

In The  
**Supreme Court**  
Of Virginia

**Brian David Hill,**

*Appellant,*

v.

**Commonwealth of  
Virginia, City of  
Martinsville**

*Appellee.*

**ON APPEAL FROM THE COURT OF APPEALS OF VIRGINIA  
DISMISSING PETITION FOR THE WRIT OF ACTUAL  
INNOCENCE UNDER CAV # 0173-22-3**

**PETITION FOR APPEAL OF APPELLANT**

**U.S.W.G.O.**

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**RULE**

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Brian David Hill, (“Appellant” or “Petitioner”) files this Petition for Appeal pursuant to Rule 5:14 of this Court, and this is direct Appeal of the final judgment (Joint Appendix 1, Pages 4843 through 4844) dismissing Petitioner’s filed Petition for the Writ of Actual Innocence (“Writ Petition”) and that decision was made on March 1, 2022. Petitioner’s petition for appeal was timely filed if filed prior to the deadline of March 31, 2022, the 30 day deadline for appealing a final judgment (Rule 5:17(a)(2)).

There is no transcript as there were no hearings by the Court of Appeals of Virginia and neither a hearing by the Circuit Court in regards to the Writ Petition.

The statement of the facts “statement of facts” will be the same statement of the facts as was entered in the original Writ Petition filed by the Petitioner.

**I. STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

1. Brian David Hill, (the “Appellant” or “Petitioner”) petitions this Court for the right to be allowed to perfect the appeal from a final judgment in an original action case in the Court of Appeals of Virginia concerning dismissal of a Petition for the Writ of Actual Innocence pursuant to Virginia Code § 19.2-327.10 through § 19.2-327.14; that had entered a final Judgment dismissing that Writ Petition. The notice of appeal was timely filed on March 1, 2022. This Petition for Appeal was timely filed prior to the 30-day deadline for filing a Notice of Appeal with the Supreme Court of Virginia. This Petition for Appeal was filed pursuant to Rule

5:17, and Rule 5A:5(b)(11).

2. The Record on Appeal (“ROA”) was not furnished by the Clerk of the Court of Appeals of Virginia, at the time which this Petition for Appeal was filed timely. So the Petitioner will submit a Joint Appendix 1 of Petitioner’s version of the entire ROA from what was filed and received from the Court of Appeals of Virginia along with the final judgment/order dismissing that Writ Petition. Joint Appendix 1 will be shown as JA1 or JA 1. Joint Appendix will include the original final order/judgment appealed from (Joint Appendix 1, Pages 4843 through 4844). The separate Joint Appendix filed with the Petition is entitled: “JOINT APPENDIX VOLUME I OF I (Pages 1 – 4,858)”.

## **II. STATEMENT OF THE FACTS**

3. The Commonwealth may have their “Statement of the Facts” as is their right, but the Petitioner will present his Statement of the Facts based upon what was filed in the Writ Petition.

4. The facts that were presented in the Writ Petition to the Court of Appeals of Virginia are as follows:

5. For the sake of brevity and for the sake of not exceeding the word limit of 6,125 words for a petition of appeal, (*since Writ Petition has over 15,000 words total, Statement of Facts in original Writ Petition is 6,257 words*)

Appellant/Petitioner will not reproduce the entire Statement of Facts in this Petition for Appeal as used in the Petition for the Writ of Actual Innocence, because doing such would exceed the word limit unless this Court allows



extending the word limit by an additional 6,257 words for the Statement of the Facts to be added. Appellant/Petitioner hereby incorporates by reference, as if fully set forth herein, Joint Appendix 1 (JA1) pages 0016 through 0046 of the record presented by Petitioner as the Statement of the Facts.

### **III. ARGUMENT**

#### **i. Standard of Review**

6. The Court of Appeals of Virginia’s final judgment to dismiss Appellant’s “Petition for the Writ of Actual Innocence (“Writ Petition”) (JA1, Pages 4843 through 4844) and then entered that final judgment on March 1, 2022 is reviewed for abuse of discretion and for the Errors specified in the Assignments of Error by Petitioner in asking the Court of Appeals to grant such Petition and allow Petitioner/Appellant to perfect the Appeal in filing a brief and Appellant designation in asking this Court to order a reversal of the Final Order/Judgment (JA1, Pages 4843 through 4844) by the Court of Appeals of Virginia.

7. The issues will be argued in the Assignments of Error as to the legal errors and constitutional errors as to why this Petition for Appeal must be granted for the best interest of justice to be so attained. The assignments of error are based on the judgment’s opinion and reason for the dismissal: “*Accordingly, this Court is without jurisdiction to consider Hill’s petition for a writ of actual innocence and his petition is summarily dismissed. Code § 19.2-327.10.*” (citation reformatted, cited in part)

**IV. Assignments of Error**

**ii. Argument**

- i. The Court of Appeals erred by entering the Final Judgment dismissing the Writ Petition (JA1, Pages 4843 through 4844) as a matter of law or abused discretion by dismissing the Writ Petition when the Court does have jurisdiction to consider the Petition on its merits. It was premature and the Virginia Constitution requires that the Court consider that Writ Petition instead of dismissing it.**

8. The assignment of error was that the Court of Appeals of Virginia had erred as a matter of law and/or abused its discretion in dismissing the Appellant's/Petitioner's "Petition for the Writ of Actual Innocence" (JA1, Pages 4843 through 4844, FINAL JUDGMENT). The error is that the Court does have jurisdiction to consider and entertain such petition filed by Petitioner, even though the Court had argued in opinion that they are without jurisdiction. They have jurisdiction due to the Virginia Constitution and the U.S. Constitution. As well as the U.S. Supreme Court's interpretation of the "actual innocence" exception to any procedural defect or default. The technicality of only "felony" convictions covered are a **procedural bar** and the Supreme Court of the United States said in its controlling opinion that actual innocence may pass a **procedural bar** and a petition claiming actual innocence may be considered on its merits.

**ARGUMENT**

9. This assignment of error is due to the U.S. Constitution's and Virginia Constitution's interpretation of preventing any miscarriage of justice. The purpose for the Writ of Actual Innocence statute was to prevent a miscarriage of justice against an

innocent person. The Court of Appeals of Virginia does have jurisdiction due to the certain amendments and sections in the Bill of rights in the Virginia Constitution.

10. The Writ Petition was filed under Chapter 19.3 of Title 19.2 of the Code of Virginia; the Amendment XIV of the United states Constitution; Article I, Section 9 of the Virginia Constitution, and in the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishments inflicted. Not just under the statute regarding this type of Writ Petition, but also under the Constitutions of both Virginia and the United States of America. All asserted in Writ Petition (JA1, page 11)

11. The statutes governing petitions for the writ of actual innocence under Chapter 19 .3 of Title 19 .2 of the Code of Virginia does lack the word or provision for mentioning about “misdemeanor” convictions to be covered under this law. However, misdemeanor convictions may be covered under 19 .3 of Title 19 .2 of the Code of Virginia if also applied under the Virginia Constitution, United States Constitution, and under those already serving a “felony” sentence of supervised release where even a misdemeanor conviction means severe consequences for that “felony” conviction for a sentence of supervised release (JA1, Pages 0705 through 0711, JOINT APPENDIX VOLUME I OF VI). This Court has the power under the interpretation of the Virginia Constitution to amend to or modify existing law to hold that a Court of Appeals of Virginia does have jurisdiction to allow a Petition for the Writ of Actual Innocence if it is to undo a state conviction which affects a “felony” supervised release violation of a Probationer serving a felony sentence. Petitioner had proven that to the Court of Appeals of Virginia in exercise of his Writ Petition (JA1, Pages 0261 through 0263, EXHIBIT

20). It is also cruel and unusual punishment to convict an innocent person of any crime, especially if that person is still under the custody of the United States of America by the U.S. Probation Office for serving a sentence of supervised release. Dismissing a Writ Petition on a statutory technicality of Chapter 19.3 of Title 19 .2 of the Code of Virginia not covering “misdemeanor” convictions violates the Virginia Constitution and U.S. Constitution prohibitions on cruel and unusual punishments inflicted.

12. The Virginia Constitution prohibits a Court from creating a miscarriage of justice in any criminal case. See Virginia Constitution; Article I. Bill of Rights; Section 9.

CITATION of Virginia Constitution; Article I. Bill of Rights; Section 9. Prohibition of excessive bail and fines, cruel and unusual punishment, suspension of habeas corpus, bills of attainder, and ex post facto laws.

“That excessive bail ought not to be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted**; that the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require; and that the General Assembly shall not pass any bill of attainder, or any ex post facto law.”

Also see Virginia Constitution; Article I. Bill of Rights; Section 11.

CITATION of Virginia Constitution; Article I. Bill of Rights; Section 9. Due process of law; obligation of contracts; taking or damaging of private property; prohibited discrimination; jury trial in civil cases.

“That **no person shall be deprived of his life, liberty, or property without due process of law...**” (Citation partially omitted)

13. Under Virginia Constitutional Law, cruel and unusual punishments cannot be inflicted upon any criminal defendant, Probationer, or prisoner. Arguably, it is cruel and

unusual to punish an innocent person of a crime that he or she is innocent of. No reasonable juror would want to find a person guilty of a crime that he or she is actually innocent of. In fact the person is presumed innocent and is innocent of a crime until all elements of guilt are proven beyond a reasonable doubt according to Virginia Constitutional Law, Common Law, and Legal Law.

14. Harward v. Commonwealth, 5 Va. App. 468, (Va. Ct. App. 1988) (“(2) Evidence — Proof Beyond a Reasonable Doubt — Standard. — In **every criminal prosecution the Commonwealth must establish beyond a reasonable doubt all elements of the offense** and **that the accused did commit it**; the evidence must exclude every hypothesis except that the accused is the criminal agent.”). Harrell v. Commonwealth, 11 Va. App. 1, (Va. Ct. App. 1990) (“The **constitutional necessity that every element of an offense be proven beyond a reasonable doubt in order to convict** is not confined to those who are morally blameless; a state may not accuse a person of one crime and convict him by proving another, unless the offense is a lesser included one of that charged.”) Unless every element of the guilt is proven, there is not enough evidence of proving a crime warranting a conviction. The person is still innocent. If an innocent person is wrongfully convicted and later on they have the new evidence and reasons to disprove the elements of the crime including the requirement of intent in order to convict, then the person has proven innocence of the crime.

15. The Court of Appeals of Virginia had erred when they prematurely dismissed the Writ Petition by Petitioner. The reason why is because “Actual Innocence” is an exception to any procedural defect or default. By not considering a petition of a

misdemeanor due to a statutory technicality of not including the word: “misdemeanor” as covered under the statute, that procedural or statutory defect or default as reason to never allow an innocent person to achieve justice for his or her wrongful conviction is a miscarriage of justice. Convicting an innocent person and demanding that the innocent person be held criminally liable and pay legal fees for a crime he or she is innocent of. That isn’t right and violates the very sanctity of due process of law and is a cruel and unusual punishment inflicted upon an innocent person.

16. The U.S. Supreme Court published opinions cited herein may or may not be considered controlling opinions for state “petitions” for “writ of actual innocence” but are referenced herein for the Supreme Court of Virginia to consider adopting upon granting the Petition for Appeal and allowing perfecting of the appeal.

17. Tomlinson v. Burt, 509 F. Supp. 2d 771, 774 (N.D. Iowa 2007) (“Herrera [v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993),] claims are of a substantive nature (actual innocence), while Schlup [v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995),] claims are of a procedural nature (obstacles such as procedural default — also overcome by actual innocence).”) La. Code Crim. Proc. art. 926.2 (“A petitioner, who has been convicted of an offense, may seek post conviction relief on the grounds that he is factually innocent of the offense for which he was convicted. A petitioner's first claim of factual innocence pursuant to this Article that would otherwise be barred from review on the merits”).

18. The State of Oregon also held the same legal arguments against a Petitioner claiming actual innocence, just as with the Court of Appeals of Virginia in this case, had

only one option which was a request for executive clemency. However they held in their opinion that such remedy may be possible under a petition for writ of error coram nobis. See *Reeves v. Nooth*, 294 Or. App. 711, 718-19 (Or. Ct. App. 2018) (“In response to the petition, the superintendent moved to dismiss, arguing that claims of actual innocence neither excused petitioner’s late and successive filing nor provided an independent ground for relief. **In the superintendent’s view, a claim of actual innocence is the proper subject of a request for executive clemency, not post-conviction relief.**”) *Reeves v. Nooth*, 294 Or. App. 711, 732 (Or. Ct. App. 2018) (“**First, to the extent our constitution may protect the right of a convicted person to collaterally challenge a conviction based on new evidence of actual innocence, we think that remedy likely would take the form of coram nobis , a remedy that, historically, demanded proof of an extraordinary circumstance of innocence based on newly discovered evidence.**”)

19. *McQuiggin v. Perkins*, 569 U.S. 383, (2013) (“**Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar**, as it was in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808, and *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1”).

20. Again, according to the Final Order, it’s opinion stated that ““Code § 19.2-327.10 confers original jurisdiction upon the Court of Appeals of Virginia to consider a petition for a writ of actual innocence based on newly-discovered, non-biological evidence filed by any individual ‘convicted of a felony[.]’” *Turner v. Commonwealth*, 282 Va. 227, 239 (2011) (emphasis added).”

21. That decision referenced from the order in paragraph 20 was made in 2011,

and that case may not have referenced the U.S. Supreme Court's interpretations of "actual Innocence" being able to overcome any procedural default or defect. The appellant of that case may not have referenced those cases and their controlling opinions. This Petition for Appeal and any perfecting of the appeal will mention and assert those controlling legal opinions with citations of those opinions.

22. That statute governing the Petitions for the Writs of Actual Innocence do not explicitly state in that statute that misdemeanors cannot be tried. It just simply does not have the word misdemeanor as a covered case. That can be left up to interpretation under the Virginia Constitution and its amendments if it applies to this type of case. Also it does not explicitly bar a person serving a "felony" supervised release sentence filing a Petition for the Writ of Actual Innocence for a misdemeanor if that misdemeanor can trigger a supervised release violation and revocation of a felon Probationer over that misdemeanor charge or conviction. If a person is innocent of a misdemeanor, they should not suffer the repercussions of a supervised release violation and revocation over a misdemeanor crime that he or she is actually innocent of.

23. The Petitioner had asserted in Writ Petition that he will suffer additional punishments inflicted upon him by both the Federal Court and State Court by not being allowed to prove his actual innocence. Additional punishments inflicted as a direct result of the state misdemeanor conviction such as:

1. Additional years of supervised release imposed by the United States District Court for the Middle District of North Carolina (JA1, Pages 0261 through 0263, EXHIBIT 20);



2. Nine (9) Months of federal imprisonment in addition to the wrongful imprisonment by the Commonwealth of Virginia imposed by the United States District Court for the Middle District of North Carolina (JA1, Pages 0261 through 0263, EXHIBIT 20);
3. Unwarranted and expensive legal fees imposed upon the Petitioner by the Circuit Court for the City of Martinsville illegally wanting money from his Supplemental Security Income (SSI) disability federal income for his wrongful conviction (JA1, Pages 0752 through 0753, JOINT APPENDIX VOLUME I OF VI; ORDER IN MISDEMEANOR...);
4. A criminal record which can be used against him and may require sex offender registration or possibly a higher tier in a different state if Petitioner ever moved to a different state in the future regardless of whether the Petitioner overturns his federal conviction separately (JA1, Pages 0752 through 0753, JOINT APPENDIX VOLUME I OF VI; ORDER IN MISDEMEANOR...) as there are states that require sex offender registration for indecent exposure;
5. And would result in making it impossible or extremely difficult for any ability to overturn the supervised release

violation in Federal Court if the Petitioner is not found innocent of the misdemeanor crime he was charged with (JA1, Pages 0261 through 0263, EXHIBIT 20). If conviction was overturned in the state then this can be used to vacate the federal revocation judgment.

24. In sub-paragraphs 1-5 of paragraph 23 (the last paragraph), there lies the cruel and unusual punishments inflicted and will continually be inflicted upon Petitioner if he is not allowed to overturn his misdemeanor conviction on the ground of Actual Innocence. It is a cruel and unusual punishment inflicted to revoke the probation or supervised release of a Probationer who is innocent of a state crime which triggered the revocation. Even if it is a misdemeanor crime, even those can carry months to possibly years of imprisonment unless no law was broken, then the revocation cannot be possible if no law was broken.

25. The Court does have jurisdiction in preventing a miscarriage of justice against an innocent person. That is due to Virginia Constitution; Article I. Bill of Rights; Section 9; and Section 11; as well as the United States Constitution's prohibition against cruel and unusual punishments inflicted. The Court does have jurisdiction when a misdemeanor charge and conviction directly causes the revocation of a felony sentence of supervised release. **Yes a, felony sentence of supervised release.** That may be considered a legal loophole but that loophole may also allow a Petitioner to pass the impediment or procedural defect or default. If somebody serving a probation or supervised release sentence for a **felony offense** is charged with a misdemeanor crime

or was convicted of a misdemeanor, then it doesn't just trigger a sentence from the Commonwealth of Virginia but also triggers a double punishment from the Federal or State Court which revoked the probation or supervised release. Arguably, the Commonwealth of Virginia did invoke that the Petitioner was convicted of a federal felony and serving supervised release for that felony (JA1, Pages 0705 through 0711, JOINT APPENDIX VOLUME I OF VI) and also was brought up in the Writ Petition in argument (See JA1, pages 0057-0062, BRIEF).

26. Under three different legal reasons such as the (1) Virginia Constitution's prohibition on cruel and unusual punishment inflicted; (2) Virginia Constitution's requirement of due process of law for taking away a person's liberty or property; and (3) the Petitioner serving a felony sentence of supervised release by the U.S. Probation Office and this misdemeanor conviction directly impacts that supervised release leading to a revocation. Under the foregoing three different legal reasons, the Court of Appeals of Virginia does have jurisdiction and may allow the Petitioner to pass such impediment and procedural bar.

- ii. The Court of Appeals erred by entering the Final Judgment dismissing the Writ Petition (JA1, Pages 4843 through 4844) as a matter of law or abused discretion by dismissing it when the Court does have jurisdiction because it is erroneous in fact as well as law to convict somebody who is actually innocent**

27. The assignment of error was that the Court of Appeals of Virginia had erred as a matter of law and/or abused its discretion in dismissing the Appellant's/Petitioner's "Petition for the Writ of Actual Innocence" (JA1, Pages 4843 through 4844, FINAL JUDGMENT). The error is that the Court does have jurisdiction to consider and

entertain such petition filed by Petitioner. They have jurisdiction because the new evidence of “actual innocence” disproves the one or more elements of the crime as originally charged by Martinsville Police Department in the General District Court which that case was later transferred to the Circuit Court for the City of Martinsville which attains the final conviction, and all criminal case records. Essential elements such as “intent” and whoever “intentionally” commits the crime of indecent exposure.

28. That criminal law statute provides, in relevant part, that “[e]very person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor.” Va. Code § 18.2-387 (emphases added).

29. “The ‘obscenity’ element of Code § 18.2–387 may be satisfied when: (1) the accused admits to possessing such intent, *Moses v. Commonwealth*, 611 S.E.2d 607, 608 (Va. App. 2005)(en banc); (2) the defendant is visibly aroused, *Morales v. Commonwealth*, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. App. 2000); or (4) in other circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex, *Hart*, 441 S.E.2d at 707–08. The mere exposure of a naked body is not obscene. See *Price v. Commonwealth*, 201 S.E.2d 798, 800 (Va. 1974) (finding that “[a] portrayal of nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene’).” *Romick v. Commonwealth*, No. 1580-12-4, 2013 WL 6094240, at \*2 (Va. Ct. App. Nov. 19,

2013)(unpublished)(internal citations reformatted).

30. In summary, in order to show that the Petitioner committed the offense of indecent exposure under Virginia law, the Commonwealth was required to prove, among other things, that the Petitioner had the intent to display or expose himself in a way which has, as its dominant theme or purpose, appeal to the prurient interest in sex, as further defined above, without any justification, excuse, or other defense. While Virginia does not appear to have established a clean definition of criminal intent, Black's Law Dictionary defines it as "[a]n intent to commit an actus reus without any justification, excuse, or other defense."

31. Petitioner had demonstrated in his Writ Petition that there are errors in the original charge and conviction against Petitioner in his criminal case. Not just errors of fact but errors of law. This requires that Petitioner be found actually innocent of his wrongful conviction in the Circuit Court. The Commonwealth of Virginia had unlawfully destroyed evidence favorable to Petitioner being found not guilty. He was not medically cleared (JA1, Pages 0023 and 0038 through 0046, BRIEF) and he was not psychologically cleared (JA1, Pages 0206 through 0213, EXHIBITS, EXHIBIT 12 AUTISM PSYCHOSIS DIAGNOSIS). That is one of the main elements of the CRIMINAL COMPLAINT against him by the Commonwealth of Virginia (JA1, Pages 0324 through 0324, JOINT APPENDIX VOLUME I OF VI; GD PAPERWORK). The other main element is that of intent.

32. It is clear that Petitioner had demonstrated actual innocence and new evidence was introduced because of Petitioner's invocation of Virginia Code § 19.2-

271.6 by Petition in his Writ Petition had demonstrated that he has new evidence because it was not considered evidence at the time of his conviction in November, 2019. Unless a Court considers evidence as admissible, it is not legally considered as evidence at all by a Court of Law. When a new statute makes previously inadmissible evidence as admissible, then the Petitioner has a right to bring up new evidence, because then the Court considers the evidence admissible on the date that the new law Virginia Code § 19.2-271.6 made such evidence admissible. It was made admissible since the year of 2021. The evidence had not been introduced until the year of 2022 in Petitioner's filed Writ Petition and in his Motion for New Trial and Motion for Judgment of Acquittal.

33. Arguably, at the time of conviction, that evidence was not admissible. A few years later that evidence became admissible. Now that new evidence had been introduced by the Writ Petition which was filed, it had proven errors in the original criminal conviction and disproven the elements of guilt in that conviction. Such errors that make such conviction erroneous as a matter of law and as a matter of fact.

34. The Writ Petition was wrongfully dismissed by the Court of Appeals of Virginia because granting such Writ Petition or considering such Writ Petition can correct the disproven elements of guilt which the law would require acquittal. Acquittal on the basis that there was "no intent" to commit any offense on September 21, 2018. Intent is required by that charged statute. Petitioner is actually innocent. Petitioner had proven that he was not medically and psychologically cleared as charged in Affidavit under CRIMINAL COMPLAINT. That means the factual basis for the original criminal

charge was erroneous. A Writ Petition or some kind of Petition must be permitted in any State Court of the Commonwealth of Virginia in order to correct these errors of fact, errors of law, and miscarriages of justice.

35. The facts and law demonstrated in the Writ Petition clearly show that the Circuit Court had engaged in a manifest justice. Conviction of an innocent person. Conviction of a person who had no intent to commit any offense. By wrongfully dismissing the Writ Petition, it creates a further issue of manifest justice, a miscarriage of justice, a continued wrongful conviction which is erroneous under the facts and law. A Circuit Court should not be allowed to continue this erroneous conviction.

**iii. The Court of Appeals erred by entering the Final Judgment dismissing the Writ Petition (JA1, Pages 4843 through 4844) as a matter of law or abused discretion by dismissing it when the Court does have jurisdiction under its inherit legal powers to deter Frauds on the Court; and to correct errors and untruthful/dishonest prosecution by the Commonwealth of Virginia.**

36. The assignment of error was that the Court of Appeals of Virginia had erred as a matter of law and/or abused its discretion in dismissing the Appellant's/Petitioner's "Petition for the Writ of Actual Innocence" (JA1, Pages 4843 through 4844, FINAL JUDGMENT). The error of law is that the Court does have jurisdiction when its final order said that it doesn't. That jurisdiction comes from its inherit or implied powers given to it under the Virginia Constitution as well as the U.S. Constitution to consider and entertain such petition filed by Petitioner. They have jurisdiction due to the inherit powers of a Court to be a record of truth, a record of fact, and a record of law. When a

Court finds out later that a criminal prosecution or civil prosecution was not truthful and/or not factual as previously asserted by the prosecutor, then a Court has the Constitutional power and authority to vacate or modify a judgment or order of any kind including a criminal conviction. Even the Supreme Court of Virginia had made rulings regarding a “court’s” inherit power to vacate a judgment or disturb a sound judgment upon later evidence surfacing showing that the judgment was procured by fraud.

### **ARGUMENT**

37. Taylor v. Taylor, 159 Va. 338, (Va. 1932) (“5. JUDGMENTS AND DECREES — Setting Aside Judgment for Fraud — Extrinsic or Collateral Frauds. — The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, relate to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the judgment or decree was rendered. ”) In re Commonwealth of Virginia, 278 Va. 1, 42 n.13 (Va. 2009) (“The provisions of Code § 8.01-428 permit a court to set aside default judgments for specific reasons, such as fraud upon the court, and correct clerical mistakes after the 21-day limitation in Rule 1:1 has expired.”)

38. By the Commonwealth of Virginia destroying biological evidence such as blood samples obtained from Petitioner at around the time of his arrest, destroying the police body-camera footage after multiple Court Orders for discovery, and the Martinsville City Jail refusing to follow the Hospital instructions to see a private physician, they destroyed evidence which would have been favorable to Petitioner. That



is engaging in defrauding the Court to only see what is favorable to the Commonwealth of Virginia.

39. A Court should overturn a judgment or order if new evidence shown that the prosecution was fraudulent or partially fraudulent. When the fraud is enough to demonstrate that not all of the elements can ever be proven to sustain a criminal conviction as a matter of law. It is a fraudulent conviction. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991) (“Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946).”). This inherit power also can apply to a state Court as well, as long as it does not conflict with the Constitutions and Laws of both the United States and of Virginia.

40. The Commonwealth of Virginia knew that they could not have proven intent or that of obscenity. The criminal conviction is based on a fraudulent or flawed prosecution. Because of ineffective assistance of counsel, the Petitioner never got the opportunity to prove his innocence in the General District Court and neither in the Circuit Court for the City of Martinsville. The prosecution was fraudulent because evidence was destroyed which would have proven the levels of Carbon Monoxide Gas Poisoning in the body of Brian David Hill, the Petitioner. The prosecution was fraudulent because Brian David Hill, the Petitioner, was not psychologically and medically cleared. Maybe the Hospital discharged him and that gave the Police the presumption that he was psychologically and medically cleared. That was a false

assumption made under oath or affirmation in the CRIMINAL COMPLAINT (JA1, Pages 0324 through 0324, JOINT APPENDIX VOLUME I OF VI; GD PAPERWORK). He was not psychologically cleared when his claims of what had happened during the alleged incident on September 21, 2018, which led up to his arrest for the charge of indecent exposure, were diagnosed as a “psychosis” a month later after his arrest (JA1, Pages 0206 through 0213, EXHIBITS, EXHIBIT 12 AUTISM PSYCHOSIS DIAGNOSIS). That does not sound like he was “psychologically” cleared either. He was not medically cleared because he has Type 1 brittle diabetes and his diabetic blood glucose level was not checked at the Hospital and the charging officer Robert Jones of Martinsville Police Department was not aware of Petitioner being type 1 Diabetic until the Federal Court hearing in 2019 (JA1, Pages 0130 through 0131, EXHIBITS, EXHIBIT 4 FEDERAL COURT TRANSCRIPT). Now he was aware after he was questioned by Attorney Renorda Pryor at that Federal Court hearing in September, 2019. So the CRIMINAL COMPLAINT stating that he was psychologically and medically cleared were erroneous, it is a fraudulent statement because the Police who charged him didn’t even have all of the medical facts and neither did they have the medical records concerning Brian David Hill at the time that affidavit for arrest and the affidavit of CRIMINAL COMPLAINT had alleged (JA1, Pages 0324 through 0324). He was not medically cleared at the time of his arrest, he was not psychologically cleared at the time of his arrest (JA1, Pages 0206 through 0213).

41. Ladies and gentlemen, the Circuit Court was defrauded. The Court of Appeals did have jurisdiction to consider the Writ Petition on the facts and evidence which

disproves the Commonwealth Attorney's prosecution against Brian David Hill. If it can disprove the essential elements necessary to convict Petitioner of indecent exposure under Virginia Code § 18.2-387, then the conviction is erroneous and fraudulent. It should not exist and deserves acquittal, vacatur, or modification to reflect the evidence, the facts, and the law. The criminal conviction does not reflect the evidence, the facts, and the law. Not at this stage. Not with all of the new evidence. Not with the passage of Virginia Code § 19.2-271.6 in the year of 2021. The Commonwealth of Virginia engaged in fraud, obtaining an erroneous or fraudulent or wrongful criminal conviction in their favor. It is manifest justice. It is a miscarriage of justice or is NO JUSTICE AT ALL. This criminal conviction is not worthy of being of the record of this Court or any Court of Virginia. It is wrongful, fraudulent, erroneous, and the evidence proves that enough elements of the crime have been disproven and the law technically requires "INTENT" to commit such an act. There is no intent. With the passage of Virginia Code § 19.2-271.6 in the year of 2021, there is even more evidence and arguments proving lack of intent. They have no proof of "intent". The psychosis diagnosis (JA1, Pages 0206 through 0213) given a month after Petitioner's arrest concerning Petitioner's statements about the man in the hoodie threatening to kill Brian's mother if Petitioner didn't get naked and take photos of himself; and the Autism Spectrum Disorder diagnosis (JA1, Pages 0197 through 0206, EXHIBITS 10 AND 11) and his Obsessive Compulsive Disorder and Type 1 Brittle Diabetes demonstrate his lack of intent. He forgot to bring his medical devices or applicators or medicines for his health conditions at the time of his arrest. No cell phone, no money, no State ID, nothing worthy of being found by

Martinsville Police Department which could have been inferred to attempt to demonstrate any evidence proving Petitioner's "intent" to commit an act of indecent exposure. There is no such evidence and there will never be such evidence. The Commonwealth of Virginia and through Glen Andrew Hall, Esquire the Officer of the Court had DEFRAUDED THE COURT. He obtained a wrongful conviction by deception and took advantage of Petitioner's ineffective assistance of counsel to win his fraudulent prosecution. It is fraudulent when evidence is destroyed which Petitioner asked for such evidence and the Court asked for such evidence. The Court of Appeals HAS THE RIGHT and jurisdiction to deal with the issues of fraud upon a Circuit Court. They have the jurisdiction to consider a petition for the writ of actual innocence if it disproves the elements of guilt presented by the Commonwealth of Virginia and City of Martinsville who both brought the charge by and through Glen Andrew Hall, Esquire the Officer of the Court, and the Commonwealth Attorney for the City of Martinsville. I rest my case.

### **CONCLUSION**

Petitioner/Appellant asserts three Assignments of Error as to why Petition for Appeal should be granted for the Constitutional rights and legal errors involved.

For the foregoing reasons stated above, the Petitioner/Appellant urges this Court to grant this Petition for Appeal and allow the Petitioner/Appellant to perfect his appeal if it is so ordered by this Court in pushing for an order and remand to vacate the final order/judgment (JA1, Pages 4843 through 4844) summarily dismissing Petitioner's/Appellant's Writ Petition.



**REQUEST FOR ORAL ARGUMENT**

As this appeal raises important constitutional and legal issues which were believed overlooked, the Appellant requests oral argument.

Respectfully Filed/Submitted on March 23, 2022,

**BRIAN DAVID HILL**  
**Pro Se**

  
*Signed*

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**Brian D. Hill**

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with type-volume limits (word limit 6,125, page limit at 35 pages), excluding the parts of the document exempted by Rule 5:17(f) (cover page, table of contents, table of authorities, signature blocks, or certificate):


[ X ] this brief contains [6,117] words.

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2. This brief complies with the typeface and type style requirements because:

[ X ] this brief has been prepared in a proportionally spaced typeface using [Microsoft Word 2013] in [14pt Times New Roman]; or

[ ] this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

  
\_\_\_\_\_  
Signed  
\_\_\_\_\_  
**Brian D. Hill**

Dated: March 23, 2022



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*Pro Se Appellant*

## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 23rd day of March, 2022, I caused this “PETITION FOR APPEAL OF APPELLANT” and “JOINT APPENDIX VOLUME I OF I (Pages 1 – 4,858)” to be delivered by email service by Assistant/Filing-Representative Roberta Hill using [rbhill67@comcast.net](mailto:rbhill67@comcast.net) or [rbhill67@justiceforuswgo.nl](mailto:rbhill67@justiceforuswgo.nl) to the Commonwealth of Virginia and City of Martinsville through the Commonwealth Attorney’s Office of Martinsville City; as well as to the named counsel for the Office of the Attorney General; and the original was filed with the Clerk of the Supreme Court of Virginia by Virginia Court eFiling System (VACES) through Assistant/Filing-Representative Roberta Hill which shall satisfy proof of service as required by Rule 5:1B(c) stating that “*Service on Other Parties by Email. – An electronic version of any document filed in this Court pursuant to Rule 5:1B(b) must be served via email on all other parties on the date the document is filed with the Court or immediately thereafter, unless excused by this Court for good cause shown. An e-filed document must contain a certificate stating the date(s) of filing and of email service of the document.*” And the proof that such pleading was delivered will be filed together with this “Petition for Appeal” shall satisfy the proof of service was required by Rule 5:17(b):

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*The reason why Brian David Hill must use such a representative/Assistant to serve such pleading with the Clerk on his behalf is because Brian is currently still under the conditions of Supervised Release for the U.S. District Court barring internet usage without permission. Brian's Probation Officer is aware of Roberta Hill using her email for conducting court business concerning Brian Hill or court business with the Probation Office in regards to Brian David Hill. Therefore, Roberta Hill is filing the pleading on Brian's behalf for official court business. Brian has authorized Roberta Hill to file the pleading.*

*If the Court wishes to contact the filer over any issues or concerns, please feel free to contact the filer Brian David Hill directly by telephone or by mailing. They can also contact Roberta Hill at rbhill67@comcast.net and request that she forward the message and any documents or attachments to Brian David Hill to view offline for his review.*

  
Signed

**U.S.W.G.O.**



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