. Dullaghan
Senior Assistant Attorney General