

**IN THE
COURT OF APPEALS OF VIRGINIA**

Record No. _____

THOMAS EDWARD HAYNESWORTH,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

**BRIEF IN SUPPORT OF UNOPPOSED PETITIONS FOR WRITS OF
ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE**

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Gary L. Wells, et al., <i>Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads</i> , 22 Law & Hum. Behav. 1 (1988).....	36
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The Future of Forensic DNA Testing: Predictions of the Research and Development Group, Nat'l Inst. Just., Off. Just. Programs, U.S. Dep't Just. (Nov. 2000), *available at* <http://www.ojp.usdoj.gov/nij/pubs-sum/183697.htm> (last visited Feb. 2, 2011)15

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault (Feb. 1997), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF> (last visited Feb. 2, 2011) 19-20

INTRODUCTION

In early 1984, a black serial rapist began to terrorize women in the City of Richmond and Henrico County, committing numerous rapes and attempted rapes of white women, often accompanied by robbery, burglary, or other related crimes. Within just a one-month span of time between January 3 and February 1, 1984, five women were assaulted within a one-mile radius in the East End of Richmond. The victims provided similar descriptions of their perpetrator, which, along with the common *modus operandi*, suggested to the police that it was the same individual who committed all five of these crimes.

In February 1984, Thomas Edward Haynesworth was arrested and charged with the five crimes that occurred in January and February and, ultimately, was convicted of three of them. Notably, however, Mr. Haynesworth's arrest did not end the crime spree. In the latter half of 1984, rapes and attempted rapes following a similar *modus operandi* resumed. At least 10 white women were raped during that period by a young black male who began to call himself the "Black Ninja." The Black Ninja was identified as Leon Davis, who was caught and arrested on December 19, 1984. Leon Davis was ultimately convicted of several of the crimes from the latter part of 1984 and sentenced to multiple life terms.

For more than 20 years, authorities believed that Leon Davis's crime spree did not begin until the latter part of 1984. However, the recent testing of DNA material from two of the crimes from early 1984 for which Mr. Haynesworth was charged and, in one case, convicted, have proven that Leon Davis, not Mr. Haynesworth, committed those crimes. These results spurred a joint investigation involving the Commonwealth's Attorney for Henrico County and the Commonwealth's Attorney for the City of Richmond into the other three crimes with which Mr. Haynesworth was charged. Based on this investigation, the Commonwealth's Attorneys have

concluded that Mr. Haynesworth is in fact innocent of all five offenses, and that each of those crimes were instead committed by Leon Davis.

This new evidence and the results of the joint investigation prove what Mr. Haynesworth has maintained for almost 27 years – that he is innocent of all of the crimes with which he was charged. All parties now agree that Mr. Haynesworth is an innocent man who has spent nearly 27 years in prison for three crimes he did not commit. The Supreme Court of Virginia already has issued a Writ of Actual Innocence to Mr. Haynesworth in the only one of his three convictions for which DNA material was maintained. Because of the unique combination of biological and non-biological evidence involved here, Mr. Haynesworth, through undersigned counsel, hereby respectfully petitions this Court pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code, Va. Code. § 19.2-327.10 et. seq., for the issuance of Writs of Actual Innocence Based on Nonbiological Evidence with respect to his remaining two convictions to remedy this unusual and unprecedented miscarriage of justice. This brief is being submitted in support of both petitions.^{1/} The Commonwealth’s Attorneys for the relevant jurisdictions have filed affidavits indicating their support, and the Attorney General has indicated that he supports Mr. Haynesworth’s petition and will file an answer with the Court.

SUMMARY OF ARGUMENT

Mr. Haynesworth was convicted of three crimes that occurred during a one-month period: the January 3, 1984, rape of J.S. in Richmond; the January 30, 1984, rape of M.A. in Henrico;

^{1/} Mr. Haynesworth has filed two separate Petitions, one for a conviction in the City of Richmond for charges under Indictment #F84-538, 540-542, and one for a conviction in Henrico County for charges under Indictment #84F244-248, 395. The underlying facts and new evidence relevant to both Petitions is identical, and thus Mr. Haynesworth submits this single brief in support of both Petitions.

and the February 1, 1984, attempted robbery and abduction of T.H. in Richmond.^{2/} All three convictions were based either exclusively or almost exclusively on eyewitness identifications made by the victims. Mr. Haynesworth also was accused of two other crimes in Richmond: the January 21, 1984, sodomy and rape of D.K., for which he was acquitted despite the victim's identification of him as the perpetrator, and the abduction and attempted robbery of L.D. on January 27, 1984, which was *nolle prossed*. In none of these five crimes was biological material subjected to DNA testing before his convictions became final. Mr. Haynesworth always has maintained his innocence of all five crimes.

In early 2009, DNA test results proved that Mr. Haynesworth did not commit the rape of J.S. and that the rape was instead committed by Leon Davis. Exs. 1 and 2, J.S. Certificate of Analysis (Mar. 6, 2009) and J.S. Certificate of Analysis (Apr. 2, 2009). On September 18, 2009, the Supreme Court of Virginia issued a Writ of Actual Innocence in the J.S. case based on this new biological evidence. Ex. 3, Order Granting Pet. for Writ of Actual Innocence (Sept. 18, 2009).

Since learning that DNA evidence established Mr. Haynesworth's innocence in the J.S. case, Mr. Haynesworth, through counsel, has worked with the Offices of the Commonwealth's Attorney in the City of Richmond and Henrico County to investigate the remaining cases and to determine whether or not Mr. Haynesworth is actually innocent of those crimes. The investigation revealed that no biological evidence exists in the two remaining cases in which Mr. Haynesworth was convicted but did uncover biological evidence from the D.K. case in which

^{2/} To respect the victims' privacy, Mr. Haynesworth refers to each victim by her initials. If the Court requests, Mr. Haynesworth can file under seal a list of names and their corresponding initials. At the time of the February 1st assault, the victim, identified herein as T.H., was named T.A.-K. She married and changed her name to T.H. by the time of trial. While this brief will refer to the victim as T.H. throughout, some exhibits refer to the victim as T.A.-K.

Mr. Haynesworth was acquitted of sodomy and rape. Ex. 4, Consent Motion for Post-Conviction DNA Testing and Request for Hearing (Nov. 12, 2009); Ex. 5, Order Granting Post-Conviction DNA Testing and Request for Hearing (Mar. 23, 2010). Testing of that DNA evidence was recently completed and confirmed Mr. Haynesworth's innocence. Ex. 6, D.K. Certificate of Analysis (June 17, 2010). As in the J.S. case, the DNA testing in the D.K. case not only vindicated Mr. Haynesworth but also identified serial rapist Leon Davis as the true perpetrator. Thus, the DNA testing established, as it had in the J.S. case, that the victim had mistakenly identified Mr. Haynesworth for a crime that had been perpetrated by Leon Davis. In addition to biological testing, the joint investigation included extensive document gathering, evidence searches, witness interviews, and two polygraph examinations administered to Mr. Haynesworth.

This investigation has led to the conclusion that Mr. Haynesworth is actually innocent of these crimes. This conclusion is compelled by two key facts. First, the DNA results from the J.S. and D.K. cases prove that each victim mistakenly identified Mr. Haynesworth as the perpetrator of crimes that were actually committed by serial rapist Leon Davis. Second, an exhaustive study of Mr. Haynesworth's convictions and Leon Davis' crimes demonstrates that the two remaining crimes for which Mr. Haynesworth was convicted both match Leon Davis' very distinctive *modus operandi*.

The evidence developed by the parties' joint investigation constitutes admissible, new material evidence in light of which no rational trier of fact could find proof of Mr. Haynesworth's guilt beyond a reasonable doubt. Indeed, the new evidence not only calls into question the accuracy of the identifications made by T.H. and M.A. – the primary evidence used to convict Mr. Haynesworth – but also establishes the identity of the person who actually committed the crimes, Leon Davis. Based upon this powerful new evidence, this Court should

issue the Writ of Actual Innocence for Nonbiological Evidence for both of the remaining Haynesworth convictions.

Mr. Haynesworth alleges under oath, and describes more fully below, that he satisfies all of the requirements of Section 19.2-327.11:

- (i) the crimes for which Mr. Haynesworth was convicted were based upon pleas of not guilty;
- (ii) Mr. Haynesworth is actually innocent of the crimes for which he was convicted;
- (iii) The previously unknown or unavailable evidence supporting his innocence is described below and includes: (1) the DNA results from two of his cases prove that multiple women mistakenly identified Mr. Haynesworth as the perpetrator of crimes that were actually committed by serial rapist Leon Davis; and (2) the crimes for which Mr. Haynesworth remains convicted match Leon Davis' very distinctive *modus operandi*;
- (iv) This evidence was previously unknown or unavailable to Mr. Haynesworth or his trial attorney of record at the time the conviction became final in the circuit court;
- (v) The previously unknown or unavailable evidence became known or available to Mr. Haynesworth, as described below, as a result of the joint investigation involving Mr. Haynesworth's attorneys and the offices of two Commonwealth's Attorneys over much of the last two years;
- (vi) 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 by the court;
- (vii) The previously unknown or unavailable evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and
- (viii) The previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral.

Because Mr. Haynesworth shows by clear and convincing evidence that he satisfies the requirements of Section 19.2-327.11, he respectfully requests that this Court find that no rational

trier of fact could have found proof of guilt beyond a reasonable doubt in each case, grant both writs, and vacate his convictions. Va. Code § 19.2-327.13.

STATEMENT OF FACTS

I. Background

A. The Events of 1984

In 1984, women in the City of Richmond and Henrico County were terrorized by a black serial rapist who committed numerous rapes and attempted rapes of white women, often accompanied by robbery, burglary, or other related crimes. Ex. 7, *Police Warn about 'Black Ninja,'* Times-Dispatch (Dec. 15, 1984) (hereinafter "Times-Dispatch, 12/15/84"). Between January 3 and February 1, 1984, five white women were assaulted by a young black male in the East End of Richmond, a small area overlapping both the City of Richmond and Henrico County. Ex. 8, *Attack Charges Certified Here,* Times-Dispatch (Mar. 3, 1984) (hereinafter "Times-Dispatch, 3/3/84"). The victims provided similar descriptions of their perpetrator, which suggested to the police that it was the same individual. Ex. 9, D.K. Henrico Police Report (Feb. 15, 1984).

On the morning of February 5, 1984, Mr. Haynesworth – an 18-year-old Richmond resident with no criminal or arrest record – was walking near his home when he was stopped by police as a suspect in one of the cases. Ex. 8, Times-Dispatch, 3/3/84. L.D. had seen him and identified him as her assailant; he also matched the description of the alleged assailant in the other rapes in the area. *Id.*; Ex. 9, D.K. Henrico Police Report. Based on this identification, he became a suspect in four other attacks, and those victims subsequently identified him as their attacker.

Although Mr. Haynesworth remained incarcerated after his arrest, the rapes continued. More than 10 women were raped in 1984 by a young black male who began to call himself the “Black Ninja.” Ex. 10, *Trial of Suspect in ‘Ninja’ Case Delayed to Investigate an Alibi*, Times-Dispatch (Apr. 4, 1985) (hereinafter, “Times-Dispatch, 4/4/85”). On December 19, 1984 – months after Mr. Haynesworth’s last conviction – the Black Ninja was caught and arrested after being identified as Leon Davis. Leon Davis was charged with fourteen rapes that occurred during the previous eight months and was ultimately convicted of at least three of those crimes and sentenced to multiple life sentences. *Id.*; see also Ex. 11, E-mail from Larry M. Traylor to Maria Glod regarding Records Request (January 10, 2011).

Police originally suspected that Leon Davis’ criminal activity began in March 1984, one to two months after the crimes for which Mr. Haynesworth was convicted. All of Mr. Haynesworth’s cases had worked their way through the system by October 1984. Ex. 12, *Figure in Abduction Case Here Convicted, Given 28-Year Term*, Times-Dispatch (Oct. 12, 1984). Thus, by the time Leon Davis was caught, no one had reason to revisit the crimes for which Mr. Haynesworth had been charged.

1. *January 3, 1984, Rape of J.S., Case No. 84-1454*

On January 3, 1984, J.S. arrived at approximately 7:00 a.m. at the Raleigh Forbes Child Care Center at 5100 Salem Street in Richmond, where she worked as its director. Haynesworth Tr. I at 18.3/ After turning on the lights throughout the facility and settling into her office, J.S. heard a noise near the front door. *Id.* at 19-20. When she went into the hallway, she saw that a man had broken into the building. *Id.* at 20-21. At knifepoint, the perpetrator forced J.S. back into her office, where he forced her to empty her pocketbook and then vaginally raped her. *Id.* at

21-25. The perpetrator asked her where she lived and talked through the entire rape, but J.S. could not recall what else he said. *Id.* at 23-26. The attack ended when a parent dropping off her child rang the front doorbell. *Id.* at 25. The entire incident lasted approximately 10 minutes. *Id.* at 33.

On February 6, following Mr. Haynesworth's arrest based on L.D.'s identification, J.S. was shown a photo array that included Mr. Haynesworth's photo. Although J.S. previously viewed two photo arrays without selecting anyone, she selected the photo of Mr. Haynesworth as that of her perpetrator on her third photo array. *Id.* at 30-32, 67-69. At trial, J.S. again identified Mr. Haynesworth and testified that there was "no question in [her] mind" that Mr. Haynesworth was her attacker. Haynesworth Tr. I at 32-34.⁴ On July 12, 1984, before the Honorable James B. Wilkinson in Richmond, Mr. Haynesworth was convicted following a jury trial.

More than 20 years later, DNA testing proved that the victim's identifications of Mr. Haynesworth as the perpetrator were incorrect – the true perpetrator was Leon Davis. *See* Exs. 1 and 2.

2. *January 21, 1984, Sodomy and Rape of D.K., Case Nos. F-84-537, F-84-677*

At approximately 7:00 a.m. on January 21, 1984, D.K. was sitting in her car outside of the East End grocery store in Richmond where she worked when a black male opened her car door. Ex. 15, D.K. Request for Lab Examination, FS Lab No. C84-00401 (Feb. 6, 1984)

³ "Haynesworth Tr. I" denotes citations to the trial transcript of *Commonwealth v. Haynesworth*, in relation to the rape of J.S. (attached hereto as Exhibit 41).

⁴ The other evidence presented against Mr. Haynesworth was a coat found in a search of his home that matched the description of the coat worn by the perpetrator and ABO blood typing results that showed the attacker likely had ABO blood type O, the blood type shared by Mr. Haynesworth and thirty-six percent of the population of Richmond. Ex. 13, Certificate of Analysis (Apr. 24, 1984); Haynesworth Tr. I at 57-58, 78. Leon Davis is also ABO blood type O. Ex. 14, A.B. Certificate of Analysis (Jan. 25, 1985).

(hereinafter “D.K. Request for Lab Examination”); Ex. 8, Times-Dispatch, 3/3/84; Ex. 16, *Youth is Acquitted in Attack on Grocery Employee*, Times-Dispatch (Aug. 25, 1984) (hereinafter “Times-Dispatch, 8/25/84”).⁵ He threatened her with a knife and forced her to perform fellatio on him. Ex. 16, Times-Dispatch, 8/25/84. He also hit her in the head twice and stole \$60 from her purse. Ex. 8, Times-Dispatch, 3/3/84.

Mr. Haynesworth was charged with this crime after the victim identified him out of a photo array. Ex. 16, Times-Dispatch, 8/25/84. At trial, she reportedly testified that she had no doubt that Mr. Haynesworth was the man who attacked her. *Id.* Nonetheless, on August 24, 1984, Mr. Haynesworth was acquitted. Ex. 17, D.K. Criminal Order (Aug. 24, 1984).

DNA testing has now established that the victim erroneously identified Mr. Haynesworth as the perpetrator when, in fact, her assailant was Leon Davis.

3. *January 27, 1984, Attempted Robbery and Abduction of L.D., Case Nos. F84-535, F84-539*

Mr. Haynesworth was charged with the January 27, 1984, abduction and attempted robbery of L.D. in Richmond. Ex. 18, L.D. Grand Jury Charges (Apr. 2, 1984).⁶ The victim was getting in her car to leave for work in front of her home at 1408 Vista Street when a man accosted her with a knife and demanded her purse. Ex. 8, Times-Dispatch, 3/3/84; Ex 19, L.D. Warrant of Arrest (Feb. 5, 1984). This location is four blocks away – less than a quarter mile – from the Raleigh Forbes Church where J.S. was raped. Ex. 20, Proximity Between Leon Davis’ Residence in Early 1984 and the Locations of the Crimes Charged to Mr. Haynesworth in Early 1984. L.D. told the perpetrator that her purse was in the house, and when he allowed her to go inside, she slammed the door shut and called the police. Ex. 8, Times-Dispatch, 3/3/84.

⁵ The transcripts from this trial and preliminary hearings are no longer available. The precise location of the rape is unknown.

The Commonwealth *nolle prossed* the case against Mr. Haynesworth. DNA evidence from the case is unavailable.

4. *January 30, 1984, Rape of M.A., Case Nos. 84F244-248, 84F395*

On January 30, 1984, M.A. walked out of the Henrico Arms Apartment Complex parking lot in Henrico County at approximately 8:30 p.m. Haynesworth Tr. II at 12.⁷ The apartment complex is less than half a mile east of the church where J.S. was raped. Ex. 20. A young black male approached M.A. and asked if she knew what time it was. She ignored him, and, after repeatedly asking for the time with no answer, the assailant pulled out a gun and told M.A. to stop walking. Haynesworth Tr. II at 12-13. He forced her at gunpoint to walk with him behind the nearest building in the apartment complex and forced her up against the back wall, where he asked the victim if she had any money or jewelry as he frisked her. *Id.* at 14. He then forced her to perform fellatio on him and threatened to kill her, stating that “the last girl that hurt [him] got hurt.” *Id.* at 16, 20, 36-37.

The perpetrator then forced M.A. to move to another location. *Id.* at 37. He put his arm around her and told her to act like she was his girlfriend as he led her toward the woods behind another apartment building. *Id.* at 38. As they walked, the assailant continued to point his gun at the victim, holding it across his stomach. *Id.* He spoke to the victim throughout the attack, inquiring about her age, her sexual history, and where she went to school. *Id.* at 39. He told his

⁶ The transcript from the grand jury hearing is no longer available.

⁷ “Haynesworth Tr. II” denotes citations to the trial transcript of *Commonwealth v. Haynesworth*, in relation to the rape of M.A. The trial was held on August 7-10, 1984 (attached hereto as Exhibit 42). The only portions of the transcript that remain in existence are pages 1-162, which cover Mr. Haynesworth’s plea of not guilty, the full testimony of the victim and the doctor who conducted an examination of the victim after the rape, and a portion of the testimony from a store clerk who assisted the victim to call police. Accordingly, this brief cites to contemporaneous news accounts that discuss other portions of the trial for which transcripts are no longer available.

victim that he had recently broken up with his girlfriend and even commented about plans he had made for his birthday in June. *Id.* at 39-40. He told M.A. not to scream because the last girl who did was not screaming anymore, adding that this was not the first time “he had done this” and that it would not be the last. *Id.* at 37, 39. He also told the victim that he usually used a kitchen knife during his crimes, but that this time was different because he was using a gun. *Id.* at 39.

After he walked with M.A. into the woods, the assailant forced her to perform fellatio again, after which he vaginally raped her. *Id.* at 42-44. When two men walked through the woods near them, the assailant led M.A. out of the woods. *Id.* at 46. The perpetrator forced M.A. to give him her phone number and called her the next morning, asking her to meet him at Trio’s Market around 2 p.m. *Id.* at 49, 52-54; Ex. 9, D.K. Henrico Police Report. The perpetrator never showed up, but police continued to stake out the area. Days later, Mr. Haynesworth was arrested when he was identified by L.D. outside of Trio’s Market. Ex. 9, D.K. Henrico Police Report at 2; Ex. 8, Times-Dispatch, 3/3/84.

On February 6, approximately a week after the rape, M.A. identified Mr. Haynesworth out of a photo array. Haynesworth Tr. II at 56-59. Like J.S., she had not identified anyone in two previous photo arrays. *Id.* at 60-61. Mr. Haynesworth pled not guilty and was tried for the assault. *Id.* at 2-5. At trial, M.A. identified Mr. Haynesworth in court and testified that she had no question in her mind about her identification. *Id.* at 61. However, M.A. – who is 5’8 ½” – testified and had previously told police that the perpetrator was 5’9” and slightly taller than her. *Id.* at 66. Mr. Haynesworth is 5’6 ½”. Haynesworth Tr. III at 32.⁸ Leon Davis is 5’10”. Ex. 21, Print out from Virginia Sex Offender Registry Search, *available at* [---

⁸ “Haynesworth Tr. III” denotes citations to the trial transcript of *Commonwealth v. Haynesworth*, in relation to the attempted abduction of T.H. The trial was held on October 10-11, 1984 \(attached hereto as Exhibit 43\).](http://sex-</p></div><div data-bbox=)

offender.vsp.virginia.gov/sor/offenderDetails.html?regId=10658 (last checked February 2, 2011) (hereinafter “Davis Sex Offender Registry”).

Other than the victim’s identification, the state at trial presented only two additional pieces of evidence. The first was a toy gun collected from Mr. Haynesworth’s bedroom that the victim testified looked like the gun used by the perpetrator. Haynesworth Tr. II at 63-64. The victim acknowledged, however, that she was able to see only the barrel of the perpetrator’s gun. *Id.* The Commonwealth also presented testimony from a serologist that semen samples collected from the victim were the same type as Mr. Haynesworth, but admitted that the type – ABO blood type O – was fairly common and matched about one-third of the Richmond population at the time of the trial. Haynesworth Tr. I at 57-58; Ex. 22, *Rape Jurors Told Samples Match Accused*, Times-Dispatch (Aug. 9, 1984); Ex. 23, M.A. Certificate of Analysis (May 31, 1984). Leon Davis is also ABO blood type O. Ex. 14, A.B. Certificate of Analysis. Mr. Haynesworth’s family members testified that he was at home with them at the time the attack occurred. Ex. 24, *Youth Given 36 Years in Rape*, Times-Dispatch (Aug. 10, 1984); *see also* Ex. 22, Times-Dispatch, 8/9/84.

On August 10, 1984, following a jury trial presided over by the Honorable Buford Parsons Jr., Mr. Haynesworth was convicted of abduction, rape, sodomy, and use of a firearm, and sentenced to thirty-six years in prison. Ex. 24, Times-Dispatch, 8/10/84. The Times-Dispatch reported that the jury had deliberated for several hours and had twice informed the judge that they could not reach a verdict. *Id.* Gary Aronholt, the Henrico Assistant Commonwealth’s Attorney who prosecuted the case, was quoted as saying that “It was a difficult case for the jury to decide The jury was hung and I expected them to stay hung.” *Id.*

Mr. Haynesworth remains incarcerated for this crime, one of two for which he now petitions the court for a Writ of Actual Innocence based on non-biological evidence. No biological evidence remains from this case.

5. *February 1, 1984, Attempted Robbery and Abduction of T.H., F84-538, F84-540-542*

Less than one mile from the location where M.A. was raped and only a day and a half later, on February 1, 1984, a man approached T.H. with a gun at around 6:30 a.m. as she went to her car, which was parked in front of her home at 1018 Nelson Street in Richmond. Haynesworth Tr. III at 5-6. The perpetrator told her not to scream, stating “I’m here to rob you” and “I have a gun.” *Id.* at 6. He then demanded that she give him her purse. *Id.* The perpetrator asked questions about the victim’s house and repeatedly asked if anyone was in it. *Id.* Fearing that he would hurt her grandmother who was inside the house, T.H. told the perpetrator multiple times that there was no one else in the house. *Id.* at 6-7. The perpetrator demanded that he be let into the vehicle and then ultimately ordered T.H. to get out of her car and to go around the corner of her house with him. *Id.* at 7. T.H. told him that her neighbors would notice that her car was still in the driveway and would come to investigate. *Id.*

The perpetrator then demanded that T.H. perform fellatio on him. *Id.* When she said that she did not know anything about fellatio, the perpetrator told her that he “[could] teach her things [she had] never known before.” *Id.* at 7-8. He resumed questioning the victim about the house, asking again if anyone lived with her and if anyone was in the house. *Id.* at 8. T.H. confessed that her grandmother lived with her and that she was home in bed, and the perpetrator told the victim that he would “take care of [her] grandmother” if she got out of bed. *Id.* T.H. entered the house and began walking down a hallway. As the perpetrator followed her, T.H.’s dog ran past her in the hallway and chased her would-be rapist from her home. *Id.* at 9.

T.H. described the perpetrator to police as being 5'10" tall. *Id.* at 16, 32. She viewed three photo arrays in the days following the crime and identified an individual, who was not Mr. Haynesworth, as looking similar to the perpetrator in the first photo array. *Id.* at 17-18. She did not identify Mr. Haynesworth until her third attempt, following his arrest on February 5, 1984. *Id.* at 14, 30. Mr. Haynesworth was charged with attempted robbery, abduction, and displaying a weapon and pled not guilty to the charges. *Id.* at 3, 50-51. T.H. identified Mr. Haynesworth as the perpetrator at trial, and this identification was the sole evidence presented against him by the prosecution. *Id.* at 10. As with M.A., the perpetrator was described by T.H. as significantly taller than Mr. Haynesworth; the perpetrator was 5 feet 10 inches, almost 4 inches taller than Mr. Haynesworth, but the same height of Leon Davis. *Id.* at 16, 32; Ex. 21, Davis Sex Offender Registry.

On October 11, 1984, following a jury trial before the Honorable James Wilkinson, Mr. Haynesworth was convicted and sentenced to serve 28 years in prison. *Id.* at 50-51. Prior to reaching its decision, the jury reported to the court three separate times that it was having difficulty reaching a unanimous verdict. *Id.* at 33, 36, 40. Although "the evidence in the case didn't take but an hour," the jury's deliberations spanned two days. *Id.* at 33-51.

DNA evidence is unavailable in this case. This is the second of two cases for which Mr. Haynesworth is seeking a Writ of Actual Innocence.

B. DNA Exoneration in J.S. Case Launches a Joint Investigation of Other Cases in Which Mr. Haynesworth was Convicted

1. The Existence of Biological Material from Old Cases is Discovered

Between 2001 and early 2005, five men were exonerated based on DNA testing performed on biological evidence that unexpectedly was saved in the 1973 to 1988 case files of the Department of Forensic Science ("DFS"). Ex. 25, *Va. Slogs Through DNA Tests*; §1.4

Million Project Attempts to Clear those Wrongfully Convicted, Times-Dispatch (Dec. 25, 2005).

On December 15, 2005, in response to these exonerations, Governor Mark R. Warner ordered DFS to search its 1973 to 1988 case files and to perform DNA testing in all cases in which biological evidence was saved and a conviction was obtained. Ex. 26, *DNA Tests Clear Convicts; Evidence Exonerates 2 Found Guilty of Rape, Spurs Further Reviews*, Times-Dispatch (Dec. 15, 2005). As part of this review, it was discovered that the laboratory case file from the J.S. rape contained numerous items of biological evidence, including the vaginal/cervical and thigh/vulva swabs from the victim's rape kit as well as cuttings from the victim's panties. Pursuant to Governor Warner's order, the evidence was subjected to DNA testing.

2. *Biological Material from the Attack on J.S. is Tested and Exonerates Mr. Haynesworth of the Crime While Demonstrating That Davis Committed the Offense*

In Certificates of Analysis dated March 6, 2009 and April 2, 2009, DFS reported that Short Tandem Repeat ("STR") DNA testing had developed a distinctive male DNA profile in the sperm fraction of the victim's swabs and panties.⁹ See Exs. 1-2. Mr. Haynesworth was

⁹ STR DNA testing is a forensic analysis that evaluates specific regions, called loci, of a given DNA strand. STR Analysis, <http://www.dna.gov/basics/analysis/str> (last visited Feb. 2, 2011). STR is a short, repeating DNA sequence found at a given locus on the DNA strand. STR sequences are variable or polymorphic among individuals in a population. As a result, forensic testing of STR at multiple loci intensifies the ability to discriminate between one DNA profile and another. *Id.* Given the size of the world's population, a complete STR DNA profile involving the analysis of multiple loci is unlikely to be the same for a second, unrelated person. The Future of Forensic DNA Testing: Predictions of the Research and Development Group, Nat'l Inst. Just., Off. Just. Programs, U.S. Dep't Just. at 19, 25, 41 (Nov. 2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183697.htm> (last visited Feb. 2, 2011) (stating that the likelihood that two unrelated African American persons have the same STR DNA profile has been estimated at 1 in 916 trillion). Consequently, a STR profile is "effectively unique" and provides "reasonable scientific certainty" to determine whether or not a person is the source of a given DNA sample. *Id.* at 25 (discussing and quoting from the FBI's policy for judging a DNA profile). DNA testing now "provides an unparalleled degree of individualization, robustness, and sensitivity." Forensic Technology Hearing: Before the Subcomm. on Crime, Terrorism, and

conclusively eliminated as the source of that DNA profile. *Id.* The foreign male DNA profile discovered through the testing was entered into the Commonwealth's DNA Databank and was found to match the DNA profile of Leon Davis. *Id.* According to the Certificates of Analysis, the probability of randomly selecting a person whose profile matches the profile developed from the evidence is "1 in greater than 6.5 billion (which is approximately the world population) in the Caucasian, Black and Hispanic populations." Ex. 2, J.S. Certificate of Analysis at 2. Based on this new biological evidence, on September 18, 2009, the Supreme Court of Virginia issued a Writ of Actual Innocence in the J.S case exonerating Mr. Haynesworth. Ex. 3, Order Granting Petition for Writ of Innocence.

3. *The Joint Investigation of the Remaining Cases in Which Mr. Haynesworth Had Been Charged*

In light of Mr. Haynesworth's exoneration in the J.S. case, his steadfast insistence that he was actually innocent, and the belief that the crimes for which Mr. Haynesworth had been charged were committed by the same perpetrator, Mr. Haynesworth, through counsel, began discussions with the Offices of the Commonwealth's Attorney in both the City of Richmond and Henrico County about revisiting his remaining convictions. The parties all agreed that the DNA results in the J.S. case required investigation into Mr. Haynesworth's other convictions and began searching for physical evidence and other records related to both Mr. Haynesworth's and Leon Davis's cases.

The investigation uncovered biological evidence from the D.K. assault for which Mr. Haynesworth was acquitted in the files of the Richmond Circuit Court. The preserved evidence included oral swabs from the victim and semen that the victim spit onto the ground after the

Homeland Security of the House Comm. on the Judiciary, 108th Cong. 1 (2003) (statement of Paul Ferrara, Ph.D., then Director of the Department of Forensic Science, Virginia).

perpetrator forced her to perform oral sodomy. On September 29, 2009, Mr. Haynesworth and the Richmond Commonwealth's Attorney jointly moved to have STR DNA testing performed on this evidence, and, on March 23, 2010, the Richmond Circuit Court ordered DFS to perform the requested testing. *See Ex. 5, Order Granting Post-Conviction DNA Testing and Request for Hearing.* DFS reported the results of its analysis in a Certificate of Analysis dated June 17, 2010. *Ex. 6, D.K. Certificate of Analysis.* According to the Certificate of Analysis, STR DNA testing had developed a distinctive male DNA profile in the sperm fraction of the oral swabs from the victim that conclusively eliminated Mr. Haynesworth as the source of that DNA profile. *Id.* Once again, the profile from the evidence was found to match the DNA profile of Leon Davis. *Id.*

DNA testing, which was not available at the time of Mr. Haynesworth's trial, had thus proven that the Davis crime spree commenced earlier than previously believed and in fact occurred throughout 1984, including during the time period in which the crimes for which Mr. Haynesworth remains incarcerated occurred. The results also showed that two victims misidentified Mr. Haynesworth as the perpetrator of crimes committed by Leon Davis.

In addition to conducting DNA testing in the D.K. case, Mr. Haynesworth, through counsel, and both Commonwealth's Attorneys also have worked together to thoroughly examine and investigate each of the Haynesworth cases and to compare the facts of those cases to the crimes committed by Leon Davis. The parties worked together to gather as much information as possible about the Davis crimes, a task that was difficult due to the age of the cases. The parties were able to obtain partial court records for some of the cases, as well as news clippings reporting on the rapes and the legal proceedings that followed.

These records show that between March and December 13, 1984, at least 14 different white women in the City of Richmond and Henrico County were attacked by a rapist with a very distinctive *modus operandi*, leading police to believe that the attacks were all committed by the same man. Ex. 7, Times-Dispatch, 12/15/84. On December 19, 1984, Davis was arrested and subsequently charged with attacks on the 14 women. Ex. 10, Times-Dispatch, 4/4/85. While Davis was acquitted of a December 12, 1984, Richmond assault, Ex. 27, *Leon Davis Acquitted in First Case*, Times-Dispatch (Apr. 27, 1985), he was convicted in at least four other cases:

- On October 16, 1984, Davis maliciously wounded and attempted to defile L.A.N. at 7503 Spratley Road in Henrico County (Henrico Circuit Court Nos. 85F39 and 85F30), stabbing L.A.N. in the chest when she refused to accompany him to a secluded area after he abducted her and attempted to kiss and grope her. Davis Tr. I at 15-22.¹⁰
- On November 9, 1984, Davis committed rape, sodomy, and breaking and entering at the home of R.S. at 4007 Hooper Road in Henrico County. Ex.7, Times-Dispatch, 12/15/84; Ex. 28, *Alleged Rapist to Provide Sample of Handwriting*, Times-Dispatch (Feb. 15, 1985).
- On December 11, 1984, Davis robbed three women – L.Y., S.H., and K.P. – at the Strawberry Suds Laundromat at 7 p.m. at 317 N. Robinson Street in Richmond. Ex. 29, *Rape Suspect Indicted 14 Times*, Times-Dispatch (Jan. 8, 1985); Ex. 30, *Commonwealth of Virginia v. Leon Westley Davis*, Commonwealth’s Response to Motion for Bill of Particulars (Feb. 11, 1985) at 1.
- On December 13, 1984, Davis forced an unknown victim to commit oral sodomy and raped her in the 2300 block of Grove Avenue in Richmond. He approached the victim, struck up a conversation with her, held her at knifepoint, and took her to a secluded location where he committed the sexual assaults. Ex. 31, *Vanity License Plate, Tip Led to ‘Black Ninja’ Suspects*

¹⁰ “Davis Tr. I” denotes citations to the trial transcript of *Commonwealth v. Davis*, in relation to the rape of L.A.N. The trial was held on May 29-30, 1985 (attached hereto as Exhibit 44).

Arrest, Times-Dispatch (Jan. 31, 1985) (hereinafter “Times-Dispatch, 1/31/85”).¹¹

Over the course of five trials from May 1985 through March 1986, Leon Davis was found guilty and sentenced to seven life sentences. *See* Ex. 11.¹² He consequently was not tried on the remaining charges, which included the November 24, 1984 rape of D.F. (Richmond Juvenile & Domestic Relations District Court Docket Number A16629-02) and the December 8, 1984, rape of L.M. (Richmond Juvenile & Domestic Relations District Court Docket Number A16629-03).

The records reviewed by the parties indicate that there are numerous similarities between the two crimes for which Mr. Haynesworth remains in prison and the crimes committed by Leon Davis, demonstrating that the factual circumstances of the crimes for which Mr. Haynesworth remains convicted fall clearly within Davis’ known *modus operandi*. In particular, Davis targeted white victims of the same demographic, approached them by attempting to strike up conversations and ultimately forced them to a secluded area, used either a knife or gun, typically attacked in the evening or early morning, was talkative throughout the attacks, frequently robbed or attempted to rob the victims, engaged in the same types of sexual assaults, and committed these crimes in the same concentrated area of Richmond and Henrico.

a. The Race and Demographics of the Victims

All of Davis’ victims were white, as were all of the purported victims of Mr. Haynesworth, including M.A. and T.H. This is noteworthy, as only twelve percent of forcible rapes are by perpetrators who rape women of other races. U.S. Department of Justice, Office of

¹¹ A transcript is no longer available from the trial concerning this assault, and the victim’s name is not known. All known facts about this crime are from contemporaneous newspaper accounts. Davis was convicted in July 1985 in Richmond Circuit Court for this crime and was sentenced to four life terms.

Justice Programs, Bureau of Justice Statistics, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault (Feb. 1997), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF> (last visited Feb. 2, 2011).

In addition to being white females, all of Davis' known victims were between the ages of 15 and 30.

- Davis Rape of J.S.: J.S. was a 20-year-old white female. Ex. 32, J.S. Request for Lab Examination, FS Lab No. C84-00051 (Jan. 3, 1984).
- Davis Rape of D.K.: D.K. was an 18-year-old white female. Ex. 15, D.K. Request for Lab Examination.
- Black Ninja victims were white females between 15 and 30 years old. Ex. 7, Times-Dispatch, 12/15/84.

T.H. and M.A. fit that same demographic. Both victims are white females and were 19 and 18 years old, respectively, at the time of the crimes.

b. Manner of Approach and Movement to Secluded Area

Davis followed a pattern of approaching his victims casually on the street and striking up a conversation with them. He would then threaten them with a weapon and force them to accompany him to a secluded area where he committed the sexual assault. He also sometimes forced his victims to walk arm in arm with him to give any witnesses the impression that they were a couple. For example:

- Davis Rape of D.F.: On November 24, 1984, Davis approached 15-year-old D.F. at a bus stop in Richmond and attempted to start a conversation with her.

¹² The Department of Correction's information indicates that, on November 26, 1985, Leon Davis also was convicted and sentenced to 30 days for assault. The available records do not provide any additional information regarding this incident.

When she ignored him, he pulled a gun on her and forced her to accompany him to a garage, where he raped her. Davis Tr. II at 21-24, 29, 36-38.¹³

- Davis Rape of L.M.: On December 8, 1984, Davis approached 15-year-old L.M. outside a Richmond church with the pretext of asking her for directions. After she gave him directions and tried to walk away, he drew a knife and forced her to walk several blocks with him to the side of a house, where he raped her. As they walked, he forced L.M. to put her arm around him as though she were his girlfriend, holding his weapon across his stomach as they walked. *Id.* at 58-64, 70-72.
- Davis rape of 30-year-old Richmond victim, name unknown: On December 13, 1984, Davis struck up a conversation with a Richmond woman while she was taking a walk. He then pulled a knife on her and forced her into an alley, where he raped her. As they walked, he told the victim to put her arm around him and to pretend that she was with him. Ex. 31, Times-Dispatch, 1/31/85.
- Davis rape of L.A.N.: This victim was stabbed on October 16, 1984. Davis approached her, threatened to kill her if she screamed, and tried to take her into the woods. Davis Tr. I at 20-22.

This Davis “signature” was noted in newspaper accounts at the time of Leon Davis’ arrest. Ex. 33, *2 More Attacks Are Charged to Rape Suspect*, Times-Dispatch (Dec. 28, 1984) (noting that in several of the crimes for which Davis was indicted he “used a knife, [he] walked or jogged up to the victim . . . in the evening and talked to the woman or girl before attacking her”).

The attack on M.A. followed this pattern precisely. While M.A. was walking along the road, she was approached by a man who asked her repeatedly for the time. Haynesworth Tr. II at 12-13. After M.A. ignored him, the perpetrator stopped her by producing a weapon and threatening her with it. *Id.* at 13. He then forced her to put her arm around him and to pretend

¹³ “Davis Tr. II” denotes citations to the preliminary hearing transcript in *Commonwealth v. Davis*, in relation to the rapes of D.F. and L.M. That hearing was held on January 7, 1985 and January 24, 1985 (attached as Exhibit 45).

that she was his girlfriend, holding his weapon across his stomach as he took her to a secluded location – the back of a building and ultimately to the woods – where he raped her. *Id.* at 37-38.

Although the attack on T.H. was somewhat different, it also follows a pattern used by Davis, as demonstrated by the rape of D.K., one of the rapes for which Mr. Haynesworth was accused but now has been exonerated. While D.K. was waiting in her car in the early morning outside of the grocery store where she worked, Davis opened the car door. He threatened her with a knife and forced her to commit oral sodomy on him. Ex. 15, D.K. Request for Lab Examination; Ex. 16, Times-Dispatch, 8/25/84. T.H. likewise got in her car in the early morning to go to work when the perpetrator approached with a gun. Haynesworth Tr. III at 5-6. He tried to get her to open the door, but she claimed that the door could not open because it was broken. *Id.* at 7. He ultimately forced her to get out of the car and – similar to the manner Davis followed in the other rapes – attempted to take her to a more secluded area on the side of her home where he said he would rape her. *Id.* at 7-8. When T.H. convinced him that her neighbors would see, he tried to take her into her own home, but was thwarted. *Id.* at 7, 9.

c. Use of a Weapon

Davis was armed during his crimes and normally used a knife, but sometimes also used a gun. In the rape of D.K., in which Davis was recently implicated and Mr. Haynesworth was exonerated, Davis used a knife. Ex. 34, D.K. Warrant of Arrest, (Feb. 5, 1984). He similarly used a knife in several crimes for which he was convicted and numerous others that were attributed to him. Haynesworth Tr. I at 21; Davis Tr. I at 20 (knife used in rape); Davis Tr. II at 61 (knife used in the attack); Ex. 7, Times-Dispatch, 12/15/84.

Although Davis typically used a knife to attack his victims, Davis also was known to use a gun, as in his assault on D.F. Davis Tr. II at 21. Likewise, in the two remaining Haynesworth

convictions, M.A. was assaulted by a man with a gun who told her that he normally used a kitchen knife, and, a day and a half later, (Haynesworth Tr. II at 39), T.H. was attacked by a man carrying a gun. Haynesworth Tr. III at 6.

d. Time of Day

Davis committed his crimes either early in the morning or in the early evening.

- Davis Rape of J.S.: J.S. was attacked at approximately 7:00 a.m. Haynesworth Tr. I at 18.
- Davis Rape of D.K.: D.K. was attacked around 7:00 a.m. Ex. 7, Times-Dispatch, 12/15/1984.
- Davis Rape of D.F.: D.F. was attacked at 7:30 a.m. Davis Tr. II at 20.
- Davis Rape of L.M.: L.M. was attacked at 5:30 p.m. *Id.* at 58.
- Davis Rape of L.A.N.: L.A.N. was attacked at 8:10 p.m. Davis Tr. I at 18.

Indeed, the police told the Richmond Times-Dispatch that all of the Black Ninja attacks occurred between 6:00-8:00 a.m. or 5:30-10:00 p.m. Ex. 7, Times-Dispatch, 12/15/84. Consistent with the timing of Davis' attacks, M.A. was attacked at 8:30 p.m., Haynesworth Tr. II at 12, and T.H. was attacked at 6:30 a.m. Haynesworth Tr. III at 5-6.

e. Davis Was Talkative During the Attacks

Davis was known for being talkative during the attacks on his victims, often giving random and incorrect information about himself and asking the victims a series of questions about themselves. He also threatened to kill his victims if they did not cooperate with his demands.

- Davis Rape of D.F.: While forcing D.F. down the alley where he raped her, Davis told his victim that he wanted her to speak with a friend because he was in trouble. He also said that "he killed a bitch yesterday, didn't mean anything to him." Davis Tr. II at 24, 34.

- Davis Rape of J.S.: J.S. testified that her assailant talked through the entire rape, but she could not recall what he said. He also asked her where she lived. Haynesworth Tr. I at 23, 25-26.
- Davis Rape of L.M.: Davis asked if his victim took birth-control pills and remarked that she may get pregnant. He threatened to kill her if she screamed. Davis Tr. II at 61, 72.
- Davis rape of 30-year-old Richmond victim, name unknown: The 30-year-old victim who was raped on December 13, 1984, reported that Davis told her he was a drama student at VCU. He threatened to kill her if she called the police and said that he had friends in high places who would kill her. Ex. 31, Times-Dispatch, 1/31/85.

During the attack on M.A., the perpetrator was very talkative and asked her several questions, inquiring about her age, her sexual history, and where she went to school. Haynesworth Tr. II at 39. He spoke about a recent breakup with his girlfriend and about plans he had made for his birthday in June. *Id.* at 39-40. The perpetrator also threatened to kill M.A. if she looked at him and, as Davis did with D.F., threatened M.A. with statements about prior victims whom he supposedly hurt when they did not cooperate. *Id.* at 37

During the attack on T.H., the perpetrator asked her numerous and repeated questions about her house and who lived there, and said he would “take care” of her grandmother if she got out of bed. Haynesworth Tr. III at 6-8. He also told the victim that he “[could] teach her things [she had] never known before.” *Id.* at 8.

f. Robbery Accompanied the Sexual Assaults

Davis robbed each of his victims, usually before sexually assaulting them. Davis Tr. II at 65 (Davis stole \$2 from L.M. before sexually assaulting her); *Id.* at 23 (at start of assault on D.F., Davis told her he wanted her “bag and you”); Ex. 31, Times-Dispatch, 1/31/85 (Davis stole necklace from victim who was raped on December 13, 1984). Davis followed this same pattern

in the two cases in which it has been established that Mr. Haynesworth was wrongly accused and exonerated. Haynesworth Tr. I at 22 (Davis forced J.S. to empty her pocketbook prior to the rape); Ex. 15, D.K. Request for Lab Examination (Davis stole \$60 from D.K.).

This pattern also holds true in the two remaining Haynesworth convictions. Before sexually assaulting M.A., M.A.'s attacker asked if she had any money or jewelry and frisked her to search for it. Haynesworth Tr. II at 14. T.H.'s attacker likewise announced that he was robbing her and demanded her purse. Haynesworth Tr. III at 6.

g. Nature of the Sex Acts

Davis engaged in the same types of sex acts with his victims – typically starting by forcing the victim to commit oral sodomy and then often attempting, if not succeeding, in vaginally raping his victims. In his attack on D.F., Davis forced his victim to orally sodomize him. Davis Tr. II at 35-38. Similarly, in the case of D.K., Davis forced D.K. to orally sodomize him. Ex. 15, D.K. Request for Lab Examination. In the assault of T.H., the perpetrator told the victim that he intended to force her to orally sodomize him before he had to flee. Haynesworth Tr. III at 7.

Davis also often vaginally raped his victims after he forced them to first orally sodomize him. Davis Tr. II at 70-71 (first orally sodomized and then vaginally raped L.M.); Ex. 31, Times-Dispatch, 1/31/85 (first orally sodomized and then vaginally raped victim who was raped on December 13, 1984). M.A.'s perpetrator similarly forced her to orally sodomize him and then vaginally penetrated her. Haynesworth Tr. II at 42-44.

h. Location of Sexual Assaults

M.A. was assaulted outside the Henrico Arms Apartment Complex. This complex was located less than half a mile east of the Raleigh Forbes Memorial Church at 5100 Salem Street,

where Davis raped J.S. *See* Ex. 20, Proximity Between Leon Davis' Residence in Early 1984 and the Locations of the Crimes Charged to Mr. Haynesworth in Early 1984 ("Leon Davis Crimes Map"). T.H.'s home at 1018 Nelson Street was half a mile west of the Raleigh Forbes Church and about seven-tenths of a mile from the Henrico Arms Apartment Complex. *Id.* The exact location of the grocery store outside which D.K. was attacked is not clear based on the records available, but it was also in the East End of Richmond. *Id.* During the time of these attacks, Davis lived with his girlfriend at 1418 National Street, less than five blocks from the scene of each of these crimes. *Id.* Although many of the crimes attributed to Davis towards the end of 1984 occurred further west in Richmond in the Fan District and the Museum District, Ex. 7, Times-Dispatch, 12/15/84, by that time – September 1984 – Davis had married and moved to Parham Road in Henrico. His wife worked at 2900 Kensington Avenue in Richmond, which is in the Fan District. Ex. 35, Mot. For Subpoena Duces Tecum, *Commonwealth v. Leon Westly Davis* (Case Nos. F-85-091 through F-85-095).

C. The Joint Investigation Concludes that Mr. Haynesworth is Innocent of Each of the Offenses for Which He was Convicted and Remains Incarcerated.

As a result of this extensive and unique joint investigation, both Commonwealth's Attorneys have come to the inescapable conclusion that Mr. Haynesworth is innocent of the crimes for which he was accused and convicted, including the attacks on M.A. and T.H. *See* Ex. 36, Declaration of Michael Herring; Ex. 37, Declaration of Wade Kizer. The Attorney General agrees that, in light of the evidence now available, Mr. Haynesworth is entitled to relief under the writ. This is unusual in an innocence case, where prosecutors and defense attorneys often disagree about the character and persuasiveness of the newly discovered evidence. In this case, however, the evidence led all parties to only one conclusion: that Leon Davis committed the

crimes in question and that Thomas Haynesworth did not. As explained in their Declarations, both Commonwealth's Attorneys were persuaded by the DNA evidence proving that Mr. Haynesworth repeatedly was mistaken for Leon Davis and the distinctive Davis *modus operandi* that mirrors the attacks on M.A. and T.H.¹⁴ As the entities that prosecuted Mr. Haynesworth in both of the remaining convictions, their assessments of the strength of the case against Mr. Haynesworth at this point in time carry significant weight.

ARGUMENT

I. Mr. Haynesworth Satisfies the Requirements for a Nonbiological Writ of Actual Innocence Pursuant to Title 19.2 of the Virginia Code

Pursuant to Va. Code Ann. § 19.2-327.10 *et seq.*, the Court of Appeals of Virginia has authority to issue a writ of actual innocence based on nonbiological evidence upon a petition by a person "who was convicted of a felony upon a plea of not guilty." A petitioner under this section must allege the following:

¹⁴ In addition, the parties also collaborated to subject Mr. Haynesworth to polygraph examinations on the two remaining convictions. On September 2, 2010, Barry Colvert, a retired FBI polygrapher, administered a polygraph examination to Mr. Haynesworth in the Greensville Correctional Center, pursuant to the request of the Richmond Commonwealth's Attorney. The questions in this test were relevant only to the Richmond attempted rape of T.H. One of Mr. Haynesworth's attorneys and the Commonwealth's Attorney were present for the pre-polygraph interview but remained outside the room for the polygraph itself. Mr. Haynesworth was asked three questions during the polygraph: (1) just prior to your arrest in 1984, did you use a gun to try to rob a woman sitting in her car?; (2) just prior to your arrest in 1984, did you use a gun to try to rob a woman sitting in her car on Nelson Street in Richmond, Virginia?; and (3) just prior to your arrest in 1984, did you force a woman at gunpoint to get out of her car and go back into her house with you? He answered each question "no."

On October 26, 2010, Richard Davis of the Virginia State Police (VSP) administered a second polygraph examination to Mr. Haynesworth at the VSP divisional headquarters in Henrico pursuant to the request of the Henrico Commonwealth's Attorney. The questions in this test were relevant only to the Henrico County rape of M.A. One of Mr. Haynesworth's Attorneys and the Commonwealth's Attorney watched the pre-polygraph interview and polygraph itself on closed-circuit TV at VSP.

- (i) the crime for which the petitioner was convicted, and that such conviction was based upon a plea of not guilty;
- (ii) that the petitioner is actually innocent of the crime for which he was convicted;
- (iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence;
- (iv) that such evidence 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;
- (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered;
- (vi) 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 the entry of the final order of conviction by the court;
- (vii) the previously unknown or unavailable evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and
- (viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral.

Va. Code Ann. § 19.2-327.11(A). Notably, “[h]uman 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.”

Id. The Court of Appeals may grant the Writ “upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding that no rational trier of fact could have found sufficient proof of guilt beyond a reasonable doubt” *Id.* § 19.2-327.13. Additional

requirements for the form of the petition are provided in § 19.2-327.11(B)-(C) and Rule 5A:5(b) of the Rules of the Supreme Court of Virginia.

Mr. Haynesworth satisfies all of the requirements for the issuance of a Writ of Actual Innocence Based on Nonbiological Evidence. He has truthfully asserted all of the allegations contained in subsection A of § 19.2-327.11 in his Petitions and this accompanying brief. Moreover, as discussed *infra*, he has proven by clear and convincing evidence the allegations contained in clauses (iv) through (viii).¹⁵ If this previously unknown and unavailable evidence had been available to Mr. Haynesworth at the time of his convictions, it would have established the following facts:

- Several victims of sexual assaults have mistakenly identified Mr. Haynesworth for Leon Davis;
- DNA evidence conclusively identified Davis as the perpetrator of several crimes for which Mr. Haynesworth was accused and wrongly identified by the victims as the perpetrator; and
- The crimes for which Mr. Haynesworth remains convicted match the same *modus operandi* to crimes known to have been committed by Davis.

Presented with these facts, and considering that all of Mr. Haynesworth's convictions were based primarily – if not exclusively – on victim identifications, no rational trier of fact could find Mr. Haynesworth guilty beyond a reasonable doubt.

¹⁵ Clear and convincing evidence is 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. It 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.” *Smith v. Commonwealth*, 694 S.E.2d 578, 581 (Va. 2010) (quoting *Commonwealth v. Allen*, 609 S.E.2d 4, 13 (Va. 2005)).

A. The Evidence Was Previously Unknown to Mr. Haynesworth at the Time the Conviction became Final, and Could Not Have Been Discovered Before the Expiration of 21 Days Following the Entry of the Final Order of Conviction

The evidence in question was not known to Mr. Haynesworth or his trial attorney at the time Mr. Haynesworth's convictions became final, nor could it have been discovered or obtained before the expiration of 21 days following the entry of the final order of conviction by the Court. Therefore, Mr. Haynesworth satisfies § 19.2-327.11(A)(iv) and (vi).

Mr. Haynesworth was convicted of his final offense on October 11, 1984, two months before Leon Davis was arrested on December 19 of that same year. The first newspaper article about the Black Ninja's serial rapes was not written until December 14, 1984. Even more significantly, as described above, Mr. Haynesworth did not discover – and could not have discovered – biological evidence that Leon Davis was the real perpetrator of at least one of the crimes for which he was convicted until March and April of 2009, the dates that DFS issued Certificates of Analysis in the J.S. case. Moreover, although that evidence was sufficient to obtain relief from his conviction in the J.S. case, it was not alone enough to obtain relief for his convictions for the rapes of T.H. and M.A. The J.S. results did, however, open a new line of investigation into his remaining convictions, an investigation that the parties have jointly conducted since that time. The DNA test results in the D.K. case, which showed that a second victim had misidentified Mr. Haynesworth as Leon Davis, were first reported by DFS on June 17, 2010. The parties also have been diligently collecting and examining records and evidence pertaining to the Davis crimes on an ongoing basis, leading to the new evidence that the rapes of T.H. and M.A. fit squarely within Davis' known *modus operandi*.¹⁶

¹⁶ These allegations also satisfy § 19.2-327.11(A)(v).

All of this evidence became known to Mr. Haynesworth and his counsel long after his trial and 21 days thereafter, and it could not have been discovered at that time with due diligence. The biological evidence from the J.S. trial, which launched the investigation into Mr. Haynesworth's convictions and provided the first connection to Leon Davis, was not subjected to STRDNA testing in 1984 because STR testing was not available at the DFS at that time. *See* <http://www.dna.gov/basics/analysishistory>.¹⁷ Even the early rudimentary forms of DNA testing – which were far less discriminating and required a large amount of DNA to obtain a result – were not admissible until several years after Mr. Haynesworth's 1984 convictions. *Spencer v. Commonwealth*, 238 Va. 275, 289-90, 384 S.E.2d 775, 783 (Va. 1989) (first case in which Virginia Supreme court recognized that “DNA testing is a reliable scientific technique”). DFS did not begin to utilize STR DNA testing until 1998, over a decade later. George C. Li & Linda Johnston, [Abstract of] *Observations Associated with CODIS Hits Obtained by Searching a Large DNA Databank* (Oct. 2000), available at <http://www.promega.com/geneticidproc/ussymp11proc/content/li.pdf> (last visited Feb. 2, 2011). In addition, the existence of DNA evidence in the J.S. case was not discovered until sometime after December 15, 2005, when Governor Mark R. Warner ordered a review of all 1973 to 1988 DFS case files for biological evidence suitable for DNA testing.

Without the DNA test results in the J.S. case, Mr. Haynesworth could not have discovered sufficient evidence to satisfy the requirements of the Writ of Actual Innocence. In addition to the timing discussed above, even if Mr. Haynesworth had learned of the Black Ninja rapes, without evidence conclusively linking Leon Davis to at least one of the crimes with which Mr. Haynesworth was charged, it would have been no more than mere speculation to assert that

¹⁷ *See* *infra* at n. 9.

the victims in the Haynesworth cases might have mistaken Mr. Haynesworth for Leon Davis. The link was not sufficiently established until DNA testing proved that multiple victims had misidentified Mr. Haynesworth in crimes that Leon Davis committed. Only then was there a compelling reason to investigate the Davis crimes, and only then was there compelling proof that Leon Davis, not Mr. Haynesworth, had committed these crimes.

Sections 19.2-327.11(A)(iv) and (vi) are intended to ensure that defendants are not able to obtain relief when they knew but could not confirm information, chose not to present evidence for strategic reasons, or simply failed to follow up on information that they could have investigated before or during their trials. *In re Bowling v. Commonwealth*, 36 Va. App. 50, 56-57, 615 S.E.2d 489, 492 (Va. Ct. App. 2005) (finding that the alibi witness presented by the defendant did not satisfy these two elements because he had the name of the alibi witness – who was in the phone book – at the time of trial but did not attempt to locate the witness). The new evidence presented by Mr. Haynesworth does not fit into any of those categories. He therefore satisfies both prongs of the statute.

B. The Previously Unknown or Unavailable Evidence Is Material and When Considered with All of the Other Evidence in the Current Record, Will Prove that No Rational Trier of Fact Could Have Found Proof of Guilt Beyond a Reasonable Doubt

To be material, the evidence in question must be: (1) admissible; and (2) evidence that would have a significant impact on the results at a new trial. *Carpitcher v. Commonwealth*, 273 Va. 335, 343-44, 641 S.E.2d 486, 491 (Va. 2007). Here, the DNA and modus operandi evidence on which Mr. Haynesworth's writes are based is plainly admissible. It also is undeniably material: both cases were already difficult for the jurors to resolve, and the new evidence thoroughly undermines the reliability of the government's evidence at trial, while also providing an alternative theory – that Leon Davis is the true perpetrator – that is not only compelling but

also better matches the circumstances of the crimes. The new evidence therefore would not only be material because it would have a significant impact on the results at a new trial, but also would cast such doubt on Mr. Haynesworth's guilt such that no reasonable juror could find proof of guilt beyond a reasonable doubt. Mr. Haynesworth thus satisfies § 19.2-327.11(vii).

1. *The New Evidence Is Admissible*

There is no question that the evidence at issue would be admissible if Mr. Haynesworth were to be tried again for these offenses. Evidence of third party guilt or "other crimes" evidence may be used by a defendant to negate his guilt if it tends to show that a particular third party committed the crime charged. "[W]here there is a trend of facts and circumstances tending clearly to point out some other person as the guilty party, the [defendant] may introduce any legal evidence which is available tending to prove that another person committed the crime with which he is charged." *Karnes v. Commonwealth*, 125 Va. 758, 99 S.E. 562, 565 (Va. 1919); *Elliott v. Commonwealth*, 267 Va. 396, 424, 593 S.E.2d 270, 287 (Va. 2004) (stating that evidence of third-party guilt is admissible if it "tends clearly to point to some other person as the guilty party").

The evidence of third-party guilt proffered by Mr. Haynesworth would have "tended clearly to point" to Leon Davis as the guilty party. The DNA evidence, victim misidentification evidence, and *modus operandi* evidence all would establish a "trend of facts and circumstances" pointing to Leon Davis as the guilty party. *Id.* Indeed, that evidence would provide highly persuasive evidence that Leon Davis committed the crimes for which Mr. Haynesworth was convicted because it would establish that Leon Davis had committed similar crimes in the same area during the same time period and that other victims had confidently – but mistakenly – identified Mr. Haynesworth as the perpetrator of crimes actually committed by Leon Davis. This

evidence is far more compelling than the recent third-party death threats that the Virginia Supreme Court found admissible in *Karnes*. *Id.*

Other courts to consider the admissibility of evidence of third-party guilt in cases similar to Mr. Haynesworth's have held that such evidence is material, relevant, and admissible. *See, e.g., United States v. Stevens*, 935 F.2d 1380, 1401-05 (3d Cir. 1991) (collecting cases) (evidence that a black victim identified a black perpetrator who was not the defendant in a similar crime was admissible because it had "a tendency to negate [the defendant's] guilt" where the crimes were sufficiently similar and where the identification in the instant case was cross-racial); *Commonwealth v. Murphy*, 185 N.E. 486 (Mass. 1933) (trial court abused its discretion in refusing to admit evidence that two victims of other similar crimes said the defendant looked somewhat like the perpetrator and evidence that the victim of a third similar crime admitted to misidentifying the defendant as the perpetrator); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965) (trial court erred in refusing to admit evidence that the defendant had been misidentified twice before as the perpetrator of virtually identical offenses); *State v. Williams*, 518 A.2d 234 (N.J. 1986) (trial court erred in excluding defendant's evidence that a third party committed two similar crimes in the same area and during the same time period as the crime for which he was accused).¹⁸

¹⁸ *See also United States v. Young*, 248 F.3d 260, 271 (4th Cir. 2001) (stating that the Due Process Clause requires the admission of evidence of third party guilt – even if it is otherwise excludable under state evidentiary rules – “where the evidence is highly relevant to a critical issue in the case, and sufficient indicia of reliability exist”); *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973) (holding that the exclusion of evidence that another person had confessed to the crime denied the defendant's due process rights); *State v. Bock*, 39 N.W.2d 887, 892 (Minn. 1949) (stating that the defendant should “have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime charged against him”); *Jackson v. State*, 551 S.W.2d 351, 352 (Tex. Crim. App. 1977) (holding that evidence that one witness had renounced

None of the cases involved evidence as compelling as the evidence Mr. Haynesworth would have sought to introduce. Mr. Haynesworth's compelling evidence shows that Leon Davis was the true perpetrator and that victims consistently mistakenly identified Mr. Haynesworth as Leon Davis. Accordingly, the evidence is material to Mr. Haynesworth's convictions.

2. *The New Evidence Would Have a Significant Impact on the Results, and No Rational Trier of Fact Could Find Proof of Guilt Beyond a Reasonable Doubt*

To be material, the new evidence underlying the Writ of Actual Innocence must not only be admissible but also must be such as would have a significant impact on the outcome of the trial. *Carpitcher*, 641 S.E.2d at 491. Moreover, § 19.2-327.11(vii) requires that the new evidence, when considered with all of the other evidence in the current record, prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The new evidence underlying both Petitions indisputably meets these standards.

In each of the cases, the key evidence against Mr. Haynesworth was the victim's identification of him as the perpetrator. Both of these identifications were known to be problematic at the time of trial. Indeed, although both victims expressed certainty in their identifications – as did J.S. and D.K., in whose cases DNA testing has now proven that Leon Davis was the actual perpetrator – Mr. Haynesworth is only 5'6 ½", several inches shorter than the perpetrator as described by the victims.¹⁹ In T.H.'s case, her identification was the sole

his identification of the defendant in a similar robbery and rape was "highly relevant" and critical to the defense of misidentification); *Renfro v. State*, 822 S.W.2d 757 (Tex. App. 1992) (holding that evidence that the victims of two similar offenses initially identified the defendant as the perpetrator from his picture, but later repudiated their identifications, was relevant to the defendant's mistaken identify defense).

¹⁹ It is also worth noting that mistaken eyewitness identification is one of the primary causes of wrongful convictions. Of the 265 post-conviction DNA exonerations to date, the vast majority – seventy-five percent – were based on eyewitness identifications that DNA testing later proved to

evidence used to convict Mr. Haynesworth. In M.A.'s case, the only evidence additional to the victim's identification were: (1) the victim's identification of a toy gun found in Mr. Haynesworth's room that she testified looked similar to the perpetrator's gun, although she only saw the barrel of the gun during the assault; and (2) the serology results showing that Thomas Haynesworth and approximately one-third of the population – including Leon Davis – have an

be erroneous. *Eyewitness Misidentification*, available at <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Feb. 1, 2011); *see also* Inst. Of Justice, Office of Justice Programs, U.S. Dep't. Just., Pub. No. 161258, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, at 35-37 (June 1996), available at <http://www.ncjrs.gov/pdffiles/dnaev.pdf> (last visited Feb. 1, 2011) (Kirk Bloodsworth was convicted of rape-murder in Maryland based on five eyewitness identifications that DNA testing later proved were erroneous). Despite its apparent force, eyewitness identification can be extraordinarily unreliable and, as a consequence, is far from conclusive evidence of guilt. Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Hum. Behav.* 1, 3 (1988) (explaining that “eyewitness testimony is among the least reliable forms of evidence and yet persuasive to juries”). This is especially true where the eyewitness is the victim of a traumatic crime. Although conventional wisdom suggests that stress enhances a witness' ability to perceive and remember a perpetrator's physical characteristics, *see, e.g., Commonwealth v. Roddy*, 184 Pa. 274, 290 (Pa. 1898) (stating that, in an instance where assailants tied up a witness and his wife and threatened to shoot the witness, “every peculiarity of each of [the assailants] must have been literally burned into the memory of both [the witness] and his wife”), scientific studies show that the opposite is true. In fact, “[a]ll other factors being equal, a witness in a high stress situation is more likely to be an unreliable witness than one not under such stress.” Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 *Am. Crim. L. Rev.* 1013, 1023 (1995). Moreover, eyewitness identifications are particularly likely to be unreliable where, as here, they are cross-racial. Otto H. MacLin, et al., *Race, Arousal, Attention, Exposure and Delay: An Examination of Factors Moderating Face Recognition*, 7 *Psych. Pub. Pol. & Law* 134, 134 (2001) (noting that in DNA exonerations where a conviction was the result of misidentification, the victim was white in 69% of these cases and the exonerated individual was black in 59%, indicating “that a proportionally greater number of misidentifications occurred across racial lines”). In fact, the problem of mistaken cross-racial eyewitness identifications has become so acute that some state supreme courts have instituted rules for special jury instructions about the fallibility of cross-racial eyewitness identifications. *See, e.g., State v. Cromedy*, 158 N.J. 112, 132 (1999) (reversing conviction on basis of trial court's failure to issue a jury instruction on the unreliable nature of cross-racial identifications and holding that “there is an impressive consistency in results showing that problems exist with cross-racial eyewitness identification”) (citation omitted).

ABO blood type consistent with the fluids collected in the victim's rape kit. Even without the new evidence that has now been developed, the evidence used to convict Mr. Haynesworth was not strong and made for difficult decisions for the juries. The jury in the T.H. case indicated on three occasions that it could not come to a decision, and the Commonwealth's Attorney in the M.A. case publicly expressed surprise that the jury did not hang.

Presented with the new evidence, there is no question that Mr. Haynesworth would not be convicted. The jury would now learn that Leon Davis – a man who looked like Mr. Haynesworth, who also had type O blood, lived in the area during the time period in question, and who spent the rest of the year committing similar rapes – committed two of the crimes with which Mr. Haynesworth was charged. The jury would learn that Leon Davis is about three inches taller than Mr. Haynesworth and thus more closely fits the description provided by both victims than Mr. Haynesworth. And the jury would learn that DNA testing has established to a scientific certainty that multiple victims mistakenly identified Mr. Haynesworth as the perpetrator of crimes that Leon Davis committed.

This evidence is far more powerful than a recantation or other evidence that simply undercuts a key witness's testimony. *See Carpitcher*, 641 S.E.2d at 492 (explaining that the recantation evidence presented did not meet this prong of the statute because it simply undermined the trial testimony). Indeed, in this case, the new evidence points clearly to another perpetrator, who is not Mr. Haynesworth. The facts both seriously call into question the accuracy of the eyewitness evidence that was so central to the government's cases and provide a far more logical answer to the question of who committed these crimes: the man who better fits the victim's descriptions, committed two of the crimes with which Mr. Haynesworth was charged, and spent several months committing exactly these types of crimes. When faced with

shaky eyewitness identifications, proof that two similar mistakes have occurred before, and evidence of a far more likely culprit, no reasonable finder of fact could find beyond a reasonable doubt that Mr. Haynesworth committed the crimes in question.

3. *The Previously Unknown or Unavailable Evidence Is Not Merely Cumulative, Corroborative, or Collateral*

The new evidence is not merely cumulative, corroborative, or collateral. This element of the statute is intended to ensure that defendants are not re-litigating issues already raised at trial. *See Moore v. Commonwealth*, 53 Va. App. 334, 347, 671 S.E.2d 429, 435 (Va. Ct. App. 2009) (finding that where the victim's credibility was tested at trial by varying accounts and recantations, an additional recantation "would be merely cumulative of evidence already in the record"). While the new evidence in this case certainly calls into question the identification evidence presented by the Commonwealth at trial, it is not simply more evidence attacking either the victims or the circumstances and specifics of those identifications. Unlike the recantation at issue in *Moore*, the evidence at issue here is a completely new type of evidence that would have allowed Mr. Haynesworth to present a new theory of the case.

At his trials, Mr. Haynesworth argued that he had been misidentified as the perpetrator of the crimes in question. This theory primarily was advanced through the cross-examination of the victims and police officers who worked the cases, which focused on the significant height difference between Mr. Haynesworth, the victims' descriptions, and other discrepancies. He did not, however, have an alternative theory about who actually had committed the crime, evidence that he actually had been misidentified for crimes that the individual in question had committed, or evidence that that individual's *modus operandi* matched the *modus operandi* of the perpetrator in the crimes with which Mr. Haynesworth was charged. This is precisely the evidence he now presents, and it unquestionably is not a belated attempt to bolster other evidence that Mr.

Haynesworth attempted to proffer in his original trials; it is entirely new evidence that mirrors nothing that the jury heard at the original trials. It therefore satisfies the requirements of element (viii).

CONCLUSION

Mr. Haynesworth's petition is based on non-biological evidence that is bolstered by biological evidence. The evidence is compelling and has been found persuasive by each of the prosecuting Commonwealth's Attorneys, as well as the Attorney General. If, as the Virginia legislature plainly contemplated, there is ever to be a case for which a Writ of Actual Innocence is granted based on non-biological evidence, this is it.

This case is a unique and egregious miscarriage of justice that is nearly unprecedented. Nationally, there have been only three cases (out of 265) since the advent of post-conviction DNA testing in 1989 that resemble Mr. Haynesworth's in that they involve multiple wrongful convictions of the same person; none of them have been in Virginia.²⁰ One of his wrongful convictions has been reversed. Justice will not be served, however, until each of the wrongful convictions is reversed, his convictions vacated, and he is released from prison after serving nearly three decades there for someone else's crimes. For all of the reasons herein stated, Mr. Haynesworth respectfully requests this Court to issue Nonbiological Writs of Actual Innocence, vacate his remaining convictions, and correct the grave injustice that has been committed.

²⁰ An examination of the case profiles of all 265 DNA exonerations on The Innocence Project's website reveals only three cases in which the defendant was convicted of multiple crimes, DNA evidence was not available for all of them, and yet the defendant was wholly exonerated through a combination biological and non-biological evidence: Lonnie Erby in Missouri, *available at* The Innocence Project: Know the Cases, http://www.innocenceproject.org/Content/Lonnie_Erby.php (last visited Feb. 1, 2011); Steven Phillips of Texas, *available at* The Innocence Project: Know the Cases, http://www.innocenceproject.org/Content/Steven_Phillips.php (last visited Feb. 1, 2011); and Jerry Frank Townsend of Florida, *available at* The Innocence Project: Know the

Cases, http://www.innocenceproject.org/Content/Jerry_Frank_Townsend.php (last visited Feb. 1, 2011).

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VERIFICATION OATH

I hereby swear or affirm that the foregoing is true and correct to the best of my knowledge, information and belief.

Thomas Haynesworth
THOMAS EDWARD HAYNESWORTH
Thomas Edward Haynesworth

Sworn to and subscribed before me

this 31 day of January 2011

Lynn Driver

Notary Public

My Commission Expires: March 31, 2014

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