No. 23-5542

In the
Supreme Court of the United States

STEPHEN JAMES HOOD,

Petitioner,

vs.

VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Virginia

PETITION FOR A WRIT OF CERTIORARI

STEPHEN JAMES HOOD,
PRO SE,
13714 Nairn Road
Chester, VA 23831
(804) 835-7529
stephenjhood@yahoo.com

COMMONWEALTH OF VIRGINIA,
BY COUNSEL,
Attorney General of Virginia,
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
service@oag.state.va.us

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QUESTIONS PRESENTED

In Virginia, anyone who was convicted of a felony has the right to demonstrate their innocence with new evidence through a petition for a writ of actual innocence. The controlling actual innocence statute grants the court subject matter jurisdiction "upon a petition of a person who was convicted of a felony." Va. Code § 19.2-327.10, App. 31. But Virginia's ruling as to the term 'was convicted' excludes those who first obtain habeas relief, from then demonstrating their innocence. Such statutory interpretation directly conflicts with this Court in *Lewis v. United States*, 445 U.S. 55 (1980), the federal courts of appeals in *United States v. Roberson*, 752 F.3d 517 (1st Cir. 2014) as well as the plain and unambiguous language of the statute itself.

To effect this definition of "was convicted," Virginia employed an unprecedented "legal fiction" to hold that Hood's felony conviction "was no conviction at all" because Hood's habeas relief rendered the conviction a "legal nullity" that is "treated as though [it] never occurred" — this, despite that the court only vacated Hood's felony sentence. App. 8. This novel legal fiction violates more than a century of precedent established in *Humphries v. District of Columbia*, 174 U.S. 190 (1899) and *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905).

The ruling forces anyone who was wrongfully convicted, and discovers evidence of their innocence post-habeas, to surrender one fundamental right (to demonstrate their innocence with new evidence) in order to assert another fundamental right (petition for a writ of habeas corpus).

The Questions Presented are: **(1)** Whether Virginia's ruling as to Va. Code § 19.2-327.10 violates the rights of Hood, and those similarly situated, under the Due Process, Equal Protection and Petition Clauses, and: **(2)** Whether Virginia's use of a legal fiction to deny the historical fact of a criminal conviction, predicate to actual innocence review, violates the Due Process and Equal Protection rights of those who are actually innocent but wrongly convicted.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Stephen James Hood ("Hood"), proceeding pro se, respectfully petitions for a writ of certiorari to review the judgement of the Court of Appeals of Virginia in this important case of first impression.

OPINIONS BELOW

The opinion of the Court of Appeals of Virginia denying the underlying petition for writ of actual innocence in *Hood v. Commonwealth*, Record No. 0731-21-2, is reported at, 75 Va. App. 358, 876 S.E.2d 710 (2022). App. 8 ("Op."). The Supreme Court of Virginia refusing Hood's petition for appeal in *Hood v. Commonwealth*, Record No. 220684, is unreported. App. 9. The Supreme Court of Virginia refusing Hood's petition for rehearing in *Hood v. Commonwealth*, Record No. 220684, is also unreported. App. 10.

JURISDICTION

The judgment of the Court of Appeals of Virginia denying the underlying petition for writ of actual innocence was entered August 23, 2022. App. 8 ("Op."). The Court of Appeals of Virginia denied Hood's timely filed petition for rehearing on September 8, 2022. The Supreme Court of Virginia refused Hood's timely filed petition for appeal on April 18, 2023. App. 9. The Supreme Court of Virginia refused Hood's timely filed petition for rehearing on June 27, 2023. App. 10. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution, provides, in relevant part: "Congress shall make no law…abridging the freedom…to petition the Government for a redress of grievances." The Fifth Amendment, in relevant part, provides: "No person shall…be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment, in relevant

part, provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And Article IV, Section 2 of the United States Constitution, provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

CITATIONS TO THE RECORD BELOW

Preliminarily, citations to the record below refer to the record in the Court of Appeals of Virginia ("CAV"), Record No. 0732-21-2. For example, the underlying petition for writ of actual innocence (and its brief in support) filed in the CAV is referred to as "Pet." The exhibits filed therewith are referred to as "Pet. Ex(s)." The appendix filed in the CAV is referred to as "Pet. App." The briefs filed by Hood and the Prosecution pursuant to the CAV Order of December 17, 2017, are referred to as "Hood Br.," and "Comm. Br.," respectively. The CAV panel opinion is referred to as "Op."

STATEMENT OF THE CASE

A. The Controlling Statute: Virginia Code § 19.2-327.10

In relevant part, Va. Code § 19.2-327.10, App. 31, provides, "Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony…the Court of Appeals shall have the authority to issue writs of actual innocence." *Id.*

B. Statutory Background

Virginia purports to grant anyone who was convicted of a felony the right to demonstrate their actual innocence with newly discovered evidence through a petition for writ of actual innocence. Virginia's statutory scheme grants the court subject matter jurisdiction of a petition

for writ of actual innocence "upon a petition of a person who was convicted of a felony." Va. Code § 19.2-327.10, App. 31. But the CAV's ruling as to the term 'was convicted' directly conflicts with, and is antithetical to, that of this Court, the federal courts of appeals, and the plain and unambiguous language of the statute itself.

The CAV has interpreted the actual innocence statute such that if a petitioner first obtains habeas relief—even relief extending only to the sentence and not to the conviction—said relief prevents the petitioner from demonstrating his actual innocence under Virginia's actual innocence statute. To effect such a peculiar interpretation, the CAV employed the use of an unprecedented "legal fiction" to hold that such habeas relief renders a felony conviction a "legal nullity" —retroactively erased from existence—and is "treated as though [it] never occurred." Op., at 4, and 6, App. 8. Thus, forcing the wrongfully convicted to surrender one fundamental right (to demonstrate his actual innocence under Virginia's actual innocence statute) in order to assert another fundamental right (to demonstrate through habeas proceedings that he is unlawfully detained).

This is especially egregious in this case because Hood initially possessed facts sufficient to warrant only habeas relief, but after the expiration of his state habeas filing deadline discovered the concealed evidence of his innocence. In Virginia, there is but one vehicle under state law by which citizens may demonstrate their innocence with new evidence and be exonerated beyond 21 days after their felony conviction becomes final: A petition for writ of actual innocence.

C. Proceedings Below

On April 3rd and 4th, 2002, Hood was tried without a jury in the circuit court for the City of Richmond. The trial court found Hood guilty of murder in the first degree as a principal in the

second degree (Va. Code § 18.2-32, App. 19, § 18.2-18, App. 17); and abduction as an accessory after the fact, (Va. Code §18.2-47, App. 20, § 18.2-19, App. 18). *Commonwealth v. Hood*, Case Nos. F-01-2201, F-01-2202 (CR01-F2201, CR01-F2202) (2001). On September 13, 2002, Hood was sentenced to 65 years. App. 1.

The CAV granted a direct appeal, and on February 17, 2004, that court in a divided decision (Judge Benton dissenting) affirmed Hood's convictions. *Hood v. Commonwealth*, Record No. 2469-02-2 (unpublished opinion) available at: Va. App. LEXIS 82, 2004, and WL 290687. App. 2. The petitions for rehearing and rehearing *en banc* were denied on March 10, 2004.

On March 3, 2005, on direct appeal, the Supreme Court of Virginia affirmed Hood's convictions. *Hood v. Commonwealth*, 269 Va. 176, 608 S.E.2d 913 (2005). App. 3. On April 29, 2005, the petition for rehearing was denied.

This Court denied Hood's petition for a writ of certiorari on October 3, 2005. *Hood v. Virginia*, No. 05-5559, 546 U.S. 910 (2005). On January 9, 2006, the petition for rehearing was denied. *Hood v. Virginia*, 546 U.S. 1133 (2006).

On March 24, 2006, Hood, proceeding *pro se*, filed a state petition for writ of habeas corpus in the circuit court for the City of Richmond. *See Hood v. Johnson*, CL06-2311. During May 2007 through June 2008, Hood discovered the concealed evidence of his actual innocence. *See* Pet., at xxvi-xxx. On November 24, 2008, Hood moved for leave to raise supplemental habeas claims pursuant to his newly discovered evidence of actual innocence but was denied leave to do so. App. 5. *See* e.g., *Hood v. Johnson*, CL06-2311, Supplemental Claims D.D. and F.F., relevant to the after-discovered evidence. In an unreported opinion, the writ of habeas

corpus was eventually granted on November 10, 2009, (App. 4) and again on May 21, 2010, (App. 5). On January 24, 2011, the Supreme Court of Virginia refused Johnson's petition for appeal, and on March 11, 2011, denied Johnson's petition for rehearing. *See Johnson v Hood*, Record No. 101597. However, Hood was not released from custody until April 14, 2011, when the habeas court vacated Hood's murder sentence. App. 6.

On November 30, 2011, Hood, moved the trial court to vacate the misdemeanor conviction of accessory after the fact to abduction: F-01-2202 (CR01-F02202). On December 14, 2011, the circuit court entered an Order dismissing the criminal charge of abduction. App. 7.

Hood filed the underlying petition for writ of actual innocence on July 30, 2021, presenting the newly discovered evidence of Hood's actual innocence of the crimes for which Hood was convicted. *See* Pet. Hood submitted that the Prosecution violated his right to exculpatory evidence, that newly-discovered FBI FOIA documents exonerate him, and that the culinary knives allegedly used to commit the murder, which were not subjected to scientific testing, have since been tested and exonerate him. Finally, Hood identified a plethora of witness testimony presented at the trial and post-conviction proceedings of one Jeffery Cox, and other information contained in the FBI FIOA documents, that clearly demonstrate Hood's innocence.

On August 23, 2022, the CAV dismissed Hood's petition for writ of actual innocence on procedural grounds, without a review of the merits, finding that the court lacked subject matter jurisdiction. This finding was based on an unprecedented legal fiction which, itself, was based on an erroneous finding of fact. The court erroneously determined that Hood's convictions "were set aside" by the habeas court. The CAV then employed the unprecedented legal fiction that, what the CAV erroneously believed to be "set aside" convictions, "should be treated as though they

never occurred." Op., at 4, 3, and 6, respectively. *See* App. 8.[1]

On October 24, 2022, Hood filed a petition for appeal in the Supreme Court of Virginia under Va. Code § 17.1-411. App. 15. On April 18, 2023, the Supreme Court of Virginia refused Hood's timely filed petition for appeal App. 9, and on June 27, 2023, refused Hood's timely filed petition for rehearing. App. 10.

STANDARD OF REVIEW

1. A question of statutory interpretation is a quintessential question of law. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). "If the statutory language is plain, [this Court] must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 486 (2015). "[I]n any case concerning the

[1] Hood adequately raised First, Fifth, Sixth, and Fourteenth Amendments claims as well as Article IV Privileges and Immunities Clause throughout the proceedings below:
(1) The initial petition for writ of actual innocence to the CAV, *see* e.g., Pet., at 63: "Claim B. The petitioner was deprived of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and progeny, when the government suppressed and failed to disclose evidence favorable to the petitioner in violation of the Fifth, Sixth, and Fourteenth, Amendments to the United States Constitution. in so doing, the Commonwealth and its agents intentionally and wrongfully fabricated evidence that was used to obtain the wrongful conviction of the petitioner while it intentionally, willfully, and continuously suppressed or withheld evidence establishing the innocence of the petitioner;" and
(2) Hood's Petition for Appeal in the Supreme Court of Virginia, *see* e.g., Assignments of Error 5 and 6: "5. The Court of Appeals' ruling that Hood and other actual innocent petitioners who first obtain *habeas corpus* relief are precluded from obtaining relief on a petition for writ of actual innocence under Virginia Code § 19.2-327.10 *et seq.* violates the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution as well as the First Amendment's Petition Clause. 6. The Court of Appeal's opinion that the legislative intent of Chapter 19.3 of Title 19.2 of the Code of Virginia is to deprive those who first prevail in *habeas corpus* proceedings of the comprehensive relief to which they are entitled upon a showing of factual innocence violates Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses of the United States Constitution;" and
(3) Hood relied heavily on this Court's precedent in his Petition for Rehearing in the Supreme Court of Virginia. *See Street v. New York*, 394 U.S. 576, 584 (1969) ("There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole show either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.")

interpretation of a statute the starting point must be the language of the statute itself." *Lewis v. United States*, 445 U.S. 55, 60 (1980).

2. When interpreting statutes, Virginia courts are required to ascertain and "give effect to the intention of the legislature." *Rodgers v. United States*, 185 U.S. 83, 86 (1902). In Virginia, "[t]hat intent is usually self-evident from the words used in the statute." *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925-926 (2006). Indeed, "[w]hen the General Assembly has used words that have a plain meaning, courts cannot give those words a construction that amounts to holding that the General Assembly meant something other than that which it actually expressed." *Beck v. Shelton*, 267 Va. 482, 488, 593 S.E. 2d 195, 198 (2004). "Further, when criminal statutes are at issue they must be construed strictly against the Commonwealth [of Virginia]." *Gerald v. Commonwealth*, 68 Va. App. 167, 172-173, 805 S.E.2d 407, 410 (2017). "It is clear the General Assembly intended that a petition for a writ of actual innocence be deemed a proceeding that is criminal in nature." *In re Phillips*, 296 Va. 433, 447, 822 S.E.2d 1, 8 (2018).

3. Moreover, laws that affect fundamental constitutional rights are subjected to strict judicial scrutiny. *Shapiro v. Thompson*, 394 U.S. 618 (1969). Anyone who was convicted of a felony has "a liberty interest in demonstrating his innocence with new evidence under state law." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). And this "state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Osborne, supra*, at 68.

4. For more than a century, this Court has not departed from two relevant and controlling precedents: "The proper use of a legal fiction is to prevent injustice." *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 208 (1905), and "There are many rights belonging to litigants—rights which a court may not properly deny, and yet which if denied do not oust the jurisdiction

or render the proceedings absolutely null and void." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899)

REASONS FOR GRANTING THE WRIT

5. At the time of his arrest in 2001 Hood had, and continues to have, a constitutional liberty interest in his freedom,[2] and the wrongful conviction and incarceration inflicted upon Hood eviscerated that right. Likewise, Hood had, and continues to have, a liberty interest in Hood's reputation,[3] to Hood's parental relations with his children,[4] and to be gainfully employed[5] with a promising career. Moreover, Hood had, and continues to have, "a liberty interest in demonstrating his innocence with new evidence under state law." [6]

6. Those rights and liberty interests, which belong to all citizens, were violated by the actions of the Prosecution in the wrongful prosecution resulting in the wrongful conviction and incarceration of Hood. Those rights and liberty interests have again been violated, and the injury to Hood exacerbated, by the CAV's ruling as to Virginia's actual innocence statutes. Indeed, Hood has now been deprived of those rights and liberty interests by the very court entrusted with providing and protecting Hood's liberty interest in demonstrating his innocence with new evidence.

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[2] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529-30 (2004) ("the most elemental of liberty interests--the interest in being free from physical detention by one's own government.") *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause").

[3] "The Supreme Court has acknowledged a constitutional liberty interest in one's reputation." *Elhady v. Kable*, 993 F.3d 208, 225 (4th Cir. 2021) (citing Kerry v. Din, 576 U.S. 86, 91-92 (2015). *See also Paul v. Davis*, 424 U.S. 693, 706-711 (1976).

[4] "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (ellipsis in original).

[5] This Court has recognized that a liberty interest includes "the right of the individual . . . to engage in any of the common occupations of life." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972); *Dean v. McWherter*, 70 F.3d 43, 45 (6th Cir. 1995) ("Freedom to pursue gainful employment is clearly a liberty interest deserving of due process protections.")

[6] *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009).

7. In Virginia, anyone who was convicted of a felony has the right to seek judicial redress and to challenge their conviction through: (1) a direct appeal,[7] (2) a petition for writ of habeas corpus,[8] and (3) a petition for writ of actual innocence.[9]

8. In Virginia, the filing of a direct appeal or petition for writ of habeas corpus is subject to stringent time constraints and statutes of limitations.[10] A petition for writ of actual innocence, however, is not so constrained. *See* Va. Code § 19.2-327.10, App. 31, and Rules of the Supreme Court of Virginia, Rule 5A:5, App. 39. Hence, it was prudent and consistent with the standards of law in Virginia, even for an actually innocent petitioner like Hood, first to seek judicial redress through the direct appeal and habeas proceedings, while time permitted, before petitioning for a writ of actual innocence. This is especially so where Hood, early in Hood's unlawful incarceration, possessed facts sufficient to obtain habeas relief but only later, and after expiration of the deadlines for filing petitions for direct appeal and habeas relief, discovered the unlawfully concealed evidence of Hood's actual innocence sufficient to satisfy the more demanding legal standards required in a petition for writ of actual innocence. *See* e.g., Pet. Exs. 101-109, 111-125, Pet. Exs. FOIA Vols. I-V, Pet., at xxvi-xxx.

9. Despite the fact that statutory habeas time constraints and prosecutorial misconduct forced Hood to pursue state habeas relief before pursuing the instant writ of actual innocence, the CAV's ruling deprives the actually innocent Hood, and those similarly situated, of their liberty

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[7] Va. Code § 17.1-406 (App. 14).
[8] Va. Code § 8.01-654 (App. 11).
[9] Va. Code § 19.2-327.10 (App. 31).
[10] Regarding a direct appeal: "A late notice of appeal or an untimely filed petition for appeal cannot be cured." *Whitt v. Commonwealth*, 61 Va. App. 637, 652, 739 S.E.2d 254, 261 (2013).

Regarding a petition for writ of habeas corpus: Va. Code § 8.01-654, App 11, in relevant part provides, "A habeas corpus petition attacking a criminal conviction or sentence shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later." No habeas petition filed out of time will be accepted by the court. "The statute contains no exception allowing a petition to be filed after the expiration of these limitations periods." *Hines v. Kuplinski*, 267 Va. 1, 2, 591 S.E.2d 692, 693 (2004).

interest in demonstrating their innocence with new evidence under state law where the CAV has effectively legislated from the bench a sequence for postconviction filings, and a statute of limitations for writs of actual innocence by requiring such petitioners to pursue a writ of actual innocence before pursuing a prevailing habeas petition. The implicit mandate from the CAV that Hood file his petition for writ of actual innocence before, or instead of, filing his prevailing petition for writ of habeas corpus, is unsupported by law.

10. Hood's final judgment was September 13, 2002. *See* Pet. App. at, 505-506, App. 1. Hood's direct appeal concluded on January 9, 2006, when this Court denied Hood's petition for rehearing. *See Hood v. Virginia*, 546 U.S. 1133 (January 9, 2006). Thus, the deadline for Hood to file a state habeas petition was January 9, 2007. *See* Va. Code § 8.01-654, App. 11.

11. However, because the Prosecution withheld, concealed, or sealed the evidence of Hood's innocence, Hood was unable to obtain said evidence until May 2007 through June 2008, well after Hood's state habeas filing deadline. Thus, it was the Prosecution's misconduct which prevented Hood from filing his petition for writ of actual innocence before he filed his petition for writ of habeas corpus.

12. The CAV's interpretation of the actual innocence statute—that habeas relief precludes actual innocence relief even where prosecutorial misconduct has constrained a petitioner to only habeas proceedings—eviscerates Hood's right to demonstrate his actual innocence. The absurd result of such interpretation is that no actually innocent person who was convicted of a felony in Virginia has recourse to Virginia's actual innocence statutes, and to the comprehensive relief available therefrom, if such person, despite prosecutorial malfeasance, first attained limited habeas relief. This Court has found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968).

13. The CAV's rationale, at base, is this: The Prosecution illegally concealed and withheld the evidence of Hood's actual innocence as best it could. Still, Hood managed to marshal sufficient facts and evidence to obtain limited habeas relief. However, now that Hood has unearthed the concealed evidence of his actual innocence, the court should use the limited relief Hood obtained through habeas proceedings to bar the comprehensive relief to which Hood is now entitled under Virginia's actual innocence statutes. "Prosecutor's dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks v. Dretke*, 540 U.S. 668, 695 (2004). Justice demands, and settled legal precedent requires this Court to reject the CAV's and Prosecution's machinations.

14. The result propounded by the CAV requires this Court to interpret the legislature's plain language, "a person who was convicted of a felony" (Va. Code § 19.2-327.10, App. 8) to, in fact, ***not*** refer to "a person who was convicted of a felony." It is well settled by this Court that interpretations of a statute which produce absurd results are to be avoided, especially if alternative interpretations consistent with the legislative purpose are available. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

15. If the CAV's ruling stands, Virginia, having violated the actually innocent Hood's constitutional rights resulting in habeas relief, would effectively be immune from liability for the injury caused by the wrongful prosecution, conviction, and incarceration of Hood. Such effective immunity would leave the actually innocent petitioner with no means of judicial redress for relief, including demonstrating his or her innocence, exoneration and expungement. Thus, with the CAV's opinion, the Prosecutor and the CAV have effectively shuttered the courthouse. Neither public policy nor the Constitution can abide such injustice.

I. Binding Precedent.

16. Regarding the legislative purpose and intent of Virginia's actual innocence statutes, the CAV panel below is bound by *stare decisis*. *See Johnson v. Commonwealth*, 252 Va. 425, 430, 478 S.E.2d 539, 541 (1996) (A panel of the CAV is bound by decisions of the Virginia Supreme Court, and the CAV sitting *en banc*. Likewise, "a decision of a panel of the [CAV] becomes a predicate for application of the doctrine of *stare decisis* until overruled.") *See also Anderson v. Commonwealth*, 48 Va. App. 704, 712 n.2, 634 S.E.2d 372, 376 n.2 (2006) ("Only decisions of the United States Supreme Court can supersede binding precedent from the Virginia Supreme Court.") This principle applies not merely to the literal holding of the case, but also to its *ratio decidendi*, the essential rationale in the case that determines the judgment. In the case at bar, the CAV violated this doctrine.

A. The legislative purpose and intent of a petition for writ of actual innocence.

17. With respect to Virginia's actual innocence statutes, in 2007 the Virginia Supreme Court held that "[t]he statutory provisions at issue reflect an *obvious legislative purpose*. By enacting these provisions, the General Assembly intended to provide relief *only* to those individuals who can establish that they did not, as a matter of fact, commit the crimes for which they ***were convicted***." *Carpitcher v. Commonwealth*, 273 Va. 335, 345, 641 S.E.2d 486, 492 (2007) (emphasis added). Thus, *Carpitcher* established binding precedent regarding the legislative purpose and intent of the statutory provisions at issue here. And, the CAV, in every actual innocence case based on nonbiological evidence since *Carpitcher*, has applied that precedent, save for the case at bar.[11]

[11] *See Bush v. Commonwealth*, 68 Va. App. 797, 811, 813 S.E.2d 582, 588 (2018) ("We hold that Bush has met his burden, under Code §§ 19.2-327.10 through -327.14, of **establishing that he is actually innocent of the crimes for which he was convicted**"); *In re Watford*, 295 Va. 114, 123, 809 S.E.2d 651, 656 (2018) ("it requires him to prove that he did not, as a matter of fact, commit the crime **for which he was convicted**"); *Phillips v. Commonwealth*, 69 Va. App. 555, 563, 820 S.E.2d 892, 896 (2018) ("**A petitioner must affirmatively establish[ ] that he is factually innocent of the crime for which he was convicted**") (all emphasis added). *See also Altizer v. Commonwealth*, 63 Va. App. 317, 326, 757 S.E.2d 565, 569 (2014); *Madison v. Commonwealth*, 71 Va. App. 678, 706, 839 S.E.2d 129,

18. Equally binding on the CAV panel below, the CAV sitting *en banc* in *Turner v. Commonwealth*, 56 Va. App. 391, 694 S.E.2d 251 (2010) held,

> ***in recognition that the relief sought by actual innocence petitioners is complete exoneration***... *The General Assembly, as reflected in the language of the statute and the purpose of the legislation, intended that an actual innocence petitioner* ... meet a burden of showing ... evidence that actually *exonerates him of* ***the crime for which he was convicted*** ... *By enacting these provisions, the General Assembly intended to provide relief only to those individuals who can establish that they did not, as a matter of fact, commit the crimes for which they* ***were convicted***....

Turner, 56 Va. App., at 445-446, 694 S.E.2d, at 278-279 (quoting *Carpitcher, supra*, 273 Va., at 345, 641 S.E.2d, at 492) (emphasis added). *See also* footnote 11, *supra*, for binding CAV panel decisions.

19. This Court established that "the doctrine of *stare decisis* is of fundamental importance to the rule of law" and "considerations of *stare decisis* have special force in the area of statutory interpretation." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (citations omitted).

20. The facts are conceded by the CAV thusly: "[O]n April 3 and 4, 2002, *the circuit court convicted Hood of ... first-degree murder*." Op., at 2, App. 8 (emphasis added).

21. The CAV also conceded: "To establish subject matter jurisdiction, a petitioner needs to show two things: first, *that they* ***were convicted*** *of some crime,* and second, *that the crime of conviction was* ***a felony***." Op., at 4, App. 8 (emphasis added). The CAV then effectively rewrote the statute, changing the predicate necessary to establish subject matter jurisdiction, in contravention of the precedent established by Supreme Court of Virginia, the CAV sitting *en banc*, numerous CAV panel decisions, and the plain and unambiguous language of the statutes themselves.

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143 (2020); *Montgomery v. Commonwealth*, 62 Va. App. 656, n.6, 751 S.E.2d 692, n.6 (2013); *Turner v. Commonwealth*, 56 Va. App. 391, 446, 694 S.E.2d 251, 279 (2010) (en banc); *Moore v. Commonwealth*, 53 Va. App. 334, 344, 671 S.E.2d 429, 434 (2009) (all quoting *Carpitcher* and holding the same).

22. In its ruling, the CAV changed the plain, ordinary meaning of "was[12] convicted[13] of a felony" (§ 19.2-327.10, App. 31) to an untenable fiction: Hood's undeniable criminal convictions—one of which was a felony— "should be treated as though they never occurred." Op., at 6, App. 8. That fiction is an absurdity. The facts here are clear and important, and "[b]eing a fiction[,] it is not allowed to obscure the facts when the facts become important." *Blackstone v. Miller*, 188 U.S. 189, 201 (1903). There is no permissible legal fiction that can retroactively erase the important historical fact of Hood's wrongful convictions and decade-long wrongful incarceration.

23. The CAV's ruling contravenes the long-standing precedent set by Virginia Supreme Court and the CAV itself regarding the legislative intent and purpose of Virginia's actual innocence statutes. *See* Section I. A., *supra*. Moreover, the CAV's ruling is contrary to this Court's and the federal courts of appeals' interpretation of the term 'was convicted' as well as the plain, and unambiguous language of Virginia's actual innocence statutes. *See* Section I. B., *infra*.

24. Furthermore, the CAV's ruling violates Due Process by depriving Hood of the "liberty interest in demonstrating his innocence with new evidence under state law." *Osborne*, *supra*. *See* Section IX., *infra*. Additionally, the CAV's ruling violates the maxim of law regarding the use of all legal fictions, and conflicts with more than a century of this Court's precedent regarding the proper use of legal fictions. S*ee* Section II. A., *infra*. Thus, the CAV deprived the actually

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[12] https://www.merriam-webster.com/dictionary/was "was: past tense first-and third-person singular of be;" https://www.merriam-webster.com/dictionary/be "be |verb| past tense first- and third-person singular was."

[13] *See*, e.g., https://englishstudyhere.com/verbs/past-tense-of-convict-past-participle-of-convict-v1-v2-v3-v4-v5-form-of-convict/ "Convicted: past tense of convict;" https://www.yourdictionary.com/convicted "Convicted meaning simple past tense and past participle of convict;" https://pasttenses.com/convict-past-tense "convict past tense Convicted; past tense of convict is convicted;" https://grammartop.com/convict-past-tense/ "convicted The past tense of convict is convicted;" https://ltsenglish.com/simple-past-tense/convict "Convict Verb Forms Base form (v1) — Convict; Past form (v2) — Convicted; Past Participle (v3) -ed form — Convicted;" https://www.merriam-webster.com/dictionary/convicted "having been convicted."

innocent Hood, and those similarly situated, of the rights, benefits, and relief to which Hood is entitled through a writ of actual innocence.

B. The term: "a person who *was convicted* of a felony."

25. The controlling statute provides, "Notwithstanding any other provision of law or rule of court, *upon a petition of a person* ***who was convicted of a felony***...the Court of Appeals shall have the authority to issue writs of actual innocence." Va. Code § 19.2-327.10, App. 31 (emphasis added). *See,* e.g., Rule 5A:5[14] and Rule 5:7B[15] of the Rules of the Supreme Court of Virginia.

26. In a similar analysis, this Court recognized, no exceptions appear on the face of the statute; "[n]o modifier is present, and nothing suggests any restriction on the scope of the term 'convicted.'" *Lewis v. United States*, 445 U.S. 55, 60 (1980). Here, the legislature did not exclude any class of person who was convicted of a felony, nor did the legislature require that the petitioner "is subject to a valid, final order of conviction." Op., at 4, App. 8. The statute at issue requires a petitioner to establish subject matter jurisdiction simply by showing that he or she is "a person who was convicted of a felony." App. 31. Notably, Va. Code §§ 19.2-327.10, App. 31 and 19.2-327.11, App. 32 are harmonious in the use of the term "was convicted," demonstrating that the present status of the felony conviction is irrelevant. *See* Va. Code § 19.2-

[14] "(b) Petition for a Writ of Actual Innocence. – (1) Scope. ***Any person*** *convicted of a felony or* ***any person who was adjudicated*** *delinquent by a circuit court of an offense that would be a felony* if committed by an adult, may file in this Court a petition under Code § 19.2-327.10 *et seq.* seeking a writ of actual innocence based on nonbiological evidence" (emphasis added).
See www.merriam-webster.com/dictionary/any "**any** |adjective|: EVERY — used to indicate one selected without restriction"

[15] "(a) Who may File a Petition. – A petition for a writ of actual innocence based upon previously unknown or untested human biological evidence *may be filed by* ***any person who has been convicted of a felony***" (emphasis added).

327.11, App. 32.[16] The Legislature chose the plain term "a person who was convicted of a felony" rather than a person who currently stands convicted, and it is indisputable that Hood is "a person who was convicted of a felony." *Id.*

27. Regarding the correct interpretation of the term 'was convicted;' *United States v. Roberson*, 752 F.3d 517 (1st Cir. 2014) "address[ed that] important question of interpretation of first impression in the federal Courts of Appeals." *Id.*, at 518. The *Roberson* Court held: "The language is plain. The term 'was convicted' refers to the fact of conviction and does not refer just to a 'valid' conviction." *Id.*, at 522 (holding "that 'convicted' refers to the historical fact of the conviction. [Roberson] argues 'was convicted' must refer only to what he calls a 'valid' conviction. But *Lewis*[, *supra*] expressly rejects that reading of almost identical language.")

28. In the instant case, the panel of the CAV applied the interpretation of the term 'was convicted' that was asserted by the defendant in *Roberson*. The court in *Roberson*, *supra*, and this Court in *Lewis*, *supra*, soundly rejected that interpretation.

29. It is an indisputable historical fact that Hood "was convicted of a felony" and thus, the predicate for subject matter jurisdiction under Va. Code § 19.2-327.10, App. 31 is established. The CAV abandoned binding precedent and ignored its statutory duty to exercise subject matter jurisdiction as to Hood's petition for writ of actual innocence where Hood clearly is "a person who was convicted of a felony." *Id. See* e.g., footnote 11, *supra*. Instead, the CAV effectively rewrote the statute to preclude actual innocence review and relief to Hood and to those similarly situated.

C. The clause: "notwithstanding any other provision of law or rule of court."

[16] "(A) The petitioner shall allege categorically and with specificity, under oath…(i) the crime for which the petitioner *was convicted*…(ii) that the petitioner is actually innocent of the crime for which he *was convicted*…" (emphasis added). Va. Code § 19.2-327.11, App. 32.

30. Va. Code § 19.2-327.10, App. 31, provides that, "*notwithstanding **any***[17] *other provision of law or rule of court*...the Court of Appeals shall have the authority to issue writs of actual innocence." (Emphasis added).

31. The precedent in this Court and the CAV requires the 'notwithstanding' clause to override any conflicting provisions of law or rule of court. Indeed, the CAV has held, "[t]he word 'notwithstanding' is defined as 'without prevention or obstruction from or by.'" *Green v. Commonwealth*, 28 Va. App. 567, 569-70, 507 S.E.2d 627, 629 (1998) (quoting Webster's Third New International Dictionary 1545 (1993)); *see also Holloway v. Commonwealth*, 72 Va. App. 370, 377, 846 S.E.2d 19, 22 (2020) (holding the same).

32. This Court's precedent requires that the CAV's "authority to issue writs of actual innocence... notwithstanding any other provision of law or rule of court" (Va. Code § 19.2-327.10 (App. 31)) "override[s] conflicting provisions [of law]." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). A unanimous Court concluded that, "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions...a clearer statement is difficult to imagine." *Cisneros*, *supra*. *See also United States v. Frank*, 8 F.4th 320, 331 (4th Cir. 2021) (the "statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws.")

33. The plain language and controlling precedent clearly confer subject matter jurisdiction and authority to grant the writ without prevention or obstruction from or by **any other provision of law or rule of court**, and thus, to grant to Hood the relief to which Hood is entitled, including a ruling that "exonerates" Hood, (*Turner*, *supra*, 56 Va. App. 445-446, 694 S.E.2d 278-279), and to "forward a copy of the writ to the circuit court, where an order of expungement shall be

[17] *See* www.merriam-webster.com/dictionary/any "**any** |adjective|: EVERY — used to indicate one selected without restriction"

immediately granted." Va. Code § 19.2.327.13, App. 33. Moreover, the clause "notwithstanding **any** other provision of law" necessarily encompasses provisions of fictional law.

34. On the contrary, the CAV effectively supplanted the term expressly used by the legislature, i.e., "was convicted of a felony" (Va. Code § 19.2-321.10, App. 31) for a substantively different term that the legislature did not use, i.e., "**is subject to a valid**, *final order of conviction.*" Op., at 4, App. 8 (emphasis added). The CAV then concluded that Hood fell outside the ambit of its *newly-written statute*, because despite that Hood is "a person who was convicted of a felony" (Va. Code § 19.2-321.10, App. 31) the CAV concluded that Hood's wrongful convictions and incarceration "should be treated as though they never occurred." Op, at 6, App. 8. And it is upon this unprecedented legal fiction and judicially created statute (based on an erroneous finding of fact) that the CAV determined it lacked subject matter jurisdiction.

II. The CAV Created an Unprecedented Legal Fiction to Dismiss Hood's Petition.

35. The CAV tersely states the parties' respective positions:

> The Commonwealth argues that for a petitioner to show that he "**was convicted of a felony**" under Code 19.2-327.10, *he must show that he* **is subject to a valid, final order of conviction**. Hood contends that the mere historical fact of his prior conviction is enough to bring his case under the court's original jurisdiction, regardless of the current validity of that conviction.

Op., at 4. App. 8 (emphasis added).

36. The CAV improperly resolved this conflict by creating an unprecedented legal fiction to erroneously conclude that the court lacked subject matter jurisdiction to adjudicate Hood's petition for a writ of actual innocence. The CAV is wrong.

37. The CAV acknowledged the "historical fact that Hood *was convicted of murder* in 2002." Op., at 6. App. 8 (emphasis added). Thus, Hood is "a person who was convicted of a felony" and, consistent with the plain and unambiguous language of the statute, the CAV had the subject

matter jurisdiction to "issue writs of actual innocence under this Chapter." Va. Code § 19.2-237.10. App. 31. Moreover, the statutory language, "[n]otwithstanding any other provision of law" necessarily encompasses provisions of fictional law. *Id. See Cisneros, supra.*

A. The CAV's use of the legal fiction conflicts with, and is contrary to, more than a century of law and precedent.

38. Because Hood is actually innocent of these crimes, Hood's wrongful convictions and wrongful incarceration resulted in a great injustice. *See* e.g., *In re Winship*, 397 U.S. 358, 372 (1970). The legal fiction created by the CAV perpetuates and exacerbates the injustice by now wrongfully depriving the actually innocent Hood of the liberty interest to demonstrate his innocence with new evidence under state law, and of the right to exoneration and expungement to which he is entitled, and instead, rewards prosecutorial malfeasance.

39. Thus, the CAV's use of a legal fiction in this case contravenes more than a century of law and precedent as espoused by this Court and the Supreme Court of Virginia. This Court established in *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 208 (1905) that: "The **proper use** of a legal fiction ***is to prevent injustice*** according to the maxim 'in fictione juris semper aequitas existat'" ('a legal fiction is always consistent with equity'). Similarly, the Virginia Supreme Court held in *Utterback's Adm'r v. Cooper*, 69 Va. 233, 270 (1877) that "a legal fiction will **never** be allowed to go so far as to work wrong and injustice" (emphasis added).

40. The CAV's analysis begins thusly:

> The law entertains ***the*** *legal fiction* that ***certain*** *orders or legal acts*, though they undeniably took place as a matter of fact, are treated as legal nullities with no effect whatsoever. This legal fiction has been extended to, among others, void marriages, orders entered when a court lacked personal jurisdiction, and ultra vires orders entered by courts.
> ....

When a legal act is void or a legal nullity, courts treat that act as if it had never occurred.

Op., at 4, App. 8 (emphasis added) (citing cases).

41. The CAV then erroneously asserts that the granting of Hood's writ of habeas corpus rendered "Hood's conviction…a legal nullity." Op., at 6, App. 8. This, despite the fact that the habeas court did not vacate either of Hood's convictions. Even so, "the definition of the term 'vacate' does not necessarily mean 'to nullify'…something may be '[set aside] cancelled [or rescinded]' without being retroactively erased from existence." *United States v. Miller*, 891 F.3d 1220, 1240-41 (10th Cir. 2018) (quoting *Black's Law Dictionary* (10th Ed. 2014) "Vacate: To annul; to set aside; to cancel or rescind").

42. Each of the Virginia cases cited by the CAV, in its failed attempt to find support for the application of its unprecedented legal fiction to Hood's habeas results, are all distinguishable from Hood because the cited cases pertain to the rare orders or legal acts that are **void ab initio**— "null from the beginning." *Jones v. Commonwealth*, 293 Va. 29, 46, 795 S.E.2d 705, 715 (2017); *see Singh v. Mooney*, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001) (distinguishing between judgments that are void and those that are merely voidable). "Significantly, very few judgments are totally void and subject to" this legal fiction. *Jones*, *supra*, 293 Va., at 48, 795 S.E.2d, at 715.

43. The CAV conflates legal acts that are void with legal acts that are merely voidable. "But there is a vast difference between a judgment which is void and one which is merely erroneous… 'a void judgment should be clearly distinguished from one which is merely erroneous or voidable.'" *Robertson v. Commonwealth*, 181 Va. 520, 536, 25 S.E.2d 352, 358 (1943). "'Where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void…This is true even if there is a

fundamental error of law appearing upon the face of the record."' *Id.* (quoting 31 Am. Jur., *Judgments*, § 401, p. 66). *See also* 46 Am. Jur. 2d, *Judgments* § 14 (1969).

44. Hood's habeas petition was granted due to ineffective assistance of trial counsel—reflecting a finding of reversible error occurring during the criminal trial process and, thus, the verdict of conviction is voidable, not a complete nullity that is subject to the CAV's asserted legal fiction. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). A violation of the right to effective assistance of counsel, like many reversible constitutional errors, "is merely a matter of error which does not render the verdict a nullity." *Humphries v. District of Columbia*, 174 U.S. 190, 195-96 (1899). *See* e.g., *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). "While ineffective assistance of counsel *may* render a judgment voidable upon the necessary showing, it does not render the trial court *incapable* of rendering judgment." *Commonwealth v. Morris*, 281 Va. 70, 80, 705 S.E.2d 503, 508 (2011) (emphasis in original).

45. In applying *Strickland*, the habeas court **did not** grant the writ of habeas corpus based on "the absence of jurisdiction of the subject matter or over the parties, [or that] the character of the [conviction] order is such that the court had no power to render it, or [that] the mode of procedure used by the [criminal] court was one that the court could not lawfully adopt." *Singh*, 261 Va., at 51-52, 541 S.E.2d, at 551 (distinguishing legal acts that are "a complete nullity.")

46. "In contrast, [a violation of *Strickland*] is merely [a matter of error which does not render the verdict a nullity, rather, such a habeas ruling reflects that the verdict is] voidable [because] it contains reversible error." *Singh, supra* (distinguishing judgments that are merely voidable.) "There are many rights belonging to litigants—rights which a court may not properly deny, and yet which if denied do not oust the jurisdiction or render the proceedings absolutely null and void." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899).

47. Thus, the granting of a writ of habeas corpus pursuant to *Strickland* does not render a conviction a legal nullity that is "retroactively erased from existence." *Miller*, *supra*, 891 F.3d, at 1240-41 (10th Cir. 2018).

48. Extending a legal fiction heretofore applied exclusively to judgments that are a complete nullity, to a habeas court judgment vacating a felony sentence under *Strickland*, is wholly unsupported by law. Indeed, even assuming, *arguendo*, that the habeas court vacated Hood's felony conviction, the CAV's unprecedented legal fiction would still be inapplicable. The CAV concedes "[t]here is no clear Virginia case law on whether a vacated conviction is a legal nullity." Op., at 5, App. 8.[18]

49. The cases cited by the court below in its attempt to find for support its use of the unprecedented legal fiction are factually and procedurally dissimilar to each other and to Hood's case. However, the court in each of those cases created a legal fiction to produce a just result. In *Hood*, the CAV created a legal fiction which produced an injustice.

50. The question of whether Hood's convictions (which, in fact, **were *not*** vacated by any habeas court order) should constitute a legal nullity must also be viewed in the context of the purpose and legislative intent of the actual innocence statutes.

51. The principal purpose of the statute is to provide and protect a petitioner's liberty interest in demonstrating their innocence with new evidence under state law, and to empower the court to

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[18] The federal cases cited by the CAV, likewise, lend no support to the assertion that granting Hood habeas relief rendered Hood's conviction a "legal nullity." Op., at 5-6, App. 8.
See United States v. Ayres, 76 U.S. (9 Wall.) 608, 610 (1869) (granting a new trial ousted the jurisdiction of the appellate court while the case is pending there; which this Court very justly pronounced an "**anomaly**"); *Nara v. Frank*, 488 F.3d 187, 201 (3d Cir. 2007) ("When an appellate court vacates a lower court's order, it renders the lower court's order null and void... **However, a state court's factual determination may be given effect even if its order has been rendered a nullity on other grounds**."); *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996) ("a judgment that has been reversed, **with instructions that the matter be dismissed**, is null and void."); *Miller v. United States*, 173 F.2d 922, 923-24 (6th Cir. 1949) (The court determined that the lower court could not adopt the evidence heard upon the first trial as the evidence in the second trial.) (All emphasis added).

exonerate a person who is factually innocent of the felony for which he was convicted. The statute, through the court, accomplishes this in three discrete ways: (1) "Grant the writ" and declare through its Order/Opinion that the person is innocent and thus, exonerated; (2) "vacate the conviction" or "modify the order of conviction;" (3) "forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted." Va. Code § 19.2-327.13, App. 33.

52. The legal fiction here—based wholly upon the erroneous finding of fact that the habeas court set aside Hood's convictions—that Hood now stands as a person who was not convicted and, therefore, cannot avail himself of the actual innocence statute, effectively nullifies the principal purpose of the statute by depriving the actually innocent Hood of the right to demonstrate his innocence and of the exoneration and expungement to which he is entitled. *See* e.g., *State Bank of India v. Chalasani* ("*In re Chalasani*"), 92 F.3d 1300, 1304 (2d Cir. 1996) ("Our condemnation of the use of legal fictions here—despite the established pedigree of one of them—is that this action effectively nullified one of the principal purposes of the Bankruptcy Code: allowing the debtor to begin a new life free from debt.")

53. Here, the injustice to Hood caused by the legal fiction is compounded because the Prosecution fabricated false inculpatory evidence at trial, while withholding and concealing the evidence of Hood's actual innocence.

54. Indeed, the CAV-created legal fiction effectively countenances prosecutorial malfeasance by precluding an actually innocent person from demonstrating their innocence and being exonerated, or from holding to account a prosecutor for misconduct, whenever the innocent person first prevails in habeas proceedings. A legal fiction cannot be employed to produce such injustice. *See Sender v. C & R. Co.*, 149 B. R. 941, 947 (D. Colo. 1992) ("The Court recognizes

that disregarding a legal fiction is appropriate in certain circumstances. Generally, a legal fiction will be disregarded to avoid injustice.")

55. It is well settled that, "[t]he trend of modern decisions is to administer justice in accordance with the realities disclosed by the facts; no legal fiction, however revered in antiquity, should be given effect when it is clearly antagonistic to the facts, to common sense, and to natural justice." *Wirt Franklin Petroleum Corp. v. Gruen*, 139 F.2d 659, 660 (5th Cir. 1944).

B. The CAV's finding of fact that the state habeas court set aside Hood's convictions is clearly erroneous.

67. The CAV grossly erred in relying on a transcript rather than a court order to erroneously conclude that the circuit court set aside Hood's convictions. The erroneous finding of fact—the habeas court vacated Hood's convictions—was the basis for the CAV-created legal fiction used to deny Hood's petition. However, a "court speaks through its judgment, and not through any other medium." *Hill v. United States*, 298 U.S. 460, 465 (1936). Indeed, "it is the firmly established law in [Virginia] that a trial court speaks only through its written orders. *Kosko v. Ramser*, 299 Va. 684, 689, 857 S.E.2d 914, 916 (2021).

68. The CAV erroneously found: "The ***circuit court set aside the convictions*** and stated for the record [during the hearing held on April 14, 2011,] that 'the writ vacated the convictions in those two file numbers.'" Op., at 3, App. 8 (quoting Pet. Ex. 129). The CAV did not, indeed could not, rely upon a written court order that vacated Hood's convictions as authority to support its erroneous finding, because no such written order exists.

69. The Virginia Supreme Court has "repeatedly stated that a court speaks ***only*** through its written orders." *Moreau v. Fuller*, 276 Va. 127, 137, 661 S.E.2d 841, 847 (2008) (emphasis

added). And "to the extent that the trial court's statements are read to conflict with the written order, the written order controls." *Dufresne v. Commonwealth*, 66 Va. App. 644, 658 n.10 791 S.E.2d 335, 341 n.10 (2016); *Pilson v. Commonwealth*, 52 Va. App. 442, 444, 663 S.E.2d 562, 563 (2008) ("Because a circuit court speaks only through its orders, we look to the order—not the court's remark from the bench—to discern its holding.")

70. Thus, it is irrelevant whether a transcript suggests that the writ of habeas corpus set aside Hood's convictions. Such in-court pronouncement is not a written order vacating Hood's convictions; as such, it does not, and cannot control. It is the Court's written order that controls. *See Family Redirection Inst., Inc. v. Commonwealth*, 61 Va. App. 765, 777 n.2, 739 S.E.2d 916, 922 n.2 (2013) ("We presume that the order, as the final pronouncement on the subject, rather than a transcript that may be flawed by omissions, accurately reflects what transpired.")

The State Habeas Court Did Not Vacate Either of Hood's Convictions.

71. The habeas court's transcript statements cited by the CAV **are clearly and *demonstrably false***: **(1)** The habeas court did not vacate Hood's murder conviction. On the contrary, the April 14, 2011, final order expressly vacated only the sentence related to Hood's murder conviction. *See* App. 6. Incontrovertibly, the habeas orders of November 10, 2009 (App. 4), and May 21, 2010 (App. 5), did not vacate Hood's murder conviction, because had they done so, there would have been no corresponding sentence related to Hood's murder conviction for the court to later vacate in its final order of April 14, 2011. *See United States v. Locke*, 409 F. Supp. 600, 603 (D. Idaho 1976) ("Without a conviction there constitutionally could be no sentence"); **(2)** on April 14, 2011—almost a year-and-a-half after the petition for writ of habeas corpus was first granted on November 10, 2009—Hood remained imprisoned in the Virginia Department of Corrections ("Va. D.O.C.") *because no written court order vacated Hood's felony conviction*; **(3)** The habeas

court lacked authority to vacate Hood's misdemeanor conviction (one of the two convictions to which the court transcript referred). Hood did not challenge the misdemeanor conviction in his state habeas petition because it was time barred under Va. Code § 8.01-654, App. 11, *see Hood v. Johnson*, CL06-2311; and **(4)** In November 2011 Hood filed a motion in the criminal trial court to have Hood's misdemeanor conviction vacated, which the court did in December 2011—eight months after the habeas hearing where the transcript purports to have vacated ***both*** of Hood's convictions, *see* Pet. App., at 855, App. 7.

The Written Habeas Court Orders.

72. **The November 10, 2009, habeas order**, in pertinent part states,

> For the forgoing reasons, the Petition for Writ of Habeas Corpus is granted as to Claim M and denied as to Claims L, G(a), G(b), and H. The writ shall be issued;[19] however, it is ordered that the petitioner be held in custody of the Department of Corrections until further order of this Court.

Pet. App., at 831, App. 4.

73. **The May 21, 2010, habeas order**, in pertinent part states,

> [I]t is Ordered that the Petition for Writ of Habeas Corpus is granted as to Claim M, and denied as to Claims L, G(a), G(b) and H. The writ shall be issued;[20] however, it is ordered that Petitioner be held in the custody of the Department of Corrections until further order of this Court.

Pet. App., at 852, App. 5.

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[19] Regarding writs of habeas corpus, the terms "the writ shall be issued" and "the Petition for Writ of Habeas Corpus is granted" do not mean that the underlying conviction has been vacated. The writ of habeas corpus is also issued and/or granted in order to, among other things, invalidate sentences and/or the duration of the confinement rather than the conviction. *See* e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) ("Even if the restoration of the respondents' credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison, habeas corpus would have been their appropriate remedy.")

Hood's prayer for habeas relief stated, "Wherefore, having stated sufficient reason why his imprisonment is illegal, the petitioner prays that this Honorable Court issue a Writ of *Habeas Corpus Ad Subjiciendum*, returnable to the respondent above, directing that **[1]** the petitioner be released forwith [sic] from such illegal confinement, or, **[2]** in the alternative, appoint counsel, **[3]** reverse the judgment of the state court, and **[4]** remand for further proceedings, and **[5]** allow any other such relief as this Court deem equitable." Hood's Habeas petition, at 1049. **Thus, it remains unclear <u>what prayer for relief was "granted"</u> by the habeas court or <u>when</u> the writ was actually "issued."**

[20] *See* footnote 19.

74. **The April 14, 2011, habeas order**, in pertinent part states, "Following the Court's entry of an Order accepting this agreement, **the previous *sentence* in case number F-01-2201 *shall be vacated***." Pet. Ex. 130, at 2, App. 6 (emphasis added, underscored emphasis in original).

75. In Virginia, a prevailing habeas corpus action must "result in a *court order* that, *on its face and standing alone, will directly impact the duration of the petitioner's confinement.*" *Carroll v. Johnson*, 278 Va. 683, 693, 685 S.E.2d 647, 552 (2009) (emphasis added) citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Although the November 10, 2009, and May 21, 2010, habeas court orders state "the Petition for Writ of Habeas Corpus is granted" (App. 4, and 5), on April 14, 2011, Hood continued to be "detained without lawful authority" (Va. Code § 8.01-654, App. 11) pursuant to the final judgment entered September 13, 2002 (App.1), because no written habeas order "on its face, and standing alone" vacated Hood's conviction nor "directly impact[ed]" Hood's confinement ***until*** April 14, 2011, when the court vacated Hood's felony murder sentence (App. 6). *Carroll, supra.*

76. In granting Hood's habeas petition, the habeas court did not vacate Hood's convictions and discharge Hood, nor admit Hood to bail as required by statute. *See* Va. Code § 8.01-662, App. 13 (1977-2019 (amended in 2019 Va. Acts ch. 48)) ("the court before whom the petitioner is brought *shall* either discharge or remand him, or admit him to bail") (emphasis added).

77. Instead, more than a year-and-a-half later and without legal authority, on April 14, 2011, the habeas court continued the criminal prosecution of Hood. The court unlawfully amended the murder indictment of May 17, 2001, in violation Va. Code § 19.2-231, App. 26, and entered a "Plea Agreement and Final Order" in "*Commonwealth v. Hood*, Case No. F-01-2201" vacating the final sentencing order entered on September 13, 2002. App. 6 and 1, respectively. These actions by the habeas court violate Va. Code §§ 8.01-662 (App. 13), 19.2-231 (App. 26), 19.2-

303 (App. 29), and Rules of the Supreme Court of Virginia, Rule 1:1 (App. 40). *See Burrell v. Commonwealth*, 283 Va. 474, 722 S.E.2d 272 (2012). Thus, these judicial acts by the habeas court were rendered ultra vires where the habeas court never entered a final written order vacating Hood's murder conviction.

78. "It is well settled that habeas corpus is a civil and not a criminal proceeding. It is designed to challenge the civil right of the validity of the petitioner's detention. It is in no sense a continuation of the criminal prosecution." *Smyth v. Godwin*, 188 Va. 753, 760, 51 S.E.2d 230, 233 (1949) (citing *Ex parte Tom Tong*, 108 U.S. 556, 559 (1883)).

79. The November 10, 2009, habeas order (App. 4) did not vacate Hood's convictions, otherwise, it would have been unlawful for Hood to be imprisoned in Va. D.O.C. for an additional year-and-a-half until April 14, 2011, with no felony conviction.[21] Likewise, the May 21, 2010, habeas order (App. 5) did not vacate Hood's convictions.

80. The April 14, 2011, "Plea Agreement and Final Order" too, fails to vacate the murder conviction Hood challenged in his state habeas petition, *Commonwealth v. Hood*, Case No. F-01-2201 (CR01-F2201). Instead of vacating the conviction, the plea agreement and final order expressly vacated only the felony sentence. *See* Pet. Ex. 130, App. 6.

81. Moreover, the habeas court lacked legal authority to "vacate[] the convictions in those two file numbers," Op., at 3, App. 8, because one of the two convictions to which the court referred was not before the habeas court.

82. Hood was convicted of murder (F-01-2201, CR01-F2201), and a misdemeanor for accessory after the fact to abduction (F-01-2202, CR01-F2202), the convictions in those "two

[21] *See* Va. Code §§ 8.01-662 (App. 13), 18.2-15 (App. 16), 19.2-120 (App. 21), 19.2-157 (App. 22), 19.2-158 (App. 23), 19.2-159 (App. 24), 19.2-160 (App. 25), 19.2-243 (App. 27), 19.2-254 (App. 28), 19.2-310 (App. 30), 53.1-20 (App. 35), 53.1-21 (App. 36), 53.1-24 (App. 37), and 53.1-28 (App. 38).

file numbers" to which the habeas court transcript referred. Op., at 3, App. 8. *See* App. 1. Hood did not raise, and could not have raised in his habeas petition, a claim challenging his misdemeanor conviction (F-01-2202, CR01-F2202) because at the time Hood filed the habeas petition such claim was time barred. *See* Va. Code § 8.01-654, App. 11. *See* footnote 10, *supra.*

83. The final judgment related to Hood's convictions was entered on September 13, 2002. *See* App. 1. The misdemeanor conviction of accessory after the fact to abduction was not raised on direct appeal. *See Hood v. Commonwealth*, 269 Va. 176, 180 n.1, 608 S.E.2d 913, 915 n.1 (2005), App. 3. Thus, Hood would have to have raised a habeas claim challenging the misdemeanor conviction "within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later" —hence, no later than September 13, 2004 (2 years after the final judgment). Va. Code § 8.01-654, App. 11. The record is clear. Hood filed only one state habeas petition, and that habeas petition was filed on March 24, 2006—4 years, 6 months, 11 days after the final judgment in the trial court. The record, therefore, demonstrates as a matter of law and fact that the state habeas court could not, and did not, "vacate[] the convictions in those two file numbers." Op., at 3, App. 8.

84. The Virginia Supreme Court has held that, "[b]ecause a trial court speaks only through its written orders and written orders speak as of the day they were entered, the best way for the trial court to make the original order speak the truth was through the entry of another order." *Jefferson v. Commonwealth*, 298 Va. 473, 477, 840 S.E.2d 329, 333 (2020) (internal quotation marks and citations omitted).

85. Here, the habeas court did enter 'another order' after the November 10, 2009, and May 21, 2010, habeas orders to ensure that the court's orders spoke the truth. Specifically, the April

14, 2011, final order which expressly ordered that "the previous sentence in case number F-01-2201 [the sentence for the murder conviction] shall be vacated." Pet. Ex. 130, at 2, App. 6.

86. Therefore, the ruling by the CAV that, because "the circuit court set aside [Hood's] convictions... [the court] lack[s] the subject matter jurisdiction to adjudicate Hood's petition for a writ of actual innocence" is erroneous as a matter of law and fact. Op., at 3, 6, App. 8.

III. The CAV'S Reliance on *Nelson v. Colorado* is Misplaced.

87. In *Nelson v. Colorado*, 581 U.S. 128 (2017) this Court held that a Colorado law that provided for the State's retention of "conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence . . . offends the Fourteenth Amendment's guarantee of due process." *Id.* 581 U.S., at 130. The holding was narrow, and specific to the facts of that case as they related to a specific Colorado law. Anything beyond this is mere dictum.

88. The *Nelson* holding is silent as to the issues Hood raises in the underlying petition and is irrelevant to any petition for a writ of actual innocence, which, in Virginia, requires a petitioner to establish subject matter jurisdiction by showing simply that he "was convicted of a felony." Va. Code § 19.2-327.10 (App. 31). *See* e.g., Op., at 4, App. 8.

89. Moreover, the facts of the case and the relief sought in *Nelson* are wholly dissimilar to those at bar. In the court below, Hood sought to demonstrate his innocence with new evidence under state law, and obtain exoneration and expungement of the record of crimes for which he was wrongfully convicted. *Nelson*, "in contrast, concern[s] the continuing deprivation of property after a conviction has been reversed or vacated, *with no prospect of reprosecution.*"[22] *Nelson*, 581 U.S., at 135 (emphasis added).

[22] Conversely, Hood still faces the prospect of reprosecution, where the Prosecution embedded within the subsequent Alford agreement provisions whereby Hood had to "expressly waive[] double jeopardy." App. 6.

90. *Nelson* does not, and cannot, alter established precedent in Virginia regarding the legislative purpose and intent of the actual innocence statutes. In Virginia, "in recognition that *relief sought by actual innocence petitioners is complete exoneration*, ... 'the General Assembly intended to provide relief *only* to those individuals who can establish that they did not, as a matter of fact, commit the crimes for which they *were convicted*.'" *Turner*, *supra*, quoting *Carpitcher*, *supra* (emphasis added).

91. The CAV wrongly relied on *Nelson* to dismiss Hood's petition for lack of subject matter jurisdiction, where the authority upon which the CAV relied was mere dicta from a footnote in *Nelson* quoting the dissenting Judge from the original Colorado State case. *See* Op., at 5, App. 8 (quoting *People v. Nelson*, 362 P.3d 1070, 1080 (2015); *Nelson*, 581 U.S., at 136 n. 10). Dicta are "[w]ords of an opinion entirely unnecessary for the decision of the case." *Black's Law Dictionary* 1072 (6th ed. 1990). Dicta, of course, are not authority in any court. And dicta from a dissenting judge in a Colorado State case are not binding upon this Court.

92. The CAV impermissibly elevates *Nelson* dicta to erroneously assert that, "[i]n *Nelson* ... *the United States Supreme Court held that*, as a matter of constitutional due process law, *a vacated conviction should be treated as a legal nullity*." Op., at 5, App. 8 (emphasis added). The CAV misapprehends *Nelson*. *Nelson* did not hold that "a vacated conviction should be treated as a legal nullity." Indeed, the *Nelson* Opinion does not contain the words "nullity" or "legal nullity." The CAV confuses *Nelson* dicta with the *Nelson* holding.

93. Moreover, the CAV ignored more than a century of precedent from this Court which is antithetical to the CAV's assertion that a vacated conviction is a legal nullity. *See Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899) ("There are many rights belonging to litigants -- rights which a court may not properly deny, and yet which if denied do not oust the jurisdiction

or render the proceedings absolutely null and void.") The granting of a writ of habeas corpus due to a violation of the right to effective assistance of counsel "is merely a matter of error which does not render the verdict [of conviction] a nullity." *Id.*, at 95-96

IV. In Virginia, Judicial Exoneration and The Right to Demonstrate Hood's Innocence Can Only be Realized Through a Petition for Writ Of Actual Innocence.

94. There are significant differences between Hood demonstrating his innocence with new evidence—and thus exonerating Hood of the abduction and murder by a writ of actual innocence—and granting Hood a writ of habeas corpus due to ineffective assistance of counsel.

95. The National Registry of Exonerations defines exoneration thusly: "Following a post-conviction re-examination of the evidence in the case, [the petitioner is] *relieved of **all** the consequences of the criminal conviction*, and ... ***declared*** **to be factually innocent**"[23] (emphasis added). *See also United States v. Del Valle Fuentes*, 143 F. Supp. 3d 24, 30 (D.P.R. 2015) ("Black's Law Dictionary (10th ed. 2014) (defining 'exonerate' as '[t]o clear of all blame'").

96. In Virginia, there is only one judicial proceeding by which a citizen who was wrongfully convicted of a felony has the right to demonstrate their innocence with new evidence under state law, and thus, be exonerated beyond twenty-one (21) days after a felony criminal conviction becomes final, *see* Rule 1:1 of the Rules of the Supreme Court of Virginia, App. 40, the proceedings pursuant to a petition for writ of actual innocence— "in recognition that *the relief sought by actual innocence petitioners is complete exoneration*." *Turner*, *supra*, 56 Va. App., at 445, 694 S.E.2d, at 278 (emphasis added).

97. In Virginia, there is no other judicial proceedings by which Hood can demonstrate his innocence, obtain exoneration, and an order for the expungement of the police and court records

[23] Available online at: https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx

because the incidents in Hood's case do not satisfy the particular requirements for expungement under Va. Code § 19.2-392.2, App. 34, which permits expungement only when a person "[i]s acquitted, . . . [a] nolle prosequi is taken or the charge is otherwise dismissed." *Forness v. Commonwealth*, 882 S.E.2d 201, 202 (2023). *See also Dressner v. Commonwealth*, 285 Va. 1, 736 S.E.2d 735 (2013); *Brown v. Commonwealth*, 278 Va. 92, 677 S.E.2d 220 (2009).

98. Thus, only through a petition writ of actual innocence can Hood demonstrate his innocence, be exonerated, and have the CAV "forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted." Va. Code § 19.2.327.13, App. 33.

V. Habeas Corpus Relief is Not an Exoneration.

99. A petition for writ of habeas corpus does not provide or protect a petitioner's right to demonstrate their innocence with new evidence, nor the right to an exoneration. And habeas does not relieve a petitioner of all the consequences of the conviction. Instead, under Virginia law, when the writ of habeas corpus is granted the habeas petitioner "can gain…no more than a new trial." Va. Code § 8.01-655, App. 12. The Prosecution has conceded this point in the CAV stating, "[t]he issuance of [Hood's] writ of habeas corpus was not an exoneration." Comm. Br., at 13, n. 9.

VI. Actual Innocence is Outside the Scope of Habeas Corpus.

100. It is well established that a claim of actual innocence is outside the scope of habeas corpus. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief." *Herrera v. Collins*, 506 U.S. 390, 400-01(1993) (citations omitted). *See also Lovett v. Warden*, 266 Va. 216, 259, 585 S.E.2d 801, 827 (2003). Thus, it is a legal and factual impossibility for Hood's actual innocence to have been fully and actually litigated in the habeas corpus proceedings because "[a]n assertion of actual innocence is

outside the scope of habeas corpus review, which concerns only the legality of the petitioner's detention." *Lovett, supra.*

VII. Hood Satisfies the Actual Innocence Statutory Requirements.

101. In order to obtain a writ of actual innocence, the petitioner must "prove[] by a preponderance of the evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11." Va. Code § 19.2-327.13, App. 33. *See Richardson v. Commonwealth*, 75 Va. App. 120, 133, 873 S.E.2d 692, 698 (2022).

102. Whether the evidence submitted with Hood's petition for writ of actual innocence was "previously unknown or unavailable" (Va. Code § 19.2-327.11(A)(iv)(a), App. 32) and whether that evidence was obtained through the "exercise of diligence" (Va. Code § 19.2-327.11(A)(vi)(a), App. 32), as it relates to the violations of *Brady v. Maryland*, 373 U.S. 83 (1963), is controlled by *Banks v. Dretke*, 540 U.S. 668 (2004).

103. Hood, through counsel, filed a Motion for Discovery on June 7, 2001, as well as a Motion to Compel Discovery, and renewed said Motion during a hearing on August 21, 2001. *See* e.g., Pet. Ex. 12, *see also* Pet., at 55. There, Prosecutor Robert Trono, ("Trono"), an Assistant United States Attorney acting as a Special Commonwealth's Attorney and, thus, representing both the federal and state government, represented to Hood and to the court that, "as far as exculpatory information, [Hood's defense counsel,] Mr. Goodwin claims that there's a pattern of withholding exculpatory evidence. **I don't know how strongly I can disagree with that.... Beyond that, we have complied with the rules** [of *Brady*]." Pet. App., at 104-106 (emphasis added).

104. The *Banks* Court held, "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, at 695. However, here, as in *Banks*, the Prosecution,

"nevertheless urges, in effect, that the prosecution can lie and conceal and the prisoner still has the burden to discover the evidence" of his innocence. *Id*, at 696. The *Banks* Court found, "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process...Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id.*, at 696 (citations omitted). "It was not incumbent on [Hood] to prove these representations [by the prosecutor were] false; rather, [Hood] was entitled to treat the prosecutors' submissions as truthful." *Id.*, at 698.

105. Thus, pursuant to this Court's precedent, Hood demonstrated the requisite diligence in 2001-2002 when Hood filed several motions for discovery and the Prosecution falsely represented to Hood and to the court that, "we have complied with the rules [of *Brady*]." Pet. App., at 105. *See* 8/21/01 M.H. tr. at 97-98. However, it was the Prosecution's noncompliance with *Brady*, and Hood's personal knowledge of his actual innocence, that prompted Hood to *extraordinary diligence to discover and obtain* the withheld FOIA documents and other evidence of Hood's innocence in May 2007 through June 2008. *See* Pet., at xxvi-xxx.

VIII. The Evidence of Hood's Innocence is Clear and Compelling.

106. The evidence submitted with Hood's petition for writ of actual innocence also satisfies the two remaining statutory requirements, i.e., "no rational trier of fact would have found proof of [Hood's] guilt...beyond a reasonable doubt" and Hood's "evidence is not merely cumulative, corroborative, or collateral." Va. Code § 19.2-327.11, clauses (A)(vii) and (A)(viii), respectively. App. 32. In May 2007 through June 2008, Hood discovered a plethora of undisclosed evidence demonstrating his innocence, including testimony establishing Hood's alibi and the government's knowledge thereof:

> Were you ever able to obtain any evidence of Mr. Hood's possible involvement in this murder?

> My recollection was that Mr. Hood had—was either in jail at the time or there was something that eliminated him as a suspect. And I can't say specifically that but I do remember that was one of the things that was determined—the two private investigators—after the fact. But I believe that we had that information prior to that time.

Pet. Ex., at 701 (FOIA IV., at 483).

107. On March 31, 1999, Government Investigators and the FBI "attended the habeas hearing and witnessed the testimony given under oath," establishing Hood's alibi. Pet. Ex., at 596 (FOIA Vol. I., at 84); Pet. Ex., at 603 (FOIA Vol. I., at 118).

IX. Federal Constitutional Deprivations.

A. Access to the court.

108. The CAV created an unprecedented legal fiction, based upon erroneous facts, to attain a result contrary to the legislative intent and purpose of the statute. These actions denied Hood access to the court by depriving him of his liberty interest in demonstrating his innocence with new evidence under state law. *See Osbourne, supra.* This effectively closed the courthouse doors to Hood, depriving him of the comprehensive relief available to every other innocent person who was convicted of a felony in Virginia; all of whom are entitled to demonstrate their actual innocence "by a preponderance of evidence" consistent with Due Process. Va. Code § 19.2-327.13, App. 33.

109. Such deprivation violates Hood's rights to access the court guaranteed by Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses of the United States Constitution. *See Christopher v. Harbury*, 536 U.S. 403, 412-416 (2002).

110. In *Christopher v. Harbury*, 536 U.S. 403 (2002), the Court characterized access to the courts claims as being in one of two classes. *Id.* at 413-14. "The second class, termed 'backward

looking claims,' arise when a... specific claim 'cannot be tried (or tried with all the evidence) [because past official action] caused the loss or inadequate settlement of a meritorious case."' *Jennings v. City of Stillwater*, 383 F.3d 1199, 1208-09 (10th Cir. 2004). "In this way, the official action is said to have "'rendered hollow [the plaintiffs] right to seek redress'" in the courts." *Id.* (quoting *Christopher*, 536 U.S., at 414 (brackets and parenthesis in original) (internal citations omitted)).

111. Certainly, an act passed by a state legislature that directs a discriminatory result is a state action and violates the first section of the Fourteenth Amendment. In addition, acts by other branches of government "by whatever instruments or in whatever modes that action may be taken" can result in a finding of "state action."[24]

112. Thus, if the CAV decision stands, the Prosecution's malfeasance in withholding and concealing evidence of Hood's innocence, and the CAV's shuttering of the courthouse doors, individually and collectively, will have violated Hood's right to access the court and the judicial proceedings—consistent with due process—to demonstrate his innocence with new evidence under state law. Such result is antithetical to the legislative intent and purpose of Va. Code 19.2-327.10. App.31.

B. Due Process

113. Hood has a "liberty interest in demonstrating his innocence with new evidence under state law." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009).

[24] "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880).

This "state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Osborne, supra*, 557 U.S., at 68.

114. The *Osborne* Court found,

> The question is whether consideration of [Hood's] claim within the framework of the State's procedures for postconviction relief **offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation**.

Osborne, 557 U.S., at 69 (emphasis added) (citations and quotations omitted).

115. Concern about injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That core concern is "bottomed on the ***fundamental*** **value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free**." *In re Winship*, 397 U.S. 358, 372 (1970) (emphasis added); *Schlup v. Delo*, 513 U.S. 298, 325 (1995). The dual aim of our criminal justice system is "that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935).

116. This fundamental principle of justice, eloquently articulated in Justice Harlan's concurrence in *Winship, supra*, remains the bedrock, axiomatic, elementary, and constitutional principle of fairness embodied in the Due Process Clause.

117. The CAV's ruling results in the absolute absence of any judicial procedure essential for Hood to demonstrate his innocence with new evidence, by which Hood can realize the exoneration and expungement to which he is entitled under Virginia's actual innocence statutes. Such a result offends any notion of fundamental fairness.

118. In determining whether a procedure complies with the Due Process Clause, the Court has often undertaken "[t]he three-part inquiry set forth in *Matthews v. Eldridge*," which requires consideration of "the private interest affected by the official action; the risk of an

erroneous deprivation of that interest through the procedures used and the Government's interest." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, all three factors indicate that Virginia's unprecedented legal fiction, and statutory interpretation and application is inconsistent with due process.

119. First, there is no doubt that people who were wrongly convicted of a felony in Virginia have been exonerated by demonstrating their actual innocence with newly discovered evidence. Second, Virginia's unprecedented legal fiction and statutory interpretation poses an extraordinarily high risk of erroneously depriving the wrongfully convicted of their liberty interest in demonstrating their innocence, and obtaining exoneration and expungement of their criminal record. Third, the government's legitimate interest is non-existent. Virginia clearly has no legitimate reason to prevent an actually innocent person who was wrongly convicted and incarcerated from demonstrating their innocence with new evidence. On the contrary, Virginia has a compelling interest—informed by due process demands for fundamental fairness and the fundamental value determination of our society—in ensuring that the actually innocent are provided with judicial processes essential in demonstrating their actual innocence with new evidence. Virginia's statutory scheme, announced in the CAV's ruling, fails the three-part test of *Matthews v. Eldridge*. It serves no purpose other than allowing the state to wrongfully convict and incarcerate actually innocent citizens with impunity.

X. This Case Presents an Ideal Vehicle for Addressing the Important Questions.

120. This case has all the normal attributes of a good vehicle for addressing the questions presented. The questions were squarely decided below. They were the only issues in the case. There are no procedural or jurisdictional obstacles that could block the Court from reaching the

merits. There can be no further percolation, because no other state has a statutory scheme like Virginia's, established by the CAV's ruling below, and the Virginia Supreme Court has definitively spoken through its refusal to intervene, and thus has adopted the CAV's ruling.

121. But this case also has an unusual feature that makes it an exceptionally good vehicle: the vital protection of the liberty interests and exoneration of those who are actually innocent, yet have been wrongfully convicted and incarcerated.

122. These are important questions. They may arise virtually every time an innocent petitioner prevails on habeas or direct appeal and later discovers the evidence demonstrating their actual innocence. Virginia, like other states, imposes an array of obstacles on virtually everyone who was convicted of a felony in order for them to demonstrate their innocence with new evidence. But these questions present a situation where a state flouts its statutory obligation and instead, completely prevents an innocent person from demonstrating their innocence with new evidence. Moreover, if Virginia can get away with keeping its citizens from demonstrating their innocence, other states may seek to do the same. This Court should make clear that due process requires the protection of the liberty interest of those who are actually innocent, yet wrongly convicted and incarcerated, to demonstrate their innocence with new evidence under state law, and to be exonerated.

Conclusion

WHEREFORE, the petition for writ of certiorari should be granted.

Stephen James Hood, pro se.

STEPHEN JAMES HOOD

BY: _____
Pro Se.

STEPHEN JAMES HOOD,
PRO SE,
13714 Nairn Road

Chester, VA 23831
Phone: (804) 835-7529
stephenjhood@yahoo.com