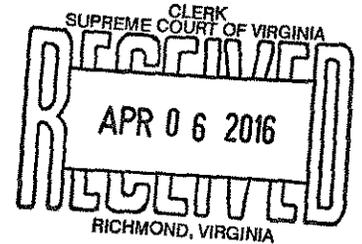


VIRGINIA:

IN THE SUPREME COURT

In Re: KEITH ALLEN HARWARD, Inmate No. 1125797



RECORD NO. 160353

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

Pursuant to Virginia Code § 19.2-327.3(C), the Commonwealth, by the Attorney General and with the concurrence of the Commonwealth's Attorney for the City of Newport News, states as follows in Answer to the Petition for a Writ of Actual Innocence:

PRELIMINARY STATEMENT

Keith Allen Harward seeks a writ of actual innocence to vacate his convictions for first degree murder, rape, forcible sodomy, and robbery on the ground that certificates of analysis recently prepared by the Virginia Department of Forensic Science (DFS) reflect that Harward has been ***eliminated*** as a contributor of the biological evidence recovered from the sexual assault victim in 1982. DFS conducted the DNA testing under an order of the Circuit Court for the City of Newport News (trial court), which

required biological testing of evidence in the possession of the Clerk of the trial court. (Pet. Ex. F). By agreement, only a portion of the biological material was tested as an initial matter. (Pet. Ex. D at 51, 53). This initial testing was conducted on: biological evidence collected from the rape victim's PERK (thigh/vulva swab) and is identified as Item 18 on the DFS report; and, 2 of 3 cigarette butts in evidence. (Pet. Ex. C; Pet. Ex. D at 96-97; Pet. Ex. G). The testing eliminated Harward as a contributor of the biological material tested. *Id.*

In light of those initial results, additional testing was conducted on items of physical evidence collected from the crime scene. Pet Ex 4 at 34. These items included a cloth diaper the assailant held over the rape victim's face (Item 7); her T-shirt (Item 17); and, a towel she had wrapped around herself when police arrived (Item 10). That DNA testing also **eliminated** Harward as a contributor of the biological evidence on each of those items.¹ See Certificate of analysis dated March 1, 2016, attached as Exhibit a.² DFS further reports that the DNA profile developed from the

¹ The Commonwealth's Attorney for the City of Newport News has contacted T.K. to advise her of the new test results. She is aware of the pendency of the instant proceedings and their purpose.

² Harward has submitted exhibits labeled with both uppercase letters and numerals. The Commonwealth, therefore, identifies its exhibits with lowercase letters to avoid confusion.

PERK, diaper, T-shirt, and towel has been compared to the National DNA databank. See Certificate of Analysis of March 8, 2016, attached as Exhibit b. That DNA profile implicates an individual named Jerry L. Crotty. *Id.* The chances that an unknown individual other than Crotty is a contributor of the DNA profile on the towel and the rape victim's T-shirt are greater than the world population. See Certificate of Analysis of March 28, 2016, attached as Exhibit c. ***In light of this new evidence, the Commonwealth agrees that the writ should issue expeditiously, and Harward's convictions from the Circuit Court for the City of Newport News in Record Numbers 9489-83, 9490-83, 9491-83, and 9492-83 should be vacated.***

PROCEDURAL HISTORY

A jury convicted Harward of capital murder, rape, forcible sodomy, and robbery in the Circuit Court for the City of Newport News. By final orders entered on December 14, 1983, Harward was sentenced to imprisonment for life for the murder, and a total of 65 years' imprisonment for the remaining offenses. (Circuit Court Nos. 9489-83 (murder), 9490-83 (robbery), 9491-83 (rape), and 9492-83 (forcible sodomy); orders attached collectively as Exhibit d).

Harward appealed his convictions to this Court. By order of November 30, 1984, the Court awarded him an appeal limited to a single assignment of error challenging the validity of the capital murder conviction. On April 25, 1985, the Court reversed the capital murder conviction, holding that Virginia Code § 18.2-31(e) did not contemplate the murder of a person other than the rape victim. *Harward v. Commonwealth*, 229 Va. 363, 367, 330 S.E.2d 89, 91 (1985) (*Harward I*) (“we conclude that Code § 18.2-31(e) only proscribes the murder of a rape victim and cannot be extended to include the murder of another.”).

The case was remanded for a new trial on the murder charge. A new jury convicted Harward of first degree murder and fixed his sentence at life in prison. Sentencing order attached as Exhibit e. Harward appealed to the Court of Appeals of Virginia, which affirmed the conviction in a published opinion. *Harward v. Commonwealth*, 5 Va. App. 468, 472-73, 364 S.E.2d 511, 512-13 (1988) (*Harward II*). This Court refused further review on December 21, 1988. (Record No. 880341; Order attached as Exhibit f).

STATEMENT OF FACTS

In the early morning of September 14, 1982, an intruder broke into the home of J.P.³ and T. K., which was located in the 4900 block of Warwick Boulevard in Newport News. *Harward II*, 5 Va. App. at 471, 364 S.E.2d at 512; *see also* (Tr. 3/3/86 at 436).⁴ The victims and their three young children were there asleep. *Id.*; *see also* (Tr. 3/3/86 at 411, 413; Pet. Ex. K at 111). T.K. awoke to a loud “thumping sound” and discovered the intruder at her bedside striking her husband on the head with a crowbar. *Id.*; *see also* (Tr. 3/3/86 at 310-11; Tr. 447-48). The assailant pulled T.K. from her bed to the floor, and pinned her there by putting his legs over hers as he continued to strike J.P. with the crowbar until he was rendered unconscious. *Id.*; *see also* (Tr. 3/3/86 at 310-11; Tr. 448, 450). The intruder told T.K. that he did not want to kill her husband, but only to “knock him out.” *Id.* (Tr. 3/3/86 at 313; Tr. 449).

³ The Commonwealth does not name the victim of the sexual assaults to respect her privacy and does not name the murder victim out of consideration for the surviving family members. T.K. had remarried by the time of Harward’s trial, so the Commonwealth uses the initials that correspond with the name recorded in the trial proceedings. (Tr. 3/3/86 at 299).

⁴ This transcript, from the first degree murder trial, is consecutively paginated, so the Commonwealth uses the first day of trial to identify it.

The intruder threatened T.K. that unless she did as he demanded, he would “get” her children. *Id.*; see also (Tr. 3/3/86 at 313; Tr. 449). He forced T.K. to remove her T-shirt and underpants, and pulled his own pants down to his knees. *Harward II*, 5 Va. App. at 471, 364 S.E.2d at 512; see also (Tr. 3/3/86 at 314-15; Tr. 451). The assailant put a cloth diaper over T.K.’s face; then he raped T.K., forced her to commit oral sodomy twice and to submit to anal sodomy. *Id.* (Tr. 3/3/86 at 315-17; Tr. 451-54). He repeatedly threatened T.K. that if she “did not do what he said he was going to get the kids.” *Id.* (Tr. 3/3/86 at 315; Tr. 453).

The assailant then asked T.K. if she had anything to drink. *Id.*; see also (Tr. 3/3/86 at 318; Tr. 455). T.K. and the assailant went to the kitchen, where she gave him a bottle of Pepsi. *Id.* (Tr. 3/3/86 at 318; Tr. 455-56). T.K. and the assailant then went into the dining room, where he lit two cigarettes and handed one to T.K. *Id.*; see also (Tr. 3/3/86 at 319; Tr. 456). The assailant asked T.K. for money, so she gave him the \$34 she had. (Tr. 3/3/86 at 320; Tr. 457, 480; Pet. Ex. K at 5). The assailant then directed T.K. into the living room, where he again repeatedly raped, and orally and anally sodomized her. *Harward II*, 5 Va. App. at 471, 364 S.E.2d at 512; see also (Tr. 3/3/86 at 320; Tr. 459-61). The assailant also bit T.K. on her

thighs and calves, leaving multiple visible bite marks. *Id.*; *see also* (Tr. 3/3/86 at 321; Tr. 461-62).

When the intruder finally left, T.K. retrieved a gun and then called the police. *Id.*; *see also* (Tr. 3/3/86 at 325; Tr. 464). She wrapped a blue towel around her waist. (Tr. 3/3/86 at 364, 419; Tr. 468). Newport News Police Officer Michael Bryant was dispatched to the victims' home at 5:05 a.m. on September 14, 1982 and arrived at 5:10 a.m. (Tr. 3/3/86 at 409; Pet. Ex. K at 109). T.K. opened the front door for Officer Bryant; she told Officer Bryant that she had been raped, and led him upstairs, after stating that she thought J.P. was dead. (Tr. 3/3/86 at 410, 464-65; Pet. Ex. K at 109-10). Officer Bryant found J.P. "laying diagonally across the bed . . . in a puddle of blood." (Tr. 3/3/86 at 411). Officer Bryant checked for J.P.'s pulse but was unable to locate one. (Tr. 3/3/86 at 411; Pet. Ex. K at 111). The Medical Examiner determined that J.P. died "as a result of brain injury, which resulted from blows to the head." (Tr. 3/3/86 at 377).

T.K. left her T-shirt and the blue towel in the bathroom at the request of the police, and put on a skirt and blouse to go to Riverside Hospital for examination and collection of evidence for a Physical Evidence Recovery Kit (PERK). *Harward II*, 5 Va. App. at 471, 364 S.E.2d at 512; *see also* (Tr. 3/3/86 at 291, 325, 405-06, 469-70; Pet. Ex. E). A pubic hair was

recovered from the PERK, and several swabs were taken including of the thigh vulva area and of the bite marks in an effort to obtain seminal fluid and saliva for analysis. *Id.*; see also (Tr. 3/3/86 at 380-81, 395-401; Ex. D at 126). Police and the medical examiner also photographed the bite marks on T.K.'s legs. *Id.*; see also (Tr. 3/3/86 at 325, 404, 470-71). Newport News Police detectives collected items of physical evidence from the home. Those items included T.K.'s T-shirt, the cloth diaper, the blue towel, cigarette butts, the Pepsi bottle, the crowbar, and numerous hair samples. *Id.*; see also (Tr. 3/3/86 at 289-92, 469).

T.K. never identified her assailant. *Id.*; see also (Tr. 3/3/86 at 329, 441; Tr. 476). She provided a general description of the intruder's size and build, describing him as a white male wearing a white sailor's uniform bearing an insignia of "three nested V's." *Id.* at 472, 364 S.E.2d at 512; see also (Tr. 3/3/86 at 331; Tr. 476, 478). According to T.K., the assailant was approximately 5'8" to 5'9," had "sandy brown" hair, and weighed between 160-165 pounds. (Tr. 3/3/86 at 330, 648; Tr. 466-67, 478). She also described the assailant as clean shaven and estimated he was 19-20 years old. (Tr. 3/3/86 at 330, 355, 648; Pet. Ex. E).

After hearing of the murder on the news, Donald L. Wade, a Newport News shipyard security guard, contacted the police and reported that he

had seen a sailor enter the 50th Street gate in the early morning hours of September 14 behaving in an unusual manner, and wearing a uniform with what appeared to be blood splattered on it. *Harward II*, 5 Va. App. at 472, 364 S.E.2d at 512; *see also* (Tr. 3/3/86 at 462-63, 466, 471). Wade reported that the sailor wore the uniform of an E-3, which has an insignia bearing three parallel slash marks, and wore a badge unique to U.S.S. Carl Vinson personnel. *Id.*; *see also* (Tr. 3/3/86 at 466, 476). According to Wade, the sailor was not in proper attire because he wore no hat and his sleeves were rolled up. *Id.*; *see also* (Tr. 3/3/86 at 480). Wade felt that the sailor was oblivious to him. *Id.*; *see also* (Tr. 3/3/86 at 485).

The 50th Street gate was a short distance from the victims' home. (Tr. 3/3/86 at 271-72). So, given T.K.'s description and Wade's report, the investigation focused on the personnel of the U.S.S. Carl Vinson which was in dry dock 11, near the 50th Street gate. *Id.*; *see also* (Tr. 3/3/86 at 271, 435, 460). Dental records of all E-3's assigned to the U.S.S. Carl Vinson were submitted for comparison with the photographs of the bite marks on T.K.'s legs. *Id.*; *see also* (Tr. 3/3/86 at 436-37, 443-45). Due to similarities between Harward's dental records and the photographs of T.K.'s injuries, as well as a domestic assault that involved biting, authorities obtained an impression of Harward's teeth. *Harward II*, 5 Va. App. at 472, 364 S.E.2d

at 512-13; (Tr. 3/3/86 at 438-40; Pet. Ex. K at 7). Dr. L. J. Levine, a forensic odontologist, identified a mold of Harward's teeth as having been made by the same person that left a bite mark on T.K.'s leg. *Id.*, 364 S.E.2d at 513. Wade subsequently identified Harward from a photo array as the sailor he had seen enter the 50th Street gate on September 14 with a blood splattered uniform. *Id.*; *see also* (Tr. 3/3/86 at 467). At trial, Dr. Levine and a second forensic odontologist, Dr. A. W. Kagey, opined that Harward had inflicted the bites on T.K. *Id.*

At trial, Harward argued that he did not match T.K.'s description of the murderer as a clean shaven nineteen or twenty year old, with a naval insignia of three inverted V's. *Harward II*, 5 Va. App. at 480, 364 S.E.2d at 517. At the time of the offenses, Harward had a moustache, was an E-3 with rank markings of three long slashes and was twenty-six years old. *Id.*; *see also* (Tr. 3/3/86 at 685-86). He also presented evidence that he had been in Norfolk on the night of September 13, 1982, at a mandatory Navy drug education class from 6:00 p.m. to 9:00 p.m. (Tr. 3/3/86 at 653-58, 682-85).

In addition, the available forensic evidence did not implicate Harward. For example, a "foreign pubic" hair taken from T.K. did not match his hair; the police were unable to match it with any possible suspect or person with

whom she had frequent contact. *Harward II*, 5 Va. App. at 479, 364 S.E.2d at 517; see also (Tr. 3/3/86 at 398-99, 625-26). In fact, no hairs collected from either the victims or the crime scenes matched Harward. *Id.*; see also (Tr. 3/3/86 at 394-95). Similarly, none of the swabs of saliva from the bite marks or the seminal fluid from the other items of evidence matched Harward, who is a type A secretor.⁵ *Id.*; see also (Tr. 3/3/86 at 397-98, 400-01, 632). Finally, none of the three cigarette implicated Harward. *Id.*; see also (Tr. 3/3/86 at 395, 639).

PETITION FOR WRIT OF ACTUAL INNOCENCE

Harward filed the instant Petition for a Writ of Actual Innocence based on previously untested biological evidence,⁶ pursuant to Virginia Code §§ 19.2-327.2 through 19.2-327.6. Harward alleges that he is innocent of the murder of J.P. and of the rape, forcible sodomy, and robbery of T.K. He contends that the more definitive scientific testing available today, which was not available at the time his conviction became final, eliminates him as

⁵ T.K. has type B blood; J.P. was type O. (Tr. 3/3/86 at 393-95).

⁶ The evidence has been in the custody of the Clerk of Court for the City of Newport News since Harward's trials in 1983 and 1986. It was not, however, previously subjected to DNA testing and analysis because such testing was not available at the time Harward's conviction became final. Indeed, this Court did not endorse the admissibility of DNA evidence until after conclusion of direct review in Harward's case. See *Spencer v. Commonwealth*, 238 Va. 275, 290, 384 S.E.2d 775, 783 (1989).

a possible contributor of the DNA isolated on the evidence recovered from T.K.'s PERK and her home. Therefore, he asserts that in light of this new evidence a reasonable jury would not have convicted him of the crimes.

DECISIONAL STANDARD

To obtain a writ of actual innocence based on previously unknown or untested biological evidence, a petitioner must allege and prove the following elements:

- (i) he pleaded not guilty to the crime for which he was convicted;
- (ii) he is actually innocent of the crime for which he was convicted;
- (iii) the exact description of the human biological evidence and the scientific testing supporting his allegation of innocence;
- (iv) the reason the evidence was not previously subjected to the scientific testing described in his petition;
- (v) when the test results became known to him or any attorney of record;
- (vi) he filed his petition within 60 days of receiving the results of the scientific testing;
- (vii) how the evidence will prove that no rational trier of fact would have found him guilty beyond a reasonable doubt.

Va. Code § 19.2-327.3(A)⁷; cf. *Johnson v. Commonwealth*, 273 Va. 315, 321-22, 641 S.E.2d 480, 485 (2007) (setting forth the standard of review in cases involving non-biological evidence).

The petitioner bears the burden of proving all the enumerated elements “by clear and convincing evidence.” Va. Code § 19.2-327.5. “Clear and convincing evidence has been defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.” *Smith v. Commonwealth*, 280 Va. 178, 185, 694 S.E.2d 578, 581 (2010). The clear and convincing standard “is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *Id.*

Upon a finding by this Court “that no rational trier of fact would have found proof of guilt beyond a reasonable doubt . . . ,” the Court shall “grant the writ and vacate the conviction” Va. Code § 19.2-327.5. This decisional standard differs from the test for sufficiency of the evidence because these original jurisdiction proceedings involve “evidence the trial

⁷ The element enumerated in § 19.2-327.3(A)(viii), that the evidence was not available for testing under § 9.1-1104, is not applicable in this case because Harward’s conviction was final prior to June 30, 1996.

jury did not have before it.” *House v. Bell*, 547 U.S. 518, 538 (2006); see also *Ex parte Elizondo*, 947 S.W.2d 202, 205-09 (Tex. Crim. App. 1996) (discussing incongruity of applying sufficiency standard of review to newly discovered evidence and, therefore, requiring a habeas corpus petitioner to “prove by clear and convincing evidence . . . that a jury would acquit him based on his newly discovered evidence”).

ANALYSIS

“The public trust reposed in the law enforcement officers of the Government *requires* that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent.” *Young v. United States*, 315 U.S. 257, 258 (1942) (emphasis added). The Commonwealth acknowledges that this Court is under “no obligation to accept concessions of error” from any party. *Copeland v. Commonwealth*, 52 Va. App. 529, 531, 664 S.E.2d 528, 529 (2008). In light of the totality of the evidence not available to Harward or his counsel at trial, however, the Commonwealth respectfully submits that the new evidence in this case “produce[s] . . . a firm belief or conviction” that no rational trier of fact would have found proof of guilt beyond a reasonable doubt.⁸ *Smith*, 280 Va. at

⁸ Harward’s additional arguments are not relevant to these proceedings, which rest solely on biological evidence. Va. Code § 19.2-327.3(A)(iii). To

185, 694 S.E.2d at 581; Va. Code § 19.2-327.5. That conclusion is especially compelling in this case because the new evidence affirmatively identifies another individual as the perpetrator. Harward is entitled to relief because he meets the stringent statutory requirements established for a writ of actual innocence.

In every criminal prosecution, the identity of the perpetrator is “an essential element of the offenses.” *Woodfin v. Commonwealth*, 236 Va. 89, 95, 372 S.E.2d 377, 381 (1988). The Commonwealth must prove identity beyond a reasonable doubt. *Brickhouse v. Commonwealth*, 208 Va. 533, 535-36, 159 S.E.2d 611, 613-14 (1968).

The evidence on which Harward relies has been in the custody of the Clerk of the trial court and was subjected to DNA testing under a court order. (Pet. Ex. F). The biological material came from evidence that originally was collected by the Newport News Police Department and Dr. Crowe at Riverside Hospital. (Tr. 3/3/86 at 280, 287-92; Pet. Ex. E). Newport News Detective L. M. Hudson took custody of the evidence during

the extent Harward wishes to rely on additional evidence of innocence, he must seek relief in the Court of Appeals of Virginia. See Va. Code § 19.2-327.11 (“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.”). Accordingly, the Commonwealth does not address Harward’s additional arguments.

the police investigation. (Tr. 3/3/86 at 287-92). The evidence was released to DFS for testing, and later introduced into evidence at trial. (Tr. 3/3/86 at 392; Pet. Ex. B at 1; Pet. Ex. D at 17-21, 108-12 (noting exhibit stickers on items collected)). It remained in the custody of the clerk of the trial court until July 20, 2015, when Newport News police officers collected it in compliance with the trial court's July 17, 2015 order. (Pet. Ex. D at 17-21, 108-12). Newport News Police then delivered the items to DFS. (Pet. Ex. D at 23-24, 30-31, 98-100, 114-15, 120-21, 157-64). Thus, the chain of custody has been maintained since the evidence was collected in September 1982.

The scientific testing establishes that Harward was not the source of the biological evidence recovered from T.K.⁹ on the morning of the attacks. That biological evidence was recovered from: the cloth diaper, T.K.'s T-shirt, the blue towel, and the vaginal swabs. See Exhibits a, b, c; Pet. Ex. C. Moreover, as noted above, Harward previously had been eliminated as a possible contributor of additional physical evidence recovered from the crime scene, including the "foreign" pubic hair. (Tr. 3/3/86 at 393-401, 625-

⁹ Although T.K. is not eliminated as the source of some of the biological material, J.P., the couple's biological children and T.K.'s husband at the time of trial all have been eliminated as possible contributors of the biological material on the diaper, towel, T-shirt, and the vulva/thigh swab and the "vaginal wash" sample. Exhibit a at 2-3.

26, 639). And the only fingerprints found on the Pepsi bottle were T.K.'s. (Tr. 3/3/86 at 292-93).

The Commonwealth agrees that the new DNA test results from the biological evidence, which affirmatively excludes Harward as the source of that biological evidence, necessarily would create a reasonable doubt in the mind of a rational trier of fact regarding Harward's guilt. Va. Code § 19.2-327.3(A)(vii). "The advent of DNA technology is one of the most significant scientific advancements of our era. The full potential for use of genetic markers in medicine and science is still being explored, but the utility of DNA identification in the criminal justice system is already undisputed." *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013).

Here, the DNA evidence positively excludes Harward as a contributor of any of the biological evidence collected on the morning of the rape and murder. Thus, no rational trier of fact would have found proof of guilt beyond a reasonable doubt in light of this evidence, notwithstanding Wade's identification of him as the sailor with the stained uniform, and the dental testimony.

Furthermore, a search of the DNA profile in the National DNA databank found it to be consistent with the DNA profile of another individual—Jerry L. Crotty. Exhibit b. Crotty also was a sailor on the

U.S.S. Carl Vinson at the time of the offenses. (Pet. Ex. K at 357). The chances that someone other than Crotty was the source of the biological material identified from T.K.'s T-shirt and the towel are greater than the world population. Exhibit c. Crotty also cannot be eliminated as the contributor of the sperm fraction of the DNA profile in the vulva/thigh swab is "approximately 1 in 1.3 billion in the Caucasian population, 1 in 2.0 billion in the Hispanic population and greater than 1 in 7.2 billion . . . in the Black population." Exhibit c. At the time of the offense, Crotty would have been 19 years old. See Exhibit b; see *also* Cuyahoga County Ohio Court of Common Pleas Journal Entry, Apr. 19, 2002 and Ohio Department of Correction and Rehabilitation Sentence Calculation, attached collectively as Exhibit g. Crotty died in the custody of the Ohio Department of Corrections on June 6, 2006, where he was detained for a 2002 conviction for abduction. See Ohio Department of Corrections summary, attached as Exhibit h; see *also* Exhibit g. Under all these circumstances, no rational trier of fact would have found proof of Harward's guilt beyond a reasonable doubt had the new scientific testing results been available at the time of his trial. Va. Code § 19.2-327.5.

The Commonwealth recognizes that the Court is not bound by its assessment of how a jury would evaluate this new evidence. *In re:*

Bennett Barbour, Record No. 120327, slip op. at 2 n.1 (May 24, 2012); *Logan v. Commonwealth*, 47 Va. App. 168, 172, 622 S.E.2d 771, 773 (2005) (*en banc*) (“Our fidelity to the uniform application of law precludes us from accepting concessions of law made on appeal. Because the law applies to all alike, it cannot be subordinated to the private opinions of litigants.”). Nevertheless the “considered judgment” of the Attorney General and the Commonwealth’s Attorney “is entitled to great weight.” *Young v. United States*, 315 U.S. 257, 258 (1942).¹⁰ This is true, in part, because the Attorney General

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or *innocence suffer*.

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

Manifestly, “the central purpose of any system of criminal justice is to convict the guilty and free the innocent.” *Herrera v. Collins*, 506 U.S. 390,

¹⁰ *Cf. also Montgomery v. Commonwealth*, 62 Va. App. 656, 677 n.7, 751 S.E.2d 692, 702 n.7 (2013) (“Although not dispositive, we also find it significant that following Coast’s recantation of her trial testimony the trial judge who originally convicted Montgomery and provided the factual record currently before us expressed his personal regret and concern regarding the original verdict he rendered in this case.”).

398 (1993). Within that system, the Attorney General is obligated to present to the Court in each case the facts and the law that ensure a just result.

“DNA testing has an unparalleled ability both to exonerate the wrongly convicted *and* to identify the guilty.” *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009) (emphasis added). DNA testing has done so in this case. Thus, the Commonwealth agrees that no reasonable trier of fact would have convicted Harward of the murder of J.P. had the new scientific evidence been available at the time of his trial. Va. Code § 19.2-327.3(A)(viii). Likewise, no reasonable trier of fact would have convicted Harward of the rape, forcible sodomy, and robbery of T.K. had the new scientific evidence been available at the time of his trial. *Id.*

CONCLUSION

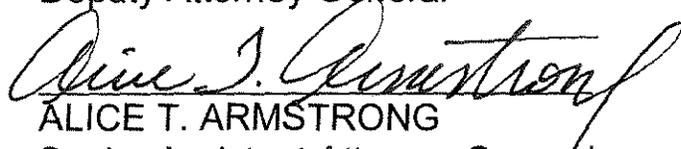
The Commonwealth, by the Attorney General and with the concurrence of the Commonwealth's Attorney for the City of Newport News, prays that the Petition for a Writ of Actual Innocence based on the newly tested biological evidence be expeditiously granted and that the Court vacate Harward's 1986 conviction for first degree murder in case 9489-83, as well as Harward's 1983 convictions for rape, forcible sodomy and robbery in cases 9490-83, 9491-83, and 9492-83 from the Circuit Court for the City of Newport News.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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CERTIFICATE OF SERVICE

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