

No. 24-6840

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

JUSTIN MICHAEL WOLFE,

Petitioner-Appellant,

v.

CHADWICK DOTSON, DIRECTOR,  
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

On Appeal from the United States District Court  
for the Eastern District of Virginia

**BRIEF OF RESPONDENT-APPELLEE**

JASON S. MIYARES  
*Attorney General*

STEPHEN G. POPPS  
*Chief Deputy Attorney General*

THEOPHANI K. STAMOS  
*Deputy Attorney General*

DONALD E. JEFFREY, III  
*Senior Assistant Attorney General*

LIAM A. CURRY  
(VSB No. 87438)  
*Assistant Attorney General*  
OagCriminalLitigation@oag.state.va.us  
lcurry@oag.state.va.us

Office of the Attorney General  
202 North Ninth Street  
Richmond, Virginia 23219  
(804) 786-2071 – Telephone  
(804) 371-0151 – Facsimile  
*Counsel for Respondent-Appellee*

December 6, 2024

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 24-6840Caption: Wolfe v. Dotson

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chadwick Dotson, Director Virginia Department of Corrections

(name of party/amicus)

who is \_\_\_\_\_ appellee \_\_\_\_\_, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?  YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim?  YES  NO  
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Liam A. Curry

Date: September 10, 2024

Counsel for: Appellee

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	v
INTRODUCTION .....	1
ISSUES PRESENTED.....	2
STATEMENT OF THE CASE AND RELEVANT FACTS .....	2
SUMMARY OF ARGUMENT .....	11
ARGUMENT .....	13
I. Standard of Review and Applicable Law.....	13
II. Wolfe’s arguments that the district court applied the wrong standard are without merit because the district court found that Barber’s 2023 declaration was not “newly discovered” or “newly presented.” .....	15
III. This Court should reject Wolfe’s argument that Barber’s 2023 declaration contains new evidence of alleged prosecutorial misconduct because the actions of prosecutors from September 2012 were known to Wolfe well before he pleaded guilty in 2016. ....	21
IV. Barber’s most recent affidavit was also inherently untrustworthy and unpersuasive, and therefore falls outside of the scope of the type of “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence” that is required to support a <i>Schlup</i> actual innocence gateway claim.....	27
V. Given that Wolfe voluntarily confessed to his role in killing Petrole, the proffered evidence was incapable of showing that it is more likely than not that no reasonable juror would have convicted Wolfe.....	29
CONCLUSION .....	36

STATEMENT REGARDING ORAL ARGUMENT .....37

CERTIFICATE OF COMPLIANCE.....37

CERTIFICATE OF SERVICE .....38

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>Blackledge v. Allison</i> , 431 U.S. 63 (1977).....	35
<i>Bousley v. United States</i> , 523 U.S. 614 (1998).....	31
<i>Brady v. Maryland</i> , 513 U.S. 298 (1995).....	5
<i>Carter v. Commonwealth of Va.</i> , No. 3:09cv121, 2010 U.S. Dist. LEXIS 5973 (E.D. Va. Jan. 26, 2010).....	34
<i>Chestang v. Sisto</i> , 522 Fed. Appx. 389 (9th Cir. 2013) .....	30
<i>Clark v. Clarke</i> , No. 7:14cv00042, 2017 U.S. Dist. LEXIS 29054 (W.D. Va. Mar. 1, 2017).....	30
<i>Class v. United States</i> , 583 U.S. 174 (2018).....	9
<i>Cleveland v. Bradshaw</i> , 693 F.3d 626 (6th Cir. 2012).....	23, 24, 25
<i>Copeland v. Clarke</i> , No. 2:17cv00093, 2018 U.S. Dist. LEXIS 166728 (E.D. Va. July 3, 2018).....	30
<i>Dobbert v. Wainwright</i> , 468 U.S. 1231, (1984).....	27
<i>Giglio v. United States</i> , 373 U.S. 83 (1963).....	5

<i>Gomez v. Jaimet</i> , 350 F.3d 673 (7th Cir. 2003).....	16
<i>Haas v. Commonwealth</i> , 283 Va. 284, 721 S.E.2d 479 (2012).....	27
<i>House v. Bell</i> , 547 U.S. 518 (2006).....	13, 14, 15, 33
<i>Kuhlmann v. Wilson</i> , 477 U.S. 436 (1986).....	20
<i>Lee v. Johnson</i> , No. 2:10cv122, 2010 U.S. Dist. LEXIS 106731 (E.D. Va. July 28, 2010) .....	16
<i>McQuiggin v. Perkins</i> , 569 US. 383 (2013).....	13, 14, 15, 27
<i>Osborne v. Purkett</i> , 411 F.3d 911 (8th Cir. 2005).....	16
<i>Pacific Ins. Co. v. Am. Nat’l Fire Ins. Co.</i> , 148 F.3d 396 (4th Cir. 1998).....	22
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995).....	passim
<i>Smith v. Warden</i> , No. 7:17cv00072, 2018 U.S. Dist. LEXIS 106192 (W.D. Va. June 26, 2018).....	30
<i>Teleguz v. Pearson</i> , 689 F.3d 322 (4th Cir. 2012).....	passim
<i>United States v. Johnson</i> , 487 F.2d 1278 (4th Cir. 1973).....	34
<i>United States v. Lighty</i> , 616 F.3d 321 (4th Cir. 2010).....	34

*Wilson v. Greene*,  
 155 F.3d 396 (4th Cir. 1998)..... 13, 30

*Wolfe v. Clarke*,  
 691 F.3d 410 (4th Cir. 2012).....6

*Wolfe v. Clarke*,  
 718 F.3d 277 (4th Cir. 2013)..... 7, 23

*Wolfe v. Clarke*,  
 819 F. Supp. 2d 538 (E.D. Va. 2011) .....6

*Wolfe v. Commonwealth*,  
 576 S.E.2d 471 (Va. 2003).....2, 4

*Wolfe v. Johnson*,  
 565 F.3d 140 (4th Cir. 2009)..... 5, 31

*Wolfe v. Johnson*,  
 No. 2:05cv432, 2010 U.S. Dist. LEXIS 144840 (E.D. Va. Feb. 4,  
 2010).....5

*Wolfe v. True*,  
 545 U.S. 1153 (2005).....5

*Wolfe v. Virginia*,  
 139 S. Ct. 790 (2019) .....9

*Wolfe v. Virginia*,  
 141 S. Ct. 2794 (2021).....9

*Wolfe v. Virginia*,  
 540 U.S. 1019 (2003).....4

*Wolfe v. Warden*,  
 Record No. 040125 (Va. Mar. 10, 2005).....5

**STATUTES**

28 U.S.C. § 2244(d)(1).....13

28 U.S.C. § 2254.....9

**RULES**

Rule 5A:18, Rules of the Supreme Court of Virginia .....9

Rule 59(e), Federal Rules of Civil Procedure.....22

**CONSTITUTIONAL PROVISIONS**

Fifth Amendment, U.S. Constitution ..... 23, 26

## INTRODUCTION

This Court should find that Wolfe cannot overcome his procedural default through the actual innocence gateway of *Schlup v. Delo*, 513 U.S. 298 (1995), because he failed to present the district court with new reliable evidence of his innocence. Specifically, Owen Barber's 2023 declaration is not "new" evidence of his innocence under *Schlup* because the substance of that declaration, Barber's recantation of his testimony from Wolfe's now vacated first criminal trial, was presented to the trial court at Wolfe's guilty plea hearing in 2016.

In addition, Barber's various accounts of the truth of Wolfe's involvement in the victim's death render his most recent affidavit inherently untrustworthy and unpersuasive. As such, Barber's 2023 declaration falls outside of the scope of the type of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" that is required to support a *Schlup* actual innocence gateway claim. *Schlup*, 513 U.S. at 324.

And finally, Wolfe's actual innocence argument is also fundamentally undercut by the fact that he presented a voluntarily drafted confession to his role in orchestrating the robbery and murder as Defense Exhibit 2 at his guilty plea hearing in 2016. Wolfe has never recanted or disavowed the statements contained in that letter, which provided overwhelming and largely corroborated evidence of his guilt. Nor has he addressed his handwritten confession in his opening brief, let alone

attempted to explain how he can establish actual innocence after having confessed his own guilt. For these reasons, the Director asks this Court to affirm the judgment below.

### **ISSUES PRESENTED**

- I. What is the standard for establishing whether evidence is “new” for purposes of satisfying the actual innocence gateway under *Schlup v. Delo*, 513 U.S. 298 (1995)?
- II. Whether Petitioner’s evidentiary showing satisfies the “new, reliable” evidence standard under *Schlup*.

### **STATEMENT OF THE CASE AND RELEVANT FACTS**

#### ***Wolfe’s First Trial, Direct Appeal, and State Habeas Corpus Review***

On January 22, 2002, a jury convicted Wolfe in the Circuit Court of Prince William County, Virginia, of hiring Owen Barber to murder Daniel Robert Petrole, Jr., illegal use of a firearm, and conspiracy to distribute marijuana. The jury sentenced Wolfe to death, finding both the future dangerousness and vileness aggravating circumstances, and the Supreme Court of Virginia unanimously affirmed. *Wolfe v. Commonwealth*, 576 S.E.2d 471 (Va. 2003).

In its published opinion affirming Wolfe’s convictions, the Supreme Court of Virginia made findings detailing the evidence presented in the 2002 trial, including the following:

[Wolfe] was a major drug dealer in Northern Virginia. He regularly sold high-grade marijuana, referred to as “kind bud” or “chronic,” for a price between \$4,200 and \$5,000 per pound. His marijuana supplier

was Daniel Robert Petrole, Jr., who began to supply marijuana to defendant in November 2000, seven months before he was murdered.

\* \* \*

Owen M. Barber, IV, and the defendant had been “good friends” for six or seven years. Barber, who was also a drug dealer, purchased low-quality marijuana, referred to as “shwag.” Occasionally, he sold pounds of marijuana to the defendant. The defendant asked Barber if he “wanted to get [the defendant’s] chronic man.” The defendant stated that Barber must not merely rob his “chronic man,” but that Barber must shoot him because Petrole knew too many people. . . .

\* \* \*

During the next several days, Barber and the defendant continued to discuss their plan to kill Petrole. On March 15, 2001, the defendant placed a telephone call to Barber, who was with a friend, Robert H. Martin, Jr. The defendant directed Barber to meet the defendant at a restaurant in Fairfax County. Barber and Martin went to the restaurant, and Barber and the defendant spoke alone in a parking lot. The defendant informed Barber that the defendant had spoken to Petrole, and the defendant planned to meet him that night. Petrole had agreed to bring a large quantity of high-grade marijuana to an apartment that the defendant shared with his girlfriend, Regina A. Zuener.

The defendant and Barber agreed that Barber would follow Petrole once he left Zuener’s apartment. Barber returned to the car where Martin had waited, and they went to Barber’s apartment. About an hour later, the defendant, using his cellular telephone, called Barber to inform him that Petrole was “on his way” to Zuener’s apartment. Barber called the defendant and inquired whether Petrole had arrived, and the defendant informed Barber that Petrole had not.

\* \* \*

As Petrole began to drive his car, unbeknownst to him, Barber followed Petrole as he drove through Fairfax County. Petrole parked his car in front of a house in Fairfax County and went inside. Barber, using his cellular telephone, called the defendant and informed him that Petrole

“went into some house in Fairfax City.” Later, Petrole got back in his car and drove off as Barber continued to follow him. While following him, Barber temporarily lost sight of Petrole’s car, but managed to locate it and continued to follow him. Petrole drove his car to a neighborhood where he had recently purchased a townhouse and parked his car. Barber stopped the car he was driving and “jumped out.” Barber stated, “I shot him across through the passenger side window and the[n] jumped back in the car and turned around and then left out with . . . my lights off.” Barber shot Petrole 10 times, and he was five or six feet from the victim when he discharged the pistol. Barber damaged Martin’s car during the murder. As Barber sped away, he tossed the pistol and gloves he used out of the car window.

\* \* \*

After he had committed the murder, Barber returned to his apartment and told Martin that he had killed Petrole. Barber used his cellular telephone to talk with the defendant, who was at the nightclub.

\* \* \*

In return for his act of killing Petrole, the defendant told Barber that he did not have to pay for four pounds of marijuana that the defendant had previously sold him. Additionally, the defendant gave Barber a half pound of “chronic” marijuana, forgave Barber’s \$3,000 debt for past drug transactions, and promised to pay Barber \$10,000 in cash.

Martin testified at trial, and his testimony corroborated Barber’s version of the events on the night of the murder. . . .

\* \* \*

[Barber’s girlfriend Jennifer Pascquirello] testified that Barber relayed to her the facts relating to the murder of Petrole. Her testimony concerning these facts was consistent with Barber’s trial testimony.

*Id.* at 474-79. The United States Supreme Court denied certiorari review. *Wolfe v. Virginia*, 540 U.S. 1019 (2003). The Supreme Court of Virginia dismissed Wolfe’s

petition for a writ of habeas corpus. *Wolfe v. Warden*, Record No. 040125 (Va. Mar. 10, 2005). The United States Supreme Court again denied certiorari review and a stay of execution regarding the state habeas judgment. *Wolfe v. True*, 545 U.S. 1153 (2005).

### ***Wolfe's Federal Habeas Corpus Proceedings***

Wolfe obtained a stay of execution from the United States District Court for the Eastern District of Virginia and filed a habeas petition. The district court dismissed all the claims, and this Court affirmed in part and vacated in part. *Wolfe v. Johnson*, 565 F.3d 140, 171 (4th Cir. 2009). The Court remanded the matter to determine whether Wolfe's gateway innocence claim under *Schlup* excused his defaulted claims. Wolfe's claims primarily relied on Barber's recantation, in which he claimed that Wolfe was not involved in the murder and robbery of Petrole. JA1161-1174.

On remand, the district court found on the pleadings that Wolfe had satisfied *Schlup* and ordered an evidentiary hearing on the defaulted claims. *Wolfe v. Johnson*, No. 2:05cv432, 2010 U.S. Dist. LEXIS 144840 (E.D. Va. Feb. 4, 2010). At the hearing, Barber again recanted, denying that Wolfe had anything to do with Petrole's murder. The district court credited that last story and ruled that the prosecution had violated Wolfe's rights under *Brady v. Maryland*, 513 U.S. 298 (1995) and *Giglio v. United States*, 373 U.S. 83 (1963). *Wolfe v. Clarke*, 819 F.

Supp. 2d 538 (E.D. Va. 2011). On August 30, 2011, the district court vacated all Wolfe's convictions and ordered that Wolfe be retried within 120 days or released unconditionally. *Wolfe v. Clarke*, 819 F. Supp. 2d 574 (E.D. Va. 2011).

The Director filed a second notice of appeal and a motion to stay the habeas judgment pending appeal. Wolfe filed an opposition and a motion for immediate release. The district court held an evidentiary hearing on the motions, granted the Director's motion to stay, and denied Wolfe's motion for release. *Id.* at 588-89. This Court affirmed the district court's habeas judgment, which permitted the Commonwealth "to retry Wolfe on the murder, firearm, and drug conspiracy charges." *Wolfe v. Clarke*, 691 F.3d 410, 426 (4th Cir. 2012).

### ***Remand for Retrial in State Court***

After the case returned to the state trial court, the original prosecutor submitted a notification of disqualification, in the form required by statute, and the trial court appointed a new prosecutor from another jurisdiction. The following month, the special prosecutor returned additional indictments. JA1337, 1339. The new indictments included charges that the special prosecutor was prepared to prove at trial "without Owen Barber's prior testimony," who had by that point given several conflicting statements. JA1339.

On November 16, 2012, Wolfe filed a motion in the district court asking for enforcement of the habeas judgment, arguing that he had not been provided a timely

retrial. *Wolfe v. Clarke*, 718 F.3d 277, 283 (4th Cir. 2013). On December 24, 2012, the district court entered an injunction requiring Wolfe’s release from all criminal proceedings, both on the charges it previously had ordered retried and of any future prosecution of Wolfe for “any other charges stemming from [the] death of Danny Petrole which requires the testimony of Owen Barber in any form.” *Id.* at 284. This Court stayed the injunction on January 3, 2013. *Id.* It ultimately vacated the injunction, “without prejudice to a retrial of the original charges against Wolfe, and it shall not preclude the conduct of such other and further proceedings in the state or federal courts as may be appropriate.” *Id.* at 291.

### ***Wolfe Pleads Guilty in State Court and Subsequently Appeals***

Before his re-trial, however, Wolfe pleaded guilty to three charges: first-degree murder; use of a firearm in the commission of a felony; and conspiracy to distribute marijuana. After a plea colloquy and stipulation of the evidence, the state trial court accepted Wolfe’s guilty pleas, concluding that the pleas were knowing and voluntary and that Wolfe was guilty of the charges. JA1424. As part of the Commonwealth’s proffer of relevant evidence, the prosecution presented the trier of fact with evidence that Barber had recanted his trial testimony. JA1406-1408. After hearing the Commonwealth’s proffered evidence, Wolfe admitted on the record that he was responsible for Petrole’s murder. JA1382-1427. Wolfe also agreed “that the evidence proffered by the Commonwealth as well as the evidence that they would

produce at trial” was sufficient to find him guilty of the three offenses to which he pleaded guilty. JA1414.

When given the opportunity to present evidence relevant to his guilty pleas, Wolfe submitted a signed, handwritten letter, written at his attorney’s request. Wolfe’s counsel did not claim that the letter was a condition of the plea, instead telling the trial court that it had been requested by the victim’s family and that Wolfe wanted them “to hear what happened in his own words.” JA1416. The letter was admitted as Defense Exhibit 2, and Wolfe’s attorney then read it in full into the record, and the trial court considered it as proffered evidence of Wolfe’s guilt. JA1416-1421.

The state trial court sentenced Wolfe to 60 years on the murder charge (with 27 years suspended); 3 years on the firearm charge; and 20 years on the marijuana charge (with 15 years suspended). JA1488-1489. It ordered the sentences to run consecutively, totaling 41 years of incarceration. JA1489.

Wolfe appealed to the Court of Appeals of Virginia, which denied the petition for appeal in an unpublished *per curiam* decision. JA1539-1544. As relevant here, Wolfe argued that his guilty pleas were involuntary because he “was the target of vindictive prosecution that subjected [him] to increased mandatory minimum sentences after successful post-conviction proceedings.” JA1539. The Court of Appeals of Virginia “[d]ecline[d] to consider” that argument, however, because

Wolfe had raised it “[f]or the first time on appeal.” JA1541-1542. The Court of Appeals thus concluded that Wolfe’s newly minted appellate argument violated Rule 5A:18 of the Rules of the Supreme Court of Virginia. The Supreme Court of Virginia denied a petition for appeal and likewise denied a petition for rehearing. JA1573, 1587.

The Supreme Court of the United States granted Wolfe’s petition, vacated the judgment, and remanded “for further consideration in light of *Class v. United States*, 583 U.S. 174 (2018).” *Wolfe v. Virginia*, 139 S. Ct. 790 (2019). Upon remand, the Court of Appeals of Virginia held, consistent with *Class*, that Virginia’s Rule 5A:18 barred its “consideration of [Wolfe’s] prosecutorial vindictiveness claim.” JA1694. The Supreme Court of Virginia again denied a petition for appeal without comment. JA1736. The United States Supreme Court denied Wolfe’s petition for a writ of certiorari on June 21, 2021. JA1823; *Wolfe v. Virginia*, 141 S. Ct. 2794 (2021). Wolfe did not seek rehearing or habeas relief in state court.

### ***The Instant Proceedings in the District Court***

On June 22, 2022, Wolfe filed his initial petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the district court, which he now concedes was filed one day late. JA7-46. On May 31, 2023, Wolfe filed an amended petition and supporting documents. JA47-1242. The Director filed its motion to dismiss the amended petition on August 4, 2023. JA1243-2096. With that amended petition,

Wolfe sought to present a *Schlup* actual innocence gateway claim to excuse his time-barred petition. Wolfe supported his actual innocence claim with Barber's 2023 declaration, in which he claimed that he "testified truthfully about the events of March 15, 2001" in his "December 14, 2005 affidavit and in the testimony [he] gave at [Wolfe]'s federal habeas hearing on November 2, 2010." JA577. Barber explained that his 2023 statements incorporate "that testimony by reference." JA577.

On March 28, 2024, the district court granted the Respondent's motion to dismiss the amended petition, finding that Wolfe's petition was not timely filed and that Wolfe could not excuse the lateness of his petition because he failed to present "new reliable evidence" of his innocence. JA2149-2164. The district court found that "Barber's version of events in his most recent affidavit is in fact consistent with the version of events he offered in his previous testimony in Wolfe's federal habeas proceedings." JA2161. The court further found that "Barber's declaration does not offer any evidence surrounding Petrole's murder that is 'new' relative to when Wolfe entered a plea." JA2161.

Wolfe filed a Motion for Reconsideration, arguing inter alia that the district court applied the wrong standard in concluding that Barber's 2023 declaration was not "new reliable evidence" for the purposes of *Schlup*. After the Director filed his responsive pleading, the district court again concluded that Barber's 2023 declaration

contained no new information relative to when Wolfe entered his guilty plea in 2016. JA2165-2170. The district court further found that Barber's 2023 declaration was "not the type of 'new reliable evidence' envisioned by the Supreme Court in *Schlup*" because it came from a witness that "has already told two sides of the same story, each time he vacillates between them." JA2169. The district court ordered that its original memorandum opinion was amended to be consistent with this new ruling. JA2170. In its prior judgment, the district court awarded a certificate of appealability on the threshold issue of Wolfe's *Schlup* actual innocence gateway claim. JA2162-2163.

### SUMMARY OF ARGUMENT

The district court correctly held that Wolfe's evidence of actual innocence was not "new reliable evidence" because it was neither "newly discovered" nor "newly presented." Specifically, the substance of Barber's 2023 recantation of his trial testimony was presented to the state trial court at the time that court heard proffers of evidence from both sides and accepted Wolfe's guilty pleas. Barber's most recent account cannot be "newly presented" for the additional reason that it is consistent with the version of events he presented to the district court in 2010. Thus, even under the less demanding "newly presented" evidence standard, Wolfe cannot demonstrate that the statements contained in Barber's 2023 declaration were new for the purposes of his *Schlup* actual innocence gateway claim.

Next, Barber's various accounts of the truth of Wolfe's involvement in Petrole's death render his most recent affidavit inherently untrustworthy and unpersuasive. While Barber's recantations may have appeared more credible in the past, Barber's 2023 recantation must now be viewed through the lens that Wolfe has voluntarily confessed to the crimes in question. As such, Barber's 2023 declaration falls outside of the scope of the type of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" that is required to support a *Schlup* actual innocence gateway claim. *Schlup*, 513 U.S. at 324.

And finally, this Court should also consider that Wolfe's burden of demonstrating actual innocence is even higher than that for a typical defendant seeking such relief because, at his guilty plea hearing in 2016, he voluntarily submitted a handwritten confession of his guilt. Wolfe does not reference his confession in his opening brief, nor has he ever disavowed it at any point over the last eight years. In that document, Wolfe admitted that he was responsible for Petrole's death because he planned with Barber to rob and kill the victim. More importantly, Wolfe's admissions confirm that Barber's trial testimony was accurate—an admission that renders Wolfe's recycling of Barber's prior recantations virtually irrelevant to the question of Wolfe's actual innocence.

For those reasons, Barber's 2023 declaration was not "new reliable evidence" of Wolfe's actual innocence under *Schlup* because Barber's latest statements were

consistent with his former recantations of his trial testimony and were unreliable and unpersuasive when considered alongside Wolfe's confession of his guilt.

## ARGUMENT

### I. Standard of Review and Applicable Law

Wolfe's only argument to avoid the time bar of 28 U.S.C. § 2244(d)(1) is his assertion of actual innocence. Such an exception "applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013) (quoting *Schlup*, 513 U.S. at 329). This "confined category" is limited to certain "exceptional cases involving a compelling claim of actual innocence." *House v. Bell*, 547 U.S. 518, 522 (2006); *Schlup*, 513 U.S. at 324; *Wilson v. Greene*, 155 F.3d 396, 405 (4th Cir. 1998). Since claims of error and innocence are commonplace, and a compelling claim is "extremely rare," Wolfe bears a heavy burden to make a threshold showing of innocence. *Schlup*, 513 U.S. at 324. Thus, Wolfe was required to show "that the totality of the evidence would prevent *any reasonable juror* from finding him guilty beyond a reasonable doubt, such that his incarceration is a miscarriage of justice." *Teleguz v. Pearson*, 689 F.3d 322, 329 (4th Cir. 2012) (emphasis added).

To meet his "rigorous" burden, Wolfe was required to "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup*, 513 U.S. at 324. A petitioner seeking entry through *Schlup*’s gateway must “make a stronger showing than that needed to establish prejudice” because he does not come to the habeas court cloaked in the presumption of innocence. *Id.* at 326 n.42, 327. Rather, he comes “with a strong—and in the vast majority of the cases conclusive—presumption of guilt.” *Id.* at 326 n.42. The petitioner must present “evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.” *McQuiggin*, 569 U.S. at 401 (quoting *Schlup*, 513 U.S. at 316). Given the rarity of such evidence, “in virtually every case, the allegation of actual innocence has been summarily rejected.” *Id.*

Although the petitioner must present new reliable evidence in pressing his innocence claim, the habeas court’s analysis is not limited to that evidence. *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 324). A district court assessing a *Schlup* claim “*must* consider ‘*all* the evidence’ old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under ‘rules of admissibility that would govern at trial,’” and make a threshold determination about the petitioner’s claim of innocence that is separate from its inquiry into the fairness of his trial. *Teleguz*, 689 F.3d at 328, 330 (quoting *House*, 547 U.S. at 537) (emphasis added).

Reviewing courts consider the nature of the evidence itself (*House*, 547 U.S. at 537), the timing of the submissions (*McQuiggin*, 569 U.S. at 387, 399-400), the character of the witnesses, and the overall probative force of the submissions in light of the trial record. *House*, 547 U.S. at 552-54. “It is well established that the district court is permitted under *Schlup* to ‘make some credibility assessments’ when, as here, a state court has not evaluated the reliability of a petitioner’s ‘newly presented evidence [that] may indeed call into question the credibility of the witnesses presented at trial.’” *Teleguz*, 689 F.3d at 331-32 (quoting *Schlup*, 513 U.S. at 330). Once the district court has completed this initial task, and based on the total record, it must then determine “what reasonable, properly instructed jurors would do.” *House*, 547 U.S. at 538; *Teleguz*, 689 F.3d at 330.

**II. Wolfe’s arguments that the district court applied the wrong standard are without merit because the district court found that Barber’s 2023 declaration was not “newly discovered” or “newly presented.”**

In this case, the record demonstrates that the substance of Wolfe’s “new” evidence of actual innocence, Barber’s recantation of his testimony from Wolfe’s first trial, was put before the trial court on remand at the time Wolfe entered his guilty plea. JA1406-1408. Moreover, there is no denying that Barber’s recantation of his testimony from Wolfe’s first trial has been presented several times in federal habeas corpus proceedings. Accordingly, this Court should find that Barber’s 2023

declaration was not “newly discovered” or “newly presented” evidence of Wolfe’s alleged actual innocence and affirm the district’s court judgment below.

As the district court recognized below (JA2168-2169), “[s]ome circuits require the petitioner to present ‘newly discovered’ evidence as opposed to evidence that is merely ‘newly presented.’” *Lee v. Johnson*, No. 2:10cv122, 2010 U.S. Dist. LEXIS 106731, at \*17 n.9 (E.D. Va. July 28, 2010). As the Eighth Circuit has explained, “evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence.” *Osborne v. Purkett*, 411 F.3d 911, 920 (8th Cir. 2005).

“Other circuits require only that the evidence be newly presented, noting that [p]articularly in a case where the underlying constitutional violation claimed is the ineffective assistance of counsel premised on a failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway.” *Lee*, 2010 U.S. Dist. LEXIS 106731, at \*18-19 n.9 (quoting *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003)). In any event, this Court should find that Wolfe’s argument fails both standards, as he has failed to present this Court with “newly discovered” or “newly presented” evidence of his actual innocence.

Specifically, this Court should find that the substance of Wolfe’s evidence of his alleged actual innocence was presented to the trial court at his guilty plea hearing

in 2016. Moreover, as evident from the procedural history of Wolfe's federal habeas litigation, Wolfe has presented the substance of Barber's 2023 declarations numerous times in federal court. Accordingly, no matter which standard of "new" evidence applies in this instance, Barber's 2023 declaration was not "newly discovered" or "newly presented" evidence for the purposes of *Schlup*'s actual innocence gateway.

On March 29, 2016, the trial court conducted a hearing on Wolfe's decision not to contest the Commonwealth's evidence and enter guilty pleas to the crimes of first-degree murder, use of a firearm in the commission of a felony, and conspiracy to distribute marijuana. JA1367. At that hearing, Wolfe acknowledged that no one had forced him to enter his pleas and that he was waiving certain rights, including, but not limited to, his right to be tried by a jury and his right to defend himself against the Commonwealth's charges. JA1388.

The Commonwealth presented an extensive proffer of the evidence in support of those convictions. JA1397-1414. During that proffer, the Commonwealth did not hide from the fact that Barber had subsequently recanted his original trial testimony. Instead, the Commonwealth proffered:

I think it must be noted, that during the pendency of the Defendant's appeals and during the history of this case, Mr. Barber has made various contradictory statements regarding his earlier-referenced testimony, earlier-referenced proffer that I made. On the 14th of December he signed a typed affidavit which stated that after multiple visits from

members of the Defendant's legal team, that he decided to sign an affidavit.

In that affidavit Barber stated, among other things, that the Defendant didn't have anything to do with the murder of Danny Petrole and that he and the Defendant didn't have discussions regarding the murder of Danny Petrole.

Barber further stated that none of the phone calls with the Defendant on the night of the murder related to the killing of Danny Petrole and that J.R. Martin was with him when he killed Danny Petrole.

JA1406. Thus, the evidence that Barber had recanted his trial testimony was presented to the trial court during the presentation of evidence relevant to findings of guilt, contrary to Wolfe's assertions in this appeal. Opening Br. at 48-49.

Furthermore, the details of Barber's subsequent changes in his story, including his recanting of his recantation followed by his testimony in federal court that was consistent with his first recantation, were also presented to the trial court.

Later in 2006, Barber executed a handwritten affidavit in which he stated that the affidavit he signed earlier on the 14th of December of 2005 was false and that members of the defense legal team and Innocence Project had visited him and had handwritten and later typed the affidavit which he was asked to sign.

Mr. Barber stated that two members of the Defendant's legal team convinced him that he had nothing to lose and that a perjury charge was not a big deal given the sentence he was serving and that they would find him an attorney.

It should be noted that an attorney who had never spoken to Mr. Barber before wrote him a letter near[,] on[,] or about that time offering to represent him on any possible perjury charge.

In this affidavit Mr. Barber stated that everything he said during the original criminal trial was the truth.

Mr. Barber then did testify November 2nd of 2010 in federal court, denying that [Wolfe] had hired him to do the killing or offer him any benefit whatsoever to do the killing including forgiveness of the drug debts, et cetera, and that he says he lied at the original trial.

He did admit that he told special agents and an assistant attorney general shortly before that hearing that his original testimony here in Prince William County was true.

JA1407-1408.

Thus, the trial court was made aware of the substance of the actual innocence evidence contained within Barber's 2023 declaration: that Barber lied during his original trial testimony, that he recanted his trial testimony, and that he later reaffirmed the veracity of his trial testimony. That proffer also presented the trial court with evidence that Barber's 2010 testimony in federal court reaffirmed that his version of the truth was that Wolfe was not involved in the murder of Petrole. While Wolfe did not object to the proffer of Barber's history of recantation and disavowal of his prior statements, he did submit his own handwritten confession that was almost diametrically opposed to Barber's recantations and almost entirely consistent with Barber's trial testimony. JA1826-1829.

Accordingly, Barber's recycled recantations of his testimony from Wolfe's now-vacated criminal trial fall outside of the scope of "new" reliable evidence of actual innocence that had not yet been not presented to the trier of fact.

In addition, accepting Barber’s latest declarations as “new reliable evidence” would have dire and unintended consequences regarding the finality of state court judgments. Stated another way, the district court wisely opined that accepting Wolfe’s argument that Barber’s recycled declarations are sufficient to warrant a full investigation into Wolfe’s alleged actual innocence “would disrupt the carefully calibrated balance of ‘finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.’” JA2169 (quoting *Schlup*, 513 U.S. at 324). Indeed, the “[a]vailability of unlimited federal collateral review to guilty defendants frustrates the State’s legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks.” *Kuhlmann v. Wilson*, 477 U.S. 436, 452-453 (1986).

With Barber’s 2023 statements, Wolfe has recycled assertions from Barber concerning his account of Wolfe’s involvement in the murder and his account of his interactions with the team of prosecutors who spoke with him on September 11, 2012, and presented them to the district court as “new reliable evidence” of Wolfe’s alleged actual innocence. JA570-577. This Court should not allow Wolfe to circumvent the relevant statute of limitations by simply repackaging information already known to him at the time of his plea (that was, in fact, considered by the trial

court before it accepted his plea) and presenting that information as new and “extraordinary” circumstances of his actual innocence.<sup>1</sup> For this additional reason, this Court should affirm the judgment below.

**III. This Court should reject Wolfe’s argument that Barber’s 2023 declaration contains new evidence of alleged prosecutorial misconduct because the actions of prosecutors from September 2012 were known to Wolfe well before he pleaded guilty in 2016.**

“Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.” *Schlup*, 513 U.S. at 316. In his opening brief, Wolfe attempts to blur the line between his evidence of his actual innocence and the merits of his underlying claims by asserting that he can show he is actually innocent through “new” evidence of prosecutorial misconduct. Opening Br. at 50-55. This Court should disregard Wolfe’s attempts to prove his actual innocence with facts that do not tend to prove that he is factually innocent of the crimes of conviction.<sup>2</sup>

---

<sup>1</sup> Indeed, if this Court accepts his logic, Wolfe could have filed his current petition *twenty years late* and he would still be able argue that he was entitled to present Barber’s 2023 declaration as newly presented evidence on the basis that it was “new.”

<sup>2</sup> Wolfe’s opening brief contains no authority from this Court or the Supreme Court that demonstrates that evidence of prosecutorial misconduct is a basis upon which a petitioner can satisfy the “new reliable evidence” of actual innocence standard. Opening Br. at 54.

Nevertheless, assuming without conceding that such evidence can be considered as evidence of Wolfe's factual innocence, Wolfe also fails to demonstrate that Barber's 2023 declaration contains new evidence of prosecutorial misconduct. On appeal, Wolfe argues that Barber's 2023 declaration is "new" because it explains the reasons why Barber's testimony changed over time. Opening Br. at 52. He states further that, "[u]ntil Barber provided his 2023 Declaration, there was no way to know how Barber took these threats, or if they had a material impact on him." Opening Br. at 55.<sup>3</sup>

This claim is without merit, as Wolfe cannot now claim that this information was new to him in 2023 when the record reveals that he and his counsel were aware of the impacts of the September 11, 2012 meeting with Barber *no later than* October 2012. In its opinion vacating the district court's bar on retrial, this Court noted in a footnote that, while "it is not clear when and how Wolfe's lawyers learned of the Barber interview," Wolfe's counsel "were aware of Barber's apparent intention to

---

<sup>3</sup> On appeal, Wolfe seeks to rely on declarations by Barber's counsel to assert that Barber was not "reasonably available" to testify at Wolfe's retrial. Opening Br. at 40-46; JA2142-2148. Those declarations were not submitted until long after the entry of that court's final judgment when Wolfe included them with his Rule 59(e) motion and were dated the day before that filing. By rule, Wolfe was not permitted to present new evidence in his Rule 59(e) motion that was not before the district court at the time of the entry of the final judgment. *See Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (a Rule 59(e) motion "may not be used . . . to raise arguments or present evidence that could have been raised prior to entry of judgment").

invoke the Fifth Amendment in connection with Wolfe's retrial, and they knew that such invocation was related to Barber's interview by the prosecutors." *Wolfe v. Clarke*, 718 F.3d at 283 n.6. The Court noted that Wolfe's counsel became aware of those effects "at least as early as the October 31, 2012 hearing." *Id.*

Indeed, consistent with this Court's summary of the record, it is clear that Barber's counsel presented the impacts of the September 11, 2012 interview that Barber describes in his 2023 declaration at the 2012 federal hearing on Wolfe's motion to bar retrial. JA1091-93. The words of Barber's own counsel make it abundantly clear that none of Barber's 2023 assertions of prosecutorial misconduct and its effects on him are new under any reasonable definition of that term.

Wolfe nevertheless argues that Barber's 2023 recycled declarations can be considered "new" for the purposes of *Schlup* "despite overlapping with prior testimony, including a recantation." Opening Br. at 50. In support of that argument, Wolfe argues that his case is analogous to the facts of *Cleveland v. Bradshaw*, 693 F.3d 626 (6th Cir. 2012). Specifically, he asserts that, "[a]s in *Cleveland*, Barber provides new testimony about the reasons his testimony (and willingness to testify) varied over time, including during Wolfe's retrial proceedings." Opening Br. at 52.

Wolfe's arguments miss the clear distinction between this case and the facts of the *Cleveland* case: that the affidavit in support of actual innocence in *Cleveland* contained *new evidence* of actual innocence because a key witness for the

prosecution recanted the testimony he gave *at trial* that was crucial to securing Cleveland's guilt. *Id.* at 636. In contrast, Barber's testimony was not used to obtain Wolfe's convictions in 2016, as the necessary quantum of evidence at that proceeding was supplied by Wolfe's guilty plea, the Commonwealth's proffer of evidence, and, of course, Wolfe's handwritten confession.

Nevertheless, in *Cleveland*, a witness named William Avery, Jr. implicated four persons in the victim's murder, including Cleveland. *Id.* at 628. A decade after Cleveland's trial, Avery signed an affidavit recanting his trial testimony. That affidavit was Avery's first recantation of the testimony that was actually used to convict Cleveland. *Id.* Avery also averred for the first time "that during Edwards's trial he informed the prosecutor that his earlier statements about witnessing the murder were false but the prosecutor told him, '[I]f these dudes don't go down for this, that [Avery] would.'" *Id.* Upon consideration of whether Avery's 2006 affidavit was new for the purposes of a *Schlup* actual innocence gateway claim, the district court determined it was "not new evidence because Cleveland previously raised both the inconsistencies between Avery's trial testimony and pre-trial statements, as well as Avery's 1991 recantation [in a codefendant's case], during his trial." *Id.* at 636. The Sixth Circuit reversed, holding that Avery's 2006 recanting affidavit contained information that was *not available* to Cleveland as the time of his trial. *Id.*

In stark contrast, Barber’s 2023 statements contain *the same recantations of his trial testimony* that were presented to the trier of fact in 2016 and are essentially identical to his federal testimony in 2010. JA1406-1408. Unlike Avery’s post-trial recantation in which Avery’s account went from inculpatory to exculpatory, Barber’s 2023 declaration merely maintains his position from 2010 that his testimony at Wolfe’s first trial was false. Such evidence cannot be considered “new” by any reasonable definition of the term, particularly where, as here, the trier of fact was presented with the uncontested evidence that Barber had recanted his testimony from the original trial. JA1406-1408.

Moreover, Avery’s 2006 affidavit was the first time Cleveland possessed any knowledge or awareness of an allegation of prosecutorial misconduct, in the form of a threat to prosecute Avery if he did not testify against the original four defendants. *Id.* at 630. In stark contrast, Wolfe cannot claim that he learned of “new” prosecutorial misconduct in 2023, as Barber merely describes the events of his September 11, 2012 interview with the original team of prosecutors, which has been presented in numerous forums over the past twelve years. JA430-511, 691-772.

Furthermore, given that Wolfe presented the substance of Barber’s claims of prosecutorial misconduct stemming from the interview on September 11, 2012, in the trial court on remand, such evidence could not be considered “newly presented” for the purposes of *Schlup*. Indeed, Wolfe filed a “Motion to Dismiss Indictments

for Prosecutorial Misconduct” in the trial court on December 4, 2012. JA329-344. The entire basis for that motion was the alleged misconduct at the September 11, 2012 meeting with Barber, as Wolfe alleged that “it [wa]s plain from that transcript that on September 11, 2012, Mr. Barber was threatened with capital murder charges if he violate[d] his original plea agreement by reaffirming the testimony he gave in the federal habeas proceedings.” JA338. After those allegations had been presented to the trial court, the trial court ruled against Wolfe, finding that Barber’s election to invoke his Fifth Amendment rights was “not surprising” given the “various statements made by Mr. Barber under oath, many diametrically opposed to each other.” JA1853-1854. On those facts, Wolfe cannot successfully claim that such evidence has never been presented to the trial court.

In summary, Wolfe has presented this court with evidence that Barber still believes that Wolfe was not involved in the robbery and murder, a fact that was considered by the factfinder before it accepted Wolfe’s guilty pleas. Because such evidence was neither “newly discovered” nor “newly presented,” this Court should affirm the district court’s judgment below on this issue.

**IV. Barber’s most recent affidavit was also inherently untrustworthy and unpersuasive, and therefore falls outside of the scope of the type of “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence” that is required to support a *Schlup* actual innocence gateway claim.**

Wolfe’s argument fails for the additional reason that Barber’s 2023 recantation falls outside of the scope of *Schlup* evidence of actual innocence because it is an untrustworthy and unpersuasive account from an unreliable witness.

“Traditionally, courts view recantations with ‘great suspicion.’” *Haas v. Commonwealth*, 283 Va. 284, 292, 721 S.E.2d 479, 482 (2012) (citing *Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34 (1984) (Brennan, J., dissenting from denial of certiorari)). The sound policy reasons underpinning this universal skepticism are well-recognized. *Id.* In addition, delays in coming forward also render recantations inherently suspect, particularly given the curious timing of the collection and presentation of this evidence. *Schlup*, 513 U.S. at 331; *McQuiggin*, 569 U.S. at 387. Here, the closest the record comes to offering an explanation for the lateness of the submission of Barber’s 2023 declaration is that Wolfe did not attempt to seek out any statements from Barber until he needed them to buttress an actual innocence claim to excuse his time-barred federal habeas petition.

Moreover, Barber’s vacillating accounts leave any additional recantations particularly unpersuasive. Indeed, at the federal evidentiary hearing, Barber admitted both to his prior affidavits repudiating his recantation and to lying about

his planned testimony when he was interviewed prior to the hearing. JA662-663. In addition, more than half of the portion of Barber's most recent affidavit that explains "My Decision to Come Forward Now" has been completely redacted, and the unredacted statements seem to suggest that Wolfe's counsel could have obtained this statement at any point after the September 11, 2012 interview if they had simply asked Barber's counsel if he was willing to provide a new declaration. JA576-577.

More importantly, however, Wolfe's own voluntary written confession from 2016 establishes that Barber's trial testimony was accurate, that Barber's subsequent recantations were not truthfully given, and that Wolfe is *not actually innocent* of the offenses to which he pleaded guilty. Stated another way, Barber's most recent declarations are not trustworthy or reliable because Wolfe's handwritten confession provided the trial court with direct evidence that any claim that Wolfe was not involved in the robbery and murder of Petrole is not truthful or worthy of belief.

Under such circumstances, Wolfe has fallen well short of his burden of demonstrating that Barber's 2023 declarations were both new and reliable evidence of his innocence. Given that the trial court was presented with evidence of Barber's recantations and still found the evidence sufficient to support each conviction beyond a reasonable doubt, there simply is no way that Wolfe's repackaging of Barber's recantation evidence would "prevent *any reasonable juror* from finding

him guilty beyond a reasonable doubt, such that his incarceration is a miscarriage of justice.” *Teleguz* 689 F.3d at 329 (emphasis added).

Accordingly, this Court should find that the district court was permitted to conclude that Barber’s most recent affidavit was inherently untrustworthy and unpersuasive, and therefore fell outside of the scope of the type of “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence” that is required to support a *Schlup* actual innocence gateway claim. JA2169-70. Because these facts do not legally constitute a “compelling claim of actual innocence” (*Schlup*, 513 U.S. at 324), this Court should conclude that the district court properly ruled that Wolfe failed to present any reliable evidence of his actual innocence.

**V. Given that Wolfe voluntarily confessed to his role in killing Petrole, the proffered evidence was incapable of showing that it is more likely than not that no reasonable juror would have convicted Wolfe.**

This Court should also affirm the judgment below on the basis that Barber’s 2023 declarations are incapable of demonstrating Wolfe’s actual innocence. In *Schlup*, the Supreme Court noted that, to ensure that the miscarriage of justice exception “would only be applied in the ‘extraordinary case,’” the Court “explicitly tied the miscarriage of justice exception to the petitioner’s innocence.” *Schlup*, 513 U.S. at 321. The Court explained that “tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of

judicial resources, and the overriding individual interest in doing justice in the ‘extraordinary case.’” *Id.* at 322.

While “a prisoner retains an overriding ‘interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated . . . [,] [t]hat interest does not extend, however, to prisoners whose guilt is conceded or plain.” *Id.* at 321 (quoting *Wilson*, 477 U.S. at 452). This case represents a matter in which Wolfe’s guilt has been conceded and established conclusively by his own actions on remand. For that reason, the district court did not err when it concluded that Wolfe had failed to present the type of “new reliable evidence” contemplated by *Schlup*.

Although “[p]leading guilty does not entirely preclude a petitioner from claiming actual innocence at habeas proceedings . . . guilty pleas and partial confessions ‘seriously undermine’ the claim.” *Clark v. Clarke*, No. 7:14cv00042, 2017 U.S. Dist. LEXIS 29054, at \*9-11 (W.D. Va. Mar. 1, 2017) (quoting *Chestang v. Sisto*, 522 Fed. Appx. 389, 390 (9th Cir. 2013) (denying a *Schlup* actual innocence claim where “the evidence . . . was overwhelming” based on the petitioner’s confession and guilty plea)); *see also Smith v. Warden*, No. 7:17cv00072, 2018 U.S. Dist. LEXIS 106192, at \*6-7 (W.D. Va. June 26, 2018) (holding that the actual innocence gateway claim was seriously undermined by the petitioner’s guilty plea); *Copeland v. Clarke*, No. 2:17cv00093, 2018 U.S. Dist. LEXIS 166728, at \*26-27 (E.D. Va. July 3, 2018)

(considering the petitioner's guilty plea as a factor in support of conclusion that he had not met the *Schlup* standard).

In this instance, the actual innocence analysis has been utterly transformed by Wolfe's guilty plea and voluntarily drafted and comprehensive confession in 2016 that he was guilty of the robbery and murder of Petrole. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) (holding that "'actual innocence' means factual innocence, not mere legal insufficiency"). That confession in particular fundamentally established that Wolfe is not factually innocent of the crimes in question and that Barber's original state trial testimony was a reliable and accurate account of the events that culminated in Petrole's death. Because the *Schlup* mandate "ensures that a gateway actual innocence assertion must be 'truly extraordinary,'" *Wolfe v. Johnson*, 565 F.3d 140, 164 (2009), this Court should conclude that Wolfe cannot show his actual innocence under that scenario as a matter of law.

At the guilty plea hearing, after the conclusion of the Commonwealth's proffer of the evidence in support of guilt, the trial court asked if the defense wished to proffer any evidence on behalf of Wolfe. JA1415. Defense counsel first submitted, as Defense Exhibit 1, certain objections to the Commonwealth's proffer, primarily on the grounds that the defense "dispute[d] any allegation that this was a murder for hire," as the defense wanted the trial court to be aware that Wolfe was admitting to his involvement in a robbery and murder, not a murder for hire. JA1415.

Wolfe also submitted a signed, handwritten letter, written at his attorney's request, confessing to his involvement in the crimes of murder and robbery. Wolfe's counsel did not claim that the letter was a condition of the plea, nor is there any evidence in the record to support such a claim. Instead, counsel told the trial court that the letter had been requested by the victim's family, who "wanted to hear what happened in his own words and to accommodate that Mr. Wolfe wrote this statement." JA1416. The letter was admitted as an exhibit and counsel then read it aloud. JA1416-1421.

Wolfe's handwritten confession was admitted prior to the trial court's acceptance of his guilty pleas and was considered as *affirmative evidence* in support of his convictions for first-degree murder, use of a firearm in the commission of a felony, and conspiracy to distribute marijuana. JA1416-1421. In the letter, Wolfe admitted that he agreed to the murder and robbery of Petrole and worked with Barber to commit those crimes. JA1416-1421. Wolfe used his confession to admit that he was indisputably responsible for Petrole's death, while at the same time challenging or denying the aspects of the Commonwealth's proffer that tended to show that Petrole's death was part of a murder for hire scheme. JA1416-1421.

In other words, other than omitting any discussion of payment specifically to commit the murder, Wolfe's confession at the plea hearing closely tracked Barber's original trial testimony. JA1826-1829. Through those statements, Wolfe directly and

voluntarily confessed that he was “responsible for Danny’s death even though [he] didn’t pull the trigger.” JA1828. Wolfe also acknowledged that his written confession was contrary to “what [he] said at trial and the position that [he has] taken for all of [his] appeals” and habeas corpus proceedings and that he feared that telling the truth about his involvement in Petrole’s murder would “let down” the people he loved. JA1828-1829. Wolfe further admitted that writing his confession was “actually the hardest thing [he had] ever done.” JA1828. Nevertheless, Wolfe wrote that statement because he wanted Petrole’s family “to know the truth” and that he was sorry for what he did to their son. JA1829.

The impact of Wolfe’s confession to the murder of Petrole on this Court’s actual innocence analysis under *Schlup* cannot be overstated. As noted *supra*, a district court “assessing a *Schlup* claim “*must* consider ‘*all* the evidence’ old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under ‘rules of admissibility that would govern at trial,’” and make a threshold determination about the petitioner’s claim of innocence that is separate from its inquiry into the fairness of his trial. *Teleguz*, 689 F.3d at 328, 330 (emphasis added) (quoting *House*, 547 U.S. at 537). For that reason, the value of Barber’s 2023 declaration concerning Wolfe’s actual innocence must be viewed through the lens that Wolfe has voluntarily confessed to the crimes in question. Specifically, this Court must determine whether Barber’s 2023 declarations are even capable of

undermining confidence in Wolfe's convictions that were supplied by his pleas of guilt, a thorough proffer of the evidence, and Wolfe's independent and voluntary submission of his handwritten confession.

Wolfe's opening brief does not address Wolfe's handwritten confession that he wrote as a letter to the family of the victim and submitted as his own evidence at his plea hearing. Nor has Wolfe ever recanted those statements, asserted that any aspect of his confession was untruthful, or claimed that it should be disregarded for any reason. Perhaps most tellingly, Wolfe has not offered any explanation for what value, if any, remains in Barber's latest recantation of his initial trial testimony, given that Wolfe has confessed to those crimes and in light of Barber's well-documented history of frequently changing his story. Indeed, Wolfe's confession has the additional effect of offering additional proof that Barber's original trial testimony was true and accurate, as well as providing reliable proof that Barber lied in all subsequent declarations in which he recanted his trial testimony. *Cf. United States v. Lighty*, 616 F.3d 321, 375 (4th Cir. 2010) ("Post-trial recantations of testimony are 'looked upon with the utmost suspicion.'") (quoting *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973)); *Carter v. Commonwealth of Va.*, No. 3:09cv121, 2010 U.S. Dist. LEXIS 5973 at \*4-6 (E.D. Va. Jan. 26, 2010) (finding that the timing and circumstances surrounding the creation of an accomplice's affidavit asserting the petitioner's innocence were relevant in determining the trustworthiness and reliability of the affidavit).

In short, Wolfe’s guilty plea and his own evidence provided in support of that plea are entitled to a strong presumption of truthfulness. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (explaining that the representations of the defendant at his guilty plea hearing “constitute a formidable barrier in any subsequent collateral proceedings” because the defendant’s “[s]olemn declarations in open court carry a strong presumption of verity”). Barber’s 2023 declarations do nothing to rebut that presumption that Wolfe’s guilty pleas and confession constitute the true version of events and that Wolfe is not factually innocent of the crimes of conviction.

From the very onset of the creation of the *Schlup* actual innocence gateway claim, the Supreme Court made it clear that a prisoner’s “interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated” does not extend “to prisoners whose guilt is conceded or plain.” *Schlup*, 513 U.S. at 321. Given that that Wolfe conceded his guilt, the district court did not err when it concluded that Wolfe had failed to present “new reliable evidence” of his actual innocence.



## STATEMENT REGARDING ORAL ARGUMENT

In compliance with Federal Rule of Appellate Procedure 34(a)(1), the Director suggests oral argument in this case would aid the decisional process.

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because it contains 8,701 words, excluding the parts exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/

---

Liam A. Curry

### CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2024, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

---

Liam A. Curry