IN THE COURT OF APPEALS

OF VIRGINIA

CASE NUMBER ____________

STEPHEN JAMES HOOD,

PETITIONER,

V.

THE COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE

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PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED 0N NONBIOLOGICAL EVIDENCE

THE COURT OF APPEALS OF VIRGINIA

Form 10. Petition for a Writ of Actual Innocence Based on Nonbiological Evidence.

Record No.

_______**Stephen James Hood**______ ____

(PETITIONER)

___Commonwealth of Virginia____

Represented by the Attorney General of Virginia

(RESPONDENT)

13714 Nairn Road, Chester VA 23831

(PETITIONER'S ADDRESS)

Pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia, I, **Stephen J. Hood**, hereby petition this Court for a WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE. In support of this petition, I state under oath that the following information is true:

1. **On April 4th, 2002 I was convicted in the Richmond Circuit Court of the following offenses**

Description of Felony Offense	Virginia Code	Circuit Court Case No,	Plea
Murder in the First Degree	**§ 18.2-32; § 18.2-18**	**F-01-2201 (CR01-F2201)**	**Not guilty**
Abduction	**§ 18.2-47; § 18.2-19**	**F-01-2202 (CR01-F2202)**	**Not guilty**

2. I am innocent of the offenses that are the subject of this petition.

3. My claim of innocence is based upon the following evidence:

***Inter alia*; the Government's knowing use of false testimony and evidence, and the Government's suppressing and withholding evidence of the Petitioner's actual innocence.**

***See* Statement of Facts That Explains the Previously Unknown or Unavailable Evidence, *infra*, at pages xxvi-xxx; Preamble-Actions of The Commonwealth and Its Agents, *infra*, at pages xxxi-xxxiv, attached Table of Contents, *infra*, at pages i-v and, the Brief in Support of Petition for Writ of Actual Innocence Based on Nonbiological Evidence, at pages 1 – 131.**

[X] ATTACHED ADDITIONAL SHEET(S)

4. Check all that apply:

[**X**] (a) This evidence was previously unknown or unavailable to either me or my attorney at the time the conviction(s) or adjudication(s) of delinquency became final in the circuit court; and/or

[**X**] (b) This evidence was not subject to scientific testing because:

***See* Statement of Facts That Explains the Previously Unknown or Unavailable Evidence, *infra*, at pages xxvi-xxx; Preamble-Actions of The Commonwealth and Its Agents, *infra*, at pages xxxi-xxxiv, attached Table of Contents, *infra*, at pages i-v and, the Brief in Support of Petition for Writ of Actual Innocence Based on Nonbiological Evidence, at pages 1 – 131.**

5. This evidence became known or available to me on **May 29, 2007 through June 5, 2008**.

6. The circumstances under which the evidence was discovered were:

***See* attached Statement of The Case and Material Proceedings, *infra*, pages xxi-xxvi, and Statement of Facts That Explains the Previously Unknown or Unavailable Evidence, *infra*, pages xxvi-xxx.**

[X] ATTACHED ADDITIONAL SHEET(S)

7. Check all that apply:

[**X**] (a) This evidence could not have been discovered or obtained by the exercise of diligence before the expiration of 21 days following entry of the final order(s) of conviction or adjudication of delinquency by the court; and/or

[**X**] (b) The testing procedure was not available at the time the conviction(s) or adjudication(s) of delinquency became final in the circuit court.

8. The evidence upon which I base my claim is material and when considered with all of the other evidence in the record, will prove that no rational trier of fact would have found me to be guilty beyond a reasonable doubt of the charges described above because:

***See, inter alia*, attached Claim A., *infra*, pages 1-62, and Claim B., *infra*, pages 62-131*, see also* Petitioner's Exhibits Volumes I.-III., *infra*.**

[X] ATTACHED ADDITIONAL SHEET(S)

9. In support of this petition, I have attached the following documents:

See* attached Brief in Support of a Petition for Writ of Actual Innocence Based on Nonbiological Evidence, *infra; see also* Catalog of Exhibits, *infra,* pages 133-137, *see also* Petitioner's Appendix, *infra.

[X] ATTACHED ADDITIONAL SHEET(S)

10. I understand that this petition must contain all relevant allegations of facts that are known to me at this time.

11. I understand that it must include all previous records, applications, petitions, and appeals and their dispositions related to this/these conviction(s) or adjudication(s) of delinquency, as well as a copy of any documents or evidence in support of the facts that I assert above.

12. I understand that if this petition is not complete, this Court may dismiss the petition or return the petition to me pending the completion of such form.

13. I understand that I am responsible for all statements contained in this petition.

14. I understand that any knowingly or willfully made false statement shall be a ground for prosecution and conviction of perjury as provided for in Virginia Code 18.2-434.

15. Counsel. Check the appropriate box.

[X] I am being represented by an attorney on the filing of this petition, my attorney's name and address are

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Mechanicsville, Virginia 23116
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Cell: (804) 402-6677
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Based on the above, I petition this Court pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence,

4/23/21

DATE

SIGNATURE OF PETITIONER

Commonwealth/State of Virginia

[ ] City [X] County of Chesterfield

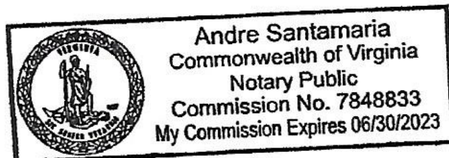
Subscribed and sworn to/affirmed before me on this date by the above-named person.

4/23/21

DATE

NOTARY PUBLIC
My commission
expires:

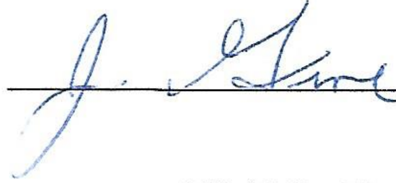
6-30-2023


Andre Santamaria
Commonwealth of Virginia
Notary Public
Commission No. 7848833
My Commission Expires 06/30/2023

4/22/2021

DATE

SIGNATURE OF ATTORNEY (IF APPLICABLE)



VIRGINIA STATE BAR
NUMBER: 22520

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AUTHORITY, JURISDICTION, AND STANDING

1. The Court of Appeals of Virginia has original subject matter jurisdiction and the authority to grant the relief sought by the Petitioner under Virginia Code § 19.2-327.10. In pertinent part, § 19.2-327.10 states,

> *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* under this chapter. (Emphasis added.)

2. Additionally, "this writ does not require that the convicted person be currently incarcerated." *Innocent Suffering: The Unavailability of Post-Conviction Relief in Virginia Courts. Potter*, 51 U. Rich. L. Rev. 299 (2016), at 308.

3. In order for the writ to be granted the Petitioner must now "prove[] by a preponderance of the evidence[1] all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and … that no rational trier of fact would have found proof of guilt … beyond a reasonable doubt" § 19.2-327.13 (*See* Acts of Virginia General Assembly Chapters 994 [SB 511], and 993 [HB 974] (signed 4/9/2020)).

4. The Court of Appeals held in *Altizer v. Commonwealth*, 63 Va. App. 317, 326, 757 S.E.2d 565, 569 (2014) that, "[t]he actual innocence statute '*reflect[s] an <u>obvious legislative purpose</u>*': to provide a mechanism other than a gubernatorial pardon, *to provide relief to those*

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[1] *See Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 562 (4th Cir. 2017) ("Preponderance of the Evidence, Black's Law Dictionary (10th ed. 2014) ('defining 'preponderance of the evidence' as 'evidence that has the most convincing force; superior evidentiary weight that, *though not sufficient to free the mind wholly from all reasonable doubt*, *is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other . . .* ***however slight the edge may be***'") (Emphasis added.) *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007) (The Petitioner "must then prove h[is]case by a 'preponderance of the evidence.' Stated otherwise, []he must demonstrate that it is more likely than not").

who demonstrate that they are factually innocent of the crimes." quoting *Carpitcher v. Commonwealth*, 273 Va. 335, 345, 641 S.E.2d 486, 492 (2007) (emphasis added).

5. Although the Petitioner's convictions were vacated when the court granted to him *habeas* relief, (*see Hood v. Johnson*, CL06-2311) the Petitioner is entitled, pursuant to Va. Code § 19.2-237.10, *et seq*., to seek, and to have granted to him additional relief including, and especially, "expungement of the police and court records relating to the charge and conviction," and relief from the collateral consequences and hardships to which his wrongful convictions and incarceration have subjected him. Va. Code § 19.2-392.2(J).

6. Were this Court to hold that those whose criminal convictions have been vacated in *habeas* proceedings cannot then petition for a Writ of Actual Innocence, such ruling would contravene both this Court's holding, and that of the Supreme Court of Virginia, that, "[t]he actual innocence statute[s] 'obvious legislative purpose' ... [is] to provide relief to those who demonstrate that they are factually innocent of the crimes." *Altizer* and *Carpitcher*, respectively, *supra.*

7. Such contravention would frustrate the obvious legislative intent by depriving those who first prevail in *habeas corpus* proceedings of the comprehensive relief to which they are entitled upon a showing of factual innocence under the Actual Innocence statutes.

8. This is particularly so where, as here, the Petitioner possessed facts sufficient to obtain *habeas* relief but only later discovered facts sufficient to satisfy the more demanding legal standard to prevail on a Petition for a Writ of Actual Innocence.

9. Indeed, the Rules of the Supreme Court of Virginia governing Petitions for Writ of Actual Innocence make clear that "*[a]ny person convicted of a felony* … may file in the Court of

Appeals a petition under Code § 19.2-327.10 *et seq.* seeking a writ of actual innocence based on nonbiological evidence." Rule 5A:5(b)(1) (emphasis added).

10. The Supreme Court of the United States in *Sibron v. New York*, 392 U.S. 40, 55 (1968) "abandoned all inquiry into the actual existence of specific collateral consequences [related to a conviction] and in effect presumed that they existed." *Id.*, at 55, citing *Pollard v. United States*, 352 U.S. 354 (1957).

11. Nevertheless, there are more than 1,500 collateral consequences stemming from the Petitioner's wrongful convictions. The National Inventory of the Collateral Consequences of Convictions ("NICCC") defines collateral consequences as "legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights."[2]

12. Accordingly, it stands to reason that there are myriad additional stigmas, hardships, and "consequences" beyond the collateral consequences listed by the NICCC suffered by one who is innocent, and yet, has been wrongfully convicted and incarcerated for nearly a decade. *See Benton v. Maryland*, 395 U.S. 784 at 790-791 (1969) ("Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable"). "Collateral consequences can be characterized as 'invisible' punishments, because they restrict freedom and

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[2] The National Inventory of the Collateral Consequences of Conviction ("NICCC"), a project of the American Bar Association (available online at https://niccc.csgjusticecenter.org/) is a part of the National Reentry Resource Center; funded by the U.S. Department of Justice, Bureau of Justice Assistance; which continues to update the NICCC data to account for statutory and regulatory changes across all of the NICCC's jurisdictions. The NICCC cites 791 collateral consequences of a conviction in the Commonwealth of Virginia recorded in the Code of Virginia, Virginia Administrative Code, and Rules of Supreme Court of Virginia. NICCC also cites 941 federal collateral consequences of convictions recorded in the United States Code Service, the Code of Federal Regulations, and Rules of The United States Court of Federal Claims, among others.

opportunity for people with criminal convictions but operate outside of the formal sentencing framework and beyond the public view." *United States Commission On Civil Rights*, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, at pg. 11. Available on line at https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf.

a) The Petitioner Has Not Had The Police And Court Records Relating To The Charges And Convictions Related To The Murder And Abduction Expunged. (*But see* Va. Code §§ 19.2-327.13, 19.2-392.2(J).)

Benefits of Expungement

13. The practical benefits of an expungement are numerous and the Petitioner has no other means to obtain adequate relief except by prevailing in the instant action. Many states allow employers to terminate employment of employees found to have had a prior conviction. Most states allow employers to deny jobs to people who were arrested but never convicted. Most states allow employers to deny jobs to anyone with a criminal record, regardless how dated the record or exemplary the individual's work history and personal achievements. Most states make criminal history information accessible to the general public through the internet, making it extremely easy for employers and others to discriminate against people on the basis of old or minor convictions, and/or convictions that have been vacated to deny employment or housing. Many public housing authorities deny eligibility for federally assisted housing based on an arrest that never led to a conviction. Thirty-seven (37) states have laws permitting all employers and occupational licensing agencies to ask about and consider arrests that never led to a conviction in making employment decisions. Employers in most states can deny jobs to – or fire – anyone with a criminal record, regardless of individual history, circumstance or business necessity.

Twenty-nine (29) states have no standards governing the relevance of conviction records of applicants for occupational licenses. Thirty-six (36) states have no standards governing public employer's consideration of applicant's criminal record. Forty-five (45) states have no standards governing private employers' consideration of applicant's criminal record. Virtually anyone with an internet connection and a credit card can find information about [the Petitioner's] arrest and/or conviction history online without his or her consent or any guidance on how to interpret or use the information. Twenty-eight (28) states allow internet access to criminal records or post records on the internet. Twenty-seven (27) housing authorities surveyed make decisions about eligibility for public housing based on arrests that never led to a conviction. Thirty-five (35) states consider the relevance of an applicant's criminal record in making a determination about an applicant's suitability to be an adoptive or foster parent. Fifteen (15) states bar people with criminal records from becoming adoptive or foster parents. Most professional certifications require a criminal history check prior to issuance. Many landlords now demand a criminal history background check prior to leasing or renting. Almost all youth volunteer positions (Boy Scouts, Little League, Pop Warner, etc.) require a clean criminal history. Insurance and loan rates could be affected by [the Petitioner's] criminal history in certain cases. It must be noted, that if [one] is arrested and never formally charged; or even if [the Petitioner's] case was dismissed; or one were found not guilty; or the conviction was later vacated, the record of [the Petitioner's] arrest and court case still exists. [The Petitioner's] non-judicial and judicial criminal record is a public record. Contrary to popular belief, a criminal record is not automatically sealed or removed over time. It remains public and permanent until ordered sealed or expunged by a judge. Expungement keeps the record of [the Petitioner's] arrest and/or court case out of the public record. Expungement allows [the Petitioner] to legally deny or fail to

acknowledge that [the Petitioner] w[as] arrested for the incident which is sealed or expunged. Expungement protects [the Petitioner's] privacy and may allow [the Petitioner] to take advantage of job, school, and other opportunities once closed because of [the Petitioner's] arrest being a part of the public record. *See The Papillon Foundation; Benefits of Expungement* available on line at https://www.papillonfoundation.org/information/expungement-benefits.

b) <u>The Petitioner Has Not Been Compensated for the Decade Long Wrongful Incarceration.</u>

14. Whereas, Stephen J. Hood ("the Petitioner") was arrested on May 21, 2001 in the City of Colonial Heights and charged with First Degree Murder and Abduction; and

15. Whereas, on April 3rd and 4th, 2002, after pleading not guilty, the Petitioner was convicted of both charges and sentenced to 65 years; and

16. Whereas, the Petitioner was incarcerated from the time of his arrest on May 21, 2001 until he was released on April 14, 2011; and

17. Whereas, the Petitioner spent nearly a decade in maximum security prison for crimes he did not commit; and

18. Whereas, new evidence has been revealed which supports the Petitioner's innocence of these crimes; and

19. Whereas, based upon the Commonwealth's denial of the Petitioner's due process rights and a right to a fair trial, and upon the ineffective assistance of counsel rendered by the Petitioner's trial counsel by failing to properly object to the Commonwealth's violations; the Richmond Circuit Court entered an order on November 10, 2009, and again on May 21, 2010 vacating the Petitioner's convictions; and

20. Whereas, at the time of his arrest, the Petitioner had custody of his then 5-year-old daughter; and

21. Whereas, the Petitioner lost custody of his daughter and has lost, and continues to be devoid of, all positive relations with his daughter as a direct consequence of the wrongful convictions and incarceration; and

22. Whereas, at the time of his arrest, the Petitioner was employed as a corporate trainer for Ruby Tuesday Inc.; and

23. Whereas, the Petitioner has lost income, a promising career and the ability to participate in other pursuits during his nearly ten years of incarceration; and

24. Whereas, the Petitioner has also suffered severe physical, emotional and psychological damage as a result of this wrongful incarceration and has no other means to obtain adequate relief except by prevailing in the instant action, both expungement of the Petitioner's criminal record and compensatory relief is appropriate. (*See* Va. Code § 8.01-195.11 Compensation for wrongful incarceration. *See also* Va. Code § 8.01-195.13. Compensation for certain intentional acts. *See also, e.g., Chapter 746 An Act for the relief of Jeffery D. Cox (2002))*.

25. To be clear, the post-*habeas* FOIA materials, *inter alia*, are what now constitute the basis for a Petition for Writ of Actual Innocence. And, relief under the writ is not precluded merely because the *habeas* court was empowered to, and did, afford the Petitioner one of the several forms of relief the Petitioner is entitled to under The Petition for Writ of Actual Innocence Based on Nonbiological Evidence. *See* Virginia Code § 19.2-327.10, *et seq*.

c) The Alford Plea On April 14, 2011 To A "New Charge" For A "Different Felony" Does Not Preclude The Petitioner From Relief.

26. The Petitioner seeks a Writ of Actual Innocence as to two charges to which he pleaded Not Guilty, namely, murder in violation of Va. Code § 18.2-32, and abduction in violation of Va. Code § 18.2-47.

27. After a bench trial, the Petitioner was convicted of murder as a principal in the second degree (§§ 18.2-32; 18.2-18) and misdemeanor abduction as an accessory after the fact (§§ 18.2-47; 18.2-19).

28. After nearly a decade of legal challenges to his convictions, the circuit court granted the Petitioner's *habeas* petition as to both convictions and, at a hearing on April 14, 2011, released him from incarceration. Pet. Ex. 129 4/14/11 Release Hearing tr.

29. The Petitioner notes that at the Release Hearing, Richmond Circuit Court Judge Cavedo and Commonwealth's Attorney Herring confirmed that the court had months earlier granted the Petitioner's *habeas* petition and vacated his convictions for murder as a principal in the second degree, and misdemeanor abduction as an accessory after-the-fact. Pet. Ex. 129, at 3.

30. Regarding the alleged abduction, the Petitioner was tried for a felony abduction, but, on the facts of the case, was convicted of a misdemeanor abduction as an accessory after-the-fact.

31. Yet, at the Release Hearing, the Petitioner was compelled to enter an Alford plea to felony attempted abduction in exchange for his immediate release from wrongful imprisonment. *See* Pet. Ex. 130, the Alford Agreement; and Pet. Ex. 131, the Amended Indictment, and Pet. Ex. 129.

32. Thus, the Petitioner, pursuant to a plea agreement, entered an Alford plea to felony attempted abduction (Va. Code § 18.2-49(1)) whereby the Petitioner steadfastly maintained his actual and factual innocence but, given the wrongful prosecution and imprisonment to which the Commonwealth had already subjected him, acknowledged that the Commonwealth likely could

again successfully, wrongfully, prosecute him.[3] *See* Pet. Ex. 130*, and Alford v. North Carolina*, 400 U.S. 25 (1970). *See also Parson v. Carroll*, 272 Va. 560, 565-566 (2006).

33. This new and different charge, attempted abduction (§ 18.2-49(1)), does not preclude the instant Petition for a Writ of Actual Innocence.

34. At the Release Hearing, the court and Commonwealth made clear the new charge of a different felony, attempted abduction (§ 18.2-49(1)), was precisely that — a "new charge" and a "different felony" — distinct from the charges and convictions at issue here, where the court stated to the Petitioner that he was "here because of a *new charge*," and the Commonwealth informed the court and the Petitioner that the Commonwealth was "*exercising its discretion to not retry Mr. Hood on the original matters; rather . . . would move to amend 01F-2201 [murder indictment] to a different felony* pursuant to a plea agreement." Pet. Ex. 129, at 2-3 (emphasis added).

35. It must be noted that presenting the new charge involved unprecedented legal machinations where, at the April 14, 2011, Release Hearing, Commonwealth's Attorney Herring, on his own, first verbally amended a 10-year-old multijurisdictional grand jury murder indictment (May 17, 2001), post-conviction (September 13, 2002), related to a 20-year-old murder (August 31, 1990), to present a felony charge of attempted abduction after the Petitioner

[3] Though at the time the Petitioner was compelled to enter the Alford plea he did possess the voluminous exculpatory FOIA documents detailing the extensive prosecutorial and investigative malfeasance that resulted in his wrongful convictions and upon which the instant writ largely is based, the Petitioner represents that his unsuccessful *pro se* efforts to enter such documents into the court record for consideration by the court before the Release Hearing of April 14, 2011, further induced Hood to enter an Alford plea rather than plead Not Guilty. *See Hood v. Johnson, CL06-2311*, Plenary Hearing tr. 7/9/2009 at pg. 4-11. *See also Hood v. Johnson*, CL06-2311 March 10, 2011 Memorandum of Judge Cavedo at pg. 3. Moreover, the Petitioner, a man innocent of any crime, had at the time of his Alford plea already languished in prison for nearly ten years. Rejecting the plea likely would have meant pretrial detention tantamount to years of additional wrongful imprisonment.

was, effectively, acquitted of felony abduction (when the trial Judge could only find Hood guilty of misdemeanor abduction as an accessory after the fact). *See Green v. United States*, 355 U.S. 184, 190 (1957) (The Petitioner "was in direct peril of being convicted and punished for [felony abduction] at his first trial. He was forced to run the gantlet once on that charge and the [judge] refused to convict him. When given the choice between finding him guilty of either [felony abduction] or [misdemeanor accessory after the fact] it chose the latter. In this situation the great majority of cases in this country have regarded the j[udge]'s verdict as an implicit acquittal on the charge of [felony abduction]" *Id*. at 190). Under the *Green* decision, jeopardy attached because the trial implicitly acquitted the Petitioner of felony abduction.

36. Then, the Commonwealth imbedded within the plea agreement provisions to prohibit the Petitioner from later seeking justice regarding the alleged attempted abduction, including, but not limited to, provisions whereby the Petitioner had to "expressly waive[] double jeopardy and claims of estoppel", as well as waivers of various other constitutional and common law rights. Pet. Ex. 130.

Conclusion

WHEREFORE, based on the facts and the authorities cited herein it is clear that the Petitioner may proceed, and must prevail, on his Petition for a Writ of Actual Innocence.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS AND REQUIREMENTS OF VIRGINIA CODE § 19.2-327.11 A. (i)(ii)

1. The Petitioner (Stephen James Hood), is actually and factually innocent of any involvement with the crimes for which the Petitioner was unjustly charged, tried, convicted, and wrongfully incarcerated for nearly a decade. The Petitioner was indicted on May 17, 2001, in Richmond City Circuit Court for the August 31, 1990, murder and abduction of Ilouise Cooper,

and was arrested on May 21, 2001. *See Commonwealth v. Hood*, F-01-2201, F-01-2202 (CR01-F2201, CR01-F2202) (2001-2002). *See* Appendix, *infra.*

2. On April 3rd and 4th, 2002, the Petitioner appeared before the Honorable Margaret P. Spencer, in the Circuit Court of the City of Richmond, on the charges of murder in the first degree F-01-2201 (CR01-F2201) in violation of Va. Code § 18.2-32; and abduction F-01-2202 (CR01-F2202) in violation of Va. Code § 18.2-47. The Petitioner entered a plea of not guilty on both charges. The case was tried before the court without a jury. Evidence was presented, testimony was heard and argument was made.

3. The trial court found the Petitioner guilty of murder in the first degree as a principal in the second degree (Va. Code §§ 18.2-32, 18.2-18); and abduction as an accessory after the fact, (Virginia Code §§ 18.2-47, 18.2-19) *Commonwealth v. Hood*, F-01-2201, F-01-2202 (CR01-F2201, CR01-F2202) (2001). On September 13, 2002, the Petitioner was sentenced to 65 years. *See* Appendix, *infra.*

4. The Court of Appeals of Virginia granted an appeal on March 26, 2003, and heard oral argument on December 3, 2003. On February 17, 2004, that Court in a divided decision (Judge Benton dissenting) rendered its opinion affirming the Petitioner's conviction. *Hood v. Commonwealth*, Record No. 2469-02-2 (unpublished opinion) (Hood v. Commonwealth, Va. App. Lexis 82 (Ct. App. Feb. 17, 2004)). The Petition for Rehearing and the Petition for Rehearing *En Banc* were denied on March 10, 2004. *See* Appendix, *infra.*

5. The Supreme Court of Virginia granted an appeal on August 31, 2004, and heard oral argument on January 13, 2005. On March 3, 2005, that Court rendered its opinion affirming the Petitioner's conviction. *Hood v. Commonwealth*, 269 Va. 176, 608 S.E.2d 913 (2005). On April 29, 2005, the Petition for Rehearing was denied. On Motion of the Petitioner the Supreme Court

of Virginia issued an order on June 10, 2005, deferring the issuance of its mandate until the final determination of the case in the Supreme Court of the United States. *See* Appendix, *infra*.

6. The Supreme Court of the United States denied the Petition for Writ of *Certiorari* on October 3, 2005. *Hood v. Virginia*, 546 U.S. 910, 126 S. Ct. 267 (2005). On January 9, 2006, the Petition for Rehearing was denied. *Hood v. Virginia*, 546 U.S. 1133, 126 S. Ct. 1125, 163 L. Ed. 2d 937, 2006 U.S. LEXIS 306 (U.S., Jan. 9, 2006).

7. On March, 24, 2006, the Petitioner filed a Petition for Writ of *Habeas Corpus*, *pro se*. *See Hood v. Johnson*, CL06-2311, Judge Cavedo, presiding.

8. The writ of *habeas corpus* was eventually granted and the convictions vacated on November 10, 2009, and again on May 21, 2010, with the final judicial action relevant to post-conviction relief taking place on March 11, 2011, when the Court denied the Commonwealth's Petition for Rehearing. The Petitioner was not released from custody until April 14, 2011. See *Johnson v Hood*, Record No. 101597. *See* Appendix, *infra.*

9. The *habeas* court ruled that the Commonwealth violated the Petitioner's right to due process and a fair trial stating,

<u>CLAIM L.</u>

> Hood had [a] right to due process and a fair trial. Hood was denied that right, in part, by the Commonwealth offering the proffer statement as evidence-in-chief in violation of the terms of the agreement, which limited the use of the statement to impeachment, cross examination and rebuttal should its terms be violated. The trial judge ruled that the agreement's terms were violated by Hood's attorney's questions. Then the Commonwealth itself violated the agreement's terms by putting the statement in as part of its case-in-chief, without objection from Hood's attorneys. In so doing, the prosecution violated Hood's Constitutional right to a fair trial because the evidence used to convict Hood as a principal in the second degree became evidence in the case-in-chief against him in violation of its own agreement with Hood not to use the statement in that manner.

Hood v. Johnson, CL06-2311 November 10, 2009, Memorandum of Judge Cavedo at pg.11.

10. The *habeas* court also ruled that without the statements made by the Petitioner in connection with the proffer agreement, there was no other evidence that could support the Commonwealth's case against Hood for murder as a principal in the second degree stating,

Claim M.

> Hood was clearly convicted on the evidence of his statements contained in his proffer read into evidence by the Commonwealth as part of its case-in-chief. The only evidence at trial showing Hood's principal in the second-degree participation in the murder was his own statement, which was presented without objection as evidence in the case-in-chief against him, in violation of the proffer agreement's terms…. Hood could not have been convicted of murder as a principal in the second degree without the proffer statement becoming part of the Commonwealth's case-in-chief. There was no other evidence to support the principal in the second-degree theory.

Id. at pg.10. *See* Appendix, *infra.*

11. On April 14, 2011, a hearing was held before the Honorable Judge Cavedo. *See* Pet. Ex 129, Release Hearing Transcript, 4/14/2011. The purpose of the hearing was to decide the disposition of the charges against the Petitioner which were vacated by the *habeas* court. *See* *Hood v. Johnson*, CL06-2311. The Judge stated for the record:

> [W]e're here today on the civil case of Mr. Hood versus Gene Johnson, the Director of the Department of Corrections, his petition for a writ of habeas corpus which was granted in the November '09 time frame, and then there was a reconsideration which was denied I think in early 2010 which was then appealed by the Attorney General, and the request for a writ of appeal was denied by the Supreme Court this year. So the writ is now before the Court, and you are here because of a ***new charge*** that is coming or -- why don't you explain where we are in terms of the criminal side of the case.

Pet. Ex 129 Release Hearing Tr. April 14, 2011, at pages 2-3 (emphasis added)

13. Commonwealth's Attorney stated for the record; the position of the Commonwealth:

> Sir, I guess we are here on the civil — we are here concluding the civil habeas matter. We are also, though, here for the matter of Commonwealth versus Steven Hood. The case number — there are two case numbers, 01F-2201 and 01F-2202. And we're here on these two criminal matters because in granting Mr. Hood's habeas petition, the Court has effectively vacated the original sentences that he

> received in connection with the trial of the two cited indictments. ***The Commonwealth is exercising its discretion to not retry Mr. Hood on the original matters; rather***, **I'm amending Indictment No. 01F – I would move to amend 01F-2201 to a *different felony*** pursuant to a plea agreement that the parties would like to tender to the Court for your consideration.

Id. at page 3 (emphasis added).

14. The murder indictment (F-01-2201 (CR01-F2201)) was allowed to be amended to a "**new charge"** and a **"different felony"** of attempt to abduct in violation Va. Code § 18.2-49(1). *Id*. The Petitioner entered an Alford plea to the new charge. *See* Pet. Ex. 130, The Alford Agreement (4/14/11). *See also Alford v, North Carolina*, 400 U.S. 25 (1970). In so doing, the Petitioner maintained his innocence of the **new crime** charged in the **new indictment**; attempt to abduct. *See e.g*., *Parson v. Carroll*, 272 Va. 560, 565 (2006) ("At the time Parson entered his Alford pleas…Parson assumed a position of law, not a position of fact. He conceded only that the evidence was sufficient to convict him of the offenses and did not admit as a factual matter that he had participated in the acts constituting the crimes.")

15. On November 30, 2011, the Petitioner, through counsel, moved the circuit court to rule that "the judgment rendered against Hood in CR01-F02202-00 [the charge of abduction] was *void ab initio* and the associated fines and costs should be vacated."

16. Pursuant to the Petitioner's November 30, 2011, motion; on December 14, 2011, the circuit court entered an Order again dismissing the criminal charge of abduction found in CR01-F2202; "On Commonwealth's motion to dismiss the charge, the Court grants the motion." *Id.* Additionally, the court ordered, "that any fine and cost assessed against the defendant for this charge be zeroed out and any fines and costs previously paid by the Defendant for this charge be refunded to the defendant [] and to preserve evidence." *Id*. *See* Appendix, *infra*.

Requirements of Virginia Code § 19.2-327.11 A. (iii) - (viii)

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

STATEMENT OF FACTS THAT EXPLAINS THE PREVIOUSLY UNKNOWN OR UNAVAILABLE EVIDENCE

17. The newly obtained evidence presented to this court is material and, when considered with all of the other evidence in the current record will prove by a preponderance of the evidence that no rational trier of fact would have found proof of guilt beyond a reasonable doubt. Accordingly, the newly obtained evidence is not merely cumulative, corroborative or collateral.

18. Moreover, this Petition, and the supporting evidence which was previously unavailable, will clearly demonstrate that the Commonwealth and its agents “intentionally and wrongfully fabricated evidence that was used to obtain the wrongful conviction” of the Petitioner while also “intentionally, willfully, and continuously suppressed or withheld evidence establishing the innocence of” the Petitioner. Va. Code § 8.01-195.13.

The Federal Freedom Of Information Act Request

19. On June 22, 2006, the Petitioner filed with the Federal Bureau of Investigation ("FBI") a Freedom of Information Act Request pursuant to 5 U.S.C. § 552 ("FOIA"). *See* Pet. Ex. 113. Specifically, the Petitioner requested any and all records and/or information relating to: "The abduction and murder of Ilouise Cooper on August 30, 1990, in the City of Richmond Virginia." Pet. Ex. 113.

20. On March 14, 2007, the DOJ/FBI verified that they "located approximately **5,324** pages which are potentially responsive to [the] request" designated by the government as "Request No.: 1051873-000 Subject: Murder of Ilouise Cooper." Pet. Ex 117 (emphasis added).

21. On May 29, 2007, the Petitioner received the first of five volumes of documents pursuant to the Freedom of Information Act request ("FOIA Vol. I."). Over time, the Petitioner received four more volumes of documents from DOJ/FBI, i.e.: "FOIA Vol. II." on August 22, 2007; "FOIA Vol. III." on January 29, 2008; "FOIA Vol. IV." on April 30, 2008; and the last one on May 09, 2008 ("FOIA Vol. V.") when the DOJ/FBI sent a fifth interim volume of documents designated "Subject: MURDER OF ILOUISE COOPER; FOIPA No. 1051873-000." In this interim release "428 page(s) were reviewed and 51 page(s) are being released." Pet. Ex. 132

22. Additionally, on November 8, 2007, the Department of Treasury, Financial Crimes Enforcement Network ("FinCEN") sent 36 pages of the 59 pages of documents that originated from, or contained information concerning FinCEN pursuant to the FOIA request which the DOJ/FBI forwarded to them for review.

23. Importantly, with regard to Va. Code § 8.01-195.13, every document within FOIA Vol. I., FOIA Vol. II., FOIA Vol. III., FOIA Vol. IV., FOIA Vol. V., and FinCEN Vol. I. concerns the government's investigation of the murder of Ilouise Cooper. Moreover, by the government's own admission, the documents were derived from the government's investigative file of the "murder

of Ilouise Cooper." Pet. Exs. 113 through 125 and 132. Accordingly, all of the FOIA documents are germane and material to the underlying case, and to the claims raised in the present Petition for Writ of Actual Innocence. *See* Pet. Exs. 113 through 125 and 132, and FOIA Vol. I., FOIA Vol. II., FOIA Vol. III., FOIA Vol. IV., FOIA Vol. V.

The New Testing of the Physical Evidence

24. On December 31, 2007, the Petitioner, through counsel filed a *Motion to Inspect Evidence* seeking a Court order to provide counsel with the ability to photograph and measure the evidence in the custody of the Clerk's Office. The newly discovered and previously unavailable evidence found in FOIA Vol. I., and FOIA Vol. II., which the Commonwealth had for years unlawfully suppressed, demanded that new testing of the physical evidence be performed. The Petitioner did not file said Motion to Inspect before trial because he could not use the evidence of innocence resulting therefrom without violating the Cooperation/Immunity Agreement where the Agreement prohibited Petitioner from presenting at trial any evidence of his innocence. *See* Pet. Ex. 86. Notably, because the Commonwealth lacked any independent evidence of the Petitioner's guilt, the Commonwealth itself violated its Agreement in order to introduce false evidence to convict.

25. On February 21, 2008, a hearing was held on the Petitioner's Motion, and the Court entered an ORDER allowing counsel to inspect and photograph the evidence.

26. On February 26, 2008, counsel for the Petitioner photographed the physical evidence introduced at trial while measuring, with scientific accuracy, the physical evidence introduced in the underlying case, i.e., the knives and sheath. The photographs demonstrate those accurate

measurements of the physical evidence which the new testing[4] provided. *See* Pet Exs. 1, 23, 28, 37, 38, 43, 46, 47, 50, 54, 55, 59, 60, 93, 94, 99, 100 -110, FOIA Vol. I., at 174-175, 334, 339-340; FOIA Vol. II., at 125, 132, 154, 217-218. *See also Hood v. Johnson*, CL06-2311 *Habeas* Claims G., H., J., K., B.B., C.C., D.D, F.F., and E.E., *supra.*

27. The fact that the sheath was only capable of carrying, and in fact did only carry, a 10-inch knife, a serrated knife, and a small paring knife was revealed to the government agents during several investigative interviews of certain individuals. However, those interview statements, which were exculpatory and of impeachment value, were never disclosed to the Petitioner or his trial counsel. For example, on 9/29/1999, the original notes of one of those interviews by government agents in pertinent part state, "[the Petitioner] had a sheath that had three (3) knives 10 [inch knife], 8 [inch knife] brad [sic] serrated [knife] and 2-inch paring [knife]." FOIA Vol. II., at 125 (a)-(b) *see also* Pet. Ex. 94. The original notes of another interview by the government likewise state that "Steve had a sheath held Chef's knife, serrated knife, and paring knife. [The Petitioner] always had three (3) knife sheath at work." FOIA Vol. II., at 132 *see also* Pet. Ex. 94. Likewise, a later interview states that the only knives ever contained in the sheath were a "bread, chef, [and] paring ... small chef, large chef, bread/serrated knife." FOIA Vol. II., at 154.

28. The independent corroboration of the physical limitations of the sheath, and the only knives the Petitioner carried in the sheath were never disclosed to defense counsel or the

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[4] Measurement is often considered a hallmark of the scientific enterprise and a privileged source of knowledge relative to qualitative modes of inquiry. Sir William Thomson, 1st Baron Kelvin famously stated that, "when you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind: it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced to the stage of science, ***whatever the matter may be***." (Thomson 1889, 73-74, Lecture to the Institute of Civil Engineers, May 3, 1883). (Emphasis added.)

Petitioner. The identity of the independent witnesses who corroborated the truth of the physical evidence was never disclosed to defense counsel or the Petitioner. The newly-discovered evidence which "was previously unknown or unavailable to the Petitioner or his trial attorney of record at the time the conviction became final" contained within the FOIA documents necessitated the new scientific testing of the physical evidence in this case. § 19.2-327.11.

The Order Entered On 12/7/2001 By the Colonial Heights Circuit Court Sealing Certain Vital Documents, and the Affidavit in Support of the Search Warrant Issued Under Seal

29. On April 2, 2008, the Petitioner, through counsel, filed with the Circuit Court for the City of Colonial Heights a *Motion to Unseal Affidavit*. The affidavit to which this motion referred was the affidavit submitted on December 6, 2001, by Richmond Police Detective George B. Wade in support of a search warrant issued on December 6, 2001. *See* Pet. Ex. 43, 45, 46, and 111. Pursuant to Virginia Code Section 19.2-54, the affidavit was placed under seal on December 7, 2001, by Order of the Colonial Heights Circuit Court after an *ex parte* hearing by the Special Commonwealth's Attorney Robert Trono. *See* Pet. Ex. 111.

30. On May 5, 2008, a hearing was held regarding the *Motion to Unseal Affidavit*, and the motion to unseal was granted. *See* Case No. CM08-60. On May 19, 2008, the Judge entered an Order directing that the affidavit be unsealed and the Clerk was directed to send a certified copy of the Order, as well as the unsealed affidavit, to party counsel. The Petitioner was provided a copy of the unsealed affidavit on June 5, 2008. *See* Pet. Ex. 111-112 (a) and (b).

PREAMBLE

State Prosecutors, Police, And FBI Agents (collectively, "Agents") Did Wrongly Prosecute, Convict, And Then Incarcerate Stephen Hood For 10 Years While the Agents Knew Hood Was Actually Innocent of Any Involvement In Those Crimes.

The Prosecutors: **Roderick C. Young**, (Asst. Com. Atty.) **Robert E. Trono**, (Asst. U.S. Atty., acting as a Special Asst. Com. Atty.);

1. Knew Hood was innocent from the beginning.[5]

2. Knew it was impossible for Hood's knives and/or sheath to be the ones used, but attempted to present, and in fact did present evidence to the contrary.[6]

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[5] 1) The agents knew that Hood had an alibi. *See* FOIA Vol. I., at p. 174-175; and FOIA Vol. IV., p. 493. The agents' knowledge of Hood's alibi was further corroborated under oath by a witness (an attorney) in the Cox *habeas* hearing. More importantly, this witness testified that Hood's alibi was verified before the trial of Cox, and that two private investigators hired by Cox investigated and confirmed the fact that the Petitioner had an alibi "after the fact" and thus, "eliminated Hood as a suspect." FOIA Vol. IV., at 483. *See* Black's Law Dictionary, Abridged 6th ed (1991) ("Alibi: A defense that places the defendant at the relevant time of the crime[s] in a different place than that of the scene involved and *so removed therefrom as to render it impossible for him to be the guilty party*.") (Emphasis added.)
2) The agents knew that the driver of the car involved in these crimes had blond hair. Pet Ex. 1, at p. 85.
3) The agents knew Hood was not identified by the eyewitnesses at a police arranged identification procedure, during which Hood is specifically described as having brown hair. The Commonwealth fabricated a cocaine distribution charge as their method for a police-arranged identification procedure. FOIA Vol. IV., at p. 168.
4) The agents knew that the motive for the crime can never happen after the crime. It is incredible to believe that a crime would be committed in order to retaliate for an event that has yet to occur. *See infra*, Claim A. III (a)(i).
5) The agents knew of the eyewitnesses' positive identification of Cox as the murderer, and that those eyewitnesses have never recanted their positive identification of Cox as the knife wielding culprit. *See infra*, Claim A. III (a)(b).
6) The agents knew that Hood's proffer statement was false. Pet. Ex. 37 (Fax transmission from FBI Agent Messing) *See* Pet. Ex. 46 (Goodwin's Letter) and Pet. Ex. 47 (Goodwin's Motion to Withdraw).
7) *See* FOIA Vol. I., at p 120 (Cox's ID. Never recanted).
8) Claim A., and B, *infra.*

[6] 1) *See* Pet. Ex. 1, at 79 (*cf.* Pet. Ex. 101, Com. Ex. 7).
2) *See* Pet. Ex. 94 (302 of James Corbin).
3) *See* Claim A. II (a), *infra*.
4) *See* Claim A. III (a)(ii)(c), *infra*.
5) *See* FOIA Vol. II., at 217-218.
6) *See* FOIA Vol. II., at 119, 125, 132, 154, 220, 125, 336, 338-340.
7) *See* Pet. Ex. 81, 110, and DFS Item # 100.
8) *See* Pet. Ex. 101, Com. Ex. 7, Pet. Ex. 107, Com. Ex. 11, Pet. Ex. 108, Pet. Ex. 106, 107, 101, and Pet. Ex. 59, 60, 110, and FOIA Vol. II., at pp 119, 125, 132, 154, 199.

3. Instructed FBI Sp. Agent Paul Messing to commit perjury, or at least suborned perjury and remained silent as Messing testified as to the content of the proffer statements, and thereby provided false evidence during trial.[7]

4. Instructed Rich. Pol. Det. George B. Wade to commit perjury, or at least, suborned perjury and remained silent as Wade testified falsely before Magistrate Darryl K. Sheley, in Colonial Heights Circuit Court building.[8]

5. Instructed or allowed Wade and Messing to violate the command to provide an inventory of items seized pursuant to a search warrant.[9]

6. Knew the proffer statement was false, but presented them as evidence anyway through FBI Agent Messing.[10]

7. Violated Hood's Due Process Rights under *Brady*.[11]

8. Violated Hood's Due Process rights by the knowing use of false testimony/evidence.[12]

9. Violated Hood's Due Process rights as an innocent man by excessive pre-indictment delay.[13]

10. Violated Hood's Due Process rights when they knowingly violated Rule 3A:8(c)(5) of the Rules of the Virginia Supreme Court, and more importantly, the government's own contractual

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[7] *See* Claim A. II(a), *infra*; Trial transcript, at pp 271-279.
[8] *See* Claim A. II(b), *infra*; (CD recordings listed in FOIA Vol. I, p 339-340 ~ FOIA Vol. III., p 579-586, Pet. Ex. 128) *see also Romer-Diaz v. Com*., 2010 Va. App. Lexis 180; *See also* Rule 3A:11. Discovery and Inspection.
[9] *See* Pet. Ex. 43, *but cf*. FOIA Vol. I., p 334. FOIA Vol. III., p 127, Claim A. II(b)(iv), *infra*; Pet. Ex. 111, 112, and 43; FOIA Vol. I., 339-340, and FOIA Vol. III., 579-586.
[10] *See* Claim A. III, *infra*, Claim B. IV(c), *infra.*
[11] *See* Claim B., *infra.*
[12] *See Hood v. Johnson*, CL06-2311; Claim J.; Claim B. IV.(a), B. IV(b), B. IV(c), B. IV(d), B. IV(e), B. IV(i), *infra.*
[13] *See* Claim B. IV.(a), *infra*. *See also Hood v. Johnson*, CL06-2311 Claim C.

agreement not to introduce the proffer statements as evidence in the Commonwealth's case-in-chief.[14]

11. Trono argued that which he knew to be false, that which was without evidence adduced at trial to support it, and in fact, that which was wholly contravened by the record.[15]

12. Trono committed fraud upon the Court when the Court of Appeals relied upon Trono's false statements of material fact.[16]

13. Young violated Hood's Due Process rights when Young breached the cooperation/immunity agreement in his opening statements and by the testimony Young adduced from several witnesses regarding a certain Forschner knife (which was never shown to be owned by Hood), when the immunized statements were the sole source of that information.[17]

14. Instructed FBI Agent B. Frank Stokes to commit perjury, or at least, suborned perjury and remained silent as Stokes committed perjury.[18]

15. Violated the demands of Virginia Code § 19.2-215.9 by intentionally failing to ensure the presence of a court reporter for the multi-jurisdictional grand jury which was used to indict Hood.[19]

> A. A court reporter shall be provided for a multi-jurisdiction grand jury to record, manually or electronically, and transcribe all oral testimony taken before a multi-jurisdiction grand jury.
> ….
> After a person has been indicted by a grand jury, the attorney for the Commonwealth shall notify such person that the multi-jurisdiction grand jury was used to obtain evidence for a prosecution. Upon motion to the presiding judge by

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[14] *See Hood v. Johnson*, CL06-2311, Claim L., *Hood v. Johnson*, CL06-2311, Memorandum Opinion, Judge Cavedo, Richmond Circuit Court; Justice Lacey, Supreme Court of Virginia, *Hood v. Com*., 269 Va. 176 n.2 608 S.E.2d 913, 915 n.2 (2005); *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986); *Santobello v. New York*, 404 U.S. 257 (1971); *Mabry v. Johnson*, 467 U.S. 504 (1984).
[15] *See Hood v. Johnson*, CL06-2311, Claim R.; Claim B. IV.(a), *infra*, p 97, 102-103.
[16] *See Hood v. Johnson*, CL06-2311, Claim V.; *See* Appendix, Court of Appeals, Commonwealth's Brief in Opposition
[17] *See Hood v. Johnson*, CL06-2311, Claim B.B.
[18] *See* Claim B. IV.(a), *infra*.
[19] *See Hood v. Johnson*, CL06-2311, Claim C., D., E., J., K., D.D., and E.E. *See also* Claim A., and Claim B., *infra*.

> a person indicted by a multi-jurisdiction grand jury or by a person being prosecuted with evidence presented to a multi-jurisdiction grand jury, similar permission to review, note, or duplicate evidence shall be extended."

§ 19.2-215.9

FBI Special Agent Paul Messing:

1. Messing provided testimony he knew was erroneous at trial; Messing knew the proffer statement was false, yet Messing testified as to the content of the proffer statement as though the proffer statement was true, as evidence in the Commonwealth's case-in-case. Thus, Messing knowingly created a false impression of material fact when the truth would have directly impugned the Commonwealth's (prosecution's) case. The knowing use of false evidence is a violation of Hood's Civil and Constitutional Rights, because Messing created a false impression of material fact which he knew was not true while intentionally prosecuting and wrongfully convicting an innocent man.[20]

FBI Agent B. Frank Stokes:

1. Committed perjury.[21]

Richmond Detective George B. Wade

1. Committed perjury.[22]

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[20] *See* Claim A. II (a), *infra*. *See e.g., Hameric v. Bailey*, 386 F.2d 390 (4th Cir. 1967), *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340 (1935), *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103 (1957), *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959), *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785 (1967), and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972).
[21] *See* Claim B. IV.(a), *infra*.
[22] See Claim A., II.(b)(iii), *infra*.

Background: False Proffer Statements

1. In 1990, Police, aided by eyewitnesses, determined that Jeffrey Cox ("Cox") abducted and murdered Ilouise Cooper; crimes for which a jury convicted Cox in 1991. Cox was found guilty of all charges related to these crimes and sentenced to a term of incarceration for life plus 50 years.

2. The Petitioner was indicted on May 17, 2001, in Richmond City Circuit Court for the August 31, 1990 abduction and murder of Ilouise Cooper; the very same crimes, against the very same victim for which Cox was convicted in 1991.

3. The Petitioner retained attorney Steven D. Goodwin ("Goodwin") to defend the Petitioner against those charges. However, the Petitioner did not know, and Goodwin failed to inform the Petitioner, that Goodwin was the former law partner and close friend of Steven Benjamin ("Benjamin"). *See* e.g., *United States v. Rahman*, 83 F.3d 89 (4th Cir. 1996) ("Counsel: argued: Steven Dwain Goodwin, Steven D. Benjamin & Associates, Richmond, Virginia, for Appellant"). Benjamin was, at that time, the attorney of record in Cox's state *habeas corpus* proceedings attacking Cox's 1991 convictions for murder and abduction. Benjamin's and Cox's theory for relief was that a Billy Madison ("Madison") was the actual murderer[23].

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[23] Madison was a known criminal accomplice of Cox at the time of the crimes against Mrs. Cooper. Madison's criminal file in Charlottesville reveals Madison had three (3) grand larceny charges which were the result of Madison and Cox, together, stealing car stereo equipment. *See* Charlottesville case number C89-5111 thru 5113.

Madison was arrested on 12/6/89. Madison signed a confession implicating himself and "Jeff Cox." Madison plead guilty to each of the three (3) charges on 4/27/90, and on 9/7/90 was sentenced to a year on each. Thus, Madison and Cox knew, on the day Mrs. Cooper was abducted and murdered, that Madison soon would be sentenced and imprisoned for the other crimes Madison and Cox committed. The signed waiver and written confession provided by Madison on December 6, 1989 states,

> **I realize I committed a crime but I am not the only one at fault.**
> ….

4. Petitioner steadfastly maintained his innocence to Goodwin and expressed to him that the Petitioner's overarching concern was the best interests of his young daughter for whom he had sole custody. Goodwin, however, insisted that the Petitioner's lack of financial resources with which to fight his criminal charges likely would result in a life sentence — unless the Petitioner agreed to falsely implicate Madison as the murderer. Moreover, Goodwin assured the Petitioner that the government already believed that Madison was the murderer.

5. Goodwin advised the Petitioner that his best hope was to enter into a cooperation/immunity agreement ("proffer agreement") with the Commonwealth, and implicate Madison as the murderer. Based on Goodwin's counsel and fear of a life sentence, the Petitioner signed the proffer agreement and made the false statements, all concocted by Goodwin, about the facts and circumstances surrounding the abduction and murder during three proffer sessions. The false statements implicated Madison as the killer, and Hood as the unwitting driver of the assailant's vehicle.

6. Goodwin advised the Petitioner to make these false statements in order to get a plea bargain that would avoid prosecution for murder in the first degree and felony abduction, and would provide for the Petitioner to be released by that Thanksgiving (2001), if he would testify

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> About a month **me and Jeff Cox hit and stole 4-5 radio and the radios were mostly VW stock radios, and Alpine radios. We then went across the road to another perking** [sic] **lot & hit a VW-GTI.** Also me and David about a month ago, we hit 3-4 radios, again mostly VW model radios. Also me and David hit a park lot near UVA here we went into 2 cab. And also tonight we hit 3 cars.
> ….
>
> **The first time me and Jeff went we split them up. I sold my half as far as I know he still got his.** Also when me and David went we split them up I sold mine for about $45.00 a piece. David still has his they were mostly Alpine, Sony, Sanyo, Kenwood. I can't remember exactly what car they came out.

falsely against Madison. Petitioner agreed, but later found himself unable, in good conscience, to testify falsely against Madison.

7. Because the Petitioner refused to follow through with Goodwin's plan to testify falsely, the promised plea agreement for the Petitioner to plead guilty to two misdemeanors and be released never materialized.

8. On November 14, 2001, based solely upon the false proffer statements, the government released Cox and vacated his convictions.

9. On December 7, 2001, the government executed a search warrant for "violations of Virginia Code Section 18.2-460, Obstruction of Justice of the murder trial of Stephen Hood." Pet. Ex. 43. The residence that was the focus of the search warrant was to be the home of the Petitioner and his then fiancé, Louise Branson.

10. In support of the December 7, 2001, search, the recently unsealed affidavit of Richmond Det. George B. Wade revealed that the basis of the search warrant was that,

> Between the dates of November 7th, 2001, and December 5th, 2001 recorded telephone conversations between Stephen James Hood, an inmate at the Henrico County Jail, and Louise Branson were intercepted and reviewed by the affiant. Review of the conversations revealed that Louise Branson is presently utilizing her computer systems located at her residence to process and transcribe hand written notes from Stephen Hood.

Pet. Ex. 112 (b), *see also* FOIA Vol. I., p. 339.

12. The government made eight CD "copies [] of numerous telephone calls made by Stephen James Hood to [Louise Branson] between November 7, 2001, and January 4, 2002." FOIA Vol. I., p. 339. During those phone calls the Petitioner and Ms. Branson discussed in detail the proffer agreement and the false statements facilitated by Goodwin given to the government in the course of the proffer sessions.

13. Pursuant to the search warrant, the government obtained evidence demonstrating that the Proffer Statements were false, and that Goodwin concocted and facilitated those false statements. *See e.g*., *inter alia*, volumes of "handwritten letters, copies of letters and related items" to Louise Branson from the Petitioner. FOIA Vol. III., at 127 (dated 12/13/2001) *see also* FOIA Vol. I., at 334 (dated 12/7/2001 - transcribed 3/04/2002); Pet. Ex. 37 (the fax transmission from FBI S.A. Paul Messing to Goodwin and the prosecutor, Robert Trono).

14. Immediately after Goodwin received the fax transmission from FBI S.A. Messing implicating Goodwin in unlawful conduct, Goodwin retained the services of Murray Janus, Esq. to defend Goodwin of any criminal charges pursuant to the government's knowledge of his obstruction of justice, and moved to withdraw as Petitioner's defense counsel. *See* Hearing Transcript, *Commonwealth v. Hood* ("5/28/2002 M.H. tr.")

15. On December 19, 2001, unbeknownst to the Petitioner the trial judge, Margaret P. Spencer, granted Goodwin's motion to withdraw, leaving the Petitioner incarcerated and unrepresented by counsel.

16. Finally, on January 9, 2002, the court appointed David Lassiter, Esq. as new defense counsel, and on April 3rd and 4th, 2002, the Petitioner appeared before Judge Margaret P. Spencer, in the Circuit Court of the City of Richmond, on the charges of murder in the first degree and abduction. The Petitioner entered a plea of not guilty on both charges. The case was tried before the court without a jury.

17. The government breached the proffer agreement by entering the false Proffer Statement as part of the government's case-in-chief. Based solely on the inadmissible false Proffer Statements, the trial court found the Petitioner guilty. The Petitioner was sentenced to 65 years. *See* Appendix, *infra.*

18. A chronology of events demonstrates how Goodwin unethically and unlawfully created the false proffer statements and then encouraged the Petitioner to provide these false statements to the prosecutor during three proffer sessions. Pet. Ex. 25. *See also Hood v. Johnson*, Cl06-2311, Claim G., and Claim A. and B. of the instant Petition, *infra*.

IN THE COURT OF APPEALS

OF VIRGINIA

CASE NUMBER ____________

STEPHEN JAMES HOOD,

PETITIONER,

V.

THE COMMONWEALTH OF VIRGINIA,

RESPONDENT.

BRIEF IN SUPPORT OF A PETITION FOR WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE

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<u>CLAIM A.</u>

THE PETITIONER IS ACTUALLY INNOCENT OF THE CRIMES FOR WHICH THE PETITIONER WAS CONVICTED IN 2002, AND WAS WRONGFULLY IMPRISONED FOR NEARLY A DECADE AS AN INNOCENT MAN WHEN THE COMMONWEALTH AND ITS AGENTS KNOWINGLY USED FALSE TESTIMONY/ EVIDENCE TO CONVICT THE PETITIONER. *SEE COMMONWEALTH V. HOOD*, F-01-2201, F-01-2202 (CR01-F2201, CR01-F2202) (2001), *HOOD V. COMMONWEALTH*, 269 VA. 176, 608 S.E.2D 913 (2005) *CERT. DENIED*, 126 S. CT. 267 (OCT. 3, 2005), HOOD V. JOHNSON, CL06-2311 CIRCUIT COURT FOR THE CITY OF RICHMOND (2011).

<u>Controlling Statutes</u>

Virginia Code Section 19.2-327.11. Contents and form of the petition based on previously unknown or unavailable evidence of actual innocence.

> A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted or the offense for which the petitioner was adjudicated delinquent; (ii) that the petitioner is actually innocent of the crime for which he was convicted or the offense for which he was adjudicated delinquent; (iii) an exact description of (a) the previously unknown or unavailable evidence supporting the allegation of innocence or (b) the previously untested evidence and the scientific testing supporting the allegation of innocence; (iv) (a) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction or adjudication of delinquency became final in the circuit court or (b) if known, the reason that the evidence was not subject to scientific testing set forth in the petition; (v) the date (a) the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered or (b) the results of the scientific testing of previously untested evidence became known to the petitioner or any attorney of record; (vi) (a) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency by the circuit court or (b) that the testing procedure was not available at the time the conviction or adjudication of delinquency became final in the circuit court; (vii) that the previously unknown, unavailable, or untested evidence is material and, when considered with all of the other

evidence in the current record, will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and (viii) that the previously unknown, unavailable, or untested evidence is not merely cumulative, corroborative, or collateral. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to clause (iii) or (iv) of § 53.1-232.1 or to delay or stay any other appeals following conviction or adjudication of delinquency, or petitions to any court. Human biological evidence may not be used as the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing; shall be accompanied by all relevant documents, affidavits, and test results; and shall enumerate and include all relevant previous records, applications, petitions, and appeals and their dispositions. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court of Appeals may dismiss the petition or return the petition to the petitioner pending the completion of such form. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution of perjury as provided for in § 18.2-434.

C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served on the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General, or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice in which to file a response to the petition that may be extended for good cause shown; however, nothing shall prevent the Attorney General from filing an earlier response. The response 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.

D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of

> the respective court below, and have brought before the Court the whole record or any part of any record. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of previously unknown, unavailable, or untested evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.
>
> E. In any petition filed pursuant to this chapter that is not summarily dismissed, the petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 *et seq.*) and Article 4 (§ 19.2-163.3 *et seq.*) of Chapter 10. The Court of Appeals may, in its discretion, appoint counsel prior to deciding whether a petition should be summarily dismissed.

See also Va. Code § 8.01-195.10; § 8.01-195.11; § 8.01-195.13 §19.2-327.10; §19.2-327.12; §19.2-327.13., and Rule 5A:5(b) of the Rules of The Supreme Court of Virginia.

I. THE GOVERNMENT'S EVIDENCE AT THE INCEPTION OF THIS CASE WHICH PROVED THE FALSITY OF THE PROFFER STATEMENT, AND WHICH EXCLUDED THE PETITIONER FROM ANY INVOLVEMENT IN THESE CRIMES.

II. THE ADDITIONAL EVIDENCE RECENTLY UNCOVERED BY WAY OF A FEDERAL FREEDOM OF INFORMATION ACT REQUEST WHICH SUPPORTS THAT THE GOVERNMENT KNOWINGLY USED FALSE EVIDENCE WHEN IT USED THE FALSE PROFFER STATEMENT IN THE COMMONWEALTH'S CASE-IN-CHIEF AGAINST THE PETITIONER. THE COMMONWEALTH INTENTIONALLY AND WRONGFULLY FABRICATED EVIDENCE THAT WAS USED TO OBTAIN THE WRONGFUL CONVICTION OF THE PETITIONER WHILE INTENTIONALLY, WILLFULLY, AND CONTINUOUSLY SUPPRESSED OR WITHHELD EVIDENCE ESTABLISHING THE INNOCENCE OF THE PETITIONER.

III. THE CUMULATIVE REVIEW OF THE EVIDENCE POSSESSED BY THE

GOVERNMENT WHICH CONCLUSIVELY PROVES THAT THE PROFFER STATEMENT WAS FALSE, AND THE GOVERNMENT KNEW IT WAS FALSE WHEN FBI S.A. MESSING TESTIFIED AS TO THE SUBSTANCE OF THE PROFFER STATEMENT AS SUBSTANTIVE EVIDENCE IN THE COMMONWEALTH'S CASE-IN-CHIEF AGAINST THE PETITIONER, THEREBY ESTABLISHING THE PETITIONER'S INNOCENECE.

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1. At the time of trial, the government knew that the Petitioner's Proffer Statement was false. Therefore, when FBI S.A. Messing testified about the details of the Proffer Statements as substantive evidence in the Commonwealth's case-in-chief against the Petitioner the government knowingly used false evidence in violation of the Fifth, Sixth, and Fourteenth Amendments to the Constitution.

2. The Supplemental/Amended *Habeas* Claim D.D. (*Hood v. Johnson*, CL06-2311) served as an addendum to the Petitioner's *Habeas* Claim J. with significant emphasis on J.(a) which was, "held under advisement pending the outcome of the plenary hearing" (*Hood v. Johnson*, CL06-2311, opinion letter at, 9, 4/6/2007). However, Claim D.D. was somehow lost from the court file and, neither Claim D.D., nor Claim J(a) were ever adjudicated. *See* Appendix, *infra*.

3. The law and previously known facts relating to the government's knowing use of false evidence have been well established throughout the *habeas* petition, and the supplemental pleadings related thereto, and for the sake of brevity will not be recited again here. *See Hood v. Johnson*, CL06-2311, *e.g.*, *Habeas* Claim J., *supra*.

4. However, the Petitioner makes clear that, because of the cumulative nature of the errors and/or prejudice flowing therefrom, the Petitioner states his intent that each and every legal

authority, assertion, or claim be deemed competent to incorporate by reference every other legal authority, assertion, or claim within the Petition for Writ of *Habeas Corpus* and its Supplemental/Amended Claims and the instant Petition. *See Hood v. Johnson*, CL06-2311. And, because of the inter-related nature of the facts, allegations, claims, and legal authorities the Petitioner hereby incorporates every fact, allegation, claim, and legal authority into every other fact, allegation, claim, and legal authority.

I. THE GOVERNMENT'S EVIDENCE AT THE INCEPTION OF THIS CASE WHICH PROVED THE FALSITY OF THE PROFFER STATEMENT, AND EXCLUDED THE PETITIONER FROM ANY INVOLVEMENT IN THESE CRIMES.

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5. As a preliminary matter it must be underscored that from the inception of the government's investigation of this case, the government knew:

a) The Petitioner was not involved in any way with these crimes. *See, e.g*., FOIA Vol. I., pp. 174-175 (When interviewed, one of the original investigators stated to agents of the government that "[His] recollection is that, following the arrest of Hood on cocaine[24] distribution charges, [he] received a telephone call from [_____] advising [him] that that Hood was not the right guy. [His] recollection is that Hood had an alibi for the time of the offense," and this precluded any prosecution of the Petitioner). FOIA Vol. IV., at 483 (the Petitioner's alibi was investigated, and confirmed under oath by one of the trial attorneys for Jeffery David Cox ("Cox"), prior to Cox's trial, and by the two private

[24] The Commonwealth fabricated a cocaine distribution charge as their method of a police-arranged identification procedure. *See* FOIA Vol. IV, at p. 168 (The Petitioner was not identified, and is known to have and is stated as having brown hair).

investigators hired by Cox "after the fact" which "eliminated [the Petitioner] as a suspect"). *Black's Law Dictionary*, Abridged 6th ed (1991) ("Alibi: A defense that **places the defendant at the relevant time of the crime[s] in a different place than that of the scene involved *and so removed therefrom as to render it impossible for him to be the guilty party*.**") (Emphasis added.) *See also Hood v. Johnson*, CL06-2311, *supra* and Claim B., *infra*.

b) The Petitioner was not the driver of the car involved in these crimes. One of the key eyewitnesses, Estelle Johnson, testified on behalf of the government that the driver of the car had "blond hair." Pet. Ex. 1, at p. 85. The Petitioner has never had blond hair. The Petitioner has dark brown hair, and always has. Thus, the eyewitness testimony, provided under oath in 1990-1991, precluded any possibility of the Petitioner being the driver of the car involved in these crimes. FOIA Vol. IV, at p. 168 (the Petitioner was not identified at court during the police-arranged identification procedure by the two eyewitnesses to these crimes, and the Petitioner is specifically and intentionally described as having brown hair).

c) The Petitioner was not the knife wielding man involved in these crimes. *See* Pet. Ex. 1 (During the investigation, trial and conviction of Cox for the very same crimes against the very same victim in 1990-1991, the government's eyewitness, Estelle Johnson, ("Johnson") positively identified Cox as the knife wielding man during the viewing of photo arrays, *see* Pet. Ex. 1, at pp. 94-106, at Cox's preliminary hearing, *see* Pet. Ex. 1, at p. 96, and during the trial of Cox, *see* Pet. Ex. 1, at pp. 69, 75, and 77). *See also* FOIA Vol. I., pp. 174-175 (One of the original investigators of these crimes stated to agents of the government, "If [anyone] had any concern about the guilt of [Cox] it was dispelled by

a number of events. First was [Estelle Johnson's] reaction when [Cox] was brought into the courtroom at the preliminary hearing"). The other key eyewitness for the government, James Corbin ("Corbin"), positively identified Cox as the knife wielding man outside the residence of the victim on the night of August 30, 1990, during Cox's trial. *See* Pet. Ex. 1, at p. 121. *See also Hood v. Johnson*, CL06-2311; Claim J., *supra*, and Claim B., *infra*. Neither of these eyewitnesses have recanted their positive identification of Cox as the knife wielding culprit. *See e.g.,* FOIA Vol. I., at 120

d) The knives and sheath owned by the Petitioner in 1990-1991 were not the ones involved in these crimes. *See* Pet. Ex. 1, at p. 79 (During the investigation and trial of Cox in 1990-1991, Johnson testified that the sheath Cox wore was, "five inches." In order to avoid any misunderstanding, the prosecutor asked Johnson to demonstrate for the jury with her fingers what her interpretation of a five-inch sheath was. The prosecutor, Learned Barry, concurred for the record that what Johnson had displayed was, in fact, "five inches"). ***But cf.*** Com. Ex. 7, and Pet. Ex. 101: the sheath owned by the Petitioner is thirteen-plus inches long. Likewise during the trial of Cox in 1990-1991, Corbin testified that the knife wielded by Cox was, "five to six inches long;" and that the knife holder simply, "looked like **a knife case**." Pet. Ex. 1, at pp. 115, and 137-138. To the contrary, the sheath owned by the Petitioner is thirteen-plus inches long, nearly triple the size to which the eyewitnesses testified, and holds three (3) knives. *See* Pet. Ex. 1. ***But cf.*** Pet. Exs. 59, 60, 101, and Com. Ex. 7. *See also* Pet. Ex. 94 (During the questioning of Corbin by Federal agents, "Corbin was shown a photograph of Stephen Hood's (the Petitioner's) knife sheath and three knives previously obtained by investigators. Corbin did not think that the sheath or knives in the photograph were the same as the one he saw"). *See also Hood v.*

Johnson, CL06-2311, Claim J., *supra*; Claim B., *infra*, FOIA Vol. I., at pp. 119, 125, 132, 154, 199, and DFS Item No. 100.

6. Thus, the government's evidence at the inception of this case proved the falsity of the Proffer Statement, *i.e.*, (1) The government knew that the Petitioner had an alibi. To the contrary, the Proffer Statement put the Petitioner at the scene of the crime; (2) The eyewitness identified the driver of the car as being blond haired. To the contrary, the Proffer Statement alleged that the brown-haired Petitioner was the driver of the car; (3) The eyewitnesses were consistent in their positive identification of Cox as the knife wielding culprit and have never recanted that sworn testimony. To the contrary, the proffer alleged that the knife wielding individual was Billy Madison; (4) The eyewitnesses testified that the knife case was five inches long. To the contrary, the proffer alleged that Madison used the Petitioner's knife sheath, which is thirteen-plus inches in length; and (5) The Petitioner was not identified by the two eyewitnesses to this crime in court during the police-arranged identification procedure. To the contrary, the proffer alleged that the Petitioner was present at the scene of the crime in full view of the prosecution's eyewitnesses.

7. Therefore, the government possessed abundant evidence prior to the Petitioner's indictment — and prior to his Proffer Statement — that negated any assertion that the Petitioner was involved in these crimes.

8. This exculpatory and impeachment evidence (withheld from the Petitioner at trial), and other evidence produced throughout the government's investigation of this case demonstrate that the government knew the Proffer Statement was false and that the Petitioner did not commit the crimes for which he was accused.

9. Consequently, the government knew that when FBI S.A. Messing testified about the details of the Proffer Statement in the Commonwealth's case-in-chief against the Petitioner,

Messing was providing false evidence, known to be such by the government.

II. THE ADDITIONAL EVIDENCE RECENTLY UNCOVERED WHICH FURTHER SUPPORTS THAT THE GOVERNMENT KNOWINGLY USED FALSE EVIDENCE WHEN IT USED THE FALSE PROFFER STATEMENT IN THE COMMONWEALTH'S CASE-IN-CHIEF AGAINST THE PETITIONER. THE COMMONWEALTH INTENTIONALLY AND WRONGFULLY FABRICATED EVIDENCE THAT WAS USED TO OBTAIN THE WRONGFUL CONVICTION OF THE PETITIONER WHILE INTENTIONALLY, WILLFULLY, AND CONTINUOUSLY SUPPRESSED OR WITHHELD EVIDENCE ESTABLISHING THE INNOCENCE OF THE PETITIONER.

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10. Additional evidence has recently been discovered by the Petitioner further supporting the claim that when FBI S.A. Messing testified about the substance of the Proffer Statement in the Commonwealth's case-in-chief against the Petitioner, the government knew that the Proffer Statement was not true. This new evidence supporting Claim A., has been revealed through the following:

11. **A.** The Petitioner's recent access to the evidence introduced at trial by the Commonwealth in the underlying criminal case, and the ability of the Petitioner, through counsel, to photograph, inspect, and measure said evidence. (Court ORDER 01/21/2008.) *See Hood v. Johnson*, CL06-2311 *Habeas* Claims G., H., J., K., B.B., C.C., D.D, and E.E., *supra*. *See* Pet. Exs. 1, 23, 28, 37, 38, 43, 46, 47, 50, 54, 55, 59, 60, 93, 94, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, and, 110; FOIA Vol. I., at 174-175, 334, 339-340; FOIA Vol. II., at 125, 132, 154, 217-218.

    B. The ongoing release of documents in response to the Petitioner's federal Freedom of

Information Act request ("FOIA") filed June 22, 2006. *See* Claim B. IV., *infra*.

C. The Petitioner's access on May 19, 2008, through counsel, to the Court ORDER entered December 7, 2001, by the Circuit Court of the City of Colonial Heights, temporarily sealing the affidavit in support of the search warrant for the Petitioner's residence issued on December 6, 2001, and executed on December 7, 2001. The Commonwealth's perjurious affidavit in support of the search warrant was not available prior to the expiration of the 21-days following the final sentencing Order, because it was sealed by the court at the *ex parte* request of Sp. Asst. Commonwealth's Attorney, Robert Trono. *See* Pet. Exs. 111, 112, 43, 44, and 45.

D. The Petitioner's access on June 5, 2008, through counsel, to the perjurious affidavit of Detective George B. Wade in support of the search warrant which was temporarily under seal by court ORDER relating to Pet. Ex. 43. *See* Pet. Exs. 112 (a) and (b), 43, 44, and 45.

II.(a) THE PHYSICAL IMPOSSIBILITY OF THE 10-INCH FORSCHNER CHEF KNIFE (431-10), THE 8-INCH FORSCHNER CHEF KNIFE (431-8), AND THE FORSCHNER SERRATED KNIFE (871-7) AS BEING THE KNIVES IN THE SHEATH AS FALSELY DESCRIBED IN THE PROFFER STATEMENT AND THE FALSE TESTIMONY OF SPECIAL AGENT MESSING.

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12. On December 31, 2007, the Petitioner filed a *Motion to Inspect Evidence* seeking a Court order to allow Petitioner's counsel to photograph and accurately measure the physical evidence introduced at trial. On February 21, 2008, a hearing was held on the Petitioner's motion, and the Petitioner's motion was granted. On February 26, 2008, counsel for the Petitioner photographed

the physical evidence introduced in the underlying case. The photographs permitted scientifically accurate measurements demonstrating that the Petitioner's sheath was designed specifically to simultaneously hold the Petitioner's 10-inch chef's knife, 7-inch serrated bread knife, and 6-inch small paring knife, but was physically incapable of simultaneously holding the 10-inch chef's knife, 7-inch serrated knife, and 8-inch chef's knife introduced into evidence by the Commonwealth, especially where the Commonwealth's evidence was that the 8 inch chef's knife was sheathed in the 6-inch compartment. The resulting photographs show the scientifically accurate measurements of the physical evidence and are displayed in the following Exhibits:

Pet. Ex. 101, The Petitioner's knife sheath with its three compartments. *See* Com. Exs. 7, Trial transcript (hereinafter "TR. tr."), pp., 133, and 172 ("the sheath"). *See also* Pet. Exs. 81, 94, and 110.

Pet. Ex. 102, The Petitioner's 10-inch Forschner chef knife model no. 431-10. *See* Com. Ex. 11, TR. tr. pp. 173-174 ("10-inch knife"). *See also* Pet. Exs. 81, 94, and 110.

Pet. Ex. 103, The Petitioner's 7-inch serrated knife model no. 871-7. *See* Com. Exs. 11, TR. tr., pp. 173-174 ("the serrated knife"). *See also* Pet. Exs. 81, 94, and 110.

Pet. Ex. 104, The Petitioner's 6-inch Forschner paring knife model no. 431-6. *See* Com. Exs. 11, TR. tr. pp. 173-174 ("6-inch knife"). *See also* Pet. Exs. 81, 94, and 110.

Pet. Ex. 105, the Commonwealth's 8-inch Forschner chef knife model no. 431-8. *See* Com. Ex. 12, TR. tr., pp. 182, and 199 ("8-inch knife"). *See also* Pet. Ex. 100.

Pet. Ex. 106, a photographic combination of Pet. Exs. 102, 103, 104, and 105.

Pet. Ex. 107, a photographic combination of Pet. Exs. 101, 102, 103, and 104. *See, e.g.*, Pet. Ex. 94 ("Corbin was shown a photograph of Stephen Hood's (the Petitioner's) sheath and three knives previously obtained by investigators. Corbin did not think that the sheath or knives in the

photograph were the same as the one he saw"). *See* also Pet. Exs. 81, and 110.

Pet Ex. 108, a photographic combination of Pet. Exs. 101, 102, 103, and 105.

Pet. Ex. 109, a photographic combination of Pet. Exs. 102, and 105.

Pet. Ex. 127, The dimensions of the Forschner chef knives; 8-inch (431-8); 10-inch (431-10); and 6-inch (431-6), i.e., Test results of the measurements.

(It is important to note that the dimensions of these knives have never changed. Likewise, while in the possession of the Petitioner the dimensions of the sheath have never changed.)

13. The Commonwealth's evidence and the Petitioner's Exhibits relating thereto clearly demonstrate that the sheath was physically incapable of containing the 10-inch knife, the 8-inch knife, and the serrated knife all at the same time. *See*, e.g., Pet. Ex. 108. **But *cf.*** Pet. Ex. 23, at p.6, and TR. tr. pp. 271-272. Instead, the sheath was uniquely designed and fabricated for the sole purpose of accommodating the 10-inch knife, the serrated knife, and a small paring knife. *See* Pet. Exs. 107, and 101. *See also* Pet. Exs. 59, 60, 81, 110; and FOIA Vol. II., at 125, 132, 154, and 199.

14. Contrary to the dispositive physical evidence, the false Proffer Statement provided that,

> **At the time of the murder, Hood had the following three knives in his sheath: A big 12-inch chef's knife, which had been modified by Ron Landry down to 10-inches to 11-inches; a plastic handled bread knife; and a medium size chef's knife. All of the knives were Forschners and were kept in the sheath.** The bread knife is now in possession of investigators, the large chef's knife is in the possession of Goodwin. **The medium size chef knife is the one that Madison used to abduct and kill Ilouise Cooper.**

Pet. Ex. 23, at p. 6 (emphasis added). *See also Hood v. Johnson*, CL06-2311 Claims B.B., and C.C., *supra*. The Proffer Statement is wholly contravened by the actual evidence introduced at trial, and presented to this court. It is important to underscore that Supplemental/Amended *Habeas* Claims B.B., and C.C., *supra*, clearly demonstrated that the government repeatedly

presented evidence at trial asserting that the Commonwealth's 8-inch knife (Com. Ex. 12) was, "the medium size chef knife [that] Madison used to abduct and kill Ilouise Cooper," and that the other two knives in the sheath at the time of the offense were the 10-inch knife, and the serrated knife. The government introduced an 8-inch knife as the murder weapon in order to erroneously present evidence which would comport with the false Proffer Statement. Again, the Proffer Statement is wholly contravened by the government's evidence in this case. As shown below, the 8-inch chef's knife, 10-inch chef's knife and serrated knife could not fit in the sheath at the same time, and the Petitioner owned only a 10-inch chef knife, a serrated bread knife and a 6-inch paring knife.

15. When Messing testified as to the substance of the Proffer Statement in the Commonwealth's case-in-chief, the government knew or should have known that Messing was providing false evidence. This is because the government knew or should have known that the Proffer Statement about which Messing testified was false and wholly contravened by the actual evidence. In pertinent part, Messing testified as follows (all emphasis added):

> Q: What happened while [the Petitioner] was at his apartment?
>
> A: Mr. Madison came over to solicit [the Petitioner] to go with him to purchase drugs.
>
> Q: And what happened after that? What did [the Petitioner] tell you happened?
>
> A: Well, [the Petitioner] indicated that he really didn't - - he was hesitant about going to that part of town at night. He wanted to know whether Madison had any kind of weapon, like a baseball bat. Mr. Madison said, no, suggested that they take [the Petitioner]'s knives that he knew [the Petitioner] had.
>
> Q: **Did [the Petitioner] indicate what kind of knives they were?**

A: **Yes. That night, he had two Forschner chef's knives, a large and a medium size, and a bread knife.**

TR. tr., at p. 271. *See also Hood v. Johnson*, CL06-2311; Claims J., G., H., B.B., and C.C., *supra.*

Q: **Did he indicate that he took <u>those</u> <u>knives?</u>**

A: Yes, they did take the knives with them.

TR. tr., at p. 273.

A: ... Mr. Madison got out, was gone for about five minutes, and then came back to the car. At the time, he was enraged, he was cussing, and he reached down to the floor board of the front passenger seat **and picked up the sheath with the knives in it, [the Petitioner]'s sheath and knives.**

TR. tr. at p. 275.

A: When they got back to the apartments, [the Petitioner] got his sheath and two of the knives back, **the bread knife and the larger chef's knife.** Madison kept the knife that he had in his hand this entire time.

TR. tr., at pp. 278-279.

16. Accordingly, based upon the actual evidence in the possession of the government at trial, and the evidence presented to this court, the government knew or should have known that the Proffer Statement was not true, and the testimony and evidence presented by the government relating thereto was false, including the testimony of Messing cited above. *See* Pet. Exs. 1, 23, 28, 37, 38, 43, 46, 47, 50, 54, 55, 59, 60, 93, 94, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, and, 110. *See also* FOIA Vol. I., at 174-175, 334, 339-340; FOIA Vol. II., at 125, 132, 154, 217-218; and 2/7/2001 Motions Hearing tr.; and *Habeas* Claims G., H., J., K., B.B., C.C., and

F.F.

17. The relevance and importance of the Petitioner's Exhibits 101-109, and 127 begins with "**the sheath**." Pet. Ex. 101. The sheath is comprised of three separate compartments. The specific dimensions and purpose of each compartment are as follows:

<u>The Large Compartment</u>

18. The sheath's one large compartment was specifically designed and fabricated at 10-inches in length. The large compartment is specifically designed and fabricated with the inner-diameter of the mouth of the opening to be narrow and to measure 1 and 7/8-inches in width. *See* Pet. Exs. 101, 106, and 107. These specific dimensions were designed and fabricated with safety in mind in order to accommodate a tight fit of the 10-inch Forschner chef knife, and that knife only. *See* Pet. Exs. 101, 102, 107, and 127. The blade of the 10-inch Forschner chef knife (Pet. Ex. 102 (model no. 431-10)) measures precisely 1 and 7/8-inches wide at 10 1/8-inches total length. *See* Pet. Exs. 102, and 127. Therefore, the large compartment was designed and fabricated to carry only one knife, and that one knife was the 10-inch Forschner chef knife. *See*, e.g., Pet. Exs. 107, and 108.

<u>The Medium Compartment</u>

19. The sheath's one medium compartment is found alongside the large compartment. The medium size compartment was specifically designed and fabricated at 7 and 1/2-inches in length. The medium size compartment is specifically designed and fabricated with the inner diameter of the mouth of the opening to be narrow and to measure 7/8-inch in width. *See* Pet. Exs. 101, and 107. These specific dimensions were designed and fabricated with safety in mind in order to accommodate a tight fit of a 7-inch Forschner serrated bread knife, and that knife only. The blade of the 7-inch Forschner serrated bread knife (Pet. Ex. 103 (model no. 817-7)) is un-tapered, and

measures precisely 7 and 1/4-inches in total length, and 7/8-inch wide. *See* Pet. Ex. 103. Therefore, the medium compartment was not capable of carrying either a knife longer than 7 and ½ inches in length or a knife wider than 7/8 inches. It was designed to carry only one knife, and that one knife was the 7-inch Forschner serrated bread knife. *See, e.g.,* Pet. Ex. 107, and 108.

The Small Compartment

20. The sheath's one small compartment is found attached to the front of the large compartment. The small compartment was specifically designed and fabricated at 6 and 1/2-inches in length. The small compartment is specifically designed and fabricated with the inner-diameter of the mouth of the opening to be narrow and to measure 1 and 1/4-inches in width. *See* Pet. Exs. 101, 106, and 107.

21. These specific dimensions were designed and fabricated with safety in mind and to accommodate a tight fit of a 6-inch Forschner paring knife, and that knife only. The blade of the 6-inch Forschner paring knife (Pet. Ex. 104 (model no. 431-6)) measures precisely 1 and 1/4-inches wide at 5 and 3/4-inches total blade length. *See* Pet. Exs. 104, and 127. Therefore, the small compartment was capable of carrying only one knife, and that one knife was the 6-inch Forschner paring knife. *See*, e.g., Pet. Exs. 107, and 108.

22. The false Proffer Statement, and the false testimony and evidence presented by the government at trial through the Assistant Commonwealth Attorney Young, and the government's witnesses Fierro, Wade, Tapazio, Davis, and especially Special Agent Messing was that on the night of the abduction and murder the sheath contained the 10-inch large Forschner chef knife, the 8-inch, "medium size chef knife," and the Forschner serrated knife. Pet. Ex. 23, at p. 6

23. Contrary to the false Proffer Statement, and contrary to the evidence presented by the government at trial the sheath is physically incapable of carrying the knives indicated in the false

proffer, and to which Messing testified. With the large knife in its large compartment, and the serrated knife in its medium compartment alongside the large compartment, this could only leave the attached small 6-inch compartment to hold the 8-inch, “medium size chef knife.” Pet. Ex. 23, at p. 6

24. Bearing in mind the specific dimensions of the small compartment, we now turn to the specific dimensions of the Forschner 8-inch, “medium size chef knife.” This comparison will conclusively demonstrate that the small compartment is physically incapable of carrying the 8-inch, “medium size chef knife,” contrary to the false Proffer Statement and contrary to the false testimony of Messing related thereto. As noted above, the small compartment measured precisely 6 and 1/2-inches in length with the inner-diameter of the mouth of the opening measuring a tight 1 and 1/4-inches wide. Pet. Ex. 23, at p. 6. *See* Pet. Exs. 101, and 107.

25. In stark contrast, the 8-inch “medium size chef knife” is manufactured with a total blade length of 8-inches. *See* Pet. Exs. 105, and 127. The blade width of the “medium size chef knife” is precisely 1 and 7/16-inches at 7-inches from the sharp tip, and 1 and 3/8inches at 6-inches from the sharp tip. Pet. Ex. 23, at p. 6. *See* Pet. Exs. 105, and 127.

26. Therefore, it is painfully obvious to anyone of reasonable intelligence that a blade measuring between 1 and 7/16-inches and 1 and 3/8-inches wide at 6 and 1/2-inches in length is physically incapable of fitting into a compartment with an inner-diameter of only 1 and 1/4-inches. Even more obvious, a blade measuring 8-inches in length is physically incapable of fitting into a compartment with a length of only 6 and 1/2-inches. Moreover, none of the sheath’s compartments are physically capable of containing more than one knife at a time.

27. Considering the alleged investigative acumen and experience of the FBI, the only reasonable conclusion to be drawn from this evidence is that the government was fully cognizant

of the physical impossibility of the Proffer Statement, and the testimony of agent Messing. Therefore, when agent Messing testified that the Petitioner's sheath, **"had two Forschner chef's knives, a large and medium size, and a bread knife,"** on the night these crimes were committed the government knew or should have known there was no possible way that could be true. TR. tr., at p. 271.

28. Moreover, it is important to underscore that the trial record, Supplemental/Amended *Habeas* Claim B.B., and Claim C.C., *supra*, clearly demonstrate that the government repeatedly presented false evidence at trial asserting that the Commonwealth's 8-inch Forschner chef knife (Com. Ex. 12) was **the**, "medium size chef knife [that] Madison used to abduct and kill Ilouise Cooper," and the other two knives in the sheath at the time of the offense were the 10-inch Forschner chef knife, and the serrated knife. The government did so in order to present false evidence which would comport with the known falsity of the Proffer Statement, and the known falsity of the testimony of Messing related thereto. Again, the Proffer Statement is wholly contravened by the actual evidence in this case. Pet. Ex. 23, at p. 6.

29. Furthermore, the Petitioner hereby certifies that while in the possession of the Petitioner, the sheath was at all times fully intact, without tear, imperfection, or cut to the leather, stitches or rivets. Any tear, cut or imperfection is directly attributable to the government when it disassembled the sheath for testing. *See* Pet. Exs. 81, and 111; FOIA Vol., at 217-218.

II.(b) THE RECENT FOIA DOCUMENTS, THE RECENTLY OBTAINED COPY OF THE COURT ORDER FROM COLONIAL HEIGHTS CIRCUIT COURT DATED DECEMBER 7, 2001, AND THE RECENTLY UNSEALED AFFIDAVIT WHICH DEMONSTRATES THAT THE GOVERNMENT KNEW THAT THE PROFFER STATEMENT WAS FALSE WHEN SPECIAL AGENT MESSING TESTIFIED ABOUT

THE SUBSTANCE OF THE PROFFER STATEMENT AS SUBSTANTIVE EVIDENCE IN THE COMMONWEALTH'S CASE-IN-CHIEF AGAINST THE PETITIONER, AND THE COMMONWEALTH KNEW THAT THE PETITIONER WAS ACTUALLY INNOCENT.

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30. The following sequence of events and evidence proves to this Court, by a preponderance of the evidence, that the government knew, or should have known that the Proffer Statement was false. It is important to note that many of the underlying facts were suppressed by the government and previously undiscoverable by the Petitioner and were only recently discovered through the Petitioner's vigorous pursuit of the federal FOIA documents. *See* Claim B., section IV., *infra*. Additionally, the court Order entered on 12/7/2001 by the Colonial Heights Circuit Court was only recently made available through the diligent efforts of the Petitioner, through counsel, on 3/20/2008. *See* Pet. Ex. 111. Likewise, the Petitioner diligently sought the affidavit issued under seal supporting the search warrant. *See* Pet. Exs. 43, 44, and 45. However, the affidavit was never unsealed and made available to the Petitioner until June 5, 2008. *See* Pet. Exs. 112 (a) and (b). Therefore, these facts are not barred from consideration by this Court because: (1) the facts were not discoverable by the Petitioner prior to the initial filing of the *habeas* petition, or the filing of the Petitioner's Bill of Particulars. *See Hood v. Johnson*, CL06-2311; (2) the inability of the Petitioner to know of these facts is directly attributable to the government for (a) failing to disclose under the demands of *Brady v. Maryland,* 373 U.S. 83 (1963), and (b) impeding the Petitioner's due diligence by suppressing, and placing under seal, the evidence for over six years. Accordingly, the Petitioner submits that he has demonstrated due diligence in attempting to obtain these facts over the course of years.

II.(b)(i) THE RECORDINGS MADE BY THE GOVERNMENT OF NUMEROUS TELEPHONE CALLS BETWEEN THE PETITIONER AND LOUISE BRANSON PROVIDED THE GOVERNMENT WITH EVIDENCE THAT THE PROFFER STATEMENT WAS FALSE. *SEE* FOIA VOL. I. pp., 339-340.

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31. On November 6, 2001, FBI S.A. Messing and Det. Wade transported the Petitioner from the Richmond City Jail to the FBI building on Parham Road, Henrico, Virginia. Once there, the Petitioner was hurried into a room where defense counsel, Steven Goodwin ("Goodwin") was waiting.

32. Goodwin told the Petitioner to hurry up and sign a document, advising the Petitioner that there was no need to read it, just to trust that, "This is to ensure that they cannot use anything you tell them against you in court. You have immunity." The Petitioner was not allowed to read the document. However, the Petitioner followed the instruction of Goodwin and signed the document, and wrote the same date used by Goodwin in doing the same. *See Hood v. Johnson*, CL06-2311, Claim G. *see also* Pet. Exs. 86, and 23. The morning of November 6, 2001, was the first time the Petitioner ever saw this document, though the Petitioner was not allowed to read the document or have the document fully and accurately explained.

33. At this time, Special Assistant Commonwealth's Attorney, Trono, Assistant Commonwealth Attorney Young, FBI S.A. Messing and Det. Wade entered the room. Goodwin advised the Petitioner to say "all the things we have agreed upon." The Petitioner obeyed the instructions of counsel and proceeded to tell the false story concocted by Goodwin. *See Habeas* Claims G., and H. *see also* Pet. Ex. 23.

34. On November 7, 2001, the Petitioner was taken to the Richmond Circuit Court. Goodwin

and another attorney, David Gammino ("Gammino") were present at defense table. The apparent purpose for this appearance was the addition of Gammino as a defense counsel, and for both parties to agree upon a continuance. *See* 7/11/2001 M.H. tr. At the conclusion of the hearing, a brief meeting was held between the Petitioner, Goodwin, and Gammino in the "Bull-pen" off to the side of the courtroom. *See Hood v. Johnson*, CL06-2311, Claim G., *supra*. Without returning to the Richmond City Jail, and without any advance notice to the Petitioner, the Petitioner was taken that day (11/7/2001) to the Henrico County Jail. *See Hood v. Johnson*, CL06-2311, Claim G.(a), *supra*.

35. On May 29, 2007, FOIA Vol. I., p. 340 revealed the government's unlawful attempt to cover up its failure to disclose evidence obtained during the Petitioner's incarceration in the Henrico County Jail which was favorable to the defense, a known violation of discovery provisions of Rule 3A:11. This evidence was favorable to the defense both because it was exculpatory, and because of its impeachment value. *See Brady*, and Claim B., *infra*., *See also* Code § 19.2-265.4(B) (sanctions for knowing violation of discovery provisions of Rule 3A:11).

36. FOIA Vol. I., p. 340 states,

> **Synopsis:** Late submission of ELSUR evidence.
> **Enclosure(s):** Enclosed is an FD-302 regarding the collection of ELSUR **evidence in this case.**
> **Details:** The enclosed FD-302 describes the circumstances surrounding the collection of ELSUR **evidence** in this case. Specifically, the collection of eight compact disks (CDs) with recorded inmate telephone calls from Henrico County Jail (HCJ). These CDs were made from original recordings maintained by the HCJ during normal course of operation. Due to inadvertence on the part of Case Agent, these CDs were never entered into ELSUR.

FOIA Vol. I., p. 340 (emphasis added). This document was not generated until February 18, 2003 – well after the trial in the underlying criminal case on April 3, 2002, and well after the expiration of 21-days from final judgement in the Petitioner's criminal trial. *See* § 19.2-327.11

(vi). *See also* Rule 3A:11.

37. This document is a contrivance to excuse the government from disclosing the CDs mentioned here to defense counsel under the demands of *Brady*, and progeny. It does not so excuse the government. Whether the non-disclosure was inadvertent or deliberate, the rule of *Brady* applies.

38. Unbeknownst to the Petitioner, and undisclosed by the government to defense counsel FOIA Vol. I., p. 339 revealed that,

> The following **investigation** was conducted by S.A. [Messing] Federal Bureau of Investigation (FBI), [Det. Wade], Richmond Police Department, and members of the Henrico County Sheriff's Office, between November 12, 2001, and January, 4, 2002: Copies were made of numerous telephone calls made by Stephen James Hood to [Louise Branson] between November 7, 2001, and January 4, 2002. The copies were made from original recordings of inmate telephone calls which the Henrico County Jail records as part of their standard operating procedure. The recordings were made on eight separate occasions.

FOIA Vol. I., p. 339 (emphasis added).

This undisclosed document further revealed that during this "**investigation**" the government's investigators made the following eight recordings:

Date of recording	**Dates recorded**
CD#1: 11/12/2001	11/07/2001 - 11/12/2001 [5 days]
CD#2: 11/16/2001	11/13/2001 - 11/16/2001 [4 days]
CD#3: 11/26/2001	11/16/2001 - 11/26/2001 [11 days]
CD#4: 11/30/2001	11/26/2001 - 11/30/2001 [5 days]
CD#5: 12/05/2001	11/30/2001 - 12/05/2001 [5 days]
CD#6: 12/10/2001	12/05/2001 - 12/10/2001 [6 days]
CD#7: 12/20/2001	12/10/2001 - 12/17/2001 [8 days]
CD#8: 01/04/2001	12/17/2001 - 01/04/2002 [19 days]

See FOIA Vol. I., p. 339. This document was not generated until February 18, 2003, even though the "**investigation**" was performed between "November 12, 2001, and January 4, 2002."

39. Importantly, several CD recordings coincide with certain issues raised in the instant

petition: First, CD numbers 1-5 encompass the telephone conversations between the Petitioner and Louise Branson beginning on the day after the first proffer session, and ending on the day before the government sought a search warrant for the residence of Louise Branson and the Petitioner, with the affidavit under seal. During these particular telephone conversations, the Petitioner repeatedly told Ms. Branson that the Proffer Statement was a false concoction of Goodwin's, and that the Petitioner only gave the false proffer at the insistence of Goodwin. *See* Rule 3A:11.

40. Furthermore, during these telephone calls the Petitioner informed Ms. Branson that Goodwin stated that the Petitioner had complete immunity – the extent of that immunity, the Petitioner was told, was that nothing the Petitioner said could *ever* be used against him in Court. Moreover, during these telephone calls the Petitioner reminded Ms. Branson to read and re-read the Petitioner's letters to Ms. Branson to ensure that she understood that (a) the proffer was false, (b) the proffer had only been made at the insistence of Goodwin, and (c) the Petitioner had complete immunity. *See e.g.,* Pet. Ex. 37 (The Fax transmission from Messing containing two of the Petitioner's letters to Ms. Branson, written contemporaneously with these recorded telephone calls. One letter is dated November 13, 2001, another letter is dated November 20, 2001 - November 23, 2001. Both of these letters reiterated the information detailed in several of the recorded telephone calls beginning 11/07/2001 through 12/05/2001 *see* CDs #1-#5).

41. Second, the CDs of telephone calls - CDs #6-#8 contain conversations between Ms. Branson and the Petitioner revealing that the Proffer Statement was false. The FOIA documents demonstrate that the government obtained copies of these telephone conversations to confirm or dispel the veracity of the Proffer Statement. The government's listening to and "investigating" the above referenced telephone conversations, particularly CDs #1-#5, provided the government

with evidence that the Proffer Statements were false.

42. The government's knowledge that individuals in addition to the government, Goodwin, and the Petitioner knew the statements were false prompted investigators to search the residence of 103 Yew Avenue in order to seize **and suppress** the evidence which proved that the Proffer Statement was false. The secondary purpose of the search warrant was to seize evidence in order to charge Steven Goodwin, Esquire with, "obstruction of justice," because the Commonwealth erroneously released Cox from prison based solely on the false Proffer Statements. *See* Pet. Ex. 43. *See* Rule 3A:11.

II.(b)(ii) THE RECENTLY OBTAINED COPY OF THE COURT ORDER ENTERED DECEMBER 7, 2001 BY THE CIRCUIT COURT OF THE CITY OF COLONIAL HEIGHTS TEMPORARILY SEALING THE AFFIDAVIT OF DETECTIVE WADE IN SUPPORT OF THE SEARCH WARRANT ISSUED ON DECEMBER 6, 2001, DEMONSTRATES THAT THE AFFIDAVIT OF DETECTIVE WADE WAS PREMISED UPON THE RESULT OF THE GOVERNMENT'S INVESTIGATION OF THE PETITIONER'S TELEPHONE CALLS WHICH EXPLICITLY STATED THAT THE PROFFER STATEMENT WAS FALSE. *SEE* PET EX. 112.

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43. Again, the government recorded and investigated the telephone calls made by the Petitioner from the Henrico County Jail. *See* section II.(b)(i), *supra*. *See also* Rule 3A:11.

44. During the course of the government's investigation eight CDs were made of the Petitioner's telephone calls. As a result of the government's investigation of the Petitioner's telephone calls, evidence was revealed that the Proffer Statement was false. Pursuant to this evidence, the government was unavoidably made aware that others, in addition to the

government, Goodwin, and the Petitioner knew that the Proffer Statement was false and that the Petitioner was actually innocent. In relying on the result of the government's investigation of the Petitioner's telephone calls from Henrico County Jail, the government sought to obtain a search warrant to seize certain property and instrumentalities which would support a charge of "violations of Virginia Code Section 18.2-460, Obstruction of Justice of the murder trial of Stephen Hood." *See* Pet. Ex. 43. *See also*, section II.(b)(v), *infra*. *See* Rule 3A:11.

45. The government, through Detective Wade, provided an affidavit to Magistrate Darryl K. Sheley in support of a search warrant directed at, "the dwelling house of 103 Yew Avenue, Colonial Heights, Virginia." Pet Ex. 43. For years the Petitioner diligently sought to obtain a copy of the affidavit provided by Detective Wade. *See* Pet. Ex. 44. The Commonwealth resisted said efforts and the Petitioner was only able to learn that, "[t]he information ... ha[d] been sealed and can only be opened by an order of this [Circuit Court of Colonial Heights]." Pet. Ex. 45.

46. Finally, on March 20, 2008, the Petitioner, through counsel, obtained a copy of the Court Order entered December 7, 2001, temporarily sealing the affidavit.

47. The December 7, 2001, Court Order confirmed the position of the Petitioner. The Order states in pertinent part,

> This day came the Special Assistant Attorney for the Commonwealth and represented to the Court that a search warrant has been issued commanding the search of a residence in Colonial Heights, based upon the affidavit of Detective Wade, a police officer for the City of Richmond.
> **The Special Assistant Attorney for the Commonwealth further represented that the affidavit of Detective George Wade refers to phone calls intercepted from the Henrico County Jail. The Special Assistant Attorney for the Commonwealth further represented that, if the identity of the source of the information is revealed or discerned, valuable investigative information and leads may be imperiled.**
> The Court has examined such affidavit, and has determined that the affidavit in support of the search warrant should be **<u>temporarily sealed</u>** as authorized by

Virginia Code Ann. 19.2-54[25].

Pet. Ex. 111 (emphasis added).

48. Thus, it was the Commonwealth's admissions during the *ex parte* hearing which revealed that the affidavit supporting the search warrant was based primarily on, "phone calls intercepted from the Henrico County Jail." Pet. Ex. 111. The phone calls referenced in the affidavit can be none other than the ones discussed in section II.(b)(i), *supra*. *See* FOIA Vol. I., pp. 339-340. Again, notably, the many Henrico County Jail telephone conversations between the Petitioner and Ms. Branson perspicuously reveal (1) the specific nature of the contacts between the Petitioner and the investigators; (2) the involuntary and unintelligent nature of the Proffer Agreement; (3) the Proffer Statement was false; (4) the false Proffer Statement was concocted by Goodwin; (5) Goodwin insisted that the Petitioner provide the government with the false statements; (6) based on the Petitioner following the instructions of Goodwin, the Petitioner would not be convicted of a felony, plead guilty to two misdemeanors, and be home by Thanksgiving, 2001; (7) Cox was erroneously released based solely upon the known false Proffer Statement; and (8) the Petitioner is actually innocent of any involvement in these crimes. These truths are further supported where the search warrant produced the FBI telefax to Trono and Goodwin on 12/10/2001. Pet. Ex. 37 (the FBI Fax Transmission). *See also Hood v. Johnson*, CL06-2311; Claims G., H., I., J., and K., *supra*.

II.(b)(iii) THE PERJURIOUS AFFIDAVIT OF DETECTIVE WADE GIVEN UNDER OATH TO MAGISTRATE DARRYL K. SHELEY, COLONIAL HEIGHTS, VIRGINIA

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[25]Va. Code § 19.2-54 states in pertinent part, "such affidavit may be temporarily sealed by the appropriate court upon application of the attorney for the Commonwealth for good cause shown in an *ex parte* hearing ... and the burden of proof with respect to the continued sealing shall be on the Commonwealth."

ON DECEMBER 6, 2001, DEMONSTRATES THAT THE GOVERNMENT KNEW THAT THE PROFFER STATEMENT WAS FALSE. *SEE* PET. EX 112.

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49. On April 2, 2008, the Petitioner, through counsel, filed with the Circuit Court for the City of Colonial Heights a Motion to Unseal Affidavit. The affidavit to which this motion referred was the affidavit submitted on December 6, 2001, by Wade in support of a search warrant issued on December 6, 2001. *See* Pet. Exs. 43, 45, 46, and 111. Pursuant to Va. Code § 19.2-54, the affidavit was placed under seal on December 7, 2001, by Order of the Colonial Heights Circuit Court after an *ex parte* hearing by the Special Commonwealth's Attorney Robert Trono. *See* Pet. Ex. 111.

50. On May 5, 2008, the Court held a hearing regarding the Motion to Unseal Affidavit where the Court granted the Motion. *See*, Case No. CM08-60. On May 19, 2008, the Judge entered an Order directing that the affidavit be unsealed and that the Clerk send a certified copy of the Order and affidavit to party counsel, which counsel for Petitioner received on June 5, 2008. *See* Pet. Exs. 112(a) and (b).

51. In Detective Wade's sworn affidavit, Wade attested,

> **Between the dates of November 7th, 2001, and December 5th, 2001, recorded telephone conversations between Stephen James Hood, an inmate at the Henrico County Jail, and Louise Branson were intercepted and reviewed by the affiant. Review of the conversations revealed that Louise Branson is presently utilizing her computer systems located at her residence to process and transcribe hand written notes from Stephen Hood. According to their telephone conversations, these notes/documents <u>describe Stephen Hood's involvement of the murder and abduction of Ilouise Cooper</u> that occurred in the City of Richmond Virginia, on August 31, 1990.**
>
> I have personal knowledge of the facts set forth in this affidavit.
>
> I have been employed by the Richmond Police Department for the past twenty one years and I am presently investigating the Ilouise Cooper homicide. **In my**

> **review of the taped conversations between Stephen Hood and Louise Branson both discuss utilizing hand written notes and computer systems to <u>document Hood's involvement into the murder and abduction of Cooper</u>.** The Ilouise Cooper murder and abduction occurred on August 31, 1990, within the jurisdiction limits of the City of Richmond and are referenced as Richmond Police case numbers 900831520339 Murder, and 9008310335314 Abduction.
>
> The statements above are true and accurate to the best of my knowledge and belief.

Pet. Ex. 112 (b) (emphasis added).

52. The sworn attestations of Wade within this affidavit are belied by the actual content of the recorded conversations, "between November 7th, 2001, and December 5th, 2001," to which Wade referred. Pet Ex. 112. Those recorded telephone conversations were copied onto CDs and are currently in the possession of the FBI. *See* FOIA Vol. I., at 339-340. *See also,* FOIA Vol. III., at 579-586. In violation of *Brady*, and progeny, the government withheld, and continues to withhold, these CDs from the Petitioner and the Petitioner's counsel as an ongoing and knowing violation of discovery provisions of Rule 3A:11, and *Brady, supra*. *See* Claim B. IV.(c), *infra*.

53. The actual content of the recorded telephone conversations between the Petitioner and Louise Branson discussed Ms. Branson utilizing handwritten notes and computer systems to document the government's wrong doing in this case. More importantly, the discussions between the Petitioner and Ms. Branson clearly revealed Ms. Branson's use of her computer to transcribe the Petitioner's handwritten notes onto her computer system in order to document **the Petitioner's <u>actual innocence</u>**, and complete **<u>lack</u> of involvement in the murder and abduction of Ilouise Cooper.** The purpose of this endeavor was to try to have the information documented and sent to government agencies, media outlets, law firms, and the like in order to obtain assistance in the underlying criminal case and to highlight the corruption of Wade, Messing, and Trono; and, to reveal the actual innocence of the Petitioner. *See* Pet. Ex. 128, *see*

also Pet Ex. 38.

54. This transcription of the Petitioner's handwritten notes was generated on the laptop computer belonging to Ms. Branson. *See* FOIA Vol. I., at 334 item # 5. *See also* FOIA Vol. III., at 127. That electronic transcription was then e-mailed to Lynnice Randolph by Louise Branson. Lynnice Randolph was a staunch supporter of the Petitioner, who's professional occupation was that of proofreader for a local corporation. Eventually, Lynnice Randolph mailed that transcription to the Petitioner. *See* Pet. Ex. 128, *see also* Pet. Ex. 38. The affidavit of Detective Wade clearly demonstrates that the government knew that the Proffer Statement was false. However, Wade willingly, and knowingly provided a perjurious affidavit to an officer of the court, Magistrate Darryl K. Sheley, in order to conceal this fact. Clearly, the government knew or should have known that the Petitioner was actually innocent, and that the Proffer Statement was false after the laptop owned by Louise Branson was seized and forensically analyzed by the government. This is particularly true since "FBI Special Agent Paul Messing, [was] a member of the Richmond, Virginia Computer Analysis Response Team ('CART'), which performed computer forensic analysis on digital media seized by the FBI." *United States v. White*, 779 F. Supp. 2d 775, at 781 (N.D. Ill. 2011).

55. Wade listened to and investigated the telephone calls between the Petitioner and Ms. Branson which revealed: (1) the specific nature of the contacts between the Petitioner and the investigators; (2) the involuntary nature of the cooperation/immunity agreement; (3) the Proffer Statement was false; (4) the Petitioner is innocent of any involvement in these crimes; (5) the false Proffer Statement was concocted by Goodwin; (6) Goodwin insisted that the Petitioner provide the government with the false statements; (7) based on the Petitioner following the instructions of Goodwin, the Petitioner would not be convicted of any felony, plead guilty to two

misdemeanors, and be home by Thanksgiving, 2001; (8) Cox was erroneously released based upon the known false Proffer Statement; and (9) the corruption and wrong doing of the government throughout this case. These realities are supported by the actual content of the recorded telephone calls (*see* FOIA Vol. I., 339-340; FOIA Vol. III., at 579-586); the actual hand written notes/letters (*see* Pet. Ex. 37 *see also* FOIA Vol. III., at 127); and the actual transcription of several of the hand written notes/letters onto the computer systems of Louise Branson. *See* Pet. Ex. 128, *see also* Pet. Ex. 38. Clearly, the government knew or should have known that the Petitioner was actually innocent, and that the Proffer Statement was false.

II.(b)(iv) THE SEARCH WARRANT DEMONSTRATES THAT THE GOVERNMENT SOUGHT TO SEIZE EVIDENCE RELATING TO THE FALSITY OF THE PROFFER STATEMENT. *SEE* PET. EX. 43.

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56. The search warrant issued on December 6, 2001, and executed on December 7, 2001, states,

> You are commanded in the name of the Commonwealth to forthwith search either in day or night:
> The dwelling house at 103 Yew Avenue, Colonial Heights, Virginia.
> To include the curtilage, detached garage, and vehicles parked upon the curtilage ... for the following property, objects and/or persons:
> Computer systems (including computer hard drives) hand written documents, records, recordings and other instrumentalities **related to violations of Virginia Code Sections 18.2-460 Obstruction of Justice of the murder trial of Stephen Hood, and Code Section 18.2-32, the murder of Ilouise Cooper.**
> You are further commanded to seize said property, persons, and/or objects if they be found and to produce before the Colonial Heights Court an inventory of all property, persons and/or objects seized.[26]

Pet. Ex 43 (emphasis added).

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[26]The government withheld the evidence seized and failed to produce the required inventory to the Court. *See* Pet. Ex. 43.

57. In 2001, Louise Branson and the Petitioner were engaged to be married, and the residence of 103 Yew Avenue was to be their marital home. Accordingly, 103 Yew Avenue contained both Ms. Branson's property as well as the Petitioner's belongings. The essence of the search warrant then, was obviously to obtain evidence from the possessions or property belonging to Louise Branson and/or the Petitioner pursuant to the information revealed through the "phone calls intercepted from Henrico County Jail." Pet. Ex. 111. The search warrant described the items sought with relative specificity and purpose:

> Computer systems (including computer hard drives) hand written documents, records, recordings and other instrumentalities <u>related to violations of Virginia Code Section 18.2-460 Obstruction of Justice in the murder trial of Stephen Hood.</u>

Pet. Ex. 43. (emphasis added) The government was obviously seeking documents or similar instrumentalities which would serve as evidence to prove that someone either accomplished the obstruction of justice, or was attempting to obstruct justice in the murder trial of the Petitioner.

58. Accordingly, the search warrant itself demonstrates that the government, having recorded and investigated the telephone conversations between the Petitioner and Ms. Branson, had every reason to believe that obstruction of justice had occurred with respect to the trial of the Petitioner and the erroneous release of Cox, and that the Proffer Statement was not true. The government intended to seize evidence to that effect during the execution of this search warrant. *See* Pet. Ex. 43 *see also* FOIA Vol. I. pp. 334, 339-340. In not coming forward with that information, someone obstructed justice in the murder trial of the Petitioner and the erroneous release of Cox. This is particularly exacerbated by the fact that the government had released a convicted murderer on November 14, 2001, based solely upon these same false Proffer Statements. It became necessary for the government to conceal and suppress this reality (the erroneous basis upon which a convicted killer was released into the public) from the citizens of the

Commonwealth.

II.(b)(v) THE ITEMS SEIZED FROM THE HOME OF MS. BRANSON AND THE PETITIONER, AND THE CONTEMPORANEOUS INTERROGATION OF MS. BRANSON BY INVESTIGATORS DEMONSTRATES THAT THE GOVERNMENT SOUGHT TO SEIZE, AND IN FACT DID SEIZE, EVIDENCE THAT THE PROFFER STATEMENT WAS FALSE. *SEE* FOIA VOL. I., P. 334 *SEE* ALSO PET. EX. 37.

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59. The items seized from the home of Ms. Branson and the Petitioner, along with the contemporaneous interrogation of Ms. Branson by the investigators demonstrates that the government had reason to believe that the Proffer Statement was false. *See* FOIA Vol. I., p. 334, *see also* Pet. Exs. 37, 38, 46, 47, and 93. Undisclosed to the Petitioner, his defense counsel and the Circuit Court of Colonial Heights, the government **did** make an inventory of the items seized. *See* FOIA Vol. I., p. 334. *See also*, FOIA Vol. III., p.127.

60. On May 29, 2007, FOIA Vol. I., at 334 provided an abundance of previously undisclosed information. This federal document (FD-302) was not generated by the government until April 4, 2002; the second day of the trial of the Petitioner even though the investigation by the federal agents was performed on December 7, 2001. *See* FOIA Vol. I., at 334. In this way, the government obviously believed that it would be able to avoid the demands of *Brady*, because the document did not exist (was not generated) until after the trial of the Petitioner. However, this maneuver does not relieve the government of its obligation under *Brady*, and progeny. Instead, it further demonstrates the government's broader scheme of withholding evidence favorable to the Petitioner. *See* Claim B., *infra*. Nevertheless, this FOIA document provides two previously undisclosed revelations.

61. First, the government did make an inventory of the items seized on December 7, 2001, and withheld this inventory from the Petitioner, his defense counsel, as well as the Colonial Heights Circuit Court. FOIA Vol. I., at 334 states in pertinent part,

> The following items were seized in connection with the formal execution of this warrant:
> 1. Mid-Tower CPU, Generic, No Serial Number
> 2. One Lot of Compact Disks
> 3. One Lot of Floppy Disks
> 4. Toshiba Laptop Computer, Serial Number 6129455PU
> 5. One Carry Bag and Kwik Kopy Bag containing documents miscellaneous papers
> 6. Three boxes and one plastic file box containing documents - miscellaneous papers.

FOIA Vol. I., at 334. *But cf.* Pet. Ex 43 (no inventory of the items seized "under the authority of this warrant" was produced for the Circuit Court of Colonial Heights, or the Petitioner and his counsel.) *See also*, FOIA Vol. III., at 127. Some of the items listed were owned by the Petitioner, *e.g.*, items #1, #2, #3, #5, and #6. Item #4 was owned by Ms. Branson. Some of the, "documents-miscellaneous papers," within item #5, and #6 were owned by both Ms. Branson and the Petitioner. Clearly, FOIA Vol. III., at p. 127 reveals that the government seized volumes of "handwritten letters, copies of letters and related items" from the Petitioner to Ms. Branson which contain further compelling evidence that the Proffer Statement was false. However, to date, the government has withheld those documents in continued violation of *Brady*.

62. Second, and vital to this Claim, the following Claim B., *infra*, and *Hood v. Johnson*, CL06-2311 Claim J.(a), this FOIA document reveals the nature of the government's interrogation of Ms. Branson during the execution of the search warrant. The generalized memorialization of the interrogation demonstrates that the purpose of the search warrant and the contemporaneous interrogation of Ms. Branson was to determine whether there was any evidence that others, in addition to the Petitioner, the government, and Goodwin knew that the

Proffer Statement was false. The document, FOIA Vol. I., at 334, further states,

> [Ms. Branson] was asked about any statements made to her by Stephen Hood regarding the abduction/murder for which he is currently incarcerated. [Ms. Branson] advised that Hood has always told her that he is innocent of the charges against him. Though [Ms. Branson] is aware that Hood has had some recent contact with investigators, she is unaware of the specific nature of those contacts. Hood has never indicated to [Ms. Branson] that he was lying to investigators.

FOIA Vol. I., at 334.

63. Notwithstanding the government's generalized description of the interrogation of Ms. Branson, and to the contrary, the result of the search warrant produced Pet. Ex 37 (the FBI Fax Transmission). *See also* Pet. Ex. 93 (Goodwin's handwritten notes re: the 12/11/2001 meeting between Goodwin and Louise Branson "He told her he was lying…He told her I told him to lie"), *Hood v. Johnson*, CL06-2311Claims G.(a), J.(a), and K.(a)). Pet Ex. 37 consists of only two of the volumes of letters from the Petitioner to Ms. Branson which explicitly stated: (1) the specific nature of the contacts between the Petitioner and the investigators; (2) the involuntary and unintelligent nature of the Proffer Agreement; (3) the Proffer Statement was false; (4) the false Proffer Statement was concocted by Goodwin; (5) Goodwin insisted that the Petitioner provide the government with the false Proffer Statement; (6) based on the Petitioner following the instructions of Goodwin, the Petitioner would not face felony charges, could plead guilty to two misdemeanors, and be home by Thanksgiving, 2001; (7) Cox was erroneously released based upon the known false Proffer Statement; (8) the Petitioner is actually innocent. *Id. See* Pet. Ex. 38, affidavit of Louise Branson, and Pet Ex. 50, affidavit of Rev. John Newell, Pet. Ex. 93, Goodwin's handwritten notes.

64. The execution of the search warrant resulted in the seizure of several pieces of evidence revealing that the Proffer Statement was false. *See, e.g.,* Pet. Ex. 37, and FOIA Vol. III., at p. 127. The government, therefore, continued to obtain evidence demonstrating that the Proffer

Statement was false, and that the Petitioner was in no way involved with these crimes. The government, therefore, knew or should have known that the Proffer Statement was false. It is important to underscore that the government seized volumes of letters revealing that the statements were false. *See* FOIA Vol. I., at 334; FOIA. Vol. III, at 127. However, Messing only disclosed two of those letters. Nevertheless, those two letters are sufficient to demonstrate that the Proffer Statement was false, and the government knew they were false. *See* Pet. Ex. 37.

65. Likewise, as part of its investigation, the government made CD recordings of numerous telephone conversations between the Petitioner and Ms. Branson which further confirmed that the Proffer Statement was false. However, the government never disclosed this evidence to the defense. *See* Claim B., *infra*, *see also* subsection II.(b)(i), *supra*.

66. Further evidence of the government's intent to suppress this evidence favorable to the defense is not only evinced by the sealing of the affidavit in support of the search warrant, but by the government's failure to comply with the lawful command of the search warrant to produce an inventory of the items seized to the Colonial Heights Circuit Court. *See* Pet. Ex. 43, 111, and 112.

67. Further, the government did not generate the FD-302 relating to the December 7, 2001, execution of the search warrant until April 4, 2002, — after the trial and some four months later. Similar tactics were employed by the government with regard to the CD recordings made between November 12, 2001, and January 4, 2002, which, "due to inadvertence on the part of Case Agent, these CDs were not entered into ELSUR," until February 18, 2003 — some ten months after the trial of the Petitioner. FOIA Vol. I., at 339. *See also*, subsection II.(b)(i), *supra*.

68. The purpose for all of these machinations by the government was twofold: (1) to suppress the abundance of evidence which demonstrated that the government knew that the Proffer

Statement was false and the Petitioner was innocent, while it fabricated more known false evidence against the Petitioner which would illegally comport with the false Proffer Statement, and (2) to prevent the public from becoming aware that the government released a convicted murderer based solely on the known false Proffer Statement.

III. THE CUMULATIVE REVIEW OF THE EVIDENCE POSSESSED BY THE GOVERNMENT WHICH CONCLUSIVELY PROVES THAT THE PROFFER STATEMENT WAS FALSE, AND THE GOVERNMENT KNEW IT WAS FALSE WHEN SPECIAL AGENT MESSING TESTIFIED AS TO THE SUBSTANCE OF THE PROFFER STATEMENT AS SUBSTANTIVE EVIDENCE IN THE COMMONWEALTH'S CASE-IN-CHIEF AGAINST THE PETITIONER.

III.(a) THE GOVERNMENT'S EVIDENCE PRIOR TO THE PROFFER SESSIONS WHICH WHOLLY CONTRAVENE THE FALSE PROFFER STATEMENT.

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69. **(i)** The theory of prosecution the government and Goodwin presented through the false proffer was that the crimes against the victim were motivated by retaliation for Roberto Steadman ("Steadman") retrieving his bicycle from the Petitioner's apartment. *See Hood v. Johnson*, CL06-2311; Claims G., H., I., J., K., R., and S., *supra*. Contrary to this theory of prosecution, and contrary to the false proffer, the Henrico County Police Report states that the breaking and entering committed by Steadman, and the apartment complex supervisor, Ronald Hopkins, in order to retrieve Steadman's bicycle from the Petitioner's apartment, **occurred between the hours of 7:30 a.m. and 7:30 p.m. of August 31, 1990.** *See* Pet. Ex. 28. But, the

victim of these crimes was abducted and killed during the night-time hours of August 30, 1990. *See* Pet. Ex. 1, at 12, 53-54, and 80; TR. tr., at 111, 129, and 150.

70. On September 9, 1990, the Henrico Police Department's investigation produced the County of Henrico Police Incident and Crime Report # 900904073. Pet. Ex. 28. This investigation and official report contradict the Proffer Statement which stated that, "Madison wanted to go downtown to make a drug deal with [Roberto] Steadman ... [the Petitioner] remembers asking Madison if he and Steadman were all right with one another as this is **after** the incident wherein Madison took Steadman's bicycle." Pet. Ex. 23 (emphasis added). On September 9, 1990, contrary to the Proffer Statement, and contrary to the government's theory of prosecution, the Henrico Police Report (Pet. Ex. 28) established that the incident in which Madison took Steadman's bicycle, and Steadman retrieved his bicycle, occurred on August 31, 1990 between the hours of 7:30 a.m. and 7:30 p.m., **which was after the crimes against the victim in this case**. The victim of these crimes was abducted and killed during the night-time hours of August 30, 1990. *See* Pet. Ex. 1, at 12, 53-54, and 80; TR. tr., at 111, 129, and 150. Accordingly, the government knew that the bicycle incident could not have been the motive for the crimes. A motive for a crime cannot occur **after** the crime. *See*, e.g., Black's Law Dictionary, Abridged 6th ed. (motive is defined as, "cause or reason that moves the will and induces action"). It is incredible to believe that a crime would be committed in order to retaliate for an event that has yet to occur.

71. Therefore, Pet. Ex. 28 proves the falsity of the Proffer Statement. Again, it is important to note that the bicycle incident occurred after the crimes were committed against the victim. Therefore, the Proffer Statement was known by the government to be false.

72. The testimony of Roberto Steadman even more definitively confirmed the government's

knowledge that the Proffer Statement was false. The Proffer Statement stated that, "Madison wanted to go downtown to make a drug deal with Steadman ... [the Petitioner] remembers asking Madison if he and Steadman were all right with one another, as this is after the incident wherein Madison took Steadman's bicycle." Pet. Ex. 23. **Steadman testified that he and the "maintenance man" retrieved his bicycle the same day he noticed it was missing** (TR. tr. 46-47) **which the Henrico Police Report demonstrates occurred on August 31, 1990; the day after the crimes against the victim.** Steadman went on to testify that he paid Madison $98.00 "24-72 hours" after he retrieved his bicycle. TR. tr., at 59, and 305-306.

73. The government knew that the bicycle incident occurred after the crimes against the victim. **With regard to the prosecutor's knowing use of false evidence and the prejudice incurred by the Petitioner, the trial judge ruled that the payment of $98.00 "was not enough to end that animosity."** TR. tr., at 342-343. However, the government's actual evidence was that the $98.00 payment to Madison occurred several days after the bicycle incident, **all of which the government knew occurred after the crimes against the victim.** Thus, the government knew that the Proffer Statement was false, and the government knew it presented false evidence regarding a motive through its use of the false proffer. Again, it is incredible to believe that a crime would be committed in order to retaliate for an event that has yet to occur.

74. The testimony of Steadman confirmed the falsity of the Proffer Statement. The Proffer Statement stated that after the payment of $98.00 the Petitioner and Madison picked up Steadman in order for Madison to purchase marijuana. *See* Pet. Ex. 23. Contrary to the Proffer Statement, Steadman testified that he never saw the Petitioner or Madison again after the payment of $98.00. TR. tr., at 306-307. Steadman was adamant. He was, "absolutely positive," that he never saw or had any interaction with the Petitioner or Madison after the payment of

$98.00. TR. tr. at 320-321. *See also Hood v. Johnson*, CL06-2311; Claims G., H., I., J., K., R., and S.

75. Notwithstanding the **true facts** listed in ¶¶ 69-74, *supra*, the government misled the trial court, and therefore based on the false assertions of the government the trial court found that;

> After reviewing the evidence the Court can find that the **Commonwealth established beyond a reasonable doubt that Mr. Madison and Mr. Hood had a motive** to harm Mr. Steadman and that they both went to Parkwood Avenue to seek revenge…and there was even more reason for Mr. Hood to seek revenge, because Mr. Hood, in fact, retrieved the bicycle that belonged to Mr. Steadman and put the bicycle in his apartment, and Mr. Steadman, had, with the assistance of the apartment superintendent, gone into Mr. Hood's apartment to get his bicycle. And that type of animosity that act would engender is clear from Mr. Steadman's arrogance. Mr. Steadman's arrogant manner on the witness stand made it clear to the Court that the return of a $98 amount for the purchase of drugs was simply not enough to end that animosity and hostility that Mr. Madison and Mr. Hood would have.

April 4, 2002 (second day of trial) TR. Tr. at page 343 (emphasis added).

76. **(ii.)** On February 13, 1991, during the trial of Cox for the very same crimes, against the very same victim, the government's sworn testimony and evidence proved the falsity of the Proffer Statement.

77. **(a)** Contrary to the false Proffer Statement which stated that the Petitioner was the driver of the car involved in these crimes, the government's eyewitness, Estelle Johnson ("Johnson"), testified that the driver of the car had "blond hair." Pet. Ex. 1, at p. 85. However, the Petitioner has never had blond hair. To the contrary, the Petitioner has dark brown hair; and always has. *See* FOIA Vol. IV, at p. 168 (the Petitioner was not identified at court during the police-arranged identification procedure by the two eyewitnesses to these crimes, and the Petitioner is specifically described as having brown hair). Accordingly, the government knew that the Proffer Statement was false. The eyewitness' testimony precluded any possibility of the Petitioner being the driver of the car, and thus, the government knew that the Proffer Statement was not true. *See* section I.

supra. *See also Hood v. Johnson,* CL06-2311; Claims G., H., I., J., and K.

78. **(b)** Contrary to the false Proffer Statement which stated that Madison was the knife wielding abductor and killer involved in these crimes, the government's eyewitness, Johnson, positively identified Cox as the knife-wielding culprit during the viewing of a photo array, then again at Cox's preliminary hearing, and yet again during Cox's criminal trial. Pet Ex. 1, at 67-107. *See* section I., *supra*. This positive identification of Cox is further emphasized by the description of that event by one of the original investigators. When questioned by agents of the government on May 8, 2000, the original investigator stated, "If [anyone] had any concern about the guilt of [Cox] it was dispelled by a number of events. First was [Johnson's] reaction when [Cox] was brought into the courtroom at the preliminary hearing." FOIA Vol. I., at 174 175.

79. Likewise, the other government eyewitness in the trial against Cox, James Corbin ("Corbin"), positively identified Cox as the knife wielding man outside the residence of the victim on the night of August 30, 1990. *See* Pet Ex. 1, at 113-143. *See also* section I., *supra*, and *Hood v. Johnson*, CL06-2311; Claims G., H., I., J., and K.

80. Neither eyewitness has recanted, nor equivocated regarding their positive identification of Cox as the knife wielding man on the night Ilouise Cooper was murdered. FOIA Vol. I, at 120.

81. **(c)** Contrary to the false Proffer Statement which stated that Madison used the Petitioner's knife sheath to abduct and kill the victim in this case, the government's eyewitness, Johnson, testified with specificity that the sheath Cox wore was, "five inches." This testimony was not due to any flawed estimation of what five inches may look like. The prosecutor, Learned Barry, asked Johnson to demonstrate for the jury by using her fingers exactly how long the perpetrator's sheath was. Upon Johnson's demonstrating the size of the sheath for the jury, the prosecutor concurred for the record that what Johnson had displayed was, in fact, "five inches." Pet. Ex. 1, at p. 79. In

stark contrast, the Petitioner's sheath measures thirteen-plus inches in length. *See* Pet. Ex. 101; Com. Ex. 7. The Petitioner's sheath is nearly triple that of Johnson's sworn eyewitness testimony, and demonstration. *See* sections I., and II., *supra*. *See also* Pet. Ex. 60 (When questioned by agents of the government on September 29, 1999, Paul Stillman stated, "[the Petitioner] wore three knives in a sheath that was attached to a belt, he stated the sheath hung down on [the Petitioner]'s right leg approximately three quarters of the way down his thigh."); *See* Pet. Ex. 110, FOIA Vol. II., at 217-218, and DFS Item number 100. *See also* Pet. Exs. 101, 106, 107, and 108.

82. Likewise, contrary to the Proffer Statement which stated that Madison used the Petitioner's knife sheath and knives to abduct and kill the victim, the government's other eyewitness, Corbin, testified that the knife wielded by Cox was, "five to six inches long," and that the knife holder worn by Cox simply, "looked like a knife case." Pet. Ex. 1, at pp. 115, and 137-138. This eyewitness testimony contradicts the false Proffer Statement, and the government's evidence adduced at trial to convict the Petitioner. *See* Pet. Exs. 59, 60, 101, 107; FOIA Vol. II., at 217-218. *See also* Pet. Ex. 94 (During the questioning of Corbin by Federal agents, "Corbin was shown a photograph of [the Petitioner]'s knife sheath and knives previously obtained by investigators. Corbin did not think that the sheath or knives in the photograph were the same as the one he saw.") *See* sections I., and II.(a); *Hood v. Johnson*, CL06-2311; Claims G., H., I., J., and K. Accordingly, the government knew that the Proffer Statement was not true.

83. **(iii)** On May 19, 1999; May 25, 1999; May 28, 1999; June 4, 1999; and July 21, 1999, the government's interviews of Johnson provided the government with evidence which contradicted the Proffer Statement. The false Proffer Statement stated that Madison made a drug deal with **Roberto** Steadman **in the street** of Parkwood Avenue. *See* Pet. Ex. 23. Contrary to the Proffer Statement, Johnson stated to agents of the government that,

> **<u>Jackie</u>** Steadman told Johnson that **she** had done a deal with some white males **<u>in the park</u>** a short time before the incident and felt this was somewhat related to the abduction and murder.

Pet. Ex. 54 (emphasis added).

> Approximately one week after the police interviewed Jackie Steadman, she moved out of the area. Before she left, Detective Woody told her that she could not leave the area .... After she left there were rumors that Jackie Steadman did have something to do with the abduction and murder due to the fact that **<u>she had ripped off the white males</u>** in a drug deal. Testimony given on June 4, 1999 says that **<u>Jackie Steadman told Estelle Johnson herself that she did in fact rip off the white males in the park.</u>**

Pet. Ex 54 (emphasis added).

Accordingly, the government's evidence contradicted the Proffer Statement. The Proffer Statement which stated that Madison made a drug deal on the street of Parkwood Avenue with Roberto Steadman, is wholly contravened by the government's evidence that the abduction and murder was subsequent to a drug deal between two white males and **<u>Jackie</u>** Steadman which occurred **<u>in the park</u>.** *See* Pet. Exs. 23, and 54. Therefore, the government knew that the Proffer Statement could not be true. *See also Hood v. Johnson*, CL06-2311; Claims G., H., I., J., and K.

84. **(iv)** In 2001, the government's interview of Corbin provided the government with evidence which contradicted the Proffer Statement. On April 13, 2000, the Petitioner provided his knives and sheath to Detective Wade and FBI S.A. Messing in order to assist in the government's investigation. *See* FOIA Vol. II, at 217-218. The false Proffer Statement stated that Madison used the Petitioner's knives and sheath to abduct and kill the victim in this case. Corbin was an eyewitness for the government relating to the knife wielding man whom he positively identified as Cox. Contrary to the false Proffer Statement, the interview in 2001 by the government agents revealed that,

> Corbin was shown a photograph of Stephen Hood's knife sheath and three knives previously obtained by investigators. Corbin did not think that the sheath or

knives in the photograph were the same as the one he saw.

Pet. Ex. 94.

85. Accordingly, the government's eyewitness contradicted the false Proffer Statement, in that, contrary to the proffer, the Petitioner's knives and sheath could not have been the ones used to commit these crimes. Thus, the government knew that the Proffer Statement was not true, and that the Petitioner was innocent. The Proffer Statement is wholly contravened by this eyewitness. *See Hood v. Johnson*, CL06-2311; Claims G., H., I., J., K.; *see also* section I., *supra*.

86. **(v)** Prior to the false Proffer Statement, government agents interviewed Andrea Hackett ("Hackett"). Hackett was Corbin's girlfriend when the victim was killed, and Hackett, Corbin, and the victim lived at the same four-apartment residence at 2605 Parkwood Avenue; Hackett and Corbin lived in the apartment downstairs from the victim. *See* Pet. Ex. 1, at p. 113, 129; TR. tr., at 128-129, 131; Pet. Ex. 55, and 94. Corbin's description to Hackett about the events on the night of August 30, 1990, directly contradicts the false Proffer Statement that on that night Madison made a drug deal with Roberto Steadman. Hackett told the agents that,

> Corbin told Hackett that he observed a **black female,** who he later identified as **Jackie** Steadman, exit the corner apartment on Parkwood Avenue, which was 2601 Parkwood Avenue. 2601 is Estelle Johnson's home. **[Jackie]** Steadman then got into a red small car appearing to be a Ford Escort occupied by two white males. A short time later, Corbin stated that he observed the same car return to the 2600 block of Parkwood Avenue and park in front of 2605 Parkwood Avenue. He then saw **the black female,** who he thought to be **Jackie Steadman,** leave the vehicle and run into the residence of Ilouise Cooper. (The Coopers would often leave their apartment open and allow individuals to come into their home freely.) Corbin told Hackett that he went to his mother's house (2611 Parkwood Avenue) and stood on the front porch and watched what was going on. The red car left and returned soon after. A white male got out of the car and went up to the apartment that **Jackie** Steadman had gone into and knocked on the door. He then dragged out a black female, whom Corbin thought was Jackie Steadman, and put her in the red car. When Corbin met Hackett a block away from home, the police were there.

Pet. Ex. 55 (emphasis added).

87. This contemporaneous description of the eyewitness' account of the events surrounding the abduction of the victim directly contradicts the false Proffer Statement in almost every key area. *See* Pet. Ex 23. Accordingly, prior to the proffer sessions, the government processed an abundance of evidence which wholly contravened the false Proffer Statement. Therefore, the government knew, or should have known, that the Proffer Statement was not true.

88. Likewise, when the agents of the government interviewed Hackett, Hackett divulged what Johnson told Hackett had actually transpired on the night of August 30, 1990. Like all of the other evidence possessed by the government, Johnson's description of the events directly contradicted the Petitioner's false Proffer Statement in almost every regard. Hackett informed the agents of the government that,

> Estelle Johnson told Hackett that Jackie Steadman had been in her apartment in the early morning hours of August 31, 1990. [Jackie] Steadman told Johnson that she had to leave and take care of some business with two guys. Estelle Johnson also told her Jackie came back to the apartment and exited through the back door. That is when a male approached Ms. Johnson's door and yelled, "Where is that, black bitch; I'm going to kill her." Johnson advised to the man that the woman he was looking for did not live in her apartment.

Pet Ex. 55.

89. This description of the personal account by the government eyewitness of the events surrounding the abduction of the victim directly contradicts the Proffer Statement on several key points. *See* Pet. Ex. 23. The proffer stated that the person with whom Madison made a drug deal was Roberto Steadman. In contrast, both Corbin and Johnson consistently told Hackett that it was a female with whom the culprits made a drug deal; that is: Jackie Steadman. The Proffer Statement states that Roberto Steadman was the drug dealer, by contrast Johnson told Hackett that Jackie Steadman ripped off **the** two males and then entered Johnson's apartment through the front door, "and exited through the back door." It was at this time that the culprit went looking for a

female at Johnson's apartment stating, "Where is that black bitch, I'm going to kill **her**." Johnson responded that, "the **woman** he was looking for did not live in her apartment." Pet Ex. 55 (emphasis added). Not only does this evidence demonstrate the government's knowing use of the false evidence through Johnson and Corbin during the trial of the Petitioner, but it also establishes the government's knowledge that the Proffer Statement was not true. *See Hood v. Johnson*, CL06-2311 Claims G., H., I., J., and K., *supra*.

90. **(vi)** Contrary to the false Proffer Statement which stated that Madison used the Petitioner's sheath and knives to abduct and kill the victim in this case, and that the sheath contained a large 10-inch chef's knife, a plastic handled bread knife, and an 8-inch "medium size chef knife" (Pet. Ex. 23); the sheath was physically incapable of containing those three knives simultaneously. *See* Pet Ex. 108. *See* also section II.(a) *supra*, and TR. tr., at 271, 273, 275, 278-279. Moreover, the Petitioner never owned an 8-inch Forschner chef knife model no. 431-8.

91. On April 13, 2000 the Petitioner voluntarily gave his sheath and knives for testing in order to assist in the government's investigation, and eliminate him as a suspect. *See* FOIA Vol. II., 217-218. *See also* FOIA Vol. II., 119, 125, 132, 154, 220, 125, 336, 338-340, and Pet. Exs. 81 and 110; D.F.S. Item #100. D.F.S. Item #100, the sheath and knives owned by the Petitioner, were submitted to the Division of Forensic Science ("DFS") on April 28, 2000 by Detective Wade to Lisa Schiesmier and not relinquished to Wade until January 23, 2001. *See* Pet. Ex. 110. It is worth noting that FOIA Vol. II., at 336, 338-340 reveal drastic discrepancies in the chain of custody regarding the sheath and knives owned by the Petitioner, and tested by the government. *See* Claim B., *infra*. Nevertheless, these Exhibits establish that the government possessed the sheath for an extended period of time prior to the Proffer Statement. It is obvious after reviewing Pet Ex. 101; Com. Ex. 7; Pet. Exs. 106, 107, Com. Ex. 11; and Pet. Ex. 108 that the government knew that the

sheath was physically incapable of containing a large 10-inch knife, a medium 8-inch knife, and a serrated knife simultaneously. Instead, contrary to the Proffer Statement, the sheath was uniquely designed and fabricated for the sole purpose of accommodating a 10-inch chef's knife, a serrated knife, and a small paring knife. *See* section II.(a) *supra*. *See also* Pet. Exs. 106, 107, and 101. *See also* Pet. Exs. 59, 60, 81, 110, and FOIA Vol. II., at 119, 125, 132, 154, 199.

92. Accordingly, prior to the proffer sessions the government possessed the forensic, physical evidence which proved the falsity of the Proffer Statement. Therefore, the government knew that the Proffer Statement was not true. Especially since, contrary to the Proffer Statements, it was a physical impossibility for the sheath to contain the large 10-inch knife, the, "medium size," 8-inch knife, and the serrated knife simultaneously. It must be underscored that the forensic, physical evidence is absolutely contrary to the testimony of Messing found on TR. Tr., 271, 273, 275, 278-279. *See* section II.(a), *supra*, and *Hood v. Johnson*, CL06-2311; Claims G., H., I., J., and K.

III.(b) THE GOVERNMENT'S AND THE PETITIONER'S EVIDENCE OBTAINED SUBSEQUENT TO THE PROFFER SESSIONS WHICH DEMONSTRATE THAT THE GOVERNMENT AND OTHERS KNEW THAT THE PROFFER STATEMENT WAS FALSE.

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93. Because the government had abundant evidence that the Proffer Statement was false (*See* **III.(a), (i)-(vi)**, *supra*) but had erroneously released convicted murderer Jeffrey Cox based solely on the false Proffer Statement, the government became desperate to find — or create — evidence that might support the false Proffer Statement.

94. **(i)** In the government's desperation, CD recordings of the Petitioner's telephone calls were made and investigated. *See* FOIA Vol. I., at 339. *See also* section II(b)(i), *supra*. After

listening to, and investigating the recordings of the Petitioner's telephone calls, the government heard more evidence that the Proffer Statement was false. While incarcerated at the Henrico County Jail, the Petitioner repeatedly told Louise Branson over the telephone in the visitation room; over the telephone on which inmates make collect calls; and in many letters that the Proffer Statement was false. *See e.g.*, Pet. Ex. 37. The information discovered by the government through its investigation of the Petitioner's phone calls caused the government to search the home of Louise Branson and the Petitioner alleging "**Obstruction of Justice in the <u>murder trial</u>**," of the Petitioner. *See* subsection II., *supra*, Pet. Exs. 111, 112, and 43 (emphasis added).

95. Instead of finding and seizing evidence which may have supported the Proffer Statement, the government seized an abundance of evidence demonstrating the falsity of the Proffer Statement, and reiterating what the government learned via its investigation of the recordings of the inmate telephone calls, *i.e.,* the Proffer Statements are false, and that the Petitioner is innocent. *See* FOIA Vol. I., at 334. *See also* FOIA Vol. III., at 127. The result of the search and seizure is particularly emphasized in the production of Pet. Ex. 37, FOIA Vol. I., 334, and FOIA Vol. III., 127.

96. The FBI faxed a portion of this evidence to Trono and Goodwin on December 10, 2001. *See* Pet. Ex. 37. On December 11, 2001, Goodwin called Ms. Branson to his office. Upon arriving at Goodwin's office, Ms. Branson was informed that the sole purpose of the meeting was to allow Goodwin to ascertain how much Ms. Branson knew with respect to the deal, the Proffer Agreement, the Proffer Statement, and Goodwin's providing the false statements for the Petitioner to give to the government in order to facilitate the deal. *See* Pet. Ex. 38, and 93. During this meeting Ms. Branson informed Goodwin that she was aware of the entire corrupt situation. *See* Pet. Exs. 38, and 93. In response, Goodwin replied, "Oh my God, I'm going to lose

my license." *See* FOIA Vol. I., p. 339, *Hood v. Johnson,* CL06-2311; Claims G., H., I., J., and K.

97. **(ii)** On December 17, 2001, Goodwin visited the Petitioner at the Henrico County Jail where, with hardly a word exchanged, Goodwin slid two documents to the Petitioner. *See* Pet. Ex. 46, and 47. The first document was a letter from Goodwin to the Petitioner which stated, in pertinent part,

> The Commonwealth has provided me with copies of two of the letters you wrote to Louise Branson, which the Commonwealth seized from her pursuant to a search warrant. **<u>From my review of these letters, and from subsequent discussions I have had with you and others, it is apparent to me that you have not been truthful in your debriefings with the Commonwealth</u>.** Further, you have implied in these letters that I instructed you to lie, or at least that I had knowledge of your **<u>untruthful statements</u>.** Ethically, **I cannot <u>continue</u> to assist you with any possible fraudulent conduct.**

Pet. Ex. 46 (emphasis added).

98. Thus, Goodwin alleges that the falsity of the Proffer Statement was "apparent" to him based on Goodwin's review of two letters the Petitioner wrote, and discussions with "others," presumably, Louise Branson, the Petitioner's fiancé and recipient of the two letters. Pet. Ex. 46.

99. In truth, however, the lies of the Proffer Statement were apparent to Goodwin because they were his own lies, fed to the Petitioner as part of Goodwin's own scheme. Indeed, it is unlikely that Goodwin, or any criminal defense attorney, would find such lies "apparent" based solely on his client's assertions in a couple of letters which were then parroted by the client's fiancé. Pet. Ex. 46.

100. While the government had developed abundant evidence independent of the Petitioner's assertions to conclude that the Proffer Statement was false, the only basis upon which Goodwin could reasonably conclude the Proffer was a lie was his knowledge that he, himself, was the architect of the lie.

101. Regardless how Goodwin knew the Proffer Statement was false — whether he based his conclusions on the assertions of his client and client's fiancé, or because he spoke with "others" who knew the proffer was false, or simply because he knew the lie was his own — Goodwin has acknowledged that he knew the Proffer Statement was a lie and he related this information to the government and to the Court. *See* Pet Ex. 47

102. Notably, Goodwin takes great care in his letter to not deny the Petitioner's allegations that Goodwin provided the false proffer statements to the Petitioner. Pet. Ex. 46. Instead, immediately after Goodwin delivered the letter to the Petitioner, Goodwin retained criminal defense attorney, Murray Janus, to defend Goodwin against anticipated criminal charges stemming from his conduct as alleged by the Petitioner. *See* 5/28/2002 M.H. tr.

103. The second document was a Motion to Withdraw as Counsel. *See* Pet. Ex. 47. In pertinent part, Goodwin's Motion to withdraw states, "**the Commonwealth is aware of the existence of and of the nature of the conflict, and agrees that counsel must withdraw from representation of the defendant.**" Pet. Ex. 47 (emphasis added). Clearly, Goodwin discussed with the government the fact, "that it is **apparent**…that [the Petitioner] **ha[d] <u>not</u> been truthful in [the] debriefings** with the Commonwealth," because "the Commonwealth is aware of the **existence of, and <u>nature</u> of the conflict**, and agree[d]" with Goodwin. Pet. Exs. 46, and 47 (respectively, emphasis added).

104. **(iii)** On February 7, 2001, court appointed counsel informed the court that the Proffer Statement was only made at the insistence of Goodwin, and that Goodwin told the Petitioner what to say. During motions hearings, court appointed defense counsel, David Lassiter, stated the following:

> And the reason why Mr. Goodwin is not in this case now is because my client is saying he only made the proffer because he was supposed to take a plea

> agreement and, in essence, go home and, basically, not get any time or a little time or something like that. And the reason why Goodwin is not here is my client said, basically, Goodwin, basically, told him what to say and that's why he made the proffer.

2/07/2002 Motions Hearing transcript (hereinafter "2/07/2002 M.H. tr."), at 21. *See* Appendix

Oddly, although Mr. Lassiter never said that, "the statements were not true," the trial judge already knew that was the case and responded,

> All right. I will consider that and the explanation given by Mr. Lassiter **that those statements were made at the request of his lawyer and your client will currently say that the <u>statements were not true</u>.**

2/07/2002 M.H. tr., at 22.

105. Notwithstanding that Lassiter never proffered that the statements were not true, Lassiter concurred with the trial judge's assessment of the issue that the Proffer Statement was not true, and that the statements were only made at the insistence of Goodwin and responded, "Yes." 2/07/2002 M.H. tr., at 22. *See Hood v. Johnson,* CL06-2311; Claims G., H., I., J., K., O., P., Q., and T.

106. **(iv)** The Respondent, has conceded this issue by admitting its knowledge that the Proffer Statement was false. Accordingly, the Respondent cannot, in good faith, take the contrary position in the instant proceedings. On May 30, 2003, the Respondent raised the falsity of the Proffer Statement in its *Brief of Appellee* filed in the Court of Appeals of Virginia (*Hood v. Commonwealth*, Record No. 2469-02-2) stating,

> When [the Petitioner] declared that his intent had been to obtain the benefits of a plea agreement by **fraud...** [the Petitioner] cannot now claim that the Commonwealth was bound by an agreement [the Petitioner] **<u>never had fulfilled</u>** and which he was refusing to be bound.

Id., *Brief of Appellee*, at 11 (emphasis added).

107. Thus, the Respondent has previously conceded that the Proffer Statement was false, and

raised the government's knowledge of the falsity of the Proffer Statement as grounds for the Court of Appeals to consider in determining whether it was the Petitioner, or the government that breached the terms of the agreement. *See Id*., at 2, and 11.

108. And again, on November 5, 2004, the Respondent admitted its knowledge that the Proffer Statement was false in its Brief of Appellee filed in the Supreme Court of Virginia (*Hood v. Commonwealth*, 269 Va. 176, 608 S.E.2d 913 (2005)). In that Court, the Respondent cited case law to support the proposition that the, **"trial court did not abuse its discretion <u>by revoking immunity of defendant who lied during his proffer</u>."** *Id.*, *Brief of Appellee* at 18. The Respondent cited as an analogy that a, "party who obtained insurance policy by **<u>fraud</u>** had no standing in equity to interpose a plea of estoppel." *Id*., at 18 (emphasis added throughout) (citing *Pennsylvania Casualty v. Simpaulous*, 235 Va. 460, 369 S.E.2d 166 (1998)).

109. Accordingly, the Respondent has raised, conceded, and admitted the falsity of the Proffer Statement to this Court and to the Supreme Court of Virginia and cannot be allowed to disavow itself of that knowledge in the instant proceedings. *See Hood v. Johnson*, CL06-2311 Claims G., H., I., J., and K., *supra*.

110. **(v)** On March 24, 2006, the Petitioner filed with the *Habeas* court the Petitioner's Exhibit 38; an affidavit of Ms. Branson. In her affidavit Ms. Branson made several attestations under the penalty of law relevant to this issue. Specifically, Ms. Branson attested that,

> I was aware that the statements Mr. Hood had been providing to the government were all lies and that these lies were created by Mr. Goodwin to provide Mr. Hood a plea bargain for two misdemeanors. By Mr. Goodwin facilitating these false statements, Mr. Hood would be home any day pursuant to the deal Mr. Goodwin had made with Robert Trono. Additionally, I knew of Mr. Goodwin's plan to have Mr. Hood give false statements to the government from the beginning.

Pet. Ex. 38 (executed August 28, 2004).

111. **(vi)** Additionally, on March 24, 2006, the Petitioner filed with the *Habeas* Court the Petitioner's Exhibit 50, an affidavit of the Reverend John Newell. In his affidavit Reverend Newell made several attestations under penalty of perjury relevant to this issue. Specifically, Reverend Newell attested that,

> during the time subsequent to Mr. Hood's arrest, I spoke frequently and at length with Mr. Hood's fiancée, Ms. Branson. These discussions concerned a variety of issues; however, the majority of our conversations were related to the plight of Mr. Hood and the untenable actions of the government and Mr. Goodwin in the course of Mr. Hood's prosecution. On or about November 2, 2001, I received a phone call from Ms. Branson at the request of Mr. Hood. Ms. Branson indicated that Mr. Hood's attorney had asked him to testify against another man whose guilt was unknown to Mr. Hood, and in exchange for doing so Mr. Hood's attorney promised that he would be home by Thanksgiving. Ms. Branson went on to say that Mr. Hood was confused and did not know what to do or who to trust. In response, I recall that I told Ms. Branson something to the effect that sometimes in life we have to choose the lesser of two evils.
>
> At some later date, while visiting Mr. Hood at the Henrico County Jail, Mr. Hood indicated to me that he would be home any day because of the deal his attorney had worked out. The deal was such that based on Mr. Hood's telling the government whatever his attorney told him to say; he would be home soon. The specifics were not gone into in great detail except that Mr. Hood was innocent of any involvement with the crimes and his attorney's instructions were for Mr. Hood to tell the government whatever his attorney told him to say. In exchange for Mr. Hood complying with his attorney's instructions, Mr. Hood would be free.

Pet. Ex. 50 (executed on January 19, 2006).

112. Accordingly, others in addition to the government, Goodwin, the Respondent, and the Petitioner knew that the Proffer Statement was false when Special Agent Messing testified about the details in the Proffer Statement as substantive evidence in the Commonwealth's case-in-chief. *See Hood v. Johnson*, CL06-2311; Claims G., H., I., J., K., L., and M.

113. **(vii)** On May 29, 2007, the Petitioner received several pages in response to his federal Freedom of Information Act request ("FOIA Vol. I") *See* B., section IV., *infra*. FOIA Vol. I, at 174-175 revealed that when questioned by agents of the government, one of the original

investigators stated,

> If [anyone] had any concern about the guilt of [Cox] it was dispelled by a number of events. First was [Johnson's] reaction when [Cox] was brought into the courtroom at the preliminary hearing. [The original investigator's] recollection is that, following the arrest of Hood on cocaine distribution charges [he] received a phone call from [ ] advising [him] that Hood was not the right guy. [His] recollection is that **Hood had an alibi for the time of the offense.**

FOIA Vol. I, at 174-175 (dated 5/8/2000) (emphasis added).

114. Additionally, FOIA Vol. I, at 120 revealed the following information which was undisclosed to the Petitioner, and/or his defense counsel, in violation of *Brady*, *supra*, and progeny. This document provided both exculpatory, and impeachment evidence, as well as evidence proving that the Proffer Statement was false and the government knew it was false. In pertinent part FOIA. Vol. I, at 120 states,

> Numerous interviews continue regarding this investigation and during a meeting on September 27, 1999, Assistant United States Attorneys James Comey and Robert E. Trono advised that the FBI would basically have to prove that [Madison] and Hood were the actual killers of Cooper and even though previous witnesses against [Cox] have since recanted or changed their testimony from the time in 1990 of the trial to the present time, **this would not make any difference in that their identifications of [Cox] in 1990 were not recanted.**

FOIA Vol. I, at 120 (dated 9/28/1999) (emphasis added).

115. On August 22, 2007, the Petitioner received another interim volume of documents in response to the federal FOIA request. The second volume of documents ("FOIA Vol. II") contained other interviews of original investigators by agents of the government. These interviews contained, among other things, that Cox had a knife in a brown case but that the Commonwealth Attorney's Office lost the brown leather case, and the buck knife. *See* FOIA Vol. II., at 199. Additionally, the original investigator stated that he remembers the small reddish orange car, with a console in the middle. Witnesses told the original investigator that the culprits had a hard time pushing the victim over the console. *See* FOIA Vol. II, at 199. This description

fits Cox's Mustang, but is contrary to the false Proffer Statement. Likewise, the description of the knife case and buck knife that Cox had is congruent with all of the evidence against Cox, however, it is contrary to the false Proffer Statement.

116. On May 5, 2008, the Petitioner received an additional interim volume of documents in response to the federal FOIA request. The fourth volume of documents ("FOIA Vol. IV") revealed more evidence favorable to the Petitioner. This evidence was favorable to the Petitioner not only because of its exculpatory value, but also because it demonstrated the government's awareness that the Proffer Statement was not true. As part of the government's pattern of withholding evidence favorable to the defense in violation of *Brady* and progeny, the following evidence was not disclosed to the Petitioner or to his defense counsel: (1) The FBI were told that the, "police took [the Petitioner] to a public place" where eyewitnesses "did not identify him." And the FBI noted that "[Petitioner] has brown hair." FOIA Vol. IV., at 168; *See, also*, FOIA Vol. III., at 29 and 34, and; (2) In 1991 the government's eyewitness testified that the driver of the assailants' vehicle had "blond hair." Pet. Ex. 1, pg. 85. This exculpatory evidence reveals that as early as 1991, eyewitnesses eliminated the Petitioner both as the assailant who abducted Mrs. Cooper at knifepoint, and as the driver of the vehicle in which Mrs. Cooper was abducted.

117. Simply stated, the government's eyewitnesses eliminated the Petitioner as being either of the two assailants in this case, and proved that the government knew the Proffer Statement was not true long before Special Agent Messing testified that it was true. More importantly, the government knew that the Petitioner was actually innocent of any involvement in these crimes well before the multi-jurisdictional grand jury was convened, without a court reporter, in violation of Virginia Code Section 19.2-215.9.

118. The May 5, 2008, release of documents, FOIA Vol. IV., also contained a copy of the

transcript of Cox's plenary hearing held on March 31, 1999. This transcript was thought to have been provided to Goodwin in the early stages of the underlying criminal case, **but was not**. *See* 8/21/2001 M.H. tr., at 96-97 ("Mr. Goodwin has been provided in this case and has the particular luxury in this case of having an entire box full of transcripts dealing with this case from the Cox trial itself and the various motions that were heard in that case as well as the extensive *habeas* corpus proceeding that was held before Judge Stout"). *See also* Pet. Ex. 81, (Commonwealth's Response to Defendant's Motion to Compel Discovery, 8/3/2001)

119. The Petitioner diligently sought to obtain Cox's plenary hearing transcript believing it contained exculpatory evidence. *See* Pet. Exs. 10, 11, and 12. When the underlying criminal case concluded, and before the Petition for Appeal was filed in the Court of Appeals, one of the Petitioner's trial counsel, Lassiter, produced the entirety of the Petitioner's case file to Louise Branson. Ms. Branson, in turn gave the entire "box of documents" to Lynnice Randolph. *See* Pet. Exs. 38, and 73. Missing from the case file, however, was the Cox *habeas* transcripts. *See* Pet. Exs. 12, 38, and 73. On June 1, 2004, the Petitioner wrote to Goodwin requesting the Cox *habeas* transcript. *See* Pet. Ex. 12. On June 17, 2004, Goodwin responded that the Petitioner's case file, in its entirety, was turned over to Lassiter. *See* Pet. Ex. 12. Likewise, on June 1, 2004, aware that when Lassiter turned over the entire case file to Louise Branson the Cox *habeas* transcript was not contained in the, "box of documents," the Petitioner wrote to Lassiter and Hunter requesting the Cox *habeas* transcripts. *See* Pet. Ex. 12.

120. Both Lassiter and Hunter denied having the Cox *habeas* transcript. The Petitioner then filed a complaint with the Virginia State Bar alleging that one, or all of the attorneys had mishandled the Petitioner's case file. *See* Pet. Ex 12. The Bar found the Petitioner failed to demonstrate by "clear and convincing evidence" that counsel's handling of the case file violated

Rules. Pet. Ex. 12.

121. The Petitioner then turned to the Circuit Court of the City of Richmond. The Petitioner twice filed motions for production of documents in his attempt to obtain a copy of Cox's *habeas* transcript, and twice Judge Spencer denied the Petitioner's motions. *See* Pet. Exs. 10 and 11. Even though Judge Spencer was the trial judge in the case, ironically, she failed to understand why the Petitioner would need the transcript of Cox's *habeas* hearings. *See* Pet. 10 and 11.

122. The May 5, 2008, FOIA release of a heavily redacted Cox *habeas* transcript revealed that investigators had determined that the Petitioner had an alibi exonerating him of involvement in the crimes against Mrs. Cooper and, therefore, had eliminated the Petitioner as a suspect and, importantly, that the Commonwealth knew of said alibi before the Commonwealth prosecuted the Petitioner.

123. Specifically, the copy of the Cox *habeas* transcript which the Petitioner was provided through the FOIA request revealed testimony, under oath, that the Petitioner was eliminated as a suspect due to a thoroughly investigated and confirmed alibi. FOIA IV., at 483.

124. In addition to the original investigator's statement to the FBI that, "[the Petitioner] was not the right guy," and that, "[the Petitioner] had an alibi for the time of the offense," (FOIA Vol. I., at 174-175), the government's knowledge of the Petitioner's alibi was corroborated under oath by a witness in the Cox *habeas* hearing. This witness also testified that two private investigators hired by Cox investigated and confirmed the fact that **the Petitioner had an alibi "after the fact" and thus, the Petitioner was, "eliminated [] as a suspect."** FOIA Vol. IV., at 483 (emphasis added).

125. The size of the excision of the name of the witness, and the nature of the questions and answers, indicate the witness was one of Cox's trial attorneys, John F. McGarvey or Robert P.

Geary, who testified as follows:

> My recollection was that Mr. Hood had — was either in jail at the time or **there was something that <u>eliminated</u> 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 <u>we</u> had that information prior to that time.**

FOIA IV., at 483 (emphasis added). Government Investigators and the FBI "attended the *habeas* hearing and witnessed the testimony given under oath" regarding the Petitioner's alibi that exonerated the Petitioner during Cox's *habeas* hearing on March 31, 1999. FOIA Vol. I., at 84; FOIA Vol. I., at 118.

126. Thus, one of the original investigators stated to the FBI that "[the Petitioner] had an alibi for the time of the offense" (FOIA Vol. I., at 174-175), and said alibi was corroborated by Cox's trial attorney at Cox's *habeas* hearing. Moreover, the Petitioner's alibi was further investigated and confirmed by the two private investigators hired by Cox after the Cox trial. Therefore, the Petitioner's alibi was investigated, established and confirmed by 1) a police officer, 2) a trial attorney, and 3) by two private investigators. Indeed, the Attorneys General on direct appeal from the criminal trial argued that the petitioner was not entitled to relief **because the Proffer Statement was false**. Undoubtedly, the government knew or should have known both that the Petitioner was actually innocent and that the Proffer Statement was not true when Special Agent Messing testified to its veracity.

III.(c) THE FOREGOING PROVIDES THIS COURT WITH THE REQUISITE SHOWING OF THE PETITIONER'S ACTUAL INNOCENCE BY WAY OF PREVIOUSLY UNKNOWN OR UNAVAILABLE EVIDENCE THAT IS MATERIAL AND, WHEN CONSIDERED WITH ALL OF THE OTHER EVIDENCE IN THE CURRENT RECORD, WILL PROVE THAT NO RATIONAL TRIER OF FACT

WOULD HAVE FOUND PROOF OF GUILT WHICH IS SUFFICIENT TO SATISFY VA. CODE § 19.2-327.11

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127. "To obtain a writ of actual innocence based on non-biological evidence under Va. Code §§ 19.2-327.10 through -327.14, a Petitioner must allege and prove [by a preponderance of evidence], among other things, that the newly-discovered evidence: (1) 'was previously unknown or unavailable to the Petitioner or his trial attorney of record at the time the conviction became final in the circuit court;' Code § 19.2-327.11(A)(iv); (2) 'is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court;" Code § 19.2-327.11(A)(vi); (3) 'is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact [w]ould have found proof of guilt beyond a reasonable doubt;' Code § 19.2-327.11(A)(vii); and (4) 'is not merely cumulative, corroborative or collateral.' Code § 19.2-327.11(A)(viii)." *Johnson v. Commonwealth*, 273 Va. 315, 321, 641 S.E.2d 480, 484 (2007)

128. Indeed, 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 reflected, for example in 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, at 372 (1970) (Harlen, J. concurring); *Schlup v. Delo*, 513 U.S. 298, at 325 (1995). *See also*, *T. Stake*, *Evidence*, 756 (1824) ("The maxim of law is ... that it is better that ninety-nine ... offenders should escape, than one innocent man should be condemned"); *Friend, The Law of Evidence in Virginia*, 6th ed. § 9-10, at 343 ("it is far better that one hundred guilty persons go free than one innocent person should be convicted"). *Henry J. Friendly, Is Innocence Irrelevant?: Collateral Attack on*

Criminal Judgments, 38 U. CHI L. REV. 142, 150 (1970) (quoting Note, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68YALE L.J. 98, 101 n.13 (1958)) ("[t]he policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.")

129. The Court in *Schlup* held, "to be credible, such a claim [of actual innocence] requires the Petitioner to support his allegations [] with reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." *Schlup*, 513 U.S., at 324; *House v. Bell*, 547 U.S. 518, at 537, 126 S.Ct. 2064, at 2077 (2006).

130. "To establish the requisite probability [of actual innocence], the Petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S., 327. *See also* § 19.2-327.13 (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, and … that no rational trier of fact would have found proof of guilt … beyond a reasonable doubt"). The *Schlup* court noted, "finally that the [*Murray v. Carrier*, 477 U.S. 478 (1986)] standard requires a Petitioner to show that it is more likely than not that 'no reasonable juror' would have convicted him. The word 'reasonable' in that formulation is not without meaning. It must be presumed that a reasonable juror would consider fairly all of the evidence presented." *Schlup*, 513 U.S. at 329.

131. In *Bush v. Commonwealth*, 68 Va. App. 797, 813 S.E.2d 582 (2018) the Court explained it this way:

> The General Assembly's amendment of the actual innocence statutes has shifted the focus from the jury's raw ability to convict (the "could" standard) to the jury's volition to convict (the "would" standard), thereby significantly broadening the scope of our review in considering whether or not to grant a writ of actual

> innocence. Through the use of the word "would," the General Assembly has directed us to examine the "probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." [*Schlup v. Delo*, 513 U.S. 298, 332, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)]. Thus, we are required to look beyond whether the evidence is sufficient to sustain the conviction; we must also examine the likelihood of a reasonable juror finding the Petitioner guilty beyond a reasonable doubt once all of the evidence has been fairly considered. *Id*.

Id. at 808-809, 813 S.E.2d at 587-588, quoting *In re Watford*, 295 Va. 114, 809 S.E.2d 651 (2018). "In other words, **the statute effectively requires us to draw our conclusion from a hypothetical new trial in which a rational factfinder hears all of the evidence in the aggregate**, including: any records from the original case, the evidence presented at the original trial, the newly discovered biological evidence, any additional factual proffers made by the petitioner or the Commonwealth, and the evidence adduced at the evidentiary hearing held pursuant to Code § [19.2-327.12]. It is only after the totality of the evidence is considered that we can determine whether to grant or deny the writ." *In re Watford*, 295 Va. 114, at 125 (emphasis added).

132. Under the *Carrier* standard then, the court must consider what reasonable triers of fact would do in view of the evidence presented at trial combined with the evidence presented in this proceeding which was not presented at trial. As the *Schlup* Court held, the court, "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Schlup*, 513 U.S. at 332.

133. Rather than requiring absolute certainty about guilt or innocence in these proceedings under § 19.2-327.10 *et seq*. in which actual innocence is invoked, the Petitioner's burden is to demonstrate that more likely than not, no reasonable juror would find him guilty beyond a reasonable doubt.

134. Furthermore, the standard for invoking actual innocence in the present proceedings is not

equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979) which governs insufficient evidence claims. Instead, because a claim involving the actual innocence involves evidence the trial court did not have before it, the inquiry requires this court to assess how reasonable jurors would react to the overall, newly supplemented record.

135. In the instant case the Petitioner has made the requisite showing to invoke the purpose and relief warranted under Virginia Code Sections § 8.01-195.10; § 8.01-195.11; § 8.01-195.13; §19.2-327.10; §19.3-327.11; §19.2-327.12; §19.2-327.13. When any rational trier of fact is provided with all of the reliable alibi evidence, exculpatory evidence, scientific evidence, physical evidence, eyewitness testimony, admissions of the Respondent, sworn attestations, proof of the knowing use of false evidence at trial by the government, evidence that the Proffer Statement was false, prosecutorial misconduct, and the abundance of evidence not presented at trial that refuted any notion of the Petitioner's guilt, "it [is] more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *House, supra*. *See Bush v. Commonwealth*, 68 Va. App. 797, 813 S.E.2d 582 (2018); *In re Watford*, 295 Va. 114, 809 S.E.2d 651 (2018).

136. This is especially true where the Petitioner's evidence proves the falsity of the Proffer Statement which was central to connecting the Petitioner to the murder, and the Petitioner's evidence puts forward substantial alibi evidence, prosecutorial malfeasance, and evidence pointing to different suspects. Without the Proffer Statements "no rational trier of fact would have found proof of guilt." § 19.2-327.11 (vii).

137. Effectively, this ruling has already been made by the Judge presiding over the Petitioner's *Habeas* case. The November 10, 2009 Memorandum Opinion granting the Petition for Writ of *Habeas Corpus,* Judge Cavedo presiding in pertinent part states,

> Hood was clearly convicted on the evidence of his statements contained in his proffer read into evidence by the Commonwealth as part of its case-in-chief. **The only evidence at trial showing Hood's principal in the second-degree participation in the murder was his own statement**, which was presented without objection as evidence in the case-in-chief against him, in violation of the proffer agreement's terms."….**"Hood could not have been convicted of murder as a principal in the second degree without the Proffer Statement becoming part of the Commonwealth's case-in-chief. There was no other evidence to support the principal in the second-degree theory.**

Id. at page 10. (Emphasis added.)

138. The *Habeas* Court has essentially made a ruling equivalent to the determination necessary to grant relief under the standard that "no rational trier of fact would have found proof of guilt beyond a reasonable doubt." § 19.2-327.11 (vii). Truly, the Judge presiding over the Petitioner's *habeas* case would fall under this court's definition of a "rational trier of fact." *Id*. The *Habeas* court ruled that: "Hood could not have been convicted of murder as a principal in the second degree without the Proffer Statement becoming part of the Commonwealth's case-in-chief. There was no other evidence to support the principal in the second-degree theory." *Hood v. Johnson*, CL06-2311, 11/10/2009 Memorandum, at 10. *See* Appendix, *infra*.

WHEREFORE, based on the facts and the authorities cited herein, The Petitioner prays that this Honorable Court will grant the Petition for Writ of Actual Innocence.

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. *SEE COMMONWEALTH V. HOOD*, F-01-2201, F-01-2202 (CR01-F2201, CR01-F2202) (2001) *SEE ALSO HOOD V. COMMONWEALTH*, 269 VA. 176, 608 S.E.2D 913 (2005) CERT. DENIED, 126 S. CT. 267 (OCT. 3, 2005); HOOD V. JOHNSON, CL06-2311, CIRCUIT COURT FOR THE CITY OF RICHMOND (2011)

Controlling Statute:

Virginia Code Section 8.01-195.13 Compensation for certain intentional acts.

> A. In any matter resulting in compensation for wrongful incarceration pursuant to this article**, if a court of competent jurisdiction over the matter determines, or the court record clearly demonstrates, that the Commonwealth or any agency, instrumentality, officer or employee, or political subdivision thereof (i) intentionally and wrongfully fabricated evidence that was used to obtain the wrongful conviction in such manner and (ii) intentionally, willfully, and continuously suppressed or withheld evidence establishing the innocence of the person wrongfully incarcerated**, including but not limited to suppression or withholding of evidence to the Governor for the purpose of clemency, **the Commonwealth may compensate the person wrongfully incarcerated for such intentional acts. Such amount shall be in addition to any compensation awarded pursuant to § 8.01-195.11 and may be up to or equal to the amount of such compensation. The additional compensation shall be added to any amount awarded pursuant to § 8.01-195.11, and the total compensation shall be paid pursuant to subdivision B of § 8.01-195.11.** Nothing provided in this section shall be interpreted to supplant, revoke, or supersede any other provision of this article applicable to the award of compensation for wrongful incarceration, and the additional compensation shall be subject to any conditions set forth in this article. 2018, cc. 502, 503.[27] (Emphasis added.)

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[27] The purpose and intent of Va. Code § 8.01-195.13 is clear. *See* Chapter 502 An Act to amend the Code of Virginia by adding in Article 18.2 of Chapter 3 of Title 8.01 a section numbered 8.01-195. and Chapter 503 An Act to amend the Code of Virginia by adding in Article 18.2 of Chapter 3 of Title 8.01 a section numbered 8.01-195.13.
….

I. LEGAL AUTHORITIES – "MATERIALALITY" See also § 19.2-327(vii)

II. THE FOLLOWING SATIFIES THE REQUIREMENTS OF A PETITION FOR WRIT OF ACTUAL INNOCENCE UNDER VA. CODE § 19.2-327.11(i) - (viii); AND VA. CODE §8.01-195.13 (i) - (ii). ACCORDINGLY, THERE IS NO PROCEDURAL BAR PRECLUDING THIS CLAIM.

III. STANDARD OF REVIEW: "MATERIALITY". ***See*** **§ 19.2-327.11 (vi)(vii) and (viii)**

IV. THE FREEDOM OF INFORMATION ACT REQUEST. ***See*** **§ 19.2-327.11 (iv)(v)(vi)**

IV.(a) THE PRE-TRIAL MOTION TO DISMISS RELATING TO THE GOVERNMENT'S PRE-INDICTMENT DELAY AND THE PREJUDICE FLOWING THEREFROM. ***SEE ALSO HOOD V. JOHNSON*****, CL06-2311 CLAIM C., AND CLAIM F.**

IV.(b) THE GOVERNMENT'S DESTRUCTION OF DNA EVIDENCE HAVING POTENTIALLY EXCULPATORY VALUE. ***SEE ALSO HOOD V.***

"Whereas, Norfolk police withheld from each of these wrongfully charged men evidence that, had it been disclosed, would have prevented Mr. Williams and Mr. Dick from entering guilty pleas to avoid the death penalty and would have led juries to acquit Mr. Wilson and Mr. Tice of all charges; and". *Id*.

….

"Whereas, had Norfolk officials not purposefully fabricated evidence to make each man appear guilty and deliberately withheld exonerating evidence during the trials, appeals, clemency proceedings, and state and federal *habeas* proceedings that would have proven their innocence, these men would not have been charged with or convicted of these horrific crimes and would not have suffered for nearly two decades with shame, humiliation, and loss of liberty as convicted rapists and murderers." *Id*.

***JOHNSON*, CL06-2311; CLAIM D., CLAIM F.**

IV.(c) THE KNOWN FALSITY OF THE PROFFER STATEMENTS AND FBI S.A. MESSING'S TESTIMONY RELATING THERETO. *SEE ALSO HOOD V. JOHNSON*, CL06-2311 CLAIMS J.(a), K.(a), D.D., AND E.E.

IV.(d) ESTELLE JOHNSON, A KEY EYEWITNESS FOR THE GOVERNMENT. *SEE ALSO HOOD V. JOHNSON*, CL06-2311; CLAIM J.(c), AND CLAIM K.(c).

IV.(e) JAMES CORBIN, A KEY EYEWITNESS FOR THE GOVERNMENT. *SEE ALSO HOOD V. JOHNSON*, CL06-2311; CLAIM J.(d), AND CLAIM K.(d).

IV.(f) MEMBERS OF THE CITY OF RICHMOND POLICE DEPARTMENT AS SUSPECTS IN THIS CASE.

IV.(g) THE OTHER UNNAMED SUSPECTS IN THIS CASE.

IV.(h) THE ARREST OF CERTAIN WITNESSES FOR VIOLATIONS OF 18 U.S.C. § 401 INVOLVING THIS CASE.

IV.(i) THE ONGOING INVESTIGATIONS OF PERJURY COMMITTED BY INDIVIDUALS INVOLVED IN THE CASE OF *COMMONWEALTH VS. COX* AND THE PETITIONER'S UNDERLYING CASE.

IV.(j) BILLY MADISON'S ABSENCE FROM ANY LEGAL PROCEEDINGS RELATED TO MS. COOPER'S ABDUCTION AND MURDER PROVES THAT LAW ENFORCEMENT KNEW THE PROFFER STATEMENTS WERE FALSE.

I. LEGAL AUTHORITIES – "MATERIALALITY" See also § 19.2-327(vii)

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139. Over five decades ago the Supreme Court of the United States, in the case of *Brady v. Maryland*, 373 U.S. 83 (1963), held that "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." *Id*., 373 U.S., at 87.

140. In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court made clear that a defendant's failure to request favorable evidence did not relieve the government of its obligation because "elementary fairness requires it to be disclosed even without a specific request." *Id*. 427 U.S., at 110-111 (relying on *Berger v. United States*, 295 U.S 78 (1935)). In *Agurs*, the Supreme Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was false. *Id*., at 103-104. Second, where the government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence. *Id.* at 104-107. Third, where the government failed to volunteer exculpatory evidence never requested, or only requested in a general way. *Id*., at 108.

141. The third prominent case on the way to current *Brady* law is *United States v. Bagley*, 473 U.S. 667 (1985). The *Bagley* Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes. The Court in *Bagley* abandoned the distinction between the second and third *Agurs* circumstances, i.e., the specific and general, or no request situations. *Bagley* held that regardless of whether a request was made, favorable evidence is material and constitutional error results from its suppression by the government, "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to

undermine confidence in the outcome." *Id.*, at 682.

142. A decade after *Bagley* this issue was addressed again in *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Kyles* the Supreme Court made several significant holdings concerning four specific aspects of materiality under *Bagley* which bear emphasis here. First, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." *Id.*, at 434. The Supreme Court made clear that, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial'." *Id.*, at 434 (quoting *Bagley*, 473 U.S., at 678).

143. Second, materiality "is not a sufficiency of the evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.*, at 435.

144. Third, a harmless error analysis is unnecessary once materiality has been determined. "In sum, once there has been *Bagley* error as claimed in this case it cannot subsequently be found harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)." *Id.*, at 435.

145. Fourth, suppressed evidence must be "considered collectively, not item by item ... This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Accordingly, "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material

level of importance is inescapable." *Id.* 514 US., at 438-439. Upon consideration of these factors, a reviewing court is charged with the responsibility of determining if the suppression of evidence "undermines confidence in the outcome of the trial." *Bagley*, 473 US., at 678.

146. The Commonwealth of Virginia has adopted the holdings and principles announced in *Kyles v. Whitley*, *supra*, and *United States v. Bagley*, *supra*. The leading Virginia Supreme Court case with respect to *Brady* claims is *Workman v. Commonwealth*, 272 Va. 633, 636 S.E.2d 368 (2006). In *Workman* the Supreme Court of Virginia reversed a trial court and the Virginia Court of Appeals, where both courts concluded that a failure to disclose impeachment evidence "does not rise to a reasonable probability that the result of the proceeding would have been different." *Id*., at 641. The Supreme Court of Virginia explained:

> There are three components of a violation of the rule of disclosure first enunciated in *Brady*: a) The evidence not disclosed to the accused 'must be favorable to the accused either because it is exculpatory,' or because it may be used for impeachment; b) the evidence not disclosed must have been withheld by the Commonwealth either willfully or inadvertently; and c) the accused must have been prejudiced. *Id*., at 281-82. Stated differently, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' *Kyles v Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). '[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that suppression undermines confidence in the outcome of the trial.' *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Id., 272 Va. 644-645.

147. Likewise, with respect to the requirement of the reviewing court to examine a *Brady* claim under the lens of how disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable; the law of the Commonwealth reflects that standard. In *Taitano v. Commonwealth*, 4 Va. App. 342, 349, 358 S.E.2d 590, 594 (1987), the Court held that,

> *Bagley* requires a court to assess the reasonable probability of a different result 'in light of the totality of the circumstances and with awareness of the difficulty of reconstructing in a post-trial proceeding the course that defense and trial would have taken had the defense not been misled by the prosecution's response.' *Robinson v. Commonwealth*, 231 Va. 142, 152, 341 S.E.2d 159, 165 (1986) (quoting *Bagley*, 473 U.S., at 683). To accomplish this, the evidence adduced at trial must be compared with what the defendant contends could have been adduced.

Taitano, 4 Va. App., at 349, 358 S.E.2d 594. *See also Davis v. Commonwealth*, 1996 Va. App. Lexis 618; *Carter v. Commonwealth*, Va. App. Lexis 409 (1999); *McCord v. Commonwealth*, Va. App. Lexis 9 (2001).

II. THE FOLLOWING SATISFIES THE REQUIREMENTS OF A PETITION FOR WRIT OF ACTUAL INNOCENCE UNDER VA. CODE § 19.2-327.11(i) - (viii); AND VA. CODE §8.01-195.13 (i) AND (ii). ACCORDINGLY, THERE IS NO PROCEDURAL BAR PRECLUDING THIS CLAIM.

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148. The instant evidence of *Brady* violations is newly discovered and was not previously discoverable by the exercise of due diligence where the Petitioner discovered the *Brady* evidence via a federal Freedom of Information Act release of documents which was made available to the Petitioner only after his criminal trial, direct appeal, and Petition for a Writ of *Habeas Corpus*. Because the Commonwealth of Virginia violated its ethical and legal duty to disclose this information to the Petitioner prior to trial, the Petitioner was wrongly and unjustly imprisoned for 9 years, 10 months, and 24 days. *See* §§ 19.2-327.10 *et seq*., and 8.01-195.13

III. STANDARD OF REVIEW: "MATERIALITY". *See* § 19.2-327.11 (vi)(vii) and (viii)

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149. The first issue for consideration is the appropriate standard of review under the current procedural posture. Under the laws of the Commonwealth there are different standards for

judging the required disclosure of exculpatory material at trial, and on appeal. *Humes v. Commonwealth*, 12 Va. App. 1140, 480 S.E.2d 553 (1991).

150. The Court of Appeals in *Humes* discussed the "materiality" standard of *Brady* and progeny, and recited the distinction between materiality at the trial level and at the appellate level.

> This test of materiality is applied by an appellate court reviewing a case in which the prosecution has failed to disclose exculpatory evidence. **It does not provide an appropriate definition of "materiality" for use pre-trial at the time disclosure is required** since the test necessarily requires hindsight judgment, i.e., whether the non-disclosed evidence might have affected the outcome of the case. A prosecutor when asked to disclose evidence pre-trial is not in a position to determine that question. In addition, even if the prosecution could make that determination, it would lead to the unacceptable conclusion that a prosecutor's obligation is less when his or her case is strong.

Humes, 12 Va. App., at 1143 n.2, 408 S.E.2d, at 555 n.2 (emphasis added).

151. This footnote has been cited as the law of the Commonwealth in several cases, *see*, e.g., *Hughes v. Commonwealth*, 16 Va. App. 576, 594, 431 S.E. 2d 906 (1993), and is presently the law of the Commonwealth.

152. In the instant case, these claims are being made to this court in the first instance, as if the court is sitting as a trial court. "Code § 19.2–327.10 confers original jurisdiction upon this Court to consider a petition for a writ of actual innocence based on non-biological evidence." *Bush v. Commonwealth*, 68 Va. App. 797, at 803, 813 S.E.2d 582, at 585 (2018). "[T]the statute effectively **requires [the Court of Appeals] to draw [its] conclusion from a hypothetical new trial."** *In re Watford*, 295 Va. 114, at 125 (emphasis added).

> Code § 19.2-327.13 requires the Court to examine the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. Thus, we are required to look beyond whether the evidence is sufficient to sustain the conviction; we must also examine the likelihood of a reasonable juror finding the petitioner guilty beyond a reasonable doubt once all of the evidence has been fairly considered. **That is, the newly-supplemented evidentiary record**

> **is reviewed in its totality, and we evaluate its probative force under the [preponderance of the evidence] standard. The court must determine whether a petitioner is entitled to a writ of actual innocence from a hypothetical <u>new trial</u> in which a rational factfinder hears all of the evidence in the aggregate.**

Knight v. Commonwealth, 71 Va. App. 492, 519, 837 S.E.2d 106, 119 (2020) (internal citations and quotations omitted) (alterations and emphasis added).

153. The standard for **pre-trial** disclosure of exculpatory and/or impeachment material is provided by the section of the *Bagley* opinion immediately prior to the traditional "materiality" quote. The *Bagley* Court defines exculpatory and or impeachment evidence as, "[s]uch evidence is evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S., at 767. Thus, the evidence that the prosecutor must disclose pre-trial is any, "evidence favorable to the accused … that **may** make the difference between conviction and acquittal." *Id.*, (emphasis added). This is clearly wider in scope than the traditional *Bagley* standard at the appellate level, "a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different." *Id.*, 681. While the *Bagley* Court did not explicitly hold that these two different standards applied at different stages of the process, this is the most logical analysis of the reasoning of the decision. This analysis is further bolstered by both the *Humes* and *Hughes* decisions; these cases making this explicit distinction the law of the Commonwealth.

154. If the trial court found a *Brady* violation, the remedy is a constitutional mandate. The non-disclosure of exculpatory evidence is a violation of due process. *Brady v. Maryland*, 375 U.S. 83 (1963). If there is non-disclosure of *Brady* material, the remedy at the trial court ranges from suppression of the evidence, grant of a continuance, *see United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527 (4th Cir. 1985), a mistrial, *see Nguyen v. Commonwealth, Va. App.*

LEXIS 333 (Ct. App. June 11, 2002), or collateral proceedings for the disbarment of the withholding prosecutor. *See Read v. Virginia State Bar*, 233 Va. 560, 357 S.E.2d 544 (1987). *See also* Code § 19.2-265.4(B) (sanctions for knowing violation of discovery provisions of Rule 3A:11).

155. Finally, it is worth noting that the **ethical** standards for disclosure of exculpatory evidence supplied by the Rules of Professional Conduct is significantly more stringent than the appellate standard of *Brady* and progeny. A prosecutor shall;

> make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of the court...

Virginia Rules of Professional Conduct, Rule 3.8(d)(2000).

156. Note that the ethical duty of the prosecutor is not satisfied by the same kind of "independent source" relief from the constitutional duties of *Brady* and progeny. *See Smith Grading and Paving, Inc.*, 760 F.2d, at 534 n.6 (4th Cir. 1985) ("the fact that disclosure came from a source other than the prosecutor is of no consequence."). The prosecutor's ethical duties are particularly relevant to the facts of this matter and the procedural posture of the entire prosecution of the Petitioner.

IV. THE FREEDOM OF INFORMATION ACT REQUEST. *See* § 19.2-327.11 (iv)(v)(vi)

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157. On June 22, 2006, the Petitioner filed with the Federal Bureau of Investigation ("FBI") a Freedom of Information Act Request pursuant to 5 U.S.C. § 552 ("FOIA request"). *See* Pet. Ex 113. Specifically, the Petitioner requested any and all records and/or information relating to: "The abduction and murder of Ilouise Cooper on August 30, 1990, in the City of Richmond

Virginia." Pet. Ex. 113.

158. On July 10, 2006, the U.S. Department of Justice responded to said FOIA request stating that the request was "forwarded to FBI Headquarters from our Richmond Field Office" and the request had been assigned a designation of "Request No.: 1051873-000; Subject: Murder of Ilouise Cooper." The U.S. Department of Justice, FBI ("DOJ/FBI"), stated, "We are searching the indices to our central records system at FBI Headquarters for the information." Pet Ex. 114.

159. On November 3, 2006, after hearing nothing further, the Petitioner inquired of the DOJ/FBI "when [the Petitioner] might anticipate some information [] regarding this matter." Pet. Ex. 115. On February 02, 2007, the DOJ/FBI contacted the Petitioner to determine his current interest in pursuing the request and to inform the Petitioner that he may "expect a continuing delay due to the tremendous volume of work at hand." Pet. Ex 116. This correspondence included an attachment which the Petitioner was required to fill in and return. The required form was filled and returned immediately. The designation assigned by the DOJ/FBI remained "Request No.: 1051873-000; Subject: Murder of Ilouise Cooper." Pet. Ex. 116.

160. On March 14, 2007, the DOJ/FBI verified that they "have located approximately **5,324** pages which are potentially responsive to [the] request" designated by the government as "Request No.: 1051873-000 Subject: Murder of Ilouise Cooper." Pet. Ex 117 (emphasis added). Of even date, the DOJ/FBI sent a waiver form in order to allow the Petitioner's supporter, Lynnice Randolph, to "have access to [the] information." Pet. Ex. 118.

161. On March 26, 2007, the Petitioner returned the waiver form necessary to allow Lynnice Randolph access, agreed to pay the cost of duplication, and requested certain information with regard to any document the government might again withhold. *See* Pet. Ex. 119.

162. On May 29, 2007, the DOJ/FBI sent an interim volume of documents designated:

“Subject: MURDER OF ILOUISE COOPER; FOIPA NO. 1051873-000.” In this interim response “642 page(s) were reviewed and 344 page(s) are being released.” Pet. Ex. 120 (“FOIA Vol. I.”). FOIA Vol. I. further stated,

> This is in response to your Freedom of Information Act request concerning the Murder of Ilouise Cooper. In an effort to expedite the release of information to you, enclosed is an interim release of material (Richmond Field Office File 267-RH-47717 section 1 through 3). Additional records responsive to your request are currently being reviewed.

Pet. Ex 120.

163. On June 28, 2007, the Petitioner appealed, administratively, every excision, deletion, and redaction made by the DOJ/FBI with respect to FOIA Vol. I. On September 27, 2007, the U.S. Department of Justice, Office of Information and Privacy denied said appeal.

164. On August 22, 2007, the DOJ/FBI sent a second interim volume of documents designated: “Subject: MURDER OF ILOUISE COOPER; FOIPA NO.: 1051873-000.” In this interim response “1114 page(s) were reviewed and 388 page(s) are being released.” ("FOIA Vol. II.”) FOIA Vol. II. further stated,

> Document(s) were located which originated with, or contained information concerning other Government agency(ies) [OGA]. This information has been: referred to the OGA for review and direct response to you.

Pet. Ex. 121.

165. Moreover, pertinent to this Claim; FOIA Vol. II. stated “Enclosed is an interim release of material (Richmond Field office file 267RH-47717-A).” Pet. Ex. 121.

166. On October 11, 2007, the Petitioner appealed, administratively, every excision, deletion, redaction, and reference to other government agencies with respect to FOIA Vol. II.

167. On November 8, 2007, the Department of Treasury, Financial Crimes Enforcement Network (“FinCEN”) sent 36 pages of the 59 pages of documents that originated, or contained

information concerning FinCEN pursuant to the FOIA request which the DOJ/FBI forwarded to them for review. *See* Pet. Ex. 122 ("FinCEN Vol. I.").

168. On November 14, 2007, the Office of Information and Privacy affirmed in part, on partly modified grounds, and remanded in part the FBI's action on the Petitioner's FOIA request stating,

> With regard to twelve pages of records withheld from you in full, I am remanding your request for reprocessing of these records. The FBI will send any and all reasonable portions of these records to you directly, subject to any applicable fees. You may appeal any further adverse determination made by the FBI.

Pet. Ex. 123.

169. On January 29, 2008, the DOJ/FBI sent a third interim volume of documents designated: "Subject: MURDER OF ILOUISE COOPER; FOIPA No. 1051873-000." In this interim response "1259 page(s) were reviewed and 625 page(s) are being released." Pet. Ex. 124 ("FOIA Vol. III."). The Petitioner received this interim release on March 28, 2008.

170. On April 2, 2008, the Petitioner filed an administrative appeal, objecting to every excision, deletion, and redaction with respect to FOIA Vol. III.

171. On April 30, 2008, the DOJ/FBI sent a fourth interim volume of documents designated: "Subject: MURDER OF ILOUISE COOPER; FOIPA No. 1051873-000. In this interim release "1068 page(s) were reviewed and 623 page(s) are being released." Pet. Ex. 125 ("FOIA Vol. IV.").

172. On June 16, 2008 the Petitioner filed an administrative appeal, objecting to every excision, deletion, and redaction with respect to FOIA Vol. IV.

173. On May 09, 2008, the DOJ/FBI sent a fifth interim volume of documents designated: "Subject: MURDER OF LOUISE COOPER; FOIPA No. 1051873-000." In this interim release "428 page(s) were reviewed and 51 page(s) are being released." Pet. Ex. 132 ("FOIA Vol. V.").

174. On June 16, 2008, the Petitioner filed an administrative appeal objecting to every excision, deletion, and redaction with respect to FOIA Vol. V.

175. To date, the Petitioner still awaits the twelve pages which were remanded for reprocessing.

176. Significantly, every document within FOIA Vol. I., FOIA Vol. II, FOIA Vol. III, FOIA Vol. IV, FOIA Vol. V, and FinCEN Vol. I. concerns the government's investigation of the murder of Ilouise Cooper. Moreover, by the government's own admission, the documents were derived from the government's investigative file of the "murder of Ilouise Cooper." Pet. Exs. 113 through 125 and 132.

IV.(a) THE PRE-TRIAL MOTION TO DISMISS RELATING TO THE GOVERNMENT'S PRE-INDICTMENT DELAY. *SEE ALSO HOOD V. JOHNSON*, CL06-2311; CLAIM C., AND CLAIM F.

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177. Preliminarily, the Petitioner was indicted on May 17, 2001, in Richmond City Circuit Court for the August 31, 1990, murder and abduction of Ilouise Cooper. However, Judge Cavedo's Memorandum and Order dated November 10, 2009, that ultimately freed the Petitioner from prison, tacitly acknowledged that the Commonwealth's Attorney necessarily presented fabricated false evidence to the multi-jurisdictional grand jury in order to obtain the indictment against the Petitioner.

178. Specifically, Judge Cavedo determined that,

> The only evidence at trial showing Hood's principal in the second degree participation in the murder was his own statement .... Hood could not have been convicted of murder as a principal in the second degree without the proffer statement becoming part of the Commonwealth's case-in-chief. There was no other evidence to support the principal in the second degree theory.

Hood v. Johnson, CL06-2311 November 10, 2009, Memorandum of Judge Cavedo, at pg.10.

179. Thus, Judge Cavedo, having thoroughly reviewed the record in anticipation of releasing the Petitioner from prison, and with the clarity and certainty of hindsight, determined that beyond the Petitioner's false proffer statement, "[t]here was no other evidence" supporting even a theory of guilt. *Id*. The Petitioner offered the false Proffer Statement long after having been indicted.

180. Therefore, necessarily, the Commonwealth could not have presented to the grand jury truthful evidence implicating the Petitioner because, as Judge Cavedo determined, there was no evidence to present.

181. Finally, where the Commonwealth's Attorney lacked any honest evidence to present to the grand jury, unsurprisingly the Commonwealth also failed to ensure the presence of the statutorily mandated court reporter to record the purported evidence.[28] Hence, neither the Petitioner nor this Court can know what information was presented to the grand jury. What is known, however, is that because there existed no evidence of the Petitioner's guilt to present to the grand jury, whatever "evidence" that was presented to the grand jury necessarily was fabricated and false.

182. The law with respect to the government's pre-indictment delay in violation of the due process clause and the resulting prejudice therefrom pursuant to the two prong test established in *United States v. Lovasco*, 431 U.S. 783 (1977) has been previously recited within both the

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[28] A court reporter **shall be provided** for a multi-jurisdiction grand jury to record, manually or electronically, and transcribe all oral testimony taken before a multi-jurisdiction grand jury…. After a person has been indicted by a grand jury, the attorney for the Commonwealth shall notify such person that the multi-jurisdiction grand jury was used to obtain evidence for a prosecution. Upon motion to the presiding judge by a person indicted by a multi-jurisdiction grand jury or by a person being prosecuted with evidence presented to a multi-jurisdiction grand jury, similar permission to review, note, or duplicate evidence **shall be extended**.

§ 19.2-215.9 (emphasis added).

habeas proceedings, *see Hood v. Johnson*, CL06-2311 *Claim* C., and in the criminal trial proceedings, *see* Motion to Dismiss, filed August 3, 2001. Therefore, for the sake of brevity will not be recited again here.

183. On August 21, 2001, several pre-trial motions were filed in the Circuit Court of the City of Richmond and were heard before Judge Margaret P. Spencer in the underlying case. *See* Motions Hearings Transcript of August 21, 2001 ("8/21/01 M.H. tr.."). One of the motions heard on August 21, 2001, was the Defendant's/Petitioner's Motion to Dismiss. The basis of the Motion to Dismiss was twofold: a) pre-indictment delay; and b) destruction of DNA evidence having potentially exculpatory value. Also pertinent to this claim is another motion heard that day, i.e., Motion to Compel Discovery. *See* 8/21/01 M.H. tr.

184. During the motions hearing defense counsel called to the stand one of the original detectives from the Richmond Police Department involved in this case, Detective Maurice D. Scott ("Scott"). 8/21/01 M.H.tr., at 7. Scott testified that he was "involved in the investigation of a murder in 1990, Labor Day weekend of Ilouise Cooper." *Id*., at 7. And, "in the course of that investigation" he spoke with the Petitioner at the police station. Scott testified that he could not recall whether the Petitioner had been charged, nor could he recall how long his conversation with the Petitioner was. *Id*., 7-8. What Scott did recall was "after our conversation was over, [Scott] didn't see [the Petitioner] anymore." *Id*., at 8. When asked whether Scott recalled whether his discussions centered around the Ilouise Cooper murder, Scott responded, "I can't recall any of the conversation." *Id*., at 8-9. Scott further testified that he could not recall any conversation he had with the prosecutor, Learned Barry, about the results of Scott's investigation of the Petitioner, nor whether Learned Barry recommended that a prosecution of the Petitioner would be appropriate. *Id*., at 9. Scott's testimony was that, because of the passage of 11-12 years,

"today" he did not have any "independent recollection of any other information about [the Petitioner's] alleged involvement in the murder of Ilouise Cooper." *Id.*, at 9-10. However, when defense counsel asked Scott whether he "had discussions with Richmond police detectives and/or FBI agents about the matter of [the Petitioner] since 1990" Scott testified that "a number of people have interviewed me that represent this case." Scott recalled that some of those individuals were FBI S.A. Stokes, FBI S.A. Messing, and Detective Wade. *Id.*, at 10-11. Notably, the very fact that Richmond Detective Scott, who was investigating the abduction and brutal murder of an elderly woman, interviewed this Petitioner, at the police station, allowed Petitioner to stroll from the station never to be spoken to again, and was unable even to remember any part of his interview with Petitioner, is itself strong evidence that the police — and, necessarily, the Commonwealth — knew the Petitioner was in no way involved in these crimes.

185. Defense then called another of the original detectives involved in the investigation of this case, Detective Thomas Surles ("Surles"). The testimony of Surles related to his handling of the evidence in the original case in 1990-1991 as he "worked in the forensic science unit." *Id.*, at 13. However, like Scott, Surles could not recall any of the details regarding his involvement in the case, for that matter Surles could not recall the name of the prosecutor. The only conversation Surles recalled having with a prosecutor was when he "had a meeting with Mr. Trono and them." *Id.*, at 13-17.

186. At that point in the hearing the defense counsel argued the motion for leave to subpoena Learned Barry, and how it related to the motion to recuse, and the motion to dismiss. Defense counsel addressed the fact that Scott interviewed the Petitioner, but Scott "doesn't recall the substance of that." *Id.*, 20. Defense counsel proffered, however, that Learned Barry "will be able

to testify about his meeting with Investigator Scott after the interview with [the Petitioner] at which time Investigator Scott related to Learned Barry **that he's not the one**." *Id.*, at 20 (emphasis added). The motion for leave to subpoena Learned Barry was denied.

187. The FOIA documents, however, reveal that the government withheld exculpatory evidence exonerating the Petitioner of this crime. The prosecution knew that one of the original Richmond Police Detectives was questioned by Richmond Police Detective George B. Wade, and FBI S.A. Messing on 5/8/2000 at his office in Chesterfield County. The unnamed Detective stated that "[His] recollection is that [the Petitioner] had an alibi for the time of the offense." FOIA Vol. I., at 174-175. Accordingly, the prosecutor withheld valuable material alibi evidence favorable to the defense, and at the same time, the prosecutor withheld evidence which would have clearly demonstrated both prongs of the *Lovasco* test for a claim that due process had been violated by the government's pre-indictment delay. *Black's Law Dictionary*, Abridged 6th ed (1991) ("Alibi: A defense that places the defendant at the relevant time of the crime[s] in a different place than that of the scene involved and ***so removed therefrom as to render it impossible for him to be the guilty party***.") (Emphasis added.)

188. During the motions hearing, defense next questioned Richmond Police Detective George B. Wade ("Wade") with regard to when Wade began investigating this case. Wade testified that he began his investigation in February of 2000. *See* 8/21/01 M.H. tr., at 43. Defense counsel then asked Wade the following:

> Q: And in the course of that investigation, you had an opportunity to review the prior file, the investigative file?
>
> A: Yes, sir, I did.
>
> Q: Approximately how many documents have you reviewed in regard to this case?
>
> A: You want it pages? Volumes?
>
> Q: Best you can guess.

A: I would say about a four drawer file cabinet, at least, full of information pertaining to this case.

8/21/01 M.H. tr., at 43.

189. Defense counsel continued his questioning of Wade regarding various acts of prosecutorial misconduct such as witness tampering, *id*., at 52-54 (*see also Hood v. Johnson*, CL06-2311, Claim J.(i), and K.(i).), and the initiation of an invalid arrest warrant from the City of Norfolk as well. *Id*., 54.

190. The defense next called Ralph T. Fleming ("Fleming"), another of the Richmond police officers involved in the original investigation of the murder of Ilouise Cooper. Like Scott, and Surles before him, Fleming did not recall any of the particulars of the investigation in 1990. Neither could he recall: a) who handled the evidence, b) having any conversation with Scott about the Petitioner, nor c) the number of people he interviewed.

191. The last three pages of Fleming's testimony related to the matter of his being questioned by Wade, Stokes, and another investigator. These investigators, Fleming stated, questioned him regarding the investigation of the Jeffrey Cox matter. *Id*., at 62. When the agents discussed whether Fleming would meet with them to discuss the matter of the murder of Ilouise Cooper, they also asked whether Fleming's "lawyer would be present and that really bothered" Fleming. *Id*., at 64.

192. The next witness called by defense was FBI S.A. Paul Messing ("Messing"). *Id*., at 68. Messing testified that he began investigating the matter of the murder of Ilouise Cooper around February of 2000. Unlike defense counsel's general questioning of Wade with respect to Wade's "review [of] the prior file, the investigative file," to which Wade responded was "a four-drawer file cabinet, at least, full of information pertaining to this case," *Id*., at 43, defense counsel's question to Messing was more specific:

Q: And have you had an opportunity to review **the prior investigative file of the Richmond Police Department detectives who investigated the original trial of Jeffrey Cox?**

A: Yes, sir.

Q: And how many documents have you reviewed in that file?

A: Whatever was in there. As to pieces of paper, I wouldn't think there were more than maybe 100 pieces of paper.

Q: How large is the physical file?

A: As best I recall, the original police file that we received was no more than one accordion folder.

Id., at 69 (emphasis added).

193. It is important to note that Wade and Messing could not have been testifying about the same file. Specifically, the file to which Messing referred was the "investigative file of the Richmond Police Detectives who investigated the original trial of Jeffrey Cox" and that file consisted of at most a mere "100 pieces of paper." *Id*., at 69. By contrast, the file to which Wade referred was simply "the prior file, the investigative file" which consisted of "a four-drawer file cabinet, at least, full of information pertaining to this case." *Id*., at 43. It is, therefore, self-evident that Messing and Wade could not have been referring to the same file. It is a reasonable probability that the file to which Wade referred was the file referenced in the Petitioner's FOIA request, which consisted of "approximately 5,324 pages." Pet Ex. 117, i.e., the investigative file "concerning the murder of Ilouise Cooper ... Richmond Field Office file 267-RH-47717." Pet. Exs. 113 through 125. It is within the Richmond Field Office file 267-RH-47717 to which Wade referred, that the evidence of an alibi witness was contained and which the government unlawfully suppressed and failed to disclose to the defense.

194. Messing was studiously able to avoid revealing that his investigation established that the Petitioner had an alibi for the time of the murder,

Q: Now, you interviewed people who had known or were acquaintances of [the Petitioner] around the time of the murder?

A: Correct.

Q: And did you ask them their whereabouts during the time of the murder, whether they could recall it?

A: No. Most of them had absolutely no involvement with the incident.

Q: Did you interview a Mark Stillman?

A: Yes.

Q: And did you ask him about his whereabouts the eve of the murder or the day of the murder.

Mr. Young: Judge, I'm just going to object as to how this goes to pre-indictment delay...

Mr. Goodwin: Judge, we're talking about prejudice here. We're talking about availability of witnesses over time.

Id., at 73-74.

195. Defense counsel's questions were closing in around the probability of the Petitioner's alibi, however, the *Brady* violations, Messing's carefully scripted responses, and the objection by the prosecutor together prevented the defense from learning this valuable exculpatory evidence.

196. Messing failed in the opportunity to come clean, and to set the record straight by telling "the whole truth" regarding the Petitioner's alibi,

A: I think the question was, did we ask where he was that night.

Q: Right.

A: I can't answer that specific question. Mark Stillman was a friend of [the Petitioner's]. We were trying to get details of [the Petitioner's] life at the time. He was not a suspect in my mind, so I would not have asked him for an alibi for that evening.

Q: But asked him questions about whether or not he may have known where [the Petitioner] was. Certainly, that would be something you'd want to know.

A: I certainly asked him if he knew anything about the incident. Sure.

Q: And was he able to recall specific facts regarding that time frame.

A: Yes.

Q: Was he able to give any information that would tend to indicate [the Petitioner] was not involved in this?

A: I don't think – he did not provide an alibi for [the Petitioner].

Q: Did you ask – withdraw that. Did you talk to a person named Paul Stillman?

A: Yes. And I'm trying to remember now. I might be getting Mark and Paul Stillman mixed up as we sit here today. They're both out of state; is that correct? Right.

Q: One's in Maryland and one is in North Carolina?

A: Right. One of them was much closer to [the Petitioner]. As we sit here right now, I'm confusing myself as to whether it was Paul or Mark.

Q: Well, address the one who you say was closer to [the Petitioner]. Was he able to recall specific events from that time period, 1990?

A: Yes. Nothing of substance, I don't believe.

Q: He couldn't recall whether or not he was with [the Petitioner] the night of the murder or the day after?

A: They definitely could not. Neither one of them could provide an alibi for [the Petitioner].

Id., 76-78.

197. Although Messing's interview of Mark and Paul Stillman allegedly failed to produce any specific alibi for the Petitioner during the time of the murder, the *Brady* material contained in the FOIA documents revealed that Messing had been told on May 8, 2000, by one of the original investigators "that [the Petitioner] had an alibi for the time of the offense." FOIA Vol. I., at 174-175 (transcribed on May 22, 2000). However, the government unlawfully suppressed, and failed to disclose, this exculpatory evidence.

198. Defense counsel then continued to question Messing and began to ask about the pre-indictment delay:

Q: Do you know who investigated this case, what agents, prior to your involvement, and how many there were?

A: I do know there were two.

Q: Who were they?

A: Agent Frank Stokes with the FBI and Detective Don Lacy, formerly of the Henrico Police Department.

Q: And was he with Henrico at the time he was investigating this?

A: He was. Whether he was on some type of task force, whether he was deputized, I don't recall. But he was a Henrico County police officer.

Q: From your review of the information in the file, do you know when they initiated their investigation?

A: Again, I'm sure it was in '99. I want to say October of '99, but it could have been earlier than that.[29]

8/21/01 M.H. tr., at 78-79.

199. The prosecution knew that this testimony of Messing clearly implied that the federal investigation began in 1999. Moreover, the prosecution and Messing knew this to be false. The FIOA documents reveal an ongoing investigation beginning in 1990-1991. The government may attempt to argue that Messing responded to the specific question of when Stokes and Lacy began their investigation. However, the prosecution possessed the investigative file which, as Wade described, consisted of a four-drawer file cabinet, at least. Within this investigative file was an abundance of documents demonstrating that the investigation had been ongoing since 1990-1991. Yet, not only did the government remain silent as Messing knowingly created a false

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[29] The FOIA documents make clear that Stokes and Lacy were investigating this case prior to October. For example, the letter from Executive A.U.S.A. James Comey to S.A.C. Thompson dated **October 8, 1999**, states, "I have directed AUSA Trono not to issue any further grand jury subpoenas on the matter and to **withdraw those that have <u>already been issued</u>.** He (Trono) is not to meet with any FBI, or FBI task force, concerning this case." Comey further stated that Stokes and Lacy be removed from the ongoing investigation as "they are the wrong men for the case. I do not know if I can undo the damage that has already been done. I can, however, prevent further injury to this office." FOIA Vol. I., at 116-117 (emphasis added). *See also* FOIA Vol. I., at 34, 84; 222, 228; FOIA Vol. II., at 21, 295-308; FOIA Vol. III at 29, 600-606, and FOIA Vol. IV at 168.

impression of material fact, but the government knew that it had withheld evidence from the defense which established the contrary of what Messing's testimony implied.

200. Finally, defense called FBI S.A. Stokes ("Stokes"):

> Q: Mr. Stokes, I take it you're involved in the investigation of the murder of Ilouise Cooper?
>
> A: Yes. Not currently, but I was.[30]
>
> Q: And when did you begin to be involved in that?
>
> A: I believe it was around March of 1999.
>
> Q: And how did you initiate that investigation? Who came to initiate that investigation?
>
> A: I received a call regarding a habeas hearing that Jeffrey Cox — that his attorneys were involved in. After that, I searched some files in our office[31] and I found a letter that had been sent to our office by Jeffrey Cox.[32]

8/21/01 M.H. tr., at 83-84.

201. Defense next questioned Stokes as to when he became aware of a statement allegedly made by Billy Madison ("Madison") to Madison's wife, Tracy Madison. *Id.*, at 85.

> Q: How did you become aware of that?
>
> A: During an interview.
>
> Q: And that interview was with Tracy Madison?

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[30] It is important to note that Stokes' testimony here was false and the government knew it was false. Stokes was ordered off of this case by A.U.S.A. James B. Comey in a letter to FBI S.A.C. Donald W. Thompson, Jr. dated October 8, 1999. *See* FOIA Vol. I., at 116-117. This document was withheld by the government. However, in direct contradiction to this order, Stokes remained actively involved in this case. *See* Pet. Ex. 58.

[31] Stokes' testimony here further substantiates that the FBI already had investigative files relating to these crimes prior to the *habeas* hearing of Jeffrey Cox to which Stokes referred.

[32] It is again important to note that Stokes' testimony that he found "a letter" sent by Cox was misleading and false. The FOIA documents reveal that what Stokes found in the long existing file was thousands of documents, and "several letters" written by Cox. *See* e.g., FOIA Vol. I., at 84-86, and 118-120. The government withheld this evidence and failed to correct Stokes' misleading testimony.

A: Yes.

Q: Prior to that interview, had you reviewed the case file?

Mr. Trono: Judge, again, the problem here is delay from 1990 to 1999.[33]

The Court: He's going to tie that up at some other future witness.

Mr. Trono: We've been down this road time and time again, Judge. Again, these are not appropriate questions at this time.

The Court: He's going to tie that up with some future witness, Mr. Trono. Let's just be patient.

Mr. Trono: Yes, ma'am.

Q: Had you reviewed the case file prior to that interview?

A: What do you mean case file?

Q: Any information regarding the murder of Ilouise Cooper.

A: Right. I'd reviewed our files.

Q: The FBI file?

A: Yes.

Q: And do you know when the FBI file was created?

A: I think the letter from Cox was dated sometime in 1996, as I recall. '96 or '97.

Q: And was that the only information in the file at that time, the letter from Cox.

A: Yes.

8/21/01 M.H. tr., at 86-87.

202. Here Stokes devolves from misleading to outright perjury, and Trono remained silent. The FOIA documents reveal that the FBI file was created as far back as 1990-1991, and consisted of approximately 5,324 pages. Accordingly, when Stokes testified that the FBI file in 1999 concerning the murder of Ilouise Cooper consisted of one single letter from a convicted

[33] Remarkably, the prosecutor, A.U.S.A. Trono, objected that defense counsel is unable to establish a delay from 1990 to 1999 even though A.U.S.A. Trono is fully aware that he has withheld the very evidence which would establish the necessary prongs of the *Lovasco* test during a motion to dismiss for pre-indictment delay. *See* FOIA Vol. I., at 34, 84; 222, 228; FOIA Vol. II., at 21, 295-308; FOIA Vol. III at 29, 600-606, and FOIA Vol. IV at 168.

murderer residing in Virginia Department of Corrections, both Stokes and the prosecutor knew it was not true. However, the prosecutor also knew that the evidence to the contrary had been withheld from defense, and that absent Trono's fulfilling his prosecutorial obligation and responsibility under *Brady*, neither the defense, the Petitioner, nor the court would ever know the truth.

203. At the close of the hearing defense counsel argued the prejudice prong had been established because "[the Stillmans] are people who are familiar with [the Petitioner], were familiar at the time and have lost recollections of whereabouts, alibis. Basically, we're talking about, specifically, the ability to present alibi and the loss of that ability due to the passage of time." 8/21/01 M.H. tr., at 91-92.

204. Unbeknownst to defense counsel, the government withheld evidence of the Petitioner's innocence, in that, a person involved in the original investigation "rec[alled] that [the Petitioner] had an alibi for the time of the offense." FOIA Vol. I., at 174-175. Had this evidence been disclosed by the government the *Lovasco* test would have clearly been satisfied with the government's own file.

205. Next defense counsel argued that,

> … it's incumbent upon me to ask this Court for leave to subpoena Mr. Trono to testify about the prosecutorial delay from March or June of 1999 until May of 2001. Now, it does not have to be a 10-year delay, Judge, to prejudice the defendant. What we have is a two-year delay.

Id., at 92.

206. The government withheld volumes of evidence which revealed a delay of 10-11 years. *See* FOIA Vol. I., at 34, 84; 222, 228; *see also* FOIA Vol. II., at 21, 295-308; FOIA Vol. III at 29, 600-606, and FOIA Vol. IV at 168. Had the prosecutor not illegally withheld this evidence, defense counsel would have easily satisfied the delay prong of the *Lovasco* test.

207. In direct contradiction to the evidence possessed by the government, and which the prosecutor failed to disclose, the prosecutor, Robert Trono ("Trono") stated in the government's defense:

> I think where Mr. Goodwin's chief complaint ought to be is the delay from 1990 until March of 1999. Of course, the only problem with that is he's put forward an advance of no evidence, whatsoever, that, that particular delay was to gain some sort of tactical advantage by the government. From the testimony that the court did hear today, **it's quite obvious what did happen. <u>This case lay dormant</u> because one individual was convicted.** There was a theory about another individual. That case was never made. **<u>And then sometime in 1999, an agent with the FBI happened to reopen the case.</u>** A two-year delay is not much at all given the nature of the case, given the fact that it's a serious case and it occurred sometime before. But nevertheless, Judge, the defendant needs to meet the burden to establish the pre-indictment delay and he has not even come close to that.

Id., at 94-95.

208. It is self-evident that the prosecutor remained silent while his investigators committed perjury regarding the pre-indictment delay. More reprehensible, the prosecutor himself offered argument which was wholly contravened by his own case file. However, because the prosecutor never fulfilled his legal or ethical obligation to disclose the truth pursuant to *Napue*, *Berger*, *Brady*, *supra*, and their progeny, neither defense counsel nor the Court were aware of these material facts. Even with the knowledge of the abundance of *Brady* material withheld by the prosecutor, Trono stated as a representative of the government: "as far as exculpatory information, Mr. Goodwin claims that there has been a pattern of withholding exculpatory evidence. I don't know how strongly I can disagree with that." *Id.*, 96. With regard to Trono's obligation to disclose exculpatory and impeachment evidence to the defense, Trono stated,

> Mr. Goodwin has had far, far more discovery above and beyond what is received in a typical case. **Beyond that, we have complied with the rules. We understand our obligations with respect to exculpatory information that may come into our possession at any point from here until the-trial date. We will**

> **of course, comply with the court's order[34] and our obligations under the rules.**

Id., at 97-98.

209. Based upon the limited evidence before it the Court made several rulings without benefit of the exculpatory and/or impeachment evidence, e.g.,

> On the discovery motion, the motion to compel discovery, the Court will order the Commonwealth to disclose all witness statements which may be inconsistent, which may lead to disclosure of exculpatory information, or which are in fact, exculpatory to the defense by 4 o'clock p.m. on Friday, August 24th.

Id., at 98-99.

210. The government defied this court order, as the FOIA documents clearly demonstrate.

<u>CONCLUSION</u>

211. With regard to the outcome of the Petitioner's Motion to Dismiss the Supreme Court has made clear "[t]he question is not whether the defendant would more likely than not have received a different [result] with the evidence, but whether in its absence he received a fair [hearing on the motion to dismiss based on the government's pre-indictment delay], understood as a [hearing] resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome." *Kyles*, 514 U.S., 434.

212. In the absence of the non-disclosed *Brady* material the court found "that the two witnesses that the defendant referred to were able to recall specific facts about the time frame of 1991 and they could not give the defendant an alibi. But in any event, because of the number of investigators who were involved in the case and had no specific recollection of facts that were not in writing, the defendant might have incurred prejudice as a result of the delay." 8/21/01

[34] *See* 8/21/01 M.H. tr., at 46.

M.H. tr., at 99-100.

213. However, because the government violated the federal law as established under *Brady* and progeny, neither the trial court, nor defense counsel were made aware that one of the original investigators involved in this case stated that "[the Petitioner] had an alibi for the time of the offense." FOIA Vol. I, at 174-175. There exists a "reasonable probability" of a different result (charges dismissed and Petitioner exonerated) at this hearing, had this fact been known to defense counsel and revealed to the trial court. The government's evidentiary suppression in this regard undermines confidence in the outcome of the trial court's determination with regard to the prejudice prong of the *Lovasco* test.

214. Likewise, in the absence of the non-disclosed *Brady* evidence, the trial court found:

> as to the delay from 1990 to 1999, the court will find that the basis of that delay was that there was no evidence or information on which an investigation could proceed. The testimony from witnesses was that the case file was open but dormant during that time.[35] If the basis for the delay was that there was no evidence or information upon which any investigation could proceed, the Court cannot find that the government intentionally delayed indicting the defendant to gain a tactical advantage. The time period from March of 1999 to May of 2001, an investigation was proceeding. Although the Court cannot find, based on all of the law it has reviewed, that a time period of less than 24 months is sufficient to constitute delay, which would warrant further inquiry into the reasons for the delay or whether the defendant was prejudiced, the Court will presume that a time period of 24 months might have been sufficient to warrant that, and the Court will find that time period was for investigative purposes.

Id., at 100-101.

> The **only information before the court** was that a statement was made in 1998, which was not made known to the government until May of 1999, by Mr. Madison, which could have implicated the defendant. Clearly, that statement alone was not sufficient information on which any grand jury could find probable

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[35] To the contrary, no witness testified that this case "was open but dormant." This "testimony" wrongly attributed to a witness was actually derived from Trono's improper and perjurious argument, *i.e*., "it's quite obvious what did happen. This case laid dormant because one individual was convicted ... And then sometime in 1999, an investigator, an agent with the FBI happened to reopen the case." *Id*. at 94

> cause to indict. So any delay that occurred between March of 1999 and May of 2001 was for the purposes of legitimate investigative delay, because there is no evidence that the Commonwealth had sufficient information to indict the defendant. Therefore, there is no evidence that the Commonwealth intentionally delayed indicting the defendant to gain a tactical advantage, and the motion to dismiss for pre-indictment delay is denied.[36]

Id., at 101. (Emphasis added.)

215. Clearly, but for the government's failure to disclose the *Brady* material discovered by way of the Petitioner's FOIA request, there is a reasonable probability that the outcome of the proceedings on the Petitioner's motion to dismiss for pre-indictment delay would have been different, and the charges would have been dropped. Bear in mind that a review of materiality for the purposes of a claim of a *Brady* violation is not a sufficiency of the evidence test, but rather a reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome.

216. Had the *Brady* material been disclosed, defense counsel would have been able to adduce the following:

1) The investigation of this case never lay dormant. Instead, there was an ongoing investigation beginning as early as 1990-1991, contrary to the perjurious testimony of the government agents and the false assertions propounded by the prosecutor. Defense counsel was precluded from exposing the government's false assertions and false testimony in this regard. *See*, e.g., FOIA Vol. I., 34,84, 222-228. *See also* FOIA Vol. II, at 21, 295-308, 321-324; FOIA Vol. III at 29, 600-606, and FOIA Vol. IV at 168.

2) The government illegally delayed indicting the Petitioner in order to gain a tactical

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[36] The Court failed to address the government's destruction of DNA evidence having potentially exculpatory value, which was also a basis for the motion to dismiss. *See Hood v. Johnson*, CL06-2311, Claims D., F., and F.F.(b), *supra*.

advantage. The government knew that the Petitioner was actually innocent of any involvement in these crimes well before the multi-jurisdictional grand jury was convened without a court reporter in violation of Virginia Code Section 19.2-215.9. The government knew that the Petitioner had a well-documented, and repeatedly confirmed alibi despite the Petitioner's lack of specific recall and supporting evidence, some ten years later, of exactly what that alibi was. The government used the 10-year delay, and the commensurate lack of specific recall the Petitioner would experience over that length of time regarding his exact whereabouts on a particular day 10 years prior, to achieve its tactical advantage. The suppression by the government of the sworn confirmation of the Petitioner's alibi was a part of its broader scheme to gain tactical advantage over the Petitioner. *See* FOIA Vol. IV., at 483 (the Petitioner's alibi was investigated and confirmed under oath by one of the trial attorneys for Cox prior to Cox's trial, and by the two private investigators hired by Cox "after the fact" which "eliminated [the Petitioner] as a suspect"). Government Investigators and the FBI "attended the *habeas* hearing and witnessed the testimony given under oath" regarding the Petitioner's alibi eliminating the Petitioner as suspect during Cox's *habeas* hearing on March 31, 1999. FOIA Vol. I., at 84; FOIA Vol. I., at 118.

3) An individual involved in the original investigation stated to the government agents that "[the Petitioner] had an alibi for the time of the offense," and the result of that precluded a prosecution of the Petitioner in 1990-1991. This statement was made to, and transcribed by Messing, however, as a result of the government's *Brady* violation, defense counsel was precluded from questioning Messing regarding this matter. *See* FOIA Vol. I at 174-175.

4) The "case file" consisted of thousands of documents, as opposed to a single letter. FBI S.A. B. Frank Stokes committed perjury with regard to this issue, and defense was precluded from revealing that this government agent committed perjury while the prosecutor remained

silent. *See* section IV, *supra*.

5) The government's investigation of this crime involved at least 10 members of the narcocide detectives of the Richmond Police Department as suspects. *See* section IV(f), *infra*.

6) The government's investigation of this case involved a litany of other suspects. *See* section IV(g), *infra*.

7) Several of the witnesses in this case have given drastically different statements regarding their testimony. *See* sections IV(d), IV(e) and IV(i), *infra*.

8) The government arrested and prosecuted several individuals for violations of 18 U.S.C. § 401 during the government's grand jury investigation of this case in federal court. *See* section IV(h), *infra*.

9) That "since the trial [of Cox], all of the forensic evidence ha[d] been destroyed, to include tissue samples taken from underneath the fingernails of Cooper." *See* section IV(b), *infra*. *See also* FOIA Vol. II., at 323; FOIA Vol. I., at 125.

10) That on October 8, 1999, Stokes was ordered off of the case. However, in direct contravention to the order of his superior, Stokes remained actively involved in the investigation. *See* FOIA Vol. I., 116-117, FOIA Vol. II., 309. **But *cf.*** Pet. Ex. 58. Moreover, the letter from then Executive A.U.S.A. James Comey to S.A.C. Thompson dated October 8, 1999, states, "I have directed AUSA Trono not to issue any further grand jury subpoenas on the matter and to withdraw those that have already been issued. He (Trono) is not to meet with any FBI, or FBI task force, concerning this case. [] I do not know if I can undo the damage that has already been done. I can, however, prevent further injury to this office." FOIA Vol. I., at 116-117.

217. In conclusion, defense counsel was precluded from adducing evidence during this hearing which would have shocked the conscience of any trial court, and thus, the charges would have

been dismissed and the Petitioner exonerated at this hearing. Defense counsel clearly would have established a pre-indictment delay of 10-11 years used by the government to gain a tactical advantage over the defendant, and, that the delay severely prejudiced the defendant. Accordingly, “the disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.” *Kyles*, at 441, 115 S.Ct. 1569; accord *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003); *Workman v. Commonwealth*, 272 Va. 633, 636 S.E.2d 368 (2006); *Taitano v. Commonwealth*, 4 Va. App. 342, 349, 358 S.E.2d 590, 594 (1987).

IV.(b) THE GOVERNMENT’S DESTRUCTION OF DNA EVIDENCE HAVING POTENTIALLY EXCULPATORY VALUE. *SEE ALSO HOOD V. JOHNSON*, CL06-2311; CLAIM D.

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218. The existence of tissue samples under the victim’s fingernails was withheld from the Petitioner, along with the subsequent destruction of the tissue samples before they were forensically tested. The prosecution at one point in time was in possession of the physical evidence that could have definitively resolved the identity of at least one of the perpetrators of the abduction and murder of the victim in this case. The government recovered tissue samples from underneath the fingernails of the victim after the murder. *See* FOIA Vol. II., at 322-323. That physical evidence was not presented at the trial of Cox, nor was it presented at the trial of the Petitioner. Further, that physical evidence was never mentioned to the attorneys for either Cox or the Petitioner. In fact, defense counsel was specifically advised that no physical evidence was recovered from the victim’s fingernails. The subsequent destruction of that potentially definitive evidence by the government was not revealed to the Petitioner, nor explained by the government, imposing, as a matter of law, the inference that the evidence would have been

damaging to the prosecution's case had the "tissue samples" been presented. FOIA Vol. II., at 323. *See* Charles E. Friend, *The Law of Evidence in Virginia*, § 10-17, at 383 (6th ed. 2003) ("[w]here one party has within his control material evidence and does not offer it, there is a presumption that the evidence, if it had been offered, would have been unfavorable to that party.")

219. The evidence gathered at the scene and from the victim was possessed exclusively by the Commonwealth and did not exist elsewhere. The white Caucasian hairs; the amylase (a marker for the presence of saliva) found on the nipple of the victim; the blood, tissue and other materials under the victim's fingernails had always been in the possession of the Commonwealth and never in the possession of an independent agency free from prosecutorial control, nor in the possession of the Petitioner or his counsel. FOIA Vol. II., at 322-323. *See also* Pet. Exs. 2 - 9, all lab test requests and Certificates of Analysis; Pet. Ex. 1, at 308-309.

220. The existence of potentially definitive evidence was never disclosed to defense counsel or the Petitioner. The government's destruction of this potentially definitive evidence was never disclosed to defense counsel or the Petitioner. However, Trono specifically and actively misled defense counsel and the Petitioner regarding this evidence. *See Commonwealth's Response to Defendant's Motion to Dismiss*, filed by Robert Trono on August 13, 2001, at 3 ("The government anxiously awaits the defendant's proof that these clippings, which indeed have been lost, contain human flesh.")

221. Notwithstanding the government's challenge that the Petitioner provide "proof that these [fingernail] clippings contain human flesh," *id*., according to documents withheld from the Petitioner, the FBI described a portion of the forensic evidence as **"tissue samples taken from underneath the fingernails of Cooper."** FOIA Vol. II., at 323. Indeed, during jury deliberations

at the Cox trial, the jury foreman, Ms. Barker, asked, "Why wasn't the analysis of skin and hair under the fingernail and fiber under the right index fingernail entered as evidence?" Pet. Ex. 1 pp. 308-09.

222. Trono told the Petitioner and the Court that, "[t]he fingernail clippings of the victim were **likely lost in 1991**, after Cox's trial," to imply mere inadvertence. *Commonwealth's Response to Defendant's Motion to Dismiss* (emphasis added). However, the withheld document implies a purposeful bad faith action: "Since the trial [of Cox], **all of the forensic evidence has been destroyed, to include tissue samples taken from underneath the fingernails of Cooper."** FOIA Vol. II., at 323 (emphasis added). *see also* FOIA Vol. I., at 125 ("All physical evidence has been destroyed.") While the government's actions are certainly relevant to the issue of prosecutorial misconduct, it is clear that the Petitioner was deprived of exculpatory evidence that could have been devastating to the government's case. At the very least, the Petitioner was knowingly, specifically, and actively deprived of a "missing evidence" inference at trial. See Friend, *The Law of Evidence in Virginia*, § 10-17, at 383, *supra*.

223. Significantly, this document (FOIA Vol. II., at 321-323) was submitted to seek authority to open a federal investigation into the wrong-doing of the Richmond Government Officials in the prosecution and conviction of Cox. *See* FOIA Vol. II., at 321. ("Richmond Division requests FBIHQ authority to investigate captioned matter under 267 classification.") *See also* section IV.(f), *infra*. The document cites, among other things:

> The eyewitnesses were identified and interviewed by **Richmond Police Detectives suspected** of having a professional relationship with noted Richmond [________]. A review of financial records in captioned matter, along with other information developed through interviews indicate that [_____] was paid a substantial sum of money by [_________]. During this same period of time, **Richmond city detectives changed** the focus of their investigation from [____________] and eventually identified [Cox] as the murder suspect. [______] was then retained to defend [_______]. **Investigation has yet to substantiate**

> **allegations that [_____] funneled money directly to detectives** and eyewitnesses.
> ……
> Interviews of the eyewitnesses who testified against [Cox] have revealed that at least one of the eyewitnesses committed **perjury**. A polygraph has been administered to the eyewitness and the results indicate that the testimony and statements of the witness were deceptive. In addition, other witnesses have indicated that **Richmond city detectives may have pressured the eyewitnesses** to identify [Cox] as the abductor. Only a portion of the forensic evidence collected in the case was analyzed for the trial of [Cox] and none of that evidence was able to tie [Cox] to the abduction and murder. **Since the trial, all of the forensic evidence has been destroyed, to include tissue samples taken from underneath the fingernails of Cooper."**

FOIA Vol. II., at 321-323 (emphasis added) *See also* FOIA Vol. II., at 20-21. (This federal file was created "in order to facilitate an efficient management of this case which is expected to produce an extensive volume of investigation." FOIA Vol. II., at 21. In this document, the Petitioner is named as a suspect, along with other individuals not named in the document due to redaction made by the FBI. *See* FOIA Vol. II., at 21. The matter was also captioned as a "Drug Related Homicide - Other Law Enforcement Individuals." FOIA Vol. II., at 21. Thus, it is plain that throughout the investigation of the Continuing Criminal Enterprise and the murder of Ms. Cooper, from 1991 through 1999, various law enforcement officers were suspects in the murder.) *See* section IV.(f), *infra*.

224. Accordingly, Trono's statement to his superiors that, "**Since the trial [of Cox], all of the forensic evidence has been destroyed**, **to include tissue samples from underneath the fingernails of Cooper**" was made to advance the proposition that the Richmond authorities had indeed acted in bad faith, and perhaps illegally, therefore, an investigation into the Richmond Government's bad faith actions was necessary[37]. *See* FOIA Vol. II., at 322 ⁋ #3, and ⁋ #4

[37] In *California v. Trombetta*, 467 U.S. 479 (1984), the Supreme Court found that the duty the constitution imposes on the state to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Id*. at 488. To play a significant role

(emphasis added). To the contrary, when this same issue was raised by the Petitioner, Trono misled the defense, the Petitioner, and the court by implying that there were no "tissue samples," and even if that evidence once existed — it was "likely lost" rather than his affirmative assertion to his superiors that it had "been destroyed." *Commonwealth's Response to Defendant's Motion to Dismiss*, and FOIA Vol. II., at 322, respectively.

IV.(c) THE KNOWN FALSITY OF THE PROFFER STATEMENTS AND FBI S.A. MESSING'S TESTIMONY RELATING THERETO. *SEE ALSO HOOD V. JOHNSON*, CL06-2311 CLAIMS J.(a), K.(a), D.D., AND E.E.

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225. (1) Contrary to the false Proffer Statements (Pet. Ex. 23), and contrary to agent Messing's testimony (TR. tr., at 271, 273, 275, and 278-279), documents suppressed by the government reveal that "eyewitnesses testified that a white male wielding a five to six inch bladed **hunting-type knife**" abducted the victim. FOIA Vol. I., at 1 (emphasis added). The government's knowledge that the eyewitnesses stated that the knife used by the culprits was identified as a "six-inch **hunting-type knife**" was never revealed to the Petitioner. *Id*. However, this evidence is contrary to the false Proffer Statements, and Messing's testimony related thereto, which stated

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in the defendant's case, the exculpatory nature and value of the evidence must have been apparent before the evidence was destroyed, and been of such a nature that the defendant could not obtain comparable evidence by other reasonable means. *Id*. at 489. **In deciding whether the destruction of evidence constituted a due process denial, the Supreme Court also considered whether the government agents had acted in good faith and in accord with their normal practice and had not made a conscious effort to suppress exculpatory evidence**. *Id*. at 488. **<u>However</u>**, "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). **In a case involving potentially useful evidence, the defendant must "<u>show bad faith on the part of the police</u>**." *Id*.; *see also, Illinois v. Fisher*, 540 U.S. 544, 548 (2004) (all emphasis added.)

that it was a "medium size [8-inch] chef knife" that was used. Pet. Ex 23, TR. tr., at p. 271.

226. (2) Contrary to the false Proffer Statements, the government's investigation revealed that "A third white male by the name of [_____] has been identified as having been present at the time Cooper was murdered." FOIA Vol. I., at 1-2. This evidence was never revealed to defense counsel or the Petitioner. However, this evidence is contrary to the false proffer and Messing's testimony relating thereto which stated that there was only Madison and the Petitioner present.

227. (3) Contrary to the false Proffer Statements, the government withheld information that Cox "was wearing a brown 'buck knife' type case on his belt." FOIA Vol. I., at 154. Further, the government withheld the fact that the "Commonwealth's Attorney lost the brown leather case, [and] buck knife." FOIA Vol. II., at 199. This evidence of a "'buck knife' type case, [and] buck knife" is consistent with all of the eyewitness testimony against Cox, however, it is entirely contrary to the false Proffer Statements. *Id*. Moreover, the loss of this evidence deprived the Petitioner of the ability to independently test the knife owned by Cox, and to independently compare the knife owned by Cox with the wounds found on the victim. The existence of this physical evidence and the subsequent loss of this evidence was never disclosed to defense counsel or the Petitioner. Likewise, the loss of this physical evidence was never explained to defense counsel or the Petitioner.

228. (4) The government suppressed exculpatory and/or impeachment evidence derived from statements made on 5/8/2000 to federal agents by one of the original investigators involved in this case. Contrary to the false Proffer Statements, the withheld statements made by the original investigator, in pertinent part states,

> If [Trono] had any concern about the guilt of [Cox] it was dispelled by a number of events. First was [Estelle Johnson's] reaction when [Cox] was brought into the courtroom at the preliminary hearing. [The original investigator] demonstrated to interviewers how ... [Estelle Johnson] indicat[ed] that he was the individual.

FOIA Vol. I., at 174.

The existence of this evidence was never made known to defense counsel or the Petitioner. This document was never disclosed to defense counsel or the Petitioner. This evidence was not only clearly exculpatory and material impeachment evidence as it is contrary to the Proffer Statements, this evidence was also contrary to the testimony of Messing regarding the false Proffer Statements.

229. (5) Additionally, this same undisclosed document (FOIA Vol. I., at 174-175) provided further exculpatory and/or impeachment evidence stating,

> [The original investigator's] recollection is that, following the arrest of Hood on cocaine[38] distribution charges, [the original investigator] received a telephone call from [_____] advising [him] that Hood was not the right guy. [The original investigator's] recollection is that Hood had an alibi for the time of the offense.

FOIA Vol. I., at 175.

230. The existence of this alibi which the original investigator recalled and which eliminated the Petitioner from being involved in these crimes is diametrically opposed to the Proffer Statements. It is beyond serious question that if defense counsel had been provided this exculpatory evidence which was, in fact generated by Messing, defense counsel's use of this document along with other evidence would have had a devastating effect on the government's knowing use of the false Proffer Statements. Moreover, the alibi evidence here would have caused a different result (when used properly by competent counsel) with respect to the Petitioner's motion to dismiss. The existence of an alibi would have been devastating to the government's entire case, as it proves that the Petitioner is actually innocent. In fact, if the

[38]The Commonwealth fabricated a cocaine distribution charge as their method of a police-arranged identification procedure. *See* FOIA Vol. IV, at p. 168 (the Petitioner was not identified, and is known to have, and is stated as having brown hair).

government had not suppressed its evidence of the Petitioner's alibi and provided that evidence to the Petitioner, this would have precluded the false Proffer Statements, the cooperation/immunity agreement, as well as any prosecution of the Petitioner.

231. The May 5, 2008, FOIA release of a heavily redacted Cox *habeas* transcript revealed that investigators had determined that the Petitioner had an alibi exonerating him of involvement in the crimes against Mrs. Cooper and, therefore, had eliminated the Petitioner as a suspect and, importantly, that the Commonwealth knew of said alibi before the Commonwealth prosecuted the Petitioner

232. Specifically, the copy of the Cox *habeas* transcript which the Petitioner was provided through the FOIA request revealed testimony, under oath, that the Petitioner was eliminated as a suspect due to a thoroughly investigated and confirmed alibi. FOIA IV., at 483.

233. In addition to the original investigator's statement to the FBI that, "[the Petitioner] was not the right guy," and that, "[the Petitioner] had an alibi for the time of the offense," (FOIA Vol. I., at 174-175), the government's knowledge of the Petitioner's alibi was corroborated under oath by a witness in the Cox *habeas* hearing. This witness also testified that two private investigators hired by Cox investigated and confirmed the fact that the Petitioner had an alibi "after the fact" and thus, the Petitioner was, "eliminated [] as a suspect." FOIA Vol. IV., at 483.

234. The size of the excision of the name of the witness, and the nature of the questions and answers, indicate the witness was one of Cox's trial attorneys, John F. McGarvey or Robert P. Geary, who testified,

> My recollection was that Mr. Hood had – was either in jail at the time or **there was something that <u>eliminated</u> 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 <u>we</u> had that information prior to that time.**

FOIA IV., at 483 (emphasis added). Notably, Government agents were present during Cox's *habeas* hearing on March 31, 1999, and witnessed the sworn testimony regarding the Petitioner's alibi exonerating the Petitioner. FOIA Vol. I., at 84-86, and 118-120.

235. Thus, one of the original investigators stated to the FBI that "[the Petitioner] had an alibi for the time of the offense" (FOIA Vol. I., at 174-175), and said alibi was corroborated by Cox's trial attorney at Cox's *habeas* hearing. Moreover, the Petitioner's alibi was further investigated and confirmed by the two private investigators hired by Cox after the Cox trial. Therefore, the Petitioner's alibi was investigated, established and confirmed by 1) a police officer, 2) a trial attorney, and 3) by two private investigators. Indeed, the Attorneys General on direct appeal from the criminal trial argued that the petitioner was not entitled to relief because the Proffer Statement was false. Undoubtedly, the government knew or should have known both that the Petitioner was actually innocent and that the Proffer Statement was not true when Special Agent Messing testified to its veracity.

236. (6) On December 7, 2001, the government executed a search warrant on 103 Yew Avenue, Colonial Heights. *See* Pet. Ex. 43. 103 Yew Avenue was to be the marital residence of the Petitioner and Louise Branson. This search warrant produced volumes of "handwritten letters, copies of letters and related items" to Louise Branson from the Petitioner. *See* FOIA Vol. III., at 127 (dated 12/13/2001) *see* also FOIA Vol. I., at 334 (dated 12/7/2001 - transcribed 3/04/2002).

237. However, the government only disclosed two of those handwritten letters. *See* Pet. Ex. 37. All of the "handwritten letters" and "related items" dated 11/6/2001, or later, contained exculpatory and impeachment evidence relating to the false Proffer Statements and the Petitioner's innocence which could have been used by competent counsel to impugn the

ostensibly credible, but false, Proffer Statements. However, none of the other "handwritten letters, copies of letters" and "related items" were ever disclosed to defense counsel or the Petitioner. FOIA Vol. III., at 127. *See* Claim A, II.(b), II.(b)(i), II.(b)(ii), and II.(b)(iii), *supra.* *See also* Rule 3A:11.

238. (7) Between 11/12/2001 and 1/4/2002, an investigation was performed by the government (The FBI, the Richmond Police, and members of the Henrico County Sheriff's office) of all of the Petitioner's telephone calls to Louise Branson. This investigation entailed the government making Compact Disk ("CDs") recordings of the telephone calls from the Petitioner, while incarcerated in the Henrico County Jail, to Louise Branson. *See* FOIA Vol. I., at 339 *see* also FOIA Vol. III., 579-586. In large part, these recorded telephone conversations contained exculpatory and impeachment evidence regarding the false Proffer Statements. The existence of the CD recordings was never disclosed to defense counsel nor to the Petitioner. In fact, in an apparent breach of FBI policy and procedure the CDs were not entered into ELSUR until 2/18/2003, more than one year after the conclusion of the investigation, more than ten (10) months after the trial of the Petitioner, and more than five (5) months after the final judgment (sentencing) in the underlying criminal case. *See* FOIA Vol. I., at 340 ("Due to inadvertence on the part of Case Agent, these CDs were never entered into ELSUR"). It was the exculpatory and impeachment evidence contained in these CDs which precipitated the search warrant on 103 Yew Avenue mentioned above. *See* Pet. Exs. 43, 112, and 113. If the CDs had been turned over to defense counsel, the Petitioner would have been provided further evidence proving the falsity of the Proffer Statements, while demonstrating that others in addition to the government, Goodwin, and the Petitioner knew that the proffer was false. Importantly, the sworn attestations of Wade within the affidavit in support of a search warrant are belied by the actual content of the

recorded conversations about which Wade testified. The Petitioner was denied the ability to expose the perjury committed by Wade and impeach the government's witness and one of its lead detectives by the government's violation of *Brady* in this regard. *See* Claim A, II.(b), II.(b)(i), II.(b)(ii), and II.(b)(iii), *supra*. *See also* Rule 3A:11.

239. (8) Contrary to the false Proffer Statements and the testimony of Messing related thereto which stated that the knives in the sheath were a "large" (10-inch) chef knife, a "medium" (8-inch) chef knife, and a serrated bread knife; the government knew that the sheath was uniquely designed and fabricated to hold only a 10-inch chef knife, a serrated bread knife, and a small paring knife. *See* Claim A., *supra*. The fact that the sheath was only capable of carrying, and in fact did only carry, a 10-inch knife, a serrated bread knife, and a small paring knife was established and confirmed by several witnesses, however, the witness statements which were of exculpatory and impeachment value in this regard were never disclosed to defense counsel or the Petitioner. On 9/29/1999, for example, the original notes of an interview by government agents in pertinent part states, "[the Petitioner] had a sheath that had three (3) knives 10 [inch], 8 [inch] brad [sic] serrated and 2-inch paring." FOIA Vol. II., at 125 (a)-(b) *see also* Pet. Ex. 94. The original notes of another interview by the government likewise stated that "Steve had a sheath held Chef's knife, serrated knife, and paring knife. [The Petitioner] always had three (3) knife sheath at work." FOIA Vol. II., at 132 *see also* Pet. Ex. 94. Likewise, a later interview of the Petitioner stated that the only knives ever contained in the sheath were a "bread, chef, [and] paring ... small chef, large chef, bread/serrated knife." FOIA Vol. II., at 154 *see also* Pet. Ex. 94.

240. The independent corroboration of the obvious physical limitations of the sheath, and the only knives the Petitioner carried in the sheath were never disclosed to defense counsel or the Petitioner. The identity of the independent witnesses who corroborated the truth of the physical

evidence was never disclosed to defense counsel or the Petitioner. These undisclosed witnesses and their statements to federal agents would have been a powerful source to impeach the false Proffer Statements and Messing's knowingly false testimony related thereto.

241. (9) Contrary to the false Proffer Statements, the FBI file revealed that on 2/16/1991 the "police took the Petitioner to a public place witnesses, [Johnson and Corbin] did not identify him." FOIA Vol. III., at 29. This exculpatory evidence was never disclosed to defense counsel or the Petitioner. Clearly, this evidence eliminated the Petitioner as a suspect in 1991, both before and after the trial of Cox, accordingly this document was favorable to the defense because of its exculpatory value, and because it revealed the ongoing unconstitutional pre-indictment delay and the prejudice flowing therefrom. Likewise, this undisclosed evidence would have been yet another source of impeachment of the false Proffer Statements and Messing's knowingly false testimony related thereto. Further, the FBI's investigation continued to state "It is **believed** that Stephen Hood was taken to some public place in order for eyewitnesses against [Cox, Estelle Johnson and James Corbin,] to view Hood." FOIA Vol. III., at 34 (emphasis added). The inability of the eyewitnesses to these crimes to identify the Petitioner could have been used by competent counsel, with devastating effect, on the prosecution's case.

242. Of course, the Respondent may argue that these two undisclosed documents merely excluded the Petitioner from being the knife wielding culprit because the witnesses never identified the driver of the car. However, the non-disclosure of exculpatory evidence does not end here. The FBI's documents which were never disclosed to defense counsel or the Petitioner further revealed that "[the Petitioner] has brown hair" and "Police took [the Petitioner] to a public place [witnesses against Cox, Johnson and Corbin] did not identify him." FOIA Vol. IV., at 168. This investigative report clearly and totally eliminated the Petitioner as having any

involvement in these crimes. The inability of the eye witnesses to identify the Petitioner as the knife wielding culprit now has the additional declaration that the Petitioner has "brown hair" just a few days before Johnson was to testify that the driver of the car had "blond hair." *See* Pet. Ex. 1. It may be argued that the eyewitnesses never identified the driver, however, the eyewitness did identify one glaring and distinguishing feature about the driver, i.e., the driver of the car had **"blond hair."** Pet. Ex. 1, at p. 85 (emphasis added).

243. Thus, the FBI file completely eliminated the Petitioner as either culprit in these crimes. These undisclosed documents would have been a valuable source to impeach the false Proffer Statements, and this FBI document would have been a devastating source of impeachment of the FBI agent's testimony relating to the false Proffer Statements.

244. Moreover, there is a reasonable probability that had the Commonwealth not suppressed this evidence, the Petitioner would have succeeded on his motion to dismiss. Indeed, had the suppressed *Brady* material been disclosed, it would have obviated the Petitioner's cooperation/immunity agreement and the false Proffer Statements. *See* Claim B. IV.(a). Clearly, this document, evidence, and information undermines confidence in the verdict.

IV.(d) ESTELLE JOHNSON, A KEY EYEWITNESS FOR THE GOVERNMENT. *SEE ALSO HOOD V. JOHNSON*, CL06-2311; CLAIM J.(c), AND CLAIM K.(c).

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245. It is well documented that Estelle Johnson ("Johnson") was one of the eyewitnesses for the government in the Cox trial in 1991, and Petitioner's trial in 2002. *See*, Pet. Ex. 1, and TR.tr. It is equally well documented that at both trials Johnson's testimony was essentially the same. *See*, Pet. Ex. 1, and TR.tr. The only exceptions were Johnson's positive identification of Cox during the viewing of photo arrays, at Cox's preliminary hearing, and at his trial, and Johnson's definitive testimony about the blond-haired driver of the assailant's car. The proffer agreement,

however, prevented defense counsel from educing that identification testimony in the Petitioner's trial, even though the government knew that Johnson never recanted or equivocated in her positive identification of Cox as the knife wielding abductor of the victim, which of course, is in direct contradiction to the false Proffer Statements. And, the prosecution refused to educe from this eyewitness her positive identification of Cox as the murderer.

246. However, the Petitioner recently discovered that the government failed to disclose a plethora of documents, evidence, and information that revealed that Johnson provided false testimony at Cox's trial and, correspondingly, at the Petitioner's trial — and that the government knew it. This impeachment evidence was not disclosed to the Petitioner or his defense counsel.

247. Remarkably, the government determined that Johnson perjured herself at Cox's trial, and then the same government officials solicited and sat silent as Johnson presented the same perjured testimony at the Petitioner's trial. Moreover, the government withheld from the Petitioner and his counsel the impeachment evidence of Johnson's perjured testimony

248. One undisclosed FBI document in pertinent part states,

> An interview of [Johnson] who testified against [Cox] has offered extremely conflicting statements between both **<u>her</u>** current recollection of the abduction of Cooper and **<u>her</u>** actual trial testimony in 1991.

FOIA Vol. I., at 85 (dated 06/28/1999) (emphasis added).

249. This statement made by federal agents was clearly in reference to Estelle Johnson as she was the only female eyewitness regarding the case that provided actual "trial testimony in 1991" regarding "the abduction of Cooper." *Id*. The existence of this powerfully damaging impeachment evidence with regard to one of the two eyewitnesses in this case was never disclosed to defense counsel or the Petitioner. Clearly, this document would not only serve to impeach the eyewitness, but more importantly, this document would expose to the trial court the

nature and extent of the prosecutorial misconduct of Trono, and the government at large in this case.

250. Again, on 9/28/1999 the federal agents stated,

> An interview of [Johnson] who testified against [Cox] has offered extremely conflicting statements between both **her** current recollection of the abduction of Cooper and **her** actual trial testimony in 1991.

FOIA Vol. I., at 119 (emphasis added).

251. Three months of further investigation had been accomplished since FOIA Vol. I., at 85, *supra*, and the FBI's position with regard to Johnson's testimony remained unchanged. Johnson continued to offer extremely conflicting statements regarding both her current recollection of Cooper and her actual trial testimony in 1991. This document and information were never disclosed to defense counsel or the Petitioner.

252. This FBI document further revealed that Johnson and Corbin, the government's two **eyewitnesses,** recanted or changed their testimony from the trial of Cox with the exception of their identification of Cox in 1990 as the knife wielding assailant. Yet, the government still educed the same false testimony from Johnson and Corbin at the Petitioner's 2002 trial as the government had educed in Cox's 1991 trial, despite that the prosecutors in the Petitioner's trial had informed the FBI in 1999 — before the Petitioner's trial — that Johnson and Corbin had recanted or changed their 1990 trial testimony. This prosecutorial misconduct is exposed by the following FBI document which states in pertinent part,

> Numerous interviews continue regarding this investigation and during a meeting on September 27, 1999, AUSAs Comey and Trono advised that the FBI would basically have to prove that [ ] and Hood were the actual killers of Cooper and **even though previous witnesses against [Cox] have since recanted or changed their testimony from the time in 1990 of the trial to the present time, this would not make any difference in that their identifications of [Cox] in 1990 were not recanted.**

FOIA Vol. I., at 120 (emphasis added).

253. This document and information was withheld by the government and never disclosed to the Petitioner or his defense counsel.

254. In 1999 the FBI concluded that Johnson's and Corbin's testimony lacked probative value where on 11/23/1999 the FBI generated a document "To report the facts of the case" wherein the FBI emphasized that the "Original witness testimony has **changed drastically** concerning the abduction/homicide." FOIA Vol. I., at 124 (emphasis added). Neither this document nor this information was ever disclosed to defense counsel or the Petitioner. The government educed from these witnesses the same testimony in the trial of the Petitioner as the "original witness testimony" notwithstanding the FBI's determination that the testimony had "changed drastically." FOIA Vol. I., at 124.

255. By no later than 12/16/1999 the government concluded that Johnson's and Corbin's 1990 Cox trial testimony was false and otherwise unreliable. This information was never disclosed to defense counsel or the Petitioner. On 12/16/1999 the federal government's documents revealed the following statement regarding the witnesses in this case:

> Subpoena [______] before a grand jury. Interviews of the [______] have produced contradictory statements, and indicate that the [eyewitnesses] may have produced inaccurate testimony at the trial of [Cox]. In addition, [eyewitnesses] may have provided information which directly contradicts the testimony of the eyewitnesses at trial.

FOIA Vol. I., at 127 *see also* FOIA Vol. II., 328.

256. This information regarding the government's eyewitnesses in this case was never disclosed to defense counsel or the Petitioner. Clearly, the government had abundant evidence which fell within the definition of impeachment evidence under *Brady*, and progeny. Equally clear is the government's pattern of illegally withholding said *Brady* material from the Petitioner

and his defense counsel.

257. During the investigation, Robert Trono's Richmond FBI office conveyed to its Louisville office its profound concerns about witness tampering by police and other officials in Cox's trial:

> [Cox] was eventually convicted of this crime, based on eyewitness testimony which identified him as Cooper's abductor. Investigation at Richmond has determined that [Cox] may have been convicted on false or perjured testimony.
>
> Richmond has also developed information that prominent Richmond [individual(s)] may have influenced the identification of [Cox] and the subsequent questionable testimony by eyewitnesses. In addition, several Richmond City Police Department personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox].

FOIA Vol. II., at 317-318.

258. The Richmond FBI used this information to obtain authorization to interview an individual in Louisville. This evidence of "false or perjured testimony" was never revealed to the defense counsel or the Petitioner. Likewise, the evidence of a prominent Richmond individual possibly having "influenced ... the questionable testimony of witnesses" was never disclosed to defense counsel or the Petitioner. Moreover, the information and evidence that "Richmond City Police Personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial" was never disclosed to defense counsel or the Petitioner. *Id*.

259. The FBI documents recently discovered by the Petitioner further revealed compelling impeachment evidence which conclusively determined that **"<u>at least one</u>** of the eyewitnesses committed perjury." *See infra*. The document from the Richmond FBI dated 05/25/1999 definitively revealed the following evidence:

> Interviews of the eyewitnesses who testified against [Cox]have revealed that **<u>at least one of the eyewitnesses committed perjury</u>.** The testimony of this eyewitness has been determined to be false and incorrect, and this has been corroborated by the second eyewitness. A polygraph was administered to the eyewitness, and the results indicated that the testimony and statements of the eyewitness were deceptive. In addition, other witnesses have indicated that

> Richmond City Detectives may have pressured the eyewitnesses to identify [Cox] as Cooper's abductor.

FOIA Vol. II., at 322 (emphasis added).

260. This evidence and information that at least one of the eyewitnesses committed perjury, and the official corruption of witness coercion involved in this case was never disclosed to defense counsel or the Petitioner. It is beyond serious question that an ethical and legally responsible Assistant United States Attorney acting as a Special Assistant Commonwealth's attorney, an Assistant Commonwealth Attorney, as well as the investigators involved in this case were aware that this information fell within the disclosure demands of *Brady*, and progeny. Likewise, it is beyond serious question that in the hands of competent counsel this evidence and information would have been employed in a mighty way to the detriment of the prosecution's case, and to the benefit of the Petitioner. This evidence would have, at least, precluded the prosecution from any attempt to put Johnson or Corbin on the witness stand to testify at all in the trial of the Petitioner, much less allow the introduction of the same perjurious testimony. Once the FBI concluded that the witness — "at least one of the eyewitnesses committed perjury" — the government could not in good faith know what, if any, testimony from the eyewitnesses in the Petitioner's trial was truthful. Undoubtedly, at least some, if not all, of the eyewitness testimony in the trial of the Petitioner was known to be perjury, or at least false, incorrect, or inaccurate. *Id.*

261. Finally, on 8/17/1999, the Richmond FBI sought to establish a wiretap under the authority of AUSA Robert Trono for violations of Title 18 U.S.C. § 1623 ("False Declarations Before A [federal] Grand Jury Or Court"). The basis for the wiretap was:

> Investigation to date has revealed that **both** [Johnson and Corbin] **offered false testimony** during the trial of [Cox]... the murder trial of [Cox] in 1991.

FOIA Vol. III., at 85 (emphasis added).

262. It was with this factual underpinning, and under the direction and authority of Trono, that authorization for the wiretap was provided to the Richmond FBI on August 18, 1999 and endorsed by the S.A.C. on 8/24/1999. This document, evidence, and information was never disclosed to defense counsel or the Petitioner. This evidence clearly falls within the demands for disclosure pursuant to *Brady*, and progeny.

263. The FBI investigation revealed that both eyewitnesses testified falsely in Cox's murder trial and, correspondingly, in the Petitioner's trial. Had the government satisfied its obligations for pre-trial disclosure, Petitioner's counsel would have been able either to render such perjurious testimony worthless or, even, preclude such testimony.

264. Accordingly, "since all of these possible [options and] findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, 'fairness' cannot be stretched to the point of calling this a fair trial." *Kyles*, *supra*, at 454, 115 S.Ct. at 1575.

IV.(e) JAMES CORBIN, A KEY EYEWITNESS FOR THE GOVERNMENT. *SEE ALSO HOOD V. JOHNSON*, CL06-2311; CLAIM J.(d), AND CLAIM K.(d).

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265. It is well documented that James Corbin ("Corbin") was one of the eyewitnesses for the government in the Cox trial of 1991, and the Petitioner's trial in 2002, and that at both trials Corbin's testimony was essentially the same. *See*, Pet. Ex. 1, and TR.tr. The only exception was Corbin's positive identification of Cox at Cox's trial. The Petitioner's proffer agreement, however, prevented defense counsel from adducing Corbin's identification testimony at Petitioner's trial, and the prosecutor failed, assiduously, to adduce from Corbin that he had positively identified Cox as the murderer — despite the government's knowledge that Corbin

never recanted or equivocated in his positive identification of Cox as the knife-wielding assailant — testimony directly contradicting the false Proffer Statements.

266. However, recently obtained FOIA documents reveal that by 1999 the government knew that another witness furnished a totally different version of events from Corbin's Cox trial testimony and the government had determined through polygraph examination of Corbin that Corbin himself was deceptive on key areas of his Cox trial testimony.

267. Remarkably, the government determined that Corbin perjured himself at Cox's trial in 1991, and then the same government officials solicited and sat silent as Corbin presented the same perjured testimony at the Petitioner's trial. Moreover, the government withheld from the Petitioner and his counsel the impeachment evidence of Corbin's perjured testimony.

268. One undisclosed FBI document in pertinent part states,

> [An individual] at the time has furnished a totally different version of [Corbin's] observations as they relate to **his** trial testimony.

FOIA Vol. I., at 35 (dated 5/13/1999) (emphasis added).

269. This statement made by federal agents was clearly in reference to James Corbin as he was the only male eyewitness regarding the case that provided actual "trial testimony" in 1991 regarding the abduction of Cooper. *Id*. The existence of this powerfully damaging impeachment evidence with regard to one of the two eyewitnesses in this case was never disclosed to defense counsel or the Petitioner. Clearly, this document would not only serve to impeach the eyewitness, but more importantly, this document would expose to the trial court the nature and extent of the prosecutorial misconduct.

270. On 6/28/1999, the FBI issued a "Case Status Report" with respect to this case. This document provided powerful evidence impeaching Corbin and his 'eyewitness testimony.' In pertinent part this FBI document related to this case and assigned to AUSA Robert Trono states,

> Part of [Corbin's] plea agreement was to cooperate fully with any and all law enforcement authorities and to undergo a polygraph examination, if necessary. Within the past several months, [Corbin] was polygraphed by SA [______] and was deceptive on three key areas of **his** testimony which **he** had offered at the trial of [Cox] in February of 1991.

FOIA Vol. I., at 85 (emphasis added) *see also* FOIA Vol. I., 119 (dated 9/28/1999).

271. This document, evidence, and information was never disclosed to defense counsel or the Petitioner. Clearly, this evidence establishes that Corbin was testifying in the trial of the Petitioner under the terms and benefits of a plea agreement. The existence and nature of Corbin's plea agreement was never disclosed to defense counsel or the Petitioner in direct violation of *Brady*, and progeny, as well as *Giglio*, and progeny. Likewise, the existence and nature of Corbin's deception, as well as those key areas of his testimony which were deceptive was never disclosed to defense counsel. Bearing in mind that Corbin's testimony "which he had offered at the trial of [Cox] in February of 1991," was the same testimony Corbin offered in the trial of the Petitioner in 2002 — with the exception of Corbin's positive, and unrecanted, identification of Cox. *Id*. Accordingly, the government knew that, at minimum, the same three key areas of testimony in the trial of the Petitioner were equally deceptive. However, the government remained silent while it knowingly solicited the same deceptive testimony. In the hands of competent counsel this document, evidence, and information would have had a devastating effect on the government's case against the Petitioner. Likewise, the revelation of Trono's misconduct throughout this case erodes any confidence in the outcome of the underlying criminal case.

272. This extremely telling document further states that based on this, and other information including the eyewitnesses' false testimony,

> Assistant United States Attorneys (AUSAs) James B. Comey and Robert E. Trono have agreed after reviewing all of the investigation to date there is much reasonable doubt in the trial of [Cox] for the murder of Cooper.

FOIA Vol. I., at 85 *see also* FOIA Vol. I., at 119.

273. Remarkably, the same false and/or deceptive testimony used in the Cox trial which revealed "much reasonable doubt in the trial of [Cox]" is the exact same false/deceptive testimony that Trono solicited in the trial of the Petitioner. Yet, the government refused to disclose this evidence to defense counsel or the Petitioner, and prosecuted the Petitioner based upon the same false eyewitness testimony, which caused much reasonable doubt in the prior trial.

274. On 9/28/1999, the FBI issued another "Case Status Report" containing much of the same information as the Report issued on 6/28/1999 mentioned above. *See* FOIA Vol. I., at 85. However, in addition, the 9/28/1999 Report also included a "Summary of Investigation Since Last Submission." The updated summary provided in pertinent part,

> Numerous interviews continue regarding this investigation and during a meeting on September 27, 1999, AUSAs Comey and Trono advised that the FBI would basically have to prove that [ ] and Hood were the actual killers of Cooper **and even though previous witnesses against [Cox] have since recanted or changed their testimony from the time in 1990 of the trial to the present time, this would not make any difference in that their identifications of [Cox] in 1990 were not recanted.**

FOIA Vol. I., at 120 (emphasis added).

275. This document, evidence, and information was never disclosed to defense counsel or the Petitioner. Neither the nature, extent, nor the content of the eyewitnesses' changed testimony and/or recanted testimony was ever disclosed to defense counsel or the Petitioner. However, notwithstanding Trono's statement that the witnesses changed and/or recanted their testimony provided in 1990, Trono solicited the same testimony provided in 1990 in the trial of the Petitioner which the witnesses had since changed and/or recanted. And, defense counsel and the Petitioner were left unaware of this prosecutorial misconduct due to the government's refusal to comply with the demands for disclosure under *Brady*, and progeny.

276. In 1999 the FBI concluded that Johnson's and Corbin's testimony lacked probative value where on 11/23/1999 the FBI generated a document "To report the facts of the case" wherein the FBI emphasized that the "Original witness testimony has **changed drastically** concerning the abduction/homicide." FOIA Vol. I., at 124 (emphasis added). Neither this document nor this information was ever disclosed to defense counsel or the Petitioner. The government educed from these witnesses the same testimony in the trial of the Petitioner as the "original witness testimony" notwithstanding the FBI's determination that the testimony had "changed drastically." FOIA Vol. I., at 124.

277. In the hands of competent counsel this powerful impeachment evidence, derived from and confirmed by an FBI investigation, would have resulted in the preclusion of the testimony of Johnson and Corbin.

278. On the other hand, if the government chose to put these perjurious witnesses on the stand after providing defense counsel with this *Brady* material, competent counsel would have destroyed the witness's testimony through the FBI's impeachment of the witnesses and/or exposed the prosecutorial misconduct of Trono in soliciting testimony known to be false, inaccurate, or incorrect.

279. By no later than 12/16/1999 the government concluded that Johnson's and Corbin's 1990 Cox trial testimony was false and otherwise unreliable. This information was never disclosed to defense counsel or the Petitioner. On 12/16/1999 the federal government's documents revealed the following statement regarding the witnesses in this case:

> Subpoena [ ] before a grand jury.
> Interviews of the [ ] have produced contradictory statements, and indicate that the [eyewitnesses] may have provided inaccurate testimony at the trial of [Cox]. In addition, [eyewitnesses] have provided information which contradicts the testimony of the [eyewitnesses] at trial.

FOIA Vol. I., at 127 *see also* FOIA Vol. II., at 328.

280. This information regarding the government's eyewitnesses in this case was never disclosed to the defense counsel or the Petitioner. Clearly, the government had abundant evidence which fell within the definition of impeachment evidence under *Brady*, and progeny. However, equally clear is the pattern of illegally withholding said *Brady* material from the Petitioner and his defense counsel.

281. During the investigation, Robert Trono's Richmond FBI office conveyed to its Louisville office its profound concerns about witness tampering by police and other officials in Cox's trial:

> [Cox] was eventually convicted of this crime, based on eyewitness testimony which identified him as Cooper's abductor. Investigation at Richmond has determined that [Cox] may have been convicted on false or perjured testimony.
>
> Richmond has also developed information that prominent Richmond [individual(s)] may have influenced the identification of [Cox] and the subsequent questionable testimony by eyewitnesses. In addition, several Richmond City Police Department personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox].

FOIA Vol. II., at 317-318.

282. The Richmond FBI used this information to obtain authorization to interview an individual in Louisville. This evidence of "false or perjured testimony" was never revealed to the defense counsel or the Petitioner. Likewise, the evidence of a prominent Richmond individual possibly having "influenced ... the questionable testimony of witnesses" was never disclosed to defense counsel or the Petitioner. Moreover, the information and evidence that "Richmond City Police Personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial" was never disclosed to defense counsel or the Petitioner. *Id*.

283. The FBI documents recently discovered by the Petitioner further revealed compelling impeachment evidence which conclusively determined that "**at least one of the eyewitnesses**

committed perjury." *See infra.* The document from the Richmond FBI dated 05/25/1999 definitively revealed the following evidence:

> **Interviews of eyewitnesses who testified against [Cox] have revealed that at least one of the eyewitnesses committed perjury.** The testimony of this eyewitness has been determined to be false and incorrect, and this has been corroborated by the second eyewitness. A polygraph was administered to the eyewitness, and the results indicated that the testimony and statements were deceptive. In addition, other witnesses have indicated that Richmond City Detectives may have pressured the eyewitnesses to identify [Cox] as Cooper's abductor.

FOIA Vol. II., at 322 (emphasis added).

284. This evidence and information that at least one of the eyewitnesses committed perjury, and the official corruption of witness coercion involved in this case was never disclosed to defense counsel or the Petitioner. It is beyond serious question that an ethical and legally responsible Assistant United States Attorney acting as a Special Assistant Commonwealth's attorney, an Assistant Commonwealth Attorney, as well as the investigators involved in this case were aware that this information fell within the disclosure demands of *Brady*, and progeny. Likewise, it is beyond serious question that in the hands of competent counsel this evidence and information would have been employed in a mighty way to the detriment of the prosecution's case, and to the benefit of the Petitioner. This evidence would have, at least, precluded the prosecution from any attempt to put Johnson or Corbin on the witness stand to testify at all in the trial of the Petitioner, much less allow the introduction of the same perjurious testimony. Once the FBI concluded that the witness — "at least one of the eyewitnesses committed perjury" — the government could not in good faith know what, if any, testimony from the eyewitnesses in the Petitioner's trial was truthful. *Id*. Undoubtedly, at least some, if not all, of the eyewitness testimony in the trial of the Petitioner was known to be perjury, or at least false, incorrect, or inaccurate.

285. Finally, on 8/17/1999, the Richmond FBI sought to establish a wiretap under the authority of AUSA Robert Trono for violations of Title 18 U.S.C. § 1623 ("False Declarations Before A [federal] Grand Jury Or Court"). The basis for the wiretap was,

> Investigation to date has revealed that **both** [Corbin and Johnson] **offered false testimony during the trial of [Cox]** ... the murder trial of [Cox] in 1991.

FOIA Vol. III., at 85 (emphasis added).

286. It was with this factual underpinning, and under the direction and authority of Trono, that authorization for the wiretap was provided to the Richmond FBI on August 18, 1999, and endorsed by the S.A.C. on 8/24/1999. This document, evidence, and information was never disclosed to defense counsel or the Petitioner. This evidence clearly falls within the demands for disclosure pursuant to *Brady*, and progeny.

287. The FBI investigation consistently revealed that both of the eyewitnesses provided false testimony in Cox's trial and, correspondingly, both eyewitnesses provided false testimony in the trial of the Petitioner. Despite the fact that the prosecutors had overwhelming evidence that the Petitioner was actually innocent, they withheld this evidence from the Petitioner, and, worse, solicited said false testimony to convict the Petitioner. Had the government disclosed this information pre-trial, any competent counsel would have been able to preclude or eviscerate any such perjurious eyewitness testimony. Thus, "since all of these possible [options, and] findings were precluded by the prosecution's failure to disclose the evidence that supported them, 'fairness' cannot be stretched to the point of calling this a fair trial." *Kyles*, *supra*, at 454, 115 S.Ct. at 1575.

288. Additionally, the following document reveals that on 4/19/1999, Corbin was promised conditional immunity against prosecution for perjury. *See* FOIA. Vol. III., at 543. On 4/19/1999 the promise of immunity made to Corbin was documented as follows,

> In conferences with Assistant United States Attorneys James B. Comey and Robert E. Trono, they have assured that in the event [_____] as the abductor of Cooper was, in fact, not truthful and/or suborned, [Corbin] will not be prosecuted for perjury if, in fact, **his** identification was coerced in any way.

FOIA Vol. III., at 543 (emphasis added).

289. Federal prosecutors withheld from the Petitioner the fact that there existed an immunity agreement and, indeed, the existence even of an offer of immunity, to Corbin to avoid prosecution for perjury. This is in addition to the plea agreement under which Corbin was already cooperating "fully with any and all law enforcement authorities" which was also never disclosed to defense counsel or the Petitioner. *See* FOIA Vol. I., at 85 *see also* FOIA Vol. I., at 119. This *Giglio* evidence was never disclosed to defense counsel or the Petitioner.

IV.(f) MEMBERS OF THE CITY OF RICHMOND POLICE DEPARTMENT AS SUSPECTS IN THIS CASE.

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290. As early as 1991 the FBI was investigating officers of the Richmond Police Department ("RPD") as suspects in the murder of the victim in this case. At least ten (10) Richmond police officers learned they were subject suspects. A Richmond City attorney representing these officers filed a federal FOIA request in 1991 to obtain all documents related to the federal investigation of these officers. *See* FOIA Volume. II., at 296-308 (request dated 4/11/1991). These documents were provided to the Petitioner in response to his FOIA request relating to the "Murder of Ilouise Cooper." *See* Pet. Exs. 113-125.

291. Along with other unspecified suspects, some of these suspects in a federal Continuing Criminal Enterprise investigation were officers and administrators of the RPD. The means, methods, thoroughness, reliability, and veracity of a police investigation is subject to mandatory disclosure as impeachment evidence under *Brady*, and progeny. *See Workman*, *supra*, 272 Va., at

646; *Kyles*, *supra*, 514 U.S., at 445. The fact that the Richmond Police Department itself, along with several of its officers, were actually suspects in the abduction and murder of Ms. Cooper was withheld from the Petitioner and his counsel. The fact that the investigating authority and its officers were themselves suspects in the crime for which the Petitioner was prosecuted is certainly exculpatory evidence and impeachment evidence that would have been devastating to the Commonwealth's case.

292. Further, on 4/15/1999, the federal authorities created a master file index related to a Continuing Criminal Enterprise and the murder of Ms. Cooper. *See* FOIA Vol. II., at 20-21. This federal file was created "in order to facilitate an efficient management of this case which is expected to produce an extensive volume of investigation." FOIA Vol. II., at 21. In this document, the Petitioner is named as a suspect, along with other individuals not named in the document due to redaction made by the FBI. *See* FOIA Vol. II., at 21. The matter was also captioned as a "Drug Related Homicide - Other Law Enforcement Individuals." FOIA Vol. II., at 21. Thus, it is plain that throughout the investigation of the Continuing Criminal Enterprise and the murder of Ms. Cooper, from 1991 through 2001, various law enforcement officers were suspects in the murder.

293. Additionally, on 5/4/1999, certain federal agents sent a communiqué "To request authorization and concurrence of travel of a Special Agent and Special Federal Officer" to travel by air to Louisville in order to conduct an interview of an individual on May 6, 1999 through May 7, 1999. In large part, the factual basis provided by the Richmond FBI in order to be granted authority to travel to Louisville stated, **"several Richmond City Police Department personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox]."** FOIA Vol. II., at 317-318 (emphasis added).

294. Moreover, on 5/25/1999, the Richmond FBI sent a request to FBIHQ seeking "authority to investigate captioned matter under 267 classification." FOIA Vol. II., at 321. A 267 classification is one in which authority is granted to investigate a Continuing Criminal Enterprise under Title 21 U.S.C § 848. *See*, *e.g.*, FOIA Vol. II., at 323. As part of the factual basis for the FBIHQ to consider in order to justify and authorize a 267 classification, the Richmond FBI under the direction and authority of AUSA Robert E. Trono, provided the following,

> [Cox] was convicted of the murder based on the testimony of two eyewitnesses who identified him as Cooper's abductor. The eyewitnesses were identified and interviewed by Richmond city detectives suspected of having a professional relationship with noted Richmond [______] ... A review of financial records in captioned matter, along with information through interviews, indicate that [______] was paid a substantial sum of money by [______]. During this same period of time, Richmond city detectives changed their focus of their investigation ... In addition, other witnesses have indicated that Richmond City detectives may have pressured the eyewitnesses to identify [Cox] as Cooper's abductor.

FOIA Vol. II., at 322.

295. This information, and evidence regarding the Richmond Police themselves "influencing or offering false or misleading testimony" was never disclosed to defense counsel or the Petitioner. *Id*. Likewise, this information, and evidence of witness coercion by the Richmond City Police Department was never made available to defense counsel or the Petitioner.

296. Moreover, FOIA documents reveal several FBI interviews and documents which show that the FBI considered Richmond police detectives themselves as suspects in this case. *See*, e.g., FOIA Vol. I., at 145-147, 152-158, 174-175, 200; FOIA Vol. II., 199-200, 327-328; and FOIA Vol. III., at 543. Defense counsel could have used this undisclosed impeachment and exculpatory evidence to great effect both at Petitioner's trial and for his Motion to Dismiss for pre-indictment delay. *See*, subsection IV.(a), *supra*.

IV. (g) THE OTHER UNNAMED SUSPECTS IN THIS CASE.

297. As previously noted, the federal authorities created a master file index related to a Continuing Criminal Enterprise and the murder of the victim in this case. *See* FOIA Vol II., at 20-21. This federal file index was created "in order to facilitate an efficient management of this case which is expected to produce an extensive volume of investigation." FOIA Vol. II., at 21. In this document the caption of the case file indicates the Petitioner as a suspect, along with other individuals not named, and yet to be discovered due to the redaction made by the FBI. *See* FOIA Vol II., at 21. Along with the Petitioner, the "other law enforcement individuals," and the redacted names of individuals, other suspects are also listed. These other suspects are not named in the Exhibits, but are consistently designated by the FBI simply as, "ET AL." *See* FOIA Vol. II., at 21. The fact that additional persons including law enforcement personnel, currently not identified, were also named or known as suspects in the murder of Ms. Cooper was never made available to defense counsel or the Petitioner.

298. For example, on 4/2/1999, the FBI identified a "third white male by the name of [______] ... as having been present at the time Cooper was murdered." FOIA Vol. I., at 1-2. On 9/25/2000, a consensual phone tap was approved. An unnamed individual "agreed to make consensually monitored contact" with another unnamed individual "in an attempt to get him to confess his involvement in Cooper's murder." FOIA Vol. III., at 87. On 1/12/1991, investigation revealed,

> that in the western black community and on Church Hill the theory in this case is as follows: A black drug dealer was murdered. He was supposed to have been murdered by another black drug dealer. The friends and family of the man killed, rather than kill the killer decided to kill his mother ... two white dudes picked the contract up and killed the mother. The woman that was killed was the mother of the drug dealer.

FOIA Vol. III., at 601.

299. On 4/27/1991, the FBI investigation revealed that an unnamed individual in November of 1991 "had been bragging about the murder of Cooper" and that "the Richmond Police were 'dumb'." This unnamed individual "had bragged about killing Cooper." FOIA Vol. V., at 1-2. All of the evidence with regard to the litany of other unnamed suspects was withheld from defense counsel and the Petitioner.

IV.(h) THE ARREST OF CERTAIN WITNESSES FOR VIOLATIONS OF 18 U.S.C. § 401 INVOLVING THIS CASE.

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300. It is indisputable that the federal prosecuting authorities involved in this case held federal grand jury proceedings related to this case. *See* FOIA Vol. I., II., III., and IV.

301. On 7/23/1999, a certain individual was arrested for violating Title 18 U.S.C. §401[39] relating to the murder of Ilouise Cooper. *See* FOIA Vol. I., at 79.

302. The acts which would fall under a violation of this federal law are far reaching — from evasive testimony of witnesses *see Lang v. United States*, 55 F.2d 922 (2nd Cir. 1932), to bribes *see Keeny v. United States*, 17 F.2d 976 (7th Cir. 1927), and refusing to testify *see United States v. Wilson*, 640 F.Supp. 238 (N.D. W.Va. 1986). Perjury, of course, is also contemplated by this statute. *See*, *e.g.*, *The Dunnigan Sisters*, 53 F.2d 502 (S.D.N.Y. 1931), as is influencing or impeding witnesses. *See Re Savin*, 131 U.S. 267 (1889); *Re Cuddy*, 131 U.S. 280 (1889); *Carlson v. United States*, 209 F.2d 209 (1st Cir. 1954).

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[39] For the record, 18 U.S.C. § 401 states,
A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as –
(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
(2) Misbehavior of any of its officers in the official transactions;
(3) Disobedience or resistance to its writ, process, order, rule, decree, or command.

303. The name of the individual arrested on 7/23/1999 for violating 18 U.S.C. §401 relating to this case was never disclosed to defense counsel or the Petitioner. The nature of, or the existence of, the alleged violation which precipitated the arrest of this individual relating to this case was never disclosed to defense counsel or the Petitioner. Whether the arrest resulted in a conviction of this individual for violating 18 U.S.C § 401 was never disclosed to defense counsel or the Petitioner. Clearly, this evidence and information was favorable to the defense for impeachment purposes.

304. Likewise, on 8/25/1999 a certain individual was arrested for violations of 18 U.S.C. § 401 relating to the murder of Ms. Cooper. *See* FOIA Vol. I., at 94. The name of the individual arrested on 8/25/1999 for violating 18 U.S.C. § 401 relating to the murder of Ms. Cooper was never disclosed to defense counsel or the Petitioner. Nether the nature of, nor the existence of, the alleged violation which precipitated the arrest of this individual relating to the murder of Ms. Cooper was ever disclosed to defense counsel or the Petitioner. Whether the arrest resulted in a conviction of this individual for violating 18 U.S.C § 401 was never disclosed to defense counsel or to the Petitioner. Again, it is plain that this evidence and information was favorable to the defense for impeachment purposes.

305. Finally, other undisclosed documents within the response to the Petitioner's FOIA request indicate completed arrest(s) of individual(s) by the federal authorities relating to the murder of Ms. Cooper. *See, e.g.,* FOIA Vol. II., at 114-115. The identity of the arrested individual(s) relating to the murder of Ms. Cooper was never disclosed to defense counsel or the Petitioner. Neither the nature of, nor the existence of, any federal arrest of individual(s) related to the murder of Ms. Cooper was ever disclosed to defense counsel or the Petitioner. Whether the arrest(s) resulted in a conviction of the individual(s) relating to the murder of Ms. Cooper was never disclosed to defense

counsel or the Petitioner. Because of its impeachment value, this evidence and information clearly required disclosure under *Brady*.

IV.(i) THE ONGOING INVESTIGATIONS OF PERJURY COMMITTED BY INDIVIDUALS INVOLVED IN THE CASE OF *COMMONWEALTH VS. COX* AND THE PETITIONER'S UNDERLYING CASE.

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306. As recently as May, 1999, certain FBI agents and federal officers were conducting field interviews in the furtherance of their investigation of the murder of Ms. Cooper, the victim in this case. On May 4, 1999, various federal law enforcement agents sought permission to travel to another FBI field office in order to conduct witness interviews, based partly on the belief that Cox, "was set up," and that Cox had been, **"convicted on false or perjured testimony."** FOIA Vol. II., at 317 (emphasis added). Further, a prominent figure in Richmond was believed to have, "influenced the identification of [Cox] and the subsequent questionable testimony." FOIA Vol. II., at 318. The fact that the FBI believed a witness in the Cox trial was suspected of providing false testimony, or had actually committed the crime of perjury, was never disclosed to defense counsel or the Petitioner. The fact that the FBI believed that witnesses were influenced or coerced to provide questionable testimony was not disclosed to the Petitioner nor his defense counsel.

307. Later, on May 25, 1999, the FBI was confident that at least one of the eyewitnesses who testified against Cox committed perjury. *See* FOIA Vol. II., at 322. The same two eyewitnesses testified on behalf of the government in the Petitioner's case without any disclosure from the government that "at least one" of those same witnesses had previously committed perjury in connection with the murder of Ms. Cooper. *Id*. Furthermore, this same document (FOIA Vol. II.,

at 322) strongly suggests that these eyewitnesses and RPD detectives were influenced by a prominent figure. There are further implications that this same prominent figure was thought to have, "funneled money to detectives and eyewitnesses." These allegations of official corruption were never disclosed to defense counsel or the Petitioner. This information and evidence was favorable to the defense because one of the lead investigators in the prosecution of the Petitioner was himself a Richmond Police Detective: Detective George B. Wade. Moreover, several of the witnesses who testified at the hearing on the Petitioner's motion to dismiss were themselves some of the original Richmond Police Detectives involved in this case. *See* subsection IV.(a), *supra*, *see also* 8/21/2001 M.H. Tr. With respect to this issue, it cannot be over emphasized that the same two eyewitnesses in the Cox case are the same two eyewitnesses in the Petitioner's case, and that the testimony of both witnesses at both events was essentially the same. However, the FBI concluded that "at <u>least</u> one of the eyewitnesses committed perjury," and the government illegally withheld that information and evidence from defense counsel and the Petitioner.

308. Further, it was strongly believed that certain unnamed individuals, suspects, and witnesses were continuing to commit perjury in the federal grand jury proceedings related to the murder of Ms. Cooper, as well as the Cox *habeas* hearings. *See* FOIA Vol. I., at 68, 84, and 86; FOIA Vol. II., at 327-328; FOIA Vol. III., at 82, and 85. In fact, Corbin was promised by AUSAs James B. Comey and Robert E. Trono that he would "not be prosecuted for perjury if, in fact, **<u>his</u>** photo identification was coerced in anyway." FOIA Vol. III., at 543.

IV.(j) BILLY MADISON'S ABSENCE FROM ANY LEGAL PROCEEDINGS RELATED TO MS. COOPER'S ABDUCTION AND MURDER PROVES THAT LAW ENFORCEMENT KNEW THE PROFFER STATEMENTS WERE FALSE.

309. It is uncontested that at least two individuals were involved in the abduction and murder of Ms. Cooper. One of the individuals developed as a suspect in these crimes has always been Billy Madison ("Madison"). The false Proffer Statement identified two perpetrators: Madison, who allegedly abducted and murdered Ms. Cooper, and the Petitioner, who allegedly drove the vehicle in which Ms. Cooper was abducted. Based solely on the false Proffer Statement, the Petitioner was tried, convicted, and sentenced to 65 years in prison. To the contrary, Madison has never been arrested, charged, indicted, tried or convicted of any offense related to the abduction and/or murder of Ms. Cooper, in spite of being named as the murderer in the false Proffer Statements. The means, methods, thoroughness, reliability, and veracity of a police investigation is subject to mandatory disclosure as impeachment evidence under *Brady* and its progeny. *See Kyles*, 514 U.S., at 445; *Workman*, 272 Va., at 646. However, the reason for Madison's glaring absence from any legal proceedings related to the abduction and murder of Ms. Cooper has never been explained to defense counsel or the Petitioner.

310. Nearly three decades of exhaustive investigation into Ms. Cooper's murder, by myriad law enforcement entities, yet, Madison remains free from all legal jeopardy. Thus, law enforcement's utter disregard for Madison — the person identified in the Proffer Statement as the mastermind who personally abducted and murdered Ms. Cooper — demonstrates that law enforcement knew that the Proffer Statements were false.

311. Conversely, if law enforcement did investigate, interrogate, arrest, etc., Madison, then the government utterly abdicated its duty to disclose to the Petitioner the related *Brady* materials, such as: (1) as noted above, the means, methods, thoroughness, reliability, and veracity of a police investigation related to Madison; (2) any evidence derived from the government's investigation of Madison which exculpates the Petitioner; (3) any evidence derived from the

government's investigation of Madison which impugns the veracity of the Proffer Statements; (4) any and all consideration or promises of consideration conferred by the government on Madison; (5) any plea agreements or offers made to Madison, any and all promises or offers of immunity, and/or any and all promises of leniency relating to Madison; (6) any testimony or statements by Madison which exculpates Madison and/or the Petitioner (including any denials made by Madison); (7) any impeachment evidence derived from the investigation of Madison as it relates to Tracy Madison, *e.g.*, reasons to testify falsely, alcoholism, drug use, psychological or psychiatric history, domestic violence, any romantic relationship Tracy Madison had with Cox, and so forth. Considering Madison's glaring absence from any legal proceedings relating to the abduction and murder of Ms. Cooper, the government's undeniable malfeasance in its handling of *Brady* material in this case, and the broad scope of *Brady* and *Giglio*, it is highly likely that the government withheld from defense counsel and the Petitioner exculpatory or impeachment evidence derived from the government's investigation of Madison.

CONCLUSION

The prosecutor is charged with constructive knowledge of all information which is known to all of the prosecutor's agents and servants. In this matter the prosecutor, as well as several of the witnesses who testified in the Petitioner's trial and pre-trial proceedings who were themselves federal and state law enforcement officers, had personal and actual knowledge of material and compelling exculpatory evidence. The prudent prosecutor will always resolve doubtful questions in favor of disclosure.

Such disclosure will serve to justify trust in the prosecutor as the representative of a sovereign whose interest in a criminal prosecution is not that it should win a case, but that justice shall be done. *Kyles*, *supra*, 514 U.S., at 339. It is manifestly clear that justice was not done with

respect to the Petitioner, that the Due Process guarantees of the United States Constitution and the Virginia Constitution were violated, and the actually innocent Petitioner was deprived of a fair trial by the government's failure to disclose exculpatory and impeachment evidence to the Petitioner or his trial counsel. "When police or prosecutors conceal significant exculpatory or impeachment material in the state's possession, it is ordinarily incumbent on the state to set the record straight." *Banks v. Dreke*, 540 US 668, 675-676 (2004).

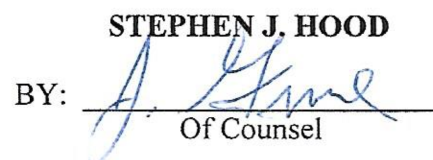
The foregoing provides this court with newly discovered evidence which is substantive, overwhelming and incontrovertible. The newly discovered evidence establishes by a preponderance of the evidence that the "Commonwealth or any agency, instrumentality, officer or employee, or political subdivision thereof (i) intentionally and wrongfully fabricated evidence that was used to obtain the wrongful conviction in such manner [of the Petitioner] and (ii) intentionally, willfully, and continuously suppressed or withheld evidence establishing the innocence of [the Petitioner who was] wrongfully incarcerated, and the Commonwealth [should] compensate the [Petitioner who was] wrongfully incarcerated for such intentional acts." § 8.01-195.13.

WHEREFORE, based on the facts and the authorities cited herein, the Petitioner prays that this Honorable Court will grant the Petition for Writ of Actual Innocence and find that the Petitioner has also satisfied the requirements stated in Virginia Code § 8.01-195.13 and grant the additional relief found therein.

Respectfully submitted,

Stephen James Hood, by counsel.

STEPHEN J. HOOD

BY: 
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CATALOG OF EXHIBITS FOR THE BRIEF IN SUPPORT OF A

PETITION FOR WRIT OF ACTUAL INNOCENCE

(For consistency, the Exhibits are numbered as they were in the Petitioner's *habeas* proceeding: *Hood v. Johnson*, Cl06-2311)

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ACCEPTANCE OF SERVICE BY OR RETURN OF SERVICE ON

THE COMMONWEALTH'S ATTORNEY

PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE (REPRESENTED PETITIONER)

THE COURT OF APPEALS OF VIRGINIA

Pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia, I,

Stephen James Hood
NAME OF PETITIONER AND PRISONER NO. (if applicable)

am petitioning the Court of Appeals of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence. A true copy of this petition and all attachments shall be served upon

The Commonwealth's Attorney for **City of Richmond** at
(CITY OR COUNTY)

John Marshall Courts Building
400 North Ninth Street
Richmond, VA 23219
ADDRESS

6/8/2021
DATE

[signature]
SIGNATURE OF PETITIONER

To the Petitioner: In order for this proof of service form to be valid, it must show either a completed acceptance of service, a completed return of service by a sheriff or a completed return of service by a private process server.

I. ACCEPTANCE OF SERVICE OF PROCESS

I, the undersigned party named below, swear under oath/affirm that I received a copy of the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments on this date. I understand that my receipt of these copies and my signature below constitute the acceptance of service of process of these copies.

6/11/21
DATE

[signature]
SIGNATURE

Carmen C. Johnson
NAME

FORM CAV-103CA (7/04)

II. RETURN OF SERVICE BY SHERIFF

I certify that I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments on the date below.

______________________ Sheriff

______________________ By ______________________ Deputy Sheriff
DATE

____
CITY OR COUNTY

III. RETURN OF SERVICE BY PRIVATE PROCESS SERVER

I, the undersigned swear/affirm that:

1. I am a private process server (list name, address and telephone number below).
   Ronicia Brice
   5612 W Marshall St.
   Richmond, VA 23230
2. I am not a party to, or otherwise interested in, the subject matter in controversy in this case.
3. I am eighteen years of age or older.
4. I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments.

— Date and time of service: June 11, 2021 at 11:45Am

— Place of service: 400 N 9th st. Richmond, VA 23219
STREET ADDRESS, CITY AND STATE

6-11-21 ______________________
DATE SIGNATURE

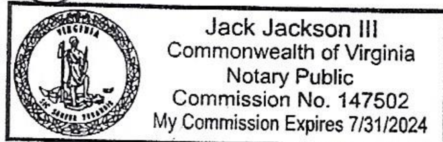
Name (Print or Type) JACK JACKSON

State of VIRGINIA [ ] City [X] County of HENRICO

Subscribed and sworn to/affirmed before me on this date by the above-named person.

6·11·21 ______________________
DATE NOTARY PUBLIC

My Commission Expires:


Jack Jackson III
Commonwealth of Virginia
Notary Public
Commission No. 147502
My Commission Expires 7/31/2024

ACCEPTANCE OF SERVICE BY OR RETURN OF SERVICE ON

THE ATTORNEY GENERAL

PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE (REPRESENTED PETITIONER)

THE COURT OF APPEALS OF VIRGINIA

Pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia, I,

Stephen James Hood

NAME OF PETITIONER AND PRISONER NO. (if applicable)

am petitioning the Court of Appeals of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence. A true copy of this petition and all attachments shall be served upon the Attorney General of Virginia at:

The Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219

6/8/2021

DATE

SIGNATURE OF PETITIONER

To the Petitioner: In order for this proof of service form to be valid, it must show either a completed acceptance of service, a completed return of service by a sheriff or a completed return of service by a private process server.

I. ACCEPTANCE OF SERVICE OF PROCESS

I, the undersigned party named below, swear under oath/affirm that I received a copy of the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments on this date. I understand that my receipt of these copies and my signature below constitute the acceptance of service of process of these copies.

6/11/21

DATE

SIGNATURE

Virginia B. Theisen

NAME

Sr. Assistant Atty Gen.

FORM CAV-103AG (7/04)

II. RETURN OF SERVICE BY SHERIFF

I certify that I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and the other documents described on the date below.

_______________________, Sheriff

_______________ By_______________________, Deputy Sheriff
DATE

____
CITY OR COUNTY

III. RETURN OF SERVICE BY PRIVATE PROCESS SERVER

I, the undersigned swear/affirm that:

1. I am a private process server (list name, address and telephone number below).
   Ronicia Brice
   5612 W Marshall St.
   Richmond, VA 23230

2. I am not a party to, or otherwise interested in, the subject matter in controversy in this case.

3. I am eighteen years of age or older.

4. I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and the attachments.

— Date and time of service: June 11, 2021 at 1215pm

— Place of service: 202 N 9th St. Richmond, VA 23219
STREET ADDRESS, CITY AND STATE

6-11-21 _______________________
DATE SIGNATURE

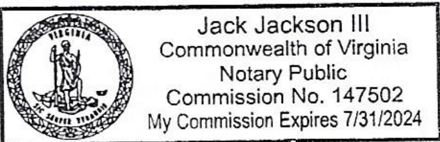
Name (Print or Type) JACK JACKSON

State of VIRGINIA [ ] City [X] County of HENRICO

Subscribed and sworn to/affirmed before me on this date by the above-named person.

6-11-21 _______________________
DATE NOTARY PUBLIC

My Commission Expires:



Jack Jackson III
Commonwealth of Virginia
Notary Public
Commission No. 147502
My Commission Expires 7/31/2024