VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 9th day of November, 2021.

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect are hereby amended, effective immediately.

Amend Rule 2:1101 as follows:

RULES OF SUPREME COURT OF VIRGINIA

PART TWO

VIRGINIA RULES OF EVIDENCE

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ARTICLE XI. APPLICABILITY

Rule 2:1101. Applicability of Evidentiary Rules.

(a) *Proceedings to which applicable generally*. – Evidentiary rules apply generally to (1) all civil actions and (2) proceedings in a criminal case (including preliminary hearings in criminal cases), and to contempt proceedings (except contempt proceedings in which the court may act summarily), in the Supreme Court of Virginia, the Court of Appeals of Virginia, the State Corporation Commission (when acting as a court of record), the circuit courts, the general district courts (except when acting as a small claims court as provided by statute), and the juvenile and domestic relations district courts.

(b) *Law of privilege*. – The law with respect to privileges applies at all stages of all actions, cases, and proceedings.

(c) *Permissive application*. – Except as otherwise provided by statute or rule, adherence to the Rules of Evidence (other than with respect to privileges) is permissive, not mandatory, in the following situations:

(1) Criminal proceedings other than (i) trial, (ii) preliminary hearings, and (iii) sentencing

proceedings before a jury.

(2) Administrative proceedings.

Amend Rules 3A:17.1 and 3A:18 as follows:

PART THREE A

CRIMINAL PRACTICE AND PROCEDURE

Rule 3A:17.1. Proceedings in Bifurcated Jury Trials of Felonies and Class 1 Misdemeanors.

(a) *Application.* – This Rule applies in cases of trial by jury when the jury finds the defendant guilty of a felony or a Class 1 misdemeanor and the accused has requested that the jury ascertain punishment of the offense pursuant to Code § 19.2-295(A).

(b) *Bifurcated Proceedings.* – In any jury trial in which the jury returns a verdict of guilty to one or more felony offenses, or Class 1 misdemeanor, a separate proceeding limited to the ascertainment of punishment must be held as soon as practicable before the same jury.

(c) *Instruction at Guilt Phase.* – At the conclusion of all of the evidence in the guilt phase of the trial, the court must instruct the jury as to punishment with respect to any Class 2, 3 or 4 misdemeanor being tried in the same proceeding or any lesser-included Class 2, 3 or 4 misdemeanor of any charged felony offense which may be properly considered by the jury. The jury may not be instructed until the punishment phase with reference to the punishment for any charged or lesser-included felony offense or Class 1 misdemeanor.

(d) *Opening Statements at Penalty Phase.* – Both the Commonwealth and the defense are entitled if they choose, to make an opening statement prior to the presentation of any evidence to the jury relevant to the penalty to be imposed. The Commonwealth must give its statement first.

(e) *Presentation of Evidence at Penalty Phase.* – If the jury convicts the defendant of one or more felony offenses, or a Class 1 misdemeanor the penalty phase must proceed in the following order:

(1) The Commonwealth may present any victim impact testimony pursuant to § 19.2-295.3 and may present the defendant's prior criminal history, including prior convictions and the punishments imposed, by certified, attested, or exemplified copies of the final order(s) as provided by law. As a prerequisite to the introduction of such evidence, the Commonwealth must have advised the defense, in accord with the requirements of law, of its intention to introduce such evidence.

(2) The defense may introduce relevant admissible evidence related to punishment. The defense must have the opportunity to present such evidence irrespective of whether or not the Commonwealth presents evidence of previous criminal history.

(3) The Commonwealth may introduce relevant, admissible evidence related to punishment in rebuttal.

(4) The defense may introduce relevant, admissible evidence related to punishment in rebuttal.

(f) *Closing Arguments at Penalty Phase*. – Both the Commonwealth and defense are entitled to make a closing argument on the subject of punishment if they elect to do so. The Commonwealth must be given the opportunity to argue first, followed by the defense. Rebuttal argument may be made by the Commonwealth.

(g) *Change of Plea*. – The accused may enter a plea of guilty to the whole of the indictment at any time until the jury returns a verdict on the issue of the defendant's guilt or innocence.

(h) *Non-Unanimous Jury at the Penalty Phase*. – Should the jury fail to reach unanimous agreement as to punishment on any charge for which it returned a verdict of guilty, the court will fix punishment.

Rule 3A:18. *Reserved.*

Amend Rule 5:7B as follows:

PART FIVE

THE SUPREME COURT

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B. ORIGINAL JURISDICTION

Rule 5:7B. Petition for a Writ of Actual Innocence.

(a) *Who may File a Petition*. – A petition for a writ of actual innocence based upon previously unknown or untested human biological evidence may be filed by any person who has been convicted of a felony or who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult.

(b) *Time for Filing.* – A petition under this Rule must be filed in the office of the clerk of this Court, as provided for in Rule 5:1B, within 60 days after the date upon which exculpatory test results are obtained by the petitioner or his counsel of record pursuant to Code § 19.2-327.1.

(c) *Contents of the Petition.* – Each petition for a writ of actual innocence must be filed on a form provided by this Court and must be verified under oath. The petition must state categorically and with specificity: (i) the offense or offenses for which petitioner was convicted or adjudicated delinquent, including all previous records, applications, petitions, and appeals relating to these convictions or adjudications of delinquency, and their dispositions; (ii) that the petitioner is actually innocent of the crime or crimes for which he was convicted or adjudicated delinquent; (iii) an exact description of the human biological evidence and the scientific testing supporting the allegation of innocence, attaching a copy of the test results; (iv) that the human biological evidence was not known or available to the petitioner or his attorney at trial, or if it was known, why it was not subject to scientific testing; (v) the earliest date the test results described in the petition became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney has filed the petition within 60 days of obtaining the test results; (vii) an

explanation of the reason or reasons the evidence will prove that no rational trier of fact would have found the petitioner guilty or delinquent beyond a reasonable doubt of the offense or offenses for which the petitioner was convicted or adjudicated delinquent; and (viii) if the conviction or adjudication of delinquency became final in the circuit court after June 30, 1996, that the evidence was not available for testing under Code § 9.1-1104.

* * *

(f) *Response.* – The Attorney General must respond to the petition as follows:

* * *

(3) If the Attorney General asserts in the declaration required by subparagraph (f)(1) of this Rule that a trial or appellate court record, or any part thereof, is necessary for the preparation of a response to the petition, the court must issue the writ of certiorari described in Code § 19.2-327.3(D) to the clerk of the respective court below for the production of the record forthwith to the clerk of this Court. Upon receipt of the record by the clerk of this Court, the clerk must immediately notify the petitioner, any attorney for the petitioner, the Attorney General, and the attorney for the Commonwealth of the jurisdiction where the conviction or convictions or adjudication or adjudications of delinquency occurred, in writing, of the date of receipt of the record. Within 30 days after receipt of the record by the clerk of this Court, the Attorney General must file the responsive pleading described in subparagraph (f)(2) of this Rule.

* * *

(j) *Appointment of Counsel.* – In any petition filed pursuant to and in compliance with this Rule, petitioner is entitled to the appointment of counsel subject to the provisions of Code § 19.2-157 et seq. Any request for counsel in this Court must be made on the form provided by this Court, entitled REQUEST FOR COUNSEL – PETITION FOR A WRIT OF ACTUAL INNOCENCE, and must include: (i) all the information required by the in forma pauperis affidavit attached to the request for appointment of counsel, and (ii) an attested copy of the order of the circuit court ordering that testing of human biological evidence on the petitioner's behalf be conducted pursuant to Code § 19.2-327.1.

(k) *Duty of Counsel.* – Any attorney(s) appointed to represent a petitioner pursuant to Code

§ 19.2-327.1 is deemed to be counsel of record for petitioner for all purposes and proceedings under this Rule until a final order of this Court is issued pursuant to Code § 19.2-327.5, or until counsel is relieved or replaced by other counsel by leave of this Court.

A Copy,

Teste:

Clerk