

14-0642

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.,
JOSEPH A. BUFFEY,

Petitioner,

v.

Civil Action No. 12-C-183-2
(Underlying Habeas No. 02-C-769-2
(Underlying Felony No. 02-F-10-2)
THOMAS A. BEDELL, Judge

DAVID BALLARD, Warden
Mount Olive Correctional Complex,

Respondent.

JUN - 6 2014

FINAL RULE 9(c) ORDER

**DENYING PETITIONER, JOSEPH A. BUFFEY'S,
PETITION/AMENDED PETITION UNDER W. VA. CODE § 53-4A-1 FOR
WRIT OF HABEAS CORPUS AND/OR SUPPLEMENTAL PLEADING IN
SUPPORT OF DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS;**

**ADDRESSING MOTIONS FILED PRE/POST EVIDENTIARY OMNIBUS
HEARING AND RULING UPON ALL MOTIONS THAT REMAIN OUTSTANDING**

Introduction

Over two (2) years ago, this second Habeas proceeding earnestly began for the Petitioner, Joseph A. Buffey (hereinafter referred to as the "Petitioner"), with the initial filing of his Petition for relief from his criminal convictions, consecutive sentences thereon and present incarceration all upon his counseled and voluntarily entered guilty pleas before this Court in 2002. His interests herein have been most ably represented by a combination of *pro bono* local legal counsel and out-of-state legal counsel with "The Innocence Project" specifically admitted *pro hac vice* for these proceedings.¹

¹ As stated on its internet webpage, located at <http://www.innocenceproject.org/>, "The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice." See Motion in Felony File No. 02-F-10-2, Binder 1, pp. 111 – 118, filed June 30, 2010 and Order, p. 338; also see Motion in Civil Action File No. 12-C-183-2, Binder 3, pp. 695 – 702, filed December 28, 2013, and Order, p. 751.

They have zealously pursued their quest for such habeas relief through every procedural means available and as liberally allowed by this Court. On his behalf, such counsel have constructed, along with legal counsel on behalf of the Respondent, State of West Virginia, a voluminous evidentiary record during the first eighteen (18) months of this proceeding. Upon all of which, this Court has meticulously considered all evidence before it in rendering its final decision herein.

Simply stated, this Court deems the Petitioner's resulting dissatisfaction with its 2002 sentencing determinations made upon a valid Plea Agreement, procedurally and substantively sound Rule 11 plea hearing and subsequent sentencing hearing essentially reflects his subsequent "buyer's remorse" as to his acceptance of such agreement although he also received quite valuable *nolle prosequi* treatment thereby in return from the State of West Virginia for other then-pending felony indictments as well as immunity from prosecution for other pending criminal matters and ongoing investigations.

The Petitioner was afforded a first evidentiary Habeas proceeding that was ruled upon in finality in 2004. This matter is his second evidentiary Habeas proceeding. This Court has not recognized any available constitutional, *Losh* and/or other "manifest injustice" grounds of sufficient merit upon which any Habeas relief should be granted to him.

Therefore, upon having having fully reviewed and exhaustively analyzed this abundant record, this Court concludes that his present Petition and Amended Petition fail in that regard and are to be DISMISSED WITH PREJUDICE and his requested relief therein DENIED. Such review and analysis will now be more specifically reflected herein below as follows.

Pleading History of Petition and Amended Petition

This instant matter began upon the Petitioner's, *Petition Under W. Va. Code § 53-4A-1 For Writ Of Habeas Corpus*, by his *pro bono* legal counsel, filed herein on April 19, 2012, and accompanied by his *Memorandum Of Law In Support Of Defendant's Petition For A Writ Of Habeas Corpus* with related Exhibits.²

² The Petitioner also filed a *Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody*, by and through legal counsel, in the United States District Court for the Northern District of West Virginia on April 25, 2012, along with a *Motion for Stay and Abeyance. By Opinion/Report And Recommendation 28 U.S.C. §2254* dated May 2, 2012, the United States Magistrate Judge recommended that such Petition be dismissed due to its being a second or successive petition within the meaning of 28 U.S.C. § 2244(b)(1) and (2)(A)and (B) and for filing it without first moving the Fourth Circuit Court of Appeals for an Order under 28 U.S.C. § 2244(b)(3)(A) authorizing the District Court to consider its application. As such, the accompanying Motion was also recommended to be denied as moot.

Within such Magistrate Court's determinations, it is represented that, in part, to-wit: "Petitioner filed his first federal habeas petition on September 19, 2005" and that his "case was considered on the merits and dismissed with prejudice by the Honorable Robert Maxwell on March 29, 2007". (See Document 7, pp. 1 – 15 herein Civil Action File Binder No. 1, pp. 115 – 129; *Also see* Buffey v. Ballard, Civil Action No. 5:12cv58., WL 675227, N.D.W.Va., 2012).

Subsequent to such, the Petitioner's legal counsel filed exceptions to the report and recommendation. Thereupon, the Honorable Frederick P. Stamp, Jr., concluded and ordered, in pertinent part, that he to-wit:

...concur in the result reached by the magistrate judge, but DECLINES TO AFFIRM AND ADOPT the report and recommendation, as presented. (ECF No. 7.) Accordingly, the petition is DISMISSED. The petitioner may seek leave of the United States Court of Appeals for the Fourth Circuit to file a second or successive petition. This Court AFFIRMS and ADOPTS the magistrate judge's recommendation that the motion for stay and abeyance (ECF No. 3) be DENIED. Further, this Court DENIES the petitioner's unopposed motion to stay proceedings for lack of jurisdiction. It is further ORDERED that this civil action be DISMISSED and STRICKEN from the active docket of this Court.

To obtain a certificate of appealability, a petitioner must make a substantial showing of the denial of a constitutional right by establishing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation omitted); see also *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). When a district court dismisses a petition on procedural grounds, the determination of whether a certificate of appealability should issue has two components: (1) the petitioner must show that reasonable jurists would find it debatable whether the court was correct in its procedural ruling; and (2) the petitioner must show that reasonable jurists would find it debatable whether the petition states a valid claim for denial of a constitutional right. *Id.* at 484. To obtain a certificate of appealability, the petitioner must satisfy both components. *Id.* at 484–85.

As stated above, this Court concludes that Buffey's petition is a second or successive petition that has not been authorized by the court of appeals. Buffey has not established

Pursuant to this Court's Order entered herein on April 30, 2012, (See Order p. 1 of 2, in *Id.*, p. 91), the Respondent filed its *State Of West Virginia's Response To Defendant Buffey's Petition for Writ Of Habeas Corpus And Motion To Dismiss This Action* with accompanying Exhibits on June 12, 2012, by and through its legal counsel. (See Response in *Id.*, pp. 95 – 145).

Pursuant to this Court's Agreed Order entered herein on July 9, 2012, the Petitioner filed his *Reply To State Of West Virginia's Response To Defendant's Petition For A Writ Of Habeas Corpus* on July 30, 2012, (See Reply in *Id.*, pp. 150 – 167).

However, in between the filing of such Reply and the Respondent's Sur-Reply, the Petitioner filed his proposed *Amended Petition and Memorandum of Law in Support of Amended Petition and/or Supplemental Pleading In Support Of Petition For A Writ Of Habeas Corpus*, with accompanying Exhibits 30 – 32, contemporaneously with the filing of his Motion for Leave to File on July 30, 2012. (See Motion; Memorandum; and Amended Petition, herein Civil Action File Binder No. 1, pp. 168 – 176; pp. 177 – 215; and pp. 216 – 222, respectively).

that jurists of reason could debate the correctness of this procedural ruling to dismiss Buffey's unauthorized second or successive petition for lack of jurisdiction. Accordingly, the petitioner is DENIED a certificate of appealability. This Court notes the distinction between the certificate of appealability requirement of § 2253, as described by *Miller-El v. Cockrell*, and the authorization for a second and successive petition requirement of § 2244. See *United States v. Hardin*, 481 F.3d 924, 925–26 (6th Cir.2007) (stating that a certificate of appealability pursuant to § 2253 is a separate procedural hurdle from the authorization required under § 2244 to file a second or successive habeas petition). This Court's denial of a certificate of appealability applies to the former, not the later. (See *Memorandum Opinion And Order Declining To Affirm And Adopt The Report And Recommendation Of The Magistrate Judge As Presented But Dismissing Habeas Petition; Denying Unopposed Motion For Stay; And Granting Motion To Exceed Page Limitation, Buffey v. Ballard*, Criminal Action No. 5:12CV58. July 5, 2012, WL 2675223 (N.D.W.Va., 2012)). (Also see Plaintiff's *Reply To State Of West Virginia's Response To Defendant's Petition For A Writ Of Habeas Corpus* on Pg. 3 n.2 in Civil Action File Binder 1 Pg. 153).

After which and pursuant to such Agreed Order entered on July 9, 2012, the Respondent filed its *State Of West Virginia's Sur-Reply To Defendant Buffey's Reply To State Of West Virginia's Response To Defendant's Petition For A Writ Of Habeas Corpus* on August 14, 2012. (See Sur-Reply in *Id.*, pp. 226 – 236).

Pursuant, in part, to this Court's Order Setting Briefing Schedule On Petitioner's Motion for Leave to File Amended Petition And/Or Supplemental Pleading In Support Of Defendant's Petition For A Writ Of Habeas Corpus, entered on July 30, 2012, (See Order List No. 3 herein *infra*), the Respondent filed its *State Of West Virginia's Response To Defendant Buffey's 5th Petition For Habeas Corpus Relief Titled "Amended Petition"* on August 14, 2012, and the Petitioner filed his *Reply To State Of West Virginia's Response To Defendant Buffey's Amended Petition* on August 23, 2012. (See Response and Reply respectively in *Id.*, pp. 239 – 242; 253 – 260).

Finally, pursuant to this Court's Order (in part) *Granting Petitioner, Joseph A. Buffey's, Motion For Leave To File Amended Petition And/Or Supplemental Pleading In Support Of Defendant's Petition For A Writ Of Habeas Corpus*, entered herein on November 5, 2012, the Petitioner's proposed *Amended Petition and Memorandum of Law in Support of Amended Petition and/or Supplemental Pleading In Support Of Petition For A Writ Of Habeas Corpus*, with accompanying Exhibits 30 – 32, were formally made a part of his pleadings herein for further consideration. (See Itemized Order List No. 4 herein *infra*; also see Order pp. 10 – 12, 17 of 18 in *Id.*, pp. 318 – 320, 325).

Initial Discovery Discussion

In keeping with *West Virginia Code* § 53-4A-4(a) and Rule 7 of the *Rules Governing Post-Conviction Habeas Corpus Proceedings*,³ the Petitioner initiated what became an increasingly demanding discovery process with the filing of his *Petitioner's Motion For Discovery* on August 23, 2012. (See *Id.*, at pp. 262 – 272).

This Court, by its Order entered on November 5, 2012, granted the Petitioner's Motion upon finding and concluding it to be viable upon 'good cause' having been sufficiently demonstrated. It specifically stated in pertinent part that, to-wit:

Such amended and supplemental pleadings aver newly-available evidence which, in turn, should require a more thorough review of investigatory file evidence in the possession of law enforcement, prosecutorial and other related offices directly involved with the original criminal investigation, evidentiary handling and prosecutorial conduct in

³ The Petitioner relies on such Rule 7 which states, in pertinent part, to-wit:

(a) *Leave of court required.* – In Post-conviction habeas corpus proceedings, a prisoner may invoke the processes of discovery available under the West Virginia Rules of Civil Procedure if, and to the extent that, the court in the exercise of its discretion, and for good cause shown, grants leave to do so. ...

(b) *Requests for discovery.* – Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.;

as well as such Code subsection which states, in pertinent part, to-wit:

...If it shall appear to the court that the record in the proceedings which resulted in the conviction and sentence, including, but not limited to, a transcript of the testimony therein, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, or all of such records, or any part or parts thereof, are necessary for a proper determination of the contention or contentions and grounds (in fact or law) advanced in the petition, the court shall, by order entered of record, direct the State to make arrangements for copies of any such record or records, or all of such records, or such part or parts thereof as may be sufficient, to be obtained for examination and review by the court, the State and the petitioner.

Of course, there is also Rule 10 of such governing Rules which states that, to-wit: "The West Virginia Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed in West Virginia circuit courts under these rules."

State of West Virginia v. Joseph A. Buffey, Case No. 02-F-10-2.⁴ **By allowing such further disclosure and review of additional evidence in the State's exclusive possession, such may yield further support for the Petitioner's claims, narrow the issues in dispute or, at least in the eyes of this Court at this state, possibly even counter such claims.**

...
...it is verily believed that **such requested disclosure via the discovery process and additional review will allow a fully developed and complete record upon which this Court can then make the appropriate Rule 9(a) determinations as to whether or not to proceed to an evidentiary hearing stage contemplated in Rule 9(b) before comprehensively ruling in finality contemplated in Rule 9(c). Thereupon, such record will be complete and available to either the Petitioner or the Respondent or both to take any further appellate action deemed necessary.**

...
Circumstantial inferences upon the totality of evidence presently before this Court, when considered in light of newly discovered evidence, as addressed in this pending Petition, as amended and/or supplemented, identify potentially credible inferences of exculpatory character and/or violation of Constitutional rights. As such, **these matters need fuller evaluation which can only be accomplished through a complete inquiry which includes the files and their contents which are the subject of these pending discovery requests. Such production of requested evidence (or not produced, if not in existence, as the case may be) is found to be necessary for a proper determination of Petitioner's claims.** (Emphasis added by this Court).

W. Va. Code § 53-4A-4(a) specifically supports the notion of mandatory production of records and documents in the State's possession upon such being found to be "necessary for a proper determination" of pending habeas grounds and claims.

Based upon prior rulings by our State Supreme Court, this Court finds and concludes that: the Petitioner herein has a right to the requested discovery in an effort to assure that no violation of his due process rights will escape this Court's attention; such access to potentially relevant evidence in the State's possession is considered a component of having Petitioner's claims fully considered; and specific allegations herein having been made by the Petitioner, upon full development, may demonstrate an entitlement to habeas relief. In light thereof, it is the duty of this Court to provide the necessary facilities and procedures for

⁴ Directly related therewith is *State of West Virginia v. Joseph A. Buffey*, Case No. 02-F-9-2. Such felony charges contained therein were made a part of the plea agreement, not prosecuted and ultimately dismissed by this Court upon the Petitioner's plea and sentencing.

disclosure, review and full inquiry. See *Gibson v. Dale*, 173 W. Va. 681, 319 S.E.2d 806 (1984) along with internal citations.

(See Order Pgs. 12 - 15 of 18; *Id.*, pp. 320 – 323).

This Court reiterated in its Order entered on April 10, 2013 (see Itemized Order List No. 20 *infra*), while ruling on several of Petitioner's particular discovery requests then pending that, to-wit:

...in order to ultimately rule on the Petitioner's *Amended Petition* herein, desires there to be a 'complete' and 'relevant' record upon which to determine if any of the Petitioner's therein asserted grounds apply... . [It further stated that it] ...has enunciated its position almost to the point of *ad nauseum* that the discovery process in this Habeas Proceeding is to be given a wide swath and, at least theoretically, to the benefit of both parties. That the Respondent State has not quantitatively undertaken or potentially benefited as much from this process as the Petitioner in developing a fuller and more complete record upon which this Court will ultimately rule, it is what it is.

This Court recognizes that it allowed a "wide discovery swath" to the Petitioner, which he accordingly made every effort to take keen advantage. However, such process was not intended to be unfettered and was still to be managed by this Court pursuant to the applicable rules and procedural requirements and within appropriate judicial discretion, determination and approval. The Petitioner all too often appeared to have mistaken this Court's granting him such extraordinary latitude to be approval of his discretion and authority to unilaterally demand and expect its requests to be unquestionably fulfilled by the Respondent without receiving appropriate permission from this Court.

The Respondent, on many occasions, voluntarily complied with the Petitioner's requests which had not brought to this Court's attention for review and determination of allowance within its discretionary permission. Of course, the record herein is replete with motions to compel discovery with seemingly endless exhibits attached which

reflected among other things the ever flowing email trail, correspondence and phone calls occurring between opposing legal counsel and their offices throughout this matter.

This Court acknowledges, in hindsight, that both the Petitioner and Respondent may well have felt like having been placed in somewhat of a “Catch-22” position as a result of such “wide discovery swath” without being specifically directed by it to seek initial permission for each and every specific discovery request. Without such direction or further requested clarification, rather than avoid tiring this Court of endless discovery requests/motions while attempting to work directly with the Respondent State in addressing all such discovery, this Court ultimately had to address multiple Motions to Compel and related Motions thereto, sometimes to its expressed displeasure and angst.

The last directive provided by this Court to the respective parties’ legal counsel was that discovery could continue up and until the last day prior to the evidentiary Omnibus hearing so long as any such initiated discovery was completed before such hearing begins. (See Itemized Order List No. 24 *infra* and in Civil Action Binder No. 4, pp. 1434 - 1444). In so footnoting such directive therein, this Court specifically stated that it, to-wit:

...fully realizes the discovery process herein is ever-evolving and quite unlike any other in its time. This Habeas proceeding is perhaps the most complicated and detailed it has presided over. Its intention to develop as complete a record as possible remains tempered by the bounds of applicable Habeas rules and relevant statutes along with related rules of discovery and controlling case law. The fluid nature of this proceeding certainly makes this Court’s inherent authority and responsibility for exercising its judicial discretion in managing its course all that more heightened.

All this being said, this Court wishes to make it abundantly clear once and for all that its initial and continuing position during this proceeding to allow for the widest possible discovery, far beyond any other Habeas proceeding presided over in this

jurist's twenty-two plus years on the bench, was intended to allow for the fullest meaningful record possible to be developed. In turn, this Court's good intention would hopefully allow for an encompassing review by this Court in an effort to have every substantively impactful stone turned and sufficiently revealed for its consideration and, hopefully, leave little if anything not being addressed, considered and applied in reaching the final rulings being made herein.⁵

Initial Res Judicata Discussion

Quite appropriately so throughout this proceeding, the Respondent State has steadfastly maintained its position as to *Res judicata* acting as a bar to most if not all of the Petitioner's present Habeas relief claims being addressed herein.

By this Court's previously recognized November 5, 2012, Order, it denied the Respondent, State of West Virginia's, Motion to Dismiss (which was consolidated within its Response to the Petitioner's original Petition herein). In so denying, this Court stated in pertinent part that, to-wit:

... Suffice it to say that this present matter avers "newly discovered evidence", that being serology evidence testing results obtained through application of advanced testing methods of DNA analysis not available during the prior 2004 habeas proceeding on behalf of the Petitioner.

Therefore, and in light of this Court's prior *Order Directing Post Conviction DNA Testing* entered on October 12, 2010, in State of West Virginia v. Joseph A. Buffey, Case No. 02-F-10-2, pursuant to this State's Right to DNA Testing Act, W. Va. Code §15-2B-14, such "new" test results' legal significance determination should not be barred by *res judicata* or as an impermissible ground for a successor Habeas petition **at this stage to warrant, in and of itself, procedural dismissal of this Petition.** To do so would not allow such claims to be fully considered on their merits and, thereby, would also be contrary to the plain mandates of respective *W. Va. Code § 15-2B-14* and *§ 54-4A-1*. **Allowing for further**

⁵ Given the totality of this discovery process allowed in this extremely involved Habeas proceeding, the quite evolving and complex nature therein and the arising difficulties therefrom between the Petitioner and the Respondent; this Court now fully realizes in hindsight that stricter procedural guidelines could have been established initially that might have been to everyone's ultimate benefit.

consideration and ruling on the merits still maintains the burden upon the Petitioner to convincingly show that he is entitled to habeas relief and affords the Respondent appropriate opportunity to raise legitimate challenges to those merits both new and revisited as a result of the newly discovered evidence.

...
As to the Petitioner's grounds for habeas relief as stated in his Petition, ...it may be found and concluded that although the Petition may be somewhat inartfully pled, **when viewing such grounds contained therein, from a totality of record perspective, they are not barred and are deemed sufficient for the purposes of surviving the Respondent's pending Motion to Dismiss. There are sufficiently implicated constitutional rights of the Petitioner herein advanced to be reviewable in habeas.** (Emphasis added by this Court herein).

...
(See Order pp. 8, 9 of 18 in Civil Action File Binder No. 1, pp. 316 – 317).

Again, just prior to the scheduled evidentiary Omnibus hearing held herein before this Court on July 10, 11, and 12, 2013, the Respondent filed its *State's Renewal And Request For Ruling On Res Judicata* filed on July 9, 2013.

Therein, it specifically renewed prior Motions made to this Court in regard to ruling upon application of *res judicata* upon "all issues waived or finally decided by this Court by Final Order entered on July 2, 2004, as a result of the Omnibus Habeas Corpus proceedings, including a Losh Checklist which took place on March 12, 2004." (See State's Renewal in Civil Action Case File Binder No. 5, p. 1717).

Finally, the Respondent State orally renewed its Motion seeking a *res judicata* ruling on the issues associated with this matter during preliminary matters on the morning of July 10, 2013, upon the opening of the evidentiary Omnibus hearing. Thereupon, this Court denied such Motion and, yet again, reiterated that it could and would reconsider this issue following the presentation of all evidence in this matter. (See Order list Item No. 30 *infra* and in Civil Action File Binder No. 5, pp. 1818 – 1823).

This Court, in keeping with its previous pronouncements to the parties herein, will now appropriately give all due consideration to such doctrine's application to the particular issues being addressed herein upon which Petitioner's requested Habeas relief relies. There is an inextricably intertwined nature to the purported issues at hand, as presented with excruciatingly meticulous detail necessitated by the Petitioner's averred circumstances resulting from both his pre-sentencing and post-conviction proceedings all prior to this instant matter. That requires this Court to accordingly analyze part and parcel the pertinent evidentiary issues (of course, directly impacted by the discovery parameters allowed) and related record herein in determining what, if any, and to what extent its application of *res judicata* will be both individually and/or cumulatively upon such consideration and appropriate application so determined within its exercise of judicial discretion.

Status Conferences

Again, this Court held more Status Conferences in this Habeas proceeding than ever before considered or implemented in any other Habeas matter conducted before it. Exemplifying this Court's desire to afford the parties every meaningful opportunity to timely address ongoing and developing matters as well as keep it informed as to any ongoing procedural and substantive issues that would benefit all concerned, numerous status conferences were conducted throughout the course of this proceeding, to-wit: September 5, 2012; November 8, 2012; December 13, 2012; January 16, 2013; and February 15, 2013. The last two held were scheduled along with the evidentiary Omnibus hearing originally set for March 27 – 29, 2013, by agreement of the parties and with this Court's approval, prior to its subsequent rescheduling.

Due to related investigatory issues and other then pending discovery matters herein, such evidentiary Omnibus hearing was rescheduled to July 10 – 12, 2013. At the time it was rescheduled, this Court determined that such status conferences would no longer be held on a recurring monthly basis. These conferences were deemed to have been less productive than originally desired. However, it informed the parties that it would consider scheduling other conferences, upon request of either party, if “substantively brought to its attention...with specific issues identified and in need of being further addressed.” (See Order list Item No. 21, p. 17 herein *infra*; also see Civil Action Binder No. 4, pp 1345 -1349).

Summary of Substantive Orders Entered Previously Herein

Found immediately below is a list of substantive Orders previously entered throughout this proceeding by this Court. Such list is provided for referencing purposes within as well as for expediently locating the actual Orders contained in the Civil Action File(s).⁶

1. *Order Noting Receipt Of Petition For Habeas Corpus Pursuant To W. Va. Code §53-4A-1, Setting Response Deadline, And Directing Service* entered April 30, 2012. (See Civil Action File Binder No. 1, pp. 91-92).
2. *Agreed Order Regarding Deadlines For Filing Legal Memoranda With Regard To Petition For Writ Of Habeas Corpus* entered July 9, 2012. (See *Id.*, pp. 148-149).
3. *Order Setting Briefing Schedule On Petitioner's Motion For Leave To File Amended Petition And/or Supplemental Pleading In Support Of Defendant's Petition For A Writ Of Habeas Corpus* entered July 30, 2012. (See *Id.*, pp. 223- 224).

⁶ Response Scheduling Orders, Videoconferencing Orders and/or Time Extension Orders previously entered herein are not included herein unless such Order also addressed separate pertinent and/or substantive matters.

4. *Order Denying The Respondent State Of West Virginia's Motion To Dismiss This Action; Granting Petitioner, Joseph A. Buffey's, Motion For Leave To File Amended Petition And/Or Supplemental Pleading In Support Of Defendant's Petition For A Writ Of Habeas Corpus; Granting Petitioner's Motion For Discovery; Taking Under Advisement State's Motion For An Order Prohibiting Disclosure Of CODIS Search Results Until Further Order Of The Court* entered November 5, 2012. (See *Id.*, pp. 309 – 326).

5. *Order Reflecting September 5, 2012 Status Conference; Directing That Outstanding Issues And Pending Motion Of Respondent Pertaining to CODIS Search Results Disclosure To Be Further Addressed At November 8, 2012, Status Conference* entered November 5, 2012. (See *Id.*, pp. 327 – 330).

6. *Order Reflecting Status Conference Proceedings On November 8, 2012, And Scheduling The Next Status Conference For December 13, 2012; Denying Respondent's Motion For Protective Order And Motion To Quash Subpoenas While Granting Its Motion For Extension Of Time To Respond; Denying Petitioner, Joseph A. Buffey's, Request For Permission To Personally Attend The Status Conference Scheduled Before This Court On December 13, 2012; And Permitting Petitioner, Joseph A. Buffey, To Participate via Video Conferencing In The Status Conference On December 13, 2012* entered December 11, 2012. (See Civil Action File Binder No. 2, pp. 628 – 637).

7. *Order Granting, In Part, And Denying, In Part, Petitioner, Joseph A. Buffey's, Motion For Protective Order; Entering A Protective Order Limited To Protecting Petitioner From Sitting For Deposition On December 19, 2012; And Establishing Partial Pre-Omnibus Hearing Schedule* entered December 18, 2012. (See Civil Action File Binder No. 3, pp. 656 – 666).

8. *Scheduling Order* entered December 28, 2012 (addressing Status Conference held on December 13, 2012, whereat: (a) Petitioner's co-counsel, Barry C. Scheck, Esq.'s, *pro hac vice* admission status was discussed; his Motion for the Petitioner's immediate release was denied; the next status conferences were set for January 16, 2013, and February 15, 2013, respectively; and an evidentiary Omnibus hearing was initially set for March 27 – 29, 2013).⁷

9. *Order* entered January 4, 2013, granting Motion and Application for Admission Pro Hac Vice of Barry Scheck as co-counsel for the Petitioner in this matter. (See *Id.*, Pg. 751).

10. *Order Appointing Counsel* entered January 18, 2013, *sua sponte* appointing legal counsel for Adam Derek Bowers, an individual then and still presently incarcerated with the West Virginia Department of Corrections. (See *Id.*, pp. 950 – 952).

11. *Order Granting Petitioner, Joseph A. Buffey's, Motion To Exceed Page Limit On Petitioner's Response To State's Privilege Logs; Ruling Upon The Discoverability Of Items Produced by the Respondent, Via Privilege Logs For In Camera Review By This Court, Pursuant To Petitioner's Subpoena Duces Tecum; Directing The Respondent, State of West Virginia, To Produce Such Documentary Items Enumerated In such Privilege Logs According To The Specific Findings And Conclusions Herein; And Directing Clerk To File Such Documentary Items Ordered To Remain Under Seal In The Court File* entered on January 22, 2013. (See *Id.*, pp. 955 – 975).

⁷ Such Order, prepared by State's legal counsel, contains styling "CIVIL ACTION NO. 02-C-769-2 12-C-183-2 [habeas action]". No. 769 was the Petitioner's first Habeas proceeding. As such, the Clerk of this Court filed such Order in Civil Action No. 02-C-769-2 Case File only. (See that Civil Action File Binder, pp. 480 – 482).

12. *Order Granting, In Part, The Petitioner, Joseph A. Buffey's, Motion For Order Permitting Disclosure Of Certain Juvenile Information; And Directing The Respondent, State Of West Virginia, To Produce Such Juvenile Information In Its Possession To This Court For In Camera Review And Further Determination* entered February 4, 2013. (See *Id.*, pp. 1047 – 1055).

13. *Order Granting The Petitioner, Joseph A. Buffey's, Motion To Compel; And Compelling The Respondent, State Of West Virginia, To Review, Prepare, Submit And/Or Provide Supplemental Responses To Petitioner's First Combined Discovery Requests As Addresses And Directed Herein* entered February 7, 2013. (See Civil Action File Binder No. 4, pp. 1099 – 1108).

14. *Order Scheduling Response Deadline For Petitioner's Motion To Compel Discovery And Motion For Additional Discovery* entered February 7, 2013. (See *Id.*, pp. 1109 – 1110).

15. *Order Ruling On Discoverability And Disclosure Of Documents Submitted By Respondent Under State's Providing Of Additional Documentation For In Camera Review Pursuant To This Court's Order Entered On January 22, 2013* entered February 12, 2013. (See *Id.*, pp. 1147 – 1153).

16. *Order Granting Petitioner's Motion For An Order Pursuant To Rule 30(d) Of The Rules Of Civil Procedure; Limiting The Depositional Scope Of Inquiry; And Prohibiting Related Questioning* entered February 12, 2013. (See *Id.*, pp. 1154 – 1161).

17. *Order Directing The Clerk Of this Court To File Correspondence From Petitioner's Legal Counsel, Dated January 20, 2013, Informing Court That No Additional Argument Would Be Offered On Respondent's Motion For Reconsideration; Granting Respondent's Motion For Reconsideration By Altering Or Amending This Court's Order*

Entered On January 22, 2013 Regarding Production Of Privileged Documents; And Amending Such Order As To The Discoverability Of Documentary Item 1 (Bates No. 129 – 132) Of The Clarksburg Police Department Privilege Log And Documentary Items 3 & 4 (Bates No. 75 – 77 & 78 – 80) Of The Harrison County Prosecuting Attorney’s Office Privilege Logs entered February 14, 2013. (See *Id.*, pp. 1209 – 1215).

18. *Order Permitting Joseph A. Buffey To Participate Via Video Conferencing In The Status Conference On February 15, 2013* entered February 8, 2013. (See *Id.*, p. 1263).

19. *Order Regarding Status Conference* (such conference was conducted before this Court on January 16, 2013) entered March 15, 2013.⁸

20. *Order Granting, In Part, And Denying, In Part, Petitioner’s Motion To Compel Discovery And Motion For Additional Discovery* entered April 10, 2013. (See *Id.*, pp. 1333 – 1344).

21. *Order Reflecting Status Conference Proceedings On February 15, 2013, And Related Post-Conference Discussions; Rescheduling Omnibus Hearing For July 10 – 12, 2013, And Filing Deadlines For Exhibit Lists And Witness Lists* entered April 10, 2013. (See *Id.*, pp. 1345 – 1349).

22. *Order Ruling On Discoverability And Disclosure Of Certain Juvenile Records Submitted By Respondent For In Camera Review Pursuant To This Court’s Order Entered On February 4, 2013; Directing The Respondent, State Of West Virginia, To Disclose And Provide Specific Juvenile Records Identified Herein To The Petitioner,*

⁸ Such Order, prepared by State’s legal counsel, contains styling “CIVIL ACTION NO. 02-C-769-2 12-C-183-2 [habeas action]”. Case No. 769 was the Petitioner’s first Habeas proceeding. As such, the Clerk of this Court filed such Order in Civil Action No. 02-C-769-2 Case File only. (See that Civil Action File Binder, pp. 483 – 485). This and other filing abnormalities are addressed herein *supra*.

Joseph A. Buffey, On Or Before May 6, 2013 entered April 29, 2103. (See *Id.*, pp. 1409 – 1416).

23. *Order Denying State's Motion For Modification Of Court's April 10, 2013 Order* entered May 1, 2013. (See *Id.*, pp. 1430 – 1433).

24. *Order Ruling Upon The Discoverability Of Items Produced Under The Respondent State's Privilege Log Of Protected Documents From The Harrison County Prosecuting Attorney's Office File Relating to 2002-2004 Omnibus Habeas Corpus Proceeding Of Petitioner Joseph Buffey For In Camera Review By This Court; Directing The Respondent, State Of West Virginia, To Produce Identified Documentary Items In Such Privilege Log According To The Specific Findings And Conclusions Herein To The Petitioner; And Directing The Clerk Of This Court To File Such Privilege Log As A Matter Of Public Record Herein And File Such Documentary Items Herein Under Seal So As To Remain Confidential And Not A Matter Of Public Record Unless And/Or Until Further Order Of this Court* entered May 3, 2013. (See *Id.* pp. 1434 – 1444).

25. *Order Denying The Petitioner, Joseph A. Buffey's Motion To Compel Production Of Certain Documents Responsive To Subpoena* entered June 11, 2013. (See *Id.* pp. 1465 – 1470).

26. *Order Scheduling Response Deadline For Petitioner's: Motion To Permit And/OR Compel Documents From The Bowers Investigation And Other Discovery Issues; Motion For Order Transporting Andrew Locke For Attendance At Omnibus Hearing And/OR Petition For Writ Of Habeas Corpus Ad Testificandum; Motion For Additional*

Depositions; And Motion To Amend And Correct Witness List entered July 1, 2013.⁹
(See Civil Action File Binder No. 5, pp. 1592 – 1594).

27. *Order Scheduling Response Deadline For Petitioner's Motion For Supplemental Discovery And Motion To Compel Witness Contact And Other Information That The State Should Have Been Disclosed; Granting, In Part, Motion To Compel Witness Contact Information* entered on July 5, 2013. (See *Id.*, pp. 1600 – 1602).

28. *Order Denying Petitioner's Motion For Order Transporting Andrew Locke For Attendance At Omnibus Hearing And/Or Petition For Writ Of Habeas Corpus Ad Testificandum; Granting, In Part, And Denying, In Part, State's Motion Requesting Sequestration Of Witnesses Pursuant To Rule 615 Of The West Virginia Rules Of Evidence; Exempting Certain Expert Witnesses From Sequestration During Specific Witness Testimony; And Holding In Abeyance Further Rulings On The Remaining Motions Still Pending Before This Court Until Further Addressed During or Post Evidentiary Omnibus Hearing* entered on July 9, 2013. (See *Id.*, pp. 1735 – 1741).¹⁰

⁹ This Court noted therein that such a barrage of Motions arrived on the cusp of the scheduled evidentiary Omnibus hearing set for July 10 – 12, 2013, and in contravention to its earlier Order directing any final discovery issues be concluded by then.

¹⁰ The rulings being held in abeyance on then pending Motions included: (a) *Petitioner's Motion For Leave To Present Evidence From Saul Kassin, Ph.D.*, filed on June 19, 2013, [see Order List No. ___ hereinabove *supra*]; (b) *Petitioner's Motion To Permit And/Or Compel Documents From The Bowers Investigation And Other Discovery Issues* filed on June 28, 2013; (c) *Petitioner's Motion For Additional Depositions* filed on June 28, 2013, [as to (b) and (c), see Order listed hereinabove *supra* at No. 34]; (d) *Petitioner's Motion For Supplemental Discovery* filed on July 5, 2013, [see Order listed hereinabove *supra* at No. 35]; (e) *Respondent State's Motion To Quash Subpoena Duces Tecum To The Clarksburg Police Department On June 27, 2013*, filed on July 8, 2013; (f) *Respondent State's Motion To Permit Former Testimony Of Ronald Perry* filed on July 8, 2013; (g) *Respondent State's Motion In Limine To Exclude Testimony Of Charles Honts* filed on July 8, 2013; (h) parts of *Petitioner's Motion To Compel Witness Contact And Other Information That The State Should Have Been Disclosed* filed on July 8, 2013; (i) *Respondent State's Renewal And Request For Ruling On Res Judicata* filed on July 9, 2013, (upon its representation that it felt compelled to so renew thereby removing all doubt, if any, that it had not been waived); and (j) *Respondent State's Motion To Quash Subpoena Duces Tecum To The West Virginia State Dated June 27, 2013* filed on July 9, 2013. This Court summarily stated on Pg. 5 of 7 in such Order (as well as actually ordered on Pg. 6 of 7 therein) that:

29. *Order Permitting Andrew Locke To Participate Via Video Conferencing In July 12, 2013 Hearing* entered on July 11, 2013. (See *Id.*, pp. 1770).¹¹
30. *Order Following Omnibus Hearing On Petition For Post Conviction Writ Of Habeas Corpus* entered August 16, 2013. (See *Id.*, pp. 1818 – 1823).
31. *Order Granting Petitioner’s Motion To File Amended Trial Notebook* entered August 19, 2013. (See *Id.*, pp. 1827 – 1829).
32. *Order Granting Petitioner, Joseph A. Buffey’s, Motion To File Video Recordings Of Depositions Out Of Time And Making Such Recordings A Part Of The Evidentiary Record Herein* entered September 25, 2013. (See *Id.*, pp. 1945 - 1947).
33. *Order Granting Petitioner’s Motion To Add Exhibit To Record; Admitting Document Attached To Petitioner’s Motion As “Exhibit A” Into The Evidentiary Record Herein As “Petitioner’s Exhibit 93”* entered October 1, 2013. (See *Id.*, pp. 1980 - 1982).
34. *Order Scheduling Response Deadline For Petitioner, Joseph A. Buffey’s, Motion To Supplement The Record With The Transcript Of The June 2002 Restitution Hearing And With Additional Notes Prepared By Tom And Mary Dyer; Informing The Parties Herein That No Further Evidentiary Motions Will Be Entertained By This Court In This*

...as to the more involved issues being addressed in all of the remaining Motions still pending before this Court as well as the resulting lack of time available to have all such Motions sufficiently briefed due to the lateness of their filing and this being the eve of the impending evidentiary Omnibus hearing prior, this Court shall hold in abeyance any further rulings until such hearing and upon being further addressed by the respective parties herein. Otherwise, this Court shall rule upon such Motions post evidentiary Omnibus hearing and as part of its comprehensive Order as contemplated and required by Rule 9(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings In West Virginia.

Several of these Motions were addressed and ruled upon at the onset of the evidentiary Omnibus hearing on July 10, 2013. These pending Motions are further discussed and/or ruled upon individually herein *infra*.

¹¹ However, such individual did not appear via videoconferencing to testify at the evidentiary Omnibus hearing. The parties stipulated to related Exhibits in lieu thereof.

Matter; Closing The Evidentiary Record Herein Except For Related Pending Motions And Evidentiary Items Yet to Be ruled Upon; Reiterating To The Parties Herein That Their Respective Detailed Findings Of Fact And Conclusions Of Law Were Due On Or Before Monday, October 14, 2013 entered on October 16, 2013. (See Id. pp. 2120 – 2122).

35. *Order Granting Respondent State's Motion For Extension Of Time To File Responses To Petitioner's Motion To Supplement The Record; Filing And Granting Petitioner's Motion To Extend Time To Respond To State's Objections To Motion To Supplement And Motions To Give No Consideration And To Seal; Informing The Parties That No Further Pleadings, Responsive or otherwise, Will Be Considered By This Court Unless Presently Scheduled By Prior Orders And/Or Identified Herein entered on October 23, 2013. (See Id. pp. 2201 – 2206).*

Rulings on Motions Previously Filed and
Still Pending at the Time of the Omnibus Hearing

Some motions pending at the time of the commencement of the evidentiary Omnibus hearing were addressed thereat while others remained to be subsequently addressed and formally ruled upon. In order for there to be a complete record herein, including all such pending Motions being given sufficient consideration and with enunciated rulings each thereon, this Court now identifies and/or addresses all such Motions accordingly while reiterating previous action taken on some of them at the opening of such evidentiary hearing.

1. *Petitioner's Motion For Leave To Present Evidence From Saul Kassin, Ph.D., was filed June 19, 2013. (See Motion in Civil Action File Binder No. 5, pp. 1481 - 1522).* Pursuant to this Court's *Order Scheduling Response Deadline for Petitioner,*

Joseph A. Buffey's, Motion For Leave To Present Evidence From Saul Kassin, Ph.D., entered on July 19, 2013, the Respondent State filed its *State's Response To Petitioner's Motion To Present Testimony Of Saul Kassin As An Expert Witness Regarding Credibility* on June 25, 2013. (See Response in *Id.*, pp. 1526 – 1535). The Petitioner renewed his request pertaining to Saul Kassin during preliminary matters on the morning of July 10, 2013, upon the opening of the evidentiary Omnibus hearing.

Thereupon, this Court entertained oral arguments and then ordered the parties to arrange Saul Kassin's deposition and submit the transcript thereof to it along with respective briefs and responses by dates certain. Also, at that time, this Court ordered that the Respondent State's Motion *in Limine* seeking to exclude Saul Kassin's testimony from the record herein be denied. (See Itemized Order List Item No. 30 hereinabove *infra*; also see Tr. 2014 Omnibus Hrg. Vol. 4, pp. 33 – 49).

Subsequently, the Petitioner filed his *Memorandum In Support Of The Admissibility Of The Testimony Of Saul Kassin, Ph.D.* via facsimile transmission on September 6, 2013, and again on September 9, 2013.¹² (See Memorandum in Civil Action File Binder No. 5, pp. 1887 – 1901 and Civil Action Binder No. 6, pp. 1911 – 1925 with Exhibits A & B loose in file "under seal"). The Respondent served its *State's Brief In Support Of Excluding Any Consideration Of Petitioner's Witness, Saul Kassin* via facsimile transmission to the Petitioner's legal counsel on September 6, 2013, and

¹² Provided therewith by the Petitioner are various exhibits, to-wit: (a) Exhibit A ~ "Deposition of Saul Kassin, August 20, 2013", pp. 1 – 366 with pp. 360-361 thereof submitted under seal; (b) Exhibit B ~ "Saul Kassin Curriculum Vitae, June 2013", pp. 1 – 21; (c) Exhibit D ~ "Police-Induced Confessions: Risk Factors and Recommendations", published online 15 July 2009 – American Psychology-Law Society/Division 41 of the American Psychological Association 2009, *Law Hum Behav* (2010) 34:3-38, S. M. Kassin et al; and (d) Exhibit F ~ "An American Psychology-Law Society Scientific Review Paper on Police Interrogation and Confession" – published online 21 January 2010 – American Psychology-Law Society/Division 41 of the American Psychological Association 2009, *Law Hum Behav* (2010) 34: 1-2, by William C. Thompson (mistakenly referenced as Exhibit E in n11 on p. 6 therein yet it is marked as Exhibit F).

filed the same herein on September 9, 2013. (See Brief In Support *Id.*, pp. 1902 - 1908).

Further, the Petitioner filed his *Petitioner's Response To State's Brief In Support Of Excluding Any Consideration Of Petitioner's Witness Saul Kassin* via facsimile transmission on September 20, 2013. (See Response To Brief in Civil Action File Binder No. 6, pp. 1932 - 1942). Then, the Respondent State filed its very terse *State's Response To Petitioner's Memorandum In Support Of The Admissibility Of The Testimony Of Saul Kassin, Ph.D.* on September 26, 2013, thereby relying on its Brief previously filed on September 9, 2013. (See Response to Petitioner's Memorandum *Id.*, pp. 1956 - 1960).

Upon its review of the pleadings thereon as well as its deliberation all thereon taking into consideration all pertinent legal authority, this Court hereby **ORDERS** that the Petitioner's original *Motion For Leave To Present Evidence From Saul Kassin, Ph.D.* be and is **GRANTED**. Accordingly, it hereby further **ORDERS** that the deposition testimony of Saul Kassin, Ph.D., taken on August 20, 2013, and a transcript of which heretofore filed herein on September 9, 2013 be and is **FILED** thereby making it a part of the evidentiary record herein. Accordingly, this Court will address such testimony, if at all, as it deems necessary and pertinent within its further findings and conclusions enunciated herein *infra*.

2. Petitioner's *Motion To Permit And/Or Compel Documents From The Bowers Investigation And Other Discovery Issues* filed on June 28, 2013. (See Motion in Civil Action File Binder No. 5, pp. 1539 – 1557). Pursuant to this Court's Order (Order No. 34 listed hereinabove *supra*), the Respondent filed its *State's Combined Response To Petitioner's Motion To Compel Documents And Other Discovery Issues*

on July 8, 2013. (See Respondent's Combined Response *Id.*, particularly pp. 1660 - 1662). Oral arguments were then entertained by this Court thereon during preliminary matters on the morning of July 10, 2013, upon the opening of the evidentiary Omnibus hearing.

Thereupon, this Court initially ordered that a ruling on such Motion would be held in abeyance pending further consideration. However, such Motion was renewed by the Petitioner in the form of requesting production of work product materials in respect to such criminal investigation for purposes of an *in camera* determination by this Court. After entertaining further oral argument, it denied the Motion requesting such disclosure and review. (See Order list Item No. 30 *supra*, p. 2 of 6; also see Court File Binder No. 5, p. 1819).

Upon further consideration of the original Motion as well as for purposes of there being established a final ruling subsequent to its being held in abeyance as initially presented, this Court now hereby **ORDERS** that the Petitioner's *Motion To Permit And/Or Compel Documents From The Bowers Investigation And Other Discovery Issues* be and is **DENIED**.¹³

3. Petitioner's *Motion For Additional Depositions* was filed on June 28, 2013, [as to (b) and (c) therein]. (See Motion with Exhibits in Civil Action File Binder No. 5, pp. 1559 – 1572 inclusive) which included, to-wit: Tom Dyer (Petitioner's legal counsel upon Indictment, plea and sentencing); Sarah Brydie, sister of Adam Bowers; Rebecca Bowers, mother of Adam Bowers; Shantell Shaffer, former girlfriend of the Petitioner

¹³ Legal counsel for the Petitioner additionally raised these and other discovery/impeachment evidence matters via application before this Court just prior to the close of the evidentiary Omnibus hearing on Friday, July 12, 2013, in an effort to make such a matter of record. Opposing legal counsel made oral argument before this Court at such time as well. This Court denied such application(s) in order for there to be a complete record on these matters in the event there is further appellate review.

and mother of his child; and Amanda Jeffress, sister of Shantell Shaffer. In keeping with its earlier directives made known to the respective parties as to timely conducting and concluding discovery herein, this Court hereby **ORDERS** that this Motion be and is **DENIED** having also become moot.

4. Petitioner's *Motion For Supplemental Discovery* was filed on July 5, 2013. (See Motion *Id.*, pp. 1603 – 1606). The Respondent filed its *State's Combined Response To Petitioner's Motion To Compel Documents And Other Discovery Issues* on July 8, 2013. (See *Id.*, Respondent's Combined Response *Id.*, particularly pp. 1657 - 1660). Such Motion requested disclosure of pertinent information and/or statements as to potential witnesses Amanda Jeffress, (Geneva) Shantell Shaffer, Danny Moore, Christopher Cozad, Dottie Swiger and Kayla Buffey. Oral arguments were entertained by this Court on such requests pertaining to Ms. Jeffress, Ms. Shaffer, Ms. Swiger and Ms. Buffey during preliminary matters on the morning of July 10, 2013, upon the opening of the evidentiary Omnibus hearing. Thereupon, this Court denied such Motion as to Ms. Jeffress and Ms. Shaffer without prejudice for the Petitioner to renew such request, if appropriate, during the hearing. It further denied the Motion as to Ms. Swiger and Ms. Buffey.¹⁴ (See Order list Item No. 30 *supra*; also see Order *Id.*, at pp. 1819 – 1820)

¹⁴ Later in the evidentiary Omnibus hearing on July, 12, 2013, Ms. Swiger was called as a witness on behalf of the Respondent State (see Tr. 2014 Omnibus Hrg. Vol. 4, pp. 229 – 231) and Ms. Buffey was called as a rebuttal witness on behalf of the Petitioner (see *Id.*, pp. 290 – 318).

Such witnesses' statements were additionally sought by the individuals pursuant to civil proceedings initiated by and through legal counsel in *Dotty Swiger and Kayla Buffey, Plaintiffs, v. David J. Romano, Assistant Prosecuting Attorney For Harrison County, West Virginia and Joseph F. Shaffer, Prosecuting Attorney For Harrison County, West Virginia*, Civil Action No. 13-C-194-2. At the time of the evidentiary Omnibus hearing herein, such matter was procedurally pending and awaiting proper service of process upon the named defendants therein. Pending Motions therein filed by the respective parties were subsequently reviewed following the evidentiary Omnibus hearing herein, with the issue of effective service of process still being at issue therein. This Court gave opposing legal counsel therein the

5. Respondent *State's Motion To Quash Subpoena Duces Tecum To The Clarksburg Police Department On June 27, 2013*, was filed on July 8, 2013. (See *Id.*, pp. 1614 – 1621). Petitioner's Subpoena concerned investigative documentation pertaining to Amanda Jeffress and Shantell Shaffer as well as training records for certain police officers involved in the Petitioner's underlying criminal investigation and any filed complaints against them alleging inappropriate behavior as police officers or resolution thereof (i.e.; Robert Matheny, David Wygal, John Sedlock and Ron Alonzo). The Petitioner filed his *Petitioner's Response to State's Motion To Quash Subpoena Ducus Tecum To The Clarksburg Police Department* on July 12, 2013. (See *Id.*, pp. 1749 – 1752).

As to Ms. Jeffress and Ms. Shaffer's information, such matter was addressed by this Court as identified hereinabove *supra* on Page 25 of 118, Motion Item No. 5. As to the remaining matters in such pending Motion pertaining to Messrs. Matheny, Wygal, Sedlock and Alonzo, in keeping with its earlier directives made known to the respective parties as to timely conducting and concluding discovery herein, this Court hereby **ORDERS** that this Motion be and is **DENIED** having also become moot.

6. Respondent *State's Motion To Permit Former Testimony Of Ronald Perry* was filed on July 8, 2013. (See Motion *Id.*, pp. 1622 – 1727). Such Motion was proffered pursuant to Rule 804(b)(1) of the *West Virginia Rules of Evidence*, in regard to former testimony, as to Mr. Perry's sworn deposition for and actual testimony in the Petitioner's 2004 Omnibus Habeas proceeding.

opportunity to brief their respective pending Motions. The Plaintiffs therein had additionally tendered to this Court a proposed Order granting their Motion to Dismiss upon representing that such matter was now moot. Following communications with respective legal counsel by this Court, a determination was made and the Plaintiffs' Motion to Dismiss was granted, without prejudice upon entry of their previously submitted proposed Order on October 8, 2013.

The Petitioner filed his *Petitioner's Response To State's Motion To Permit Former Testimony Of Ronald Perry* on July 12, 2013. (See *Response Id.*, pp. 1767 – 1768).

Mr. Perry was listed as a potential witness on both the Petitioner's and the Respondent State's final witness lists for the evidentiary Omnibus hearing. A subpoena was issued for his appearance at the evidentiary Omnibus hearing herein. However, his whereabouts appear to have remained unknown to all parties herein.

Therein, the Petitioner did not object to the Respondent State's Motion. In fact, his Response further requested that all of Mr. Perry's former statements be admitted. In particular, such are identified as, to-wit: (a) Transcript and audio of Mr. Perry's statement from December 6, 2001; (b) Transcript and audio of Mr. Perry's testimony dated April 10, 2003; (c) Transcript and video records of Mr. Perry's deposition from December 29, 2003; and (d) Testimony of Ronald Perry at the habeas hearing on March 12, 2004.¹⁵

Upon its review of the pleadings thereon as well as its deliberation all thereon taking into consideration all pertinent legal authority as well as its judicial discretion in determining the admissibility of proffered evidentiary items, this Court hereby **ORDERS** that the Respondent State's *Motion To Permit Former Testimony Of Ronald Perry* be and is **GRANTED** as well as expanded to include all related statements by Mr. Perry in relation to the Petitioner's underlying felony matters and underlying habeas proceeding.

¹⁵ Furthermore, the Petitioner therein further moved this Court to admit "...all statement of Ronald Perry...along with any documents attributed to Mr. Perry including, but not limited to, his request that the Harrison County Prosecuting Attorney aid him in getting his sentence reduced, Mr. Perry's motion to reduce his sentence, the record of dates of his parole hearings, and any other matters that go to his credibility and that would have been used to cross examine him had he been available for the hearing." (See *Response Id.*, pp. 1767 – 1768).

Accordingly, it hereby further **ORDERS** that: (a) Transcript and audio of Mr. Perry's statement from December 6, 2001; (b) Transcript and audio of Mr. Perry's testimony dated April 10, 2003; (c) Transcript and video records of Mr. Perry's deposition from December 29, 2003; and (d) Testimony of Ronald Perry at the habeas hearing on March 12, 2004, be and are **ADMITTED** and made a part of the evidentiary record herein. This Court will address such testimony, if at all, as it deems necessary and pertinent within its further findings and conclusions enunciated herein *infra*.

7. Respondent *State's Motion In Limine To Exclude Testimony Of Charles Honts* was filed on July 8, 2013. (See *Id.*, pp. 1628 – 1629). The Petitioner filed his *Petitioner's Opposition To State's Motion To Exclude Testimony Of Charles Honts* on July 12, 2013. (See *Oposition Id.*, pp. 1759 – 1762). Oral arguments were entertained by this Court on such Motion during preliminary matters on the morning of July 10, 2013, upon the opening of the evidentiary Omnibus hearing. Thereupon, this Court granted such Motion and excluded such testimony as reflected in its subsequent Order entered on August 16, 2013. However, upon the Petitioner's request, this Court ordered that he be permitted to vouch the record of these proceedings with the anticipated testimony of their polygraph expert, Charles Honts. (See *Order Id.*, pp. 1818 – 1823).¹⁶

8. Petitioner's *Motion To Compel Witness Contact And Other Information That The State Should Have Been Disclosed* was filed on July 8, 2013. (See *Civil*

¹⁶ This Court specifically informed the respective parties that, to-wit: “that witness [Mr. Honts] will be excluded as any witness for the Respondent [actually meaning the Petitioner] with regards to polygraphs and their validity and use and the procedure. And I'll note your exception on that.” (See *Tr. 2014 Omnibus Hrg. Vol. 1, p. 12 at lines 11 - 14*).

The Petitioner subsequently filed his *Petitioner's Proffer Of The Testimony Of Charles Honts, Ph.D.* on August 19, 2013. Such Proffer consists of five (5) pages and is accompanied by Charles Honts's *Curriculum Vitae* attached thereto as Exhibit A which consists of forty-eight (48) pages of typewritten documentation. (See *Proffer in Civil Action File Binder No. 5, pp. 1830 – 1882*).

Action File Binder No. 5, pp. 1633 – 1653). Particularly, this Motion requested that there be an Order directing the Respondent State to provide: (a) contact information for two (2) witnesses, Danny Moore and Chris Cozad by a date and time certain;¹⁷ (b) additional Clarksburg City Police Department documents as to other crimes by the Petitioner purportedly not provided earlier pursuant to previous discovery requests by way of supplementation; and, (c) the original DNA Report from Lt. Myers and the West Virginia State Police Forensic Laboratory in 2002 (or, alternatively, admit that it cannot locate the purportedly original April 5, 2002, DNA Report sent to the Harrison County Prosecuting Attorney's office). As to matters (b) and (c), in keeping with its earlier directives made known to the respective parties as to timely conducting and concluding discovery herein, this Court hereby **ORDERS** that this Motion be and is **DENIED** having also become moot.

9. Respondent *State's Renewal And Request For Ruling On Res Judicata* was filed on July 9, 2013, (upon its representation that it felt compelled to so renew thereby removing all doubt, if any, that it had not been waived). (See *Renewal and Request Id.*, pp. 1717 – 1720). Such Motion was verbally renewed before this Court prior to the calling of any witnesses at the evidentiary Omnibus hearing. In response, this Court denied that Motion as to making a ruling on such doctrine's application at that time but it could and would reconsider the issue following the presentation of all evidence in this matter and in keeping with its continuing representations on such issue heretofore made throughout this proceeding and reflected in multiple Orders previously

¹⁷ Such contact information had been previously ordered by this Court to be disclosed to the Petitioner's legal counsel by the Respondent State's legal counsel pursuant to its *Order Scheduling Response Deadline For Petitioner's Motion For Supplemental Discovery And Motion To Compel Witness Contact And Other Information That The State Should Have Been Disclosed; Granting, In Part, Motion To Compel Witness Contact Information* entered on July 5, 2013. (See *Order Id.*, pp. 1600 – 1602).

entered. Accordingly, further consideration and possible application as to the Doctrine of *Res Judicata* herein *infra* will be identified by this Court when deemed necessary.

10. Respondent *State's Motion To Quash Subpoena Duces Tecum To The West Virginia State Police Dated June 27, 2013* filed on July 9, 2013. (See Motion *Id.*, pp. 1721 – 1727). The Petitioner filed his *Petitioner's Response To State's Motion To Quash Subpoena Duces Tecum To The West Virginia State Police* on July 12, 2013. (See Response *Id.*, pp. 1764 – 1766). As such matter failed to come before this Court during the presentation of evidence during the evidentiary Omnibus hearing and in keeping with its earlier directives made known to the respective parties as to timely conducting and concluding discovery herein, this Court hereby **ORDERS** that this Motion be and is **GRANTED** for purposes of finality on any requested items identified therein subject to such subpoena and in keeping with the evidentiary record herein having been closed thereby also having now become moot.

Rulings on Evidentiary Matters/Motions which Arose
During or Subsequent to the Evidentiary Omnibus Hearing¹⁸

There were particular evidentiary issues still being addressed by the respective parties before this Court during the evidentiary Omnibus hearing which necessitated additional briefing and upon which this Court has yet to further address and rule upon. Also, other Motions not contemplated at the close of such hearing were subsequently filed. Again, in order for there to be a complete record herein so that it includes all such

¹⁸ Keeping in mind that this Court specifically informed the respective parties at the close of the evidentiary Omnibus hearing on Friday, July 12, 2013, to-wit: “So let me find with regards to the evidentiary portions of these proceedings, with the exceptions as noted, the record will be closed, subject to exhibits being cleaned up and those sorts of things, as counsel indicated they will promptly do.” (See Tr. 2014 Omnibus Hrg. Vol. 4, p. 371).

pending Motions and matters being given sufficient consideration and afforded enunciated rulings, this Court now identifies and addresses them accordingly.

1. Admissibility of Mary G. Dyer, Esq.'s, Testimony

Petitioner's Motion To Exclude Testimony Of Mary Dyer (Submitted Under Seal) filed on August 22, 2013, along with Exhibits A through D (in particular, Exhibit A being *Mary Dyer Depo Video Part 1 & Part 2 DVDs*). (See Civil Action File Folder No. 5, Binder No. 5, filed loosely). The Petitioner's submission followed the State filing its *Respondent's Brief In Support Of Admissibility Of Attorney Mary Dyer Testimony* on August 20, 2013, along with Exhibit Nos. 1 and 2 as well as "Deposition Transcript Of Mary G. Dyer – July 29, 2013" (all filed under seal). (See *Id.*)

There was then filed (under seal) the *State's Response To Petitioner's Motion To Exclude Testimony Of Attorney, Mary Dyer* on September 4, 2013, and the Petitioner filed (under seal) his *Petitioner's Response To Respondent's Brief In Support Of Admissibility Of Attorney Mary Dyer's Testimony* on September 4, 2013. (See *Id.*)

These pleadings came pursuant to this Court's Order of August 16, 2013, which reflected that the parties had addressed and argued a matter concerning "...the admission of a statement of the Petitioner allegedly made to Mary Dyer" on July 12, 2013, during the evidentiary Omnibus hearing. (See Tr. 2014 Omnibus Hrg. Vol. 4, pp. 12 – 30). Following such argument, this Court ordered, to-wit:

...that the parties to brief the issue of the admissibility of said statement and the issue of application of attorney client privilege to said statement and submit said briefs...along with the deposition of Ms. Dyer...under seal and that simultaneous briefs be served under seal...with responses to the initial memorandum of counsel be served under seal...

Such submissions were to be by dates certain and further established therein. There were no other related briefs, responsive or otherwise, contemplated by this Court to be made by the respective parties upon this limited matter.

However, subsequently filed in relation to these Court ordered briefs and responses were additionally related pleadings by the respective parties, to-wit:

(a) The Petitioner, Joseph A. Buffey's, *Motion To File Supplemental Memorandum Regarding Motion To Exclude Testimony Of Mary Dyer*, was likewise submitted under seal and filed on September 23, 2013. (See Civil Action File Folder No. 6, Binder No. 6, filed loosely) Simultaneously filed therewith was his *Supplemental Memorandum Regarding Motion To Exclude Testimony Of Mary Dyer*. (See *Id.*). However, it wasn't until September 24, 2013, that this Court discovered its having received a "courtesy copy" of such sealed Supplemental Memorandum and Motion to File submitted under a cover letter from Petitioner's legal counsel, dated September 19, 2013.

(b) On September 24, 2013, before being aware of the Petitioner's submissions and having time to fully review them, this Court received a hand-delivered "courtesy copy" of the *State's Objection To Petitioner's Motion To File Supplemental Memorandum Regarding Motion To Exclude Testimony Of Mary Dyer And Motion To Strike and Not Consider Such Supplemental Memorandum Filed Without This Court's Permission*.¹⁹

¹⁹ Legal counsel for the Respondent State filed a *Certificate Of Service* on September 26, 2013, certifying that he served such Objection to Petitioner's Motion to File and Motion To Strike and Not Consider upon the Petitioner's legal counsel via facsimile transmission on September 24, 2013. (See Civil Action File Binder No. 6, pp. 1961 – 1963).

(c) Late in the day September 25, 2013, this Court received a “courtesy copy” of the *Petitioner’s Response To The State’s Objection To Petitioner’s Motion To File Supplemental Memorandum Regarding Motion To Exclude Testimony Of Mary Dyer*” via email attachment submitted to its law clerk from the Petitioner’s legal counsel. This Response was then filed herein on September 27, 2013. (See *Id.*, pp. 1964 – 1967)

Given the hurried timing within which these various additional pleadings (which were outside the pleadings originally requested and approved for submission by it on such admissibility issue) were being submitted and filed, this Court had insufficient time to fully review such additional Motions and determine what it would allow, if any, as well as what additional responsive pleadings it would entertain and, if so, to what extent. While determining its position on these technically fugitive pleadings and just when this Court thought there would be no further unscheduled responses filed, then came the *State’s Response To Petitioner’s Response To State’s Objection To Petitioner’s Motion To File Supplemental Memo Regarding Admissibility Of Testimony Of Mary Dyer* filed by and through its legal counsel on October 8, 2013.²⁰ (See *Id.*, pp. 2082 – 2090).

²⁰ Thus, this Court has the Respondent’s Motion upon the Petitioner’s Motion upon the initial Petitioner’s Motion” filed by the parties’ respective legal counsel herein with less than circumspect regard for this Court’s authority and judicial discretion for managing all pleadings and proceedings before it.

Such pleadings opportunistically include what this Court considers to be derisive and unnecessary commentary in casting aspersions upon opposing legal counsel. Referring to pleadings of an opposing party as being ignorant attacks that depict perplexing attitudes as well as being motivated by dubious professional error and intentional obfuscation that qualify for being considered as violating *Rules of Professional Conduct* is not a productive means for currying this Court’s enlightened perspective in reviewing additional pleadings pertaining to a matter originally ordered to be briefed in limited fashion.

Then, opposing counsels’ rapidly filed responsive pleadings seemed more a war of words while addressing only briefing matters without responding substantively other than to proffer another Motion is likewise viewed as treading upon this Court’s even-handed, judicial temperament.

Expressions of acrimonious conflict between the respective parties’ legal counsel is something that, if it must occur, need to remain between them outside of this Court’s presence and not injected during proceedings conducted before it or in pleadings submitted to it. It is certainly one thing to offer meritorious criticism through advocacy. However, offering such criticism in caustic, stinging and/or bitter rebukes under the guise of substantive pleadings ultimately serves no higher path to justice.

This Court has additionally reviewed this particular set of interwoven Motions and responsive pleadings arising out of the original issue of whether or not Ms. Dyer's deposition testimony is admissible in this Habeas proceeding and made a part of the evidentiary record herein. It has further considered the arguments of the respective parties all thereon as well as pertinent sections of hearing transcripts, proffered case law citations, other rules and opinions as well as other matters deemed worthy of judicial consideration in ultimately ruling all thereon. This is especially true given the particular Habeas nature of this proceeding.

Accordingly, it has determined that only the respective pleadings originally contemplated by this Court on the admissibility of Ms. Dyer's testimony, particularly in light of the related application of the attorney-client privilege and whether or not there is

Although these Omnibus proceedings at now at an end save for the final rulings herein, these last few pleadings appear to inject opposing legal counsel "gamesmanship" and desire for "getting the last word" that are thinly disguised with overtures of just being zealous representation, constitutionally strategic or serving philosophical manifestos.

Finally, this Court appears to be somewhat taken to task in a responsive pleading where it is presupposed that it will take a Shakespearean "plague upon both your houses" position (apparently due to previous remonstrative commentary made on opposing counsels' rancor exhibited at various times throughout these proceedings). Then, such presupposition is equated as "...not necessarily the path to justice in this or any other case..." and represented to be "...[T]he fact that parties are in conflict, even acrimonious conflict, does not mean that both of them are wrong about the issues." (*See* Petitioner's Response to the State's Objection To Petitioner's Motion to File contained in Civil Action File Binder No. 6, Pg. 1966 at ¶ 2). These commentaries are misplaced and unnecessary coming from officers of this Court in formal pleadings.

We must value Rule 4.06 of the *West Virginia Trial Court Rules* which states, in pertinent part, a rather well-balanced approach as to our courts' expectations for "...the highest standards of professionalism, human decency, and considerate behavior toward others...who come before the courts..." and that, "...[J]udicial officers must ensure that appropriate action is taken to preserve a neutral and fair forum for all persons...", all the while specifically noting that nothing in such Rule "...is intended to infringe unnecessarily or improperly upon...otherwise legitimate rights...of any person, nor...impede or interfere with the aggressive advocacy of cause and positions by lawyers and litigants."

This Court believes that it has shown an abundance of patience and even-tempered demeanor throughout this arduous proceeding and has made every meaningful effort to efficiently yet fairly managed further proceedings and related pleadings herein all within its considerable judicial discretion. Most certainly, it will be fully and equitably exercised when making the various findings, conclusions and ultimate rulings herein. May legal counsel and the parties herein receive these constructive admonitions in the professional spirit they are being offered by this Court.

need for or has been a waiver thereof by the Petitioner, as specifically addressed in its August 16, 2013 Order will be considered in ruling thereon. Subsequent pleadings unilaterally provided and filed by the respective parties without the Court's prior knowledge or permission, although a matter of record herein, will not be considered nor utilized as any basis whatsoever for its ruling(s) thereon.

Upon such review and appropriately conducted deliberations determined to be necessary all thereon, this Court hereby **FINDS** that the testimony of Mary G. Dyer, Esq., is admissible insofar as the Petitioner's grounds for Habeas relief based upon actual innocence, question of actual guilt and/or manifest injustice (i.e.; necessity). This Court hereby **FINDS** there being a sufficiently implied waiver by the Petitioner of any attorney-client privilege and/or confidentiality duty existing with Thomas G. Dyer, Esq., (and Dyer Law Office) arising from the original legal representation provided in the underlying criminal proceedings.

The Petitioner's averred grounds for Habeas relief are so interwoven that the totality of his presented evidence makes it practically impossible to legally distinguish them for separate application as asserted by him. Therefore, this Court will not support his effort to assert particular application of duties or privileges directly flowing from any attorney-client relationship for his evidentiary benefit while, in essence, he thereby averts consideration of potentially aggravating evidence which would rightfully inure to his claims of actual innocence, question of actual guilt and/or manifest injustice.

Such evidence being offered through Ms. Dyer's testimony is deemed to be irrelevant to any claims of ineffective assistance of counsel. However, this Court **FINDS** such testimony potentially relevant in light of the Petitioner's actual innocence and question of actual guilt grounds. As such, it could also inferentially explain why the

purported commentary during any 2002 restitution discussions had not previously come to light since it isn't directly impactful upon any alleged ineffective assistance of counsel.

Accordingly, this Court hereby **ORDERS** that, to-wit:

(a) The *Petitioner's Motion To Exclude Testimony Of Mary Dyer (Submitted Under Seal)* be and is **DENIED**.

(b) The *Petitioner's Motion To File Supplemental Memorandum Regarding Motion To Exclude Testimony Of Mary Dyer* be and is **DENIED** as well as being **MOOT** thereby.

(c) The *State's Motion To Strike and Not Consider Such Supplemental Memorandum Filed Without This Court's Permission* be and is likewise **DENIED** as well as being **MOOT**.

Having so ruled, this Court hereby *sua sponte* **ORDERS** that all such depositional testimony and related DVDs, Motions and responsive pleadings heretofore submitted and filed "under seal" shall remain so and maintained under seal unless and until further Order of this Court or that of another in the event of appellate review.

The Petitioner also previously requested, in addition to these related Motions, that this Court enter a protective order prohibiting the State and/or its witnesses and/or all others with knowledge of Ms. Dyer's testimony be prohibited from disclosing same to anyone else or using same in any future proceedings, if any, against the Petitioner. Such position being taken regardless of this Court's ruling on the admissibility of Ms. Dyer's testimony in this Habeas proceeding. (See Petitioner's Motion to Exclude, pp. 23 – 26 as contained in Civil Action File Binder No. 5, filed under seal loosely therein).

In light of its previous findings and rulings herein related to such testimony, this Court further **FINDS** there to be a lack of sufficient procedural bases or substantive

grounds upon which to support entering a protective order, at this time, as requested by the Petitioner either in part or in whole.

Accordingly, this Court hereby further **ORDERS** that the Petitioner's request for a protective order as contained in his Motion to Exclude be and is **DENIED**.

Upon all of such rulings, this Court *sua sponte* **ORDERS** that the Petitioner and the Respondent be and are each respectively **GRANTED** all appropriate objections and exceptions thereto.

All of this having now been exhaustively stated, this Court will address such testimony of Ms. Dyer, if at all, as it deems necessary and pertinent within its further findings and conclusions enunciated herein *infra*.

2. Petitioner's Request to Reopen the Evidentiary Record

On October 4, 2013, the Petitioner filed his *Motion To Supplement The Record*, along with Exhibit Nos. 1, 1(A), 1(B), 2 and 3, pursuant to Rule 8 of the *Rules Governing Post-Conviction Habeas Corpus Proceedings* for supplementing his evidentiary Omnibus hearing with statements of Peggy Singleton, Paige Shaffer, Michael Wyke and Todd Amos and/or seeking permission to reopen the record for their supplemental testimony.²¹ (See Motion in Civil Action File Binder No. 6, pp. 1983 – 2048).

Pursuant to this Court's Scheduling Order entered on October 7, 2013, to-wit: (a) the *State's Objection To Petitioner's Motion To Supplement The Record And State's Motion For Court To Give No Consideration To Petitioner's Documents And Unsubstantiated Statements Made In Petitioner's Motion And To Seal All Such Matters And Not Permit Them To Be Used For Any Purpose In These Proceedings* along with

²¹ The Petitioner filed his *Notice Of Filing* herein on October 10, 2013, in filing the audio versions of statements of such individuals which were inadvertently omitted when the Motion was initially filed.

Exhibit Nos. 2, 3, 3(a), 4, 5, 6, 7, 8 and 9 were filed on October 21, 2013;²² (See *Objection Id.*, pp. 2125 – 2162) and (b) the *Petitioner's Reply To State's Objections To Petitioner's Motion To Supplement The Record* filed via facsimile transmission on November 1, 2013.²³ (See *Reply Id.*, pp. 2481 – 2493).

This Court has additionally reviewed this particular set of interwoven Motions and various responsive pleadings arising out of the Petitioner's desire to supplement and/or reopen the evidentiary record herein with additional witness statements (serving as rebuttal testimony) which are asserted to attack the credibility of two (2) particular witnesses, Shantell Shaffer and Daniel Moore, called to testify by the Respondent State during the evidentiary Omnibus hearing. It has further considered the arguments of the respective parties all thereon as well as their respectively proffered sections of evidentiary Omnibus hearing transcript, Rule 8 of the *Rules Governing Post-Conviction Habeas Corpus Proceedings* and minimal case law authority deemed worthy of judicial consideration in ultimately ruling all thereon.

Upon such review and appropriately conducted deliberations as determined to be necessary all thereon, this Court hereby **FINDS** within its appropriate judicial discretion

²² Yet, again, this Court is confronted with multiple pleadings; two (2) Respondent motions upon the Petitioner's motion and further legal counsel acrimony. Please revisit n.19 herein *infra*.

²³ Such Reply was filed pursuant to this Court's Order entered on October 23, 2013, which granted the Petitioner an extension of time to respond to the Respondent State's Objections and included Motions therein. Such Order also specifically informed the respective parties, in addition to its Order entered on October 16, 2013 (inadvertently referred to as 2012 in its prior Order), to-wit:

...that no new pleadings, responsive or otherwise, or submissions will be considered by it on the record other than: (1) those presently scheduled by prior Orders entered herein that have yet to be timely submitted; (2) those specifically addressed herein; or (3) those which may be determined by it, *sua sponte*, and addressed by an Order subsequently entered by it specifically pertaining thereto.

that it is unnecessary to supplement the already extensive record in this proceeding with the additional statements and affidavits presently at issue.²⁴

The Petitioner accurately points out that under Rule 8 of the *Rules Governing Post-Conviction Habeas Corpus Proceedings In West Virginia*, this Court “may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition”. However, even though prior rulings have resulted in generous discovery for the Petitioner and expansion of the record herein to grandiose proportions already achieved, this Court **FINDS** that any further expansion based upon the totality of circumstances relied on in the Petitioner’s Motion is unwarranted and unnecessary. This Court believes the record contains more than sufficient evidentiary material for it to consider in regards to determining what, if any, relevancy and credibility be given the various individuals testifying by personal appearance or otherwise and previously made a matter of record or filed for consideration herein.

In acting well within its discretionary authority on such matters, this Court accordingly hereby **ORDERS** that, to-wit:

- (a) The Petitioner’s *Motion To Supplement The Record* be and is **DENIED**.
- (b) The *State’s Motion For Court To Give No Consideration To Petitioner’s Documents And Unsubstantiated Statements Made In Petitioner’s Motion And To Seal*

²⁴ Moreover, the instant pleadings herein on this particular matter reflect, yet again, several more attempts by the respective opposing legal counsel to posture themselves in hand-to-hand pleading combat with what seem to be either personal or professional *ad hominen* vendettas apparently underlying therein. Inferring some sort of improper or suspect context upon which the Respondent State’s legal counsel may be utilizing this proceeding and pleadings herein to protect and/or otherwise somehow shelter a “first cousin once removed” is ever so close to being seen by this Court in contemptuous light. However, given the other various and sundry accusations and bloviating commentary hurled toward each other throughout this proceeding, this Court has become frustratingly accustomed to and increasingly disappointed by it all.

All Such Matters And Not Permit Them To Be Used For Any Purpose In These Proceedings be and is **DENIED** as well as being **MOOT** thereby.

(c) Although such supplementation will not be considered in ultimate deliberations and final rulings being made herein, such pleadings and exhibits shall not be sealed as they shall remain filed but not a matter of evidentiary record.

Upon such rulings, this Court *sua sponte* **ORDERS** that the Petitioner and the Respondent be and are each respectively **GRANTED** all appropriate objections and exceptions thereto.

3. Petitioner's Renewed Request that this Court Reconsider his Previously Denied Request for Statements and Other Documents Pertaining to Adam Bowers

Also on October 4, 2013, the Petitioner filed his *Motion To Reconsider Petitioner's Request For Witness Statements And Other Documents From The State's Investigation Of Petitioner And Adam Bowers* along with Exhibit Nos. A and B. (See *Motion Id.*, pp. 2049 – 2078).

Pursuant to this Court's Scheduling Order entered on October 7, 2013, to-wit: (a) the *State's Response To Petitioner's Motion To Reconsider Request For Witness Statements And Bowers' Investigatory Documents* along with Exhibit Nos. 1 through 5 were filed on October 21, 2013, (See *Response Id.*, pp. 2167 – 2194); and (b) the *Petitioner's Reply To State's Response To Petitioner's Motion To Reconsider Request For Witness Statements and Bowers Investigatory Documents* was filed on October 24, 2013. (See *Reply Id.* on pp. 2211 – 2215).

Particularly, the Petitioner's Motion asks this Court yet again to reconsider, in limited part, its rulings made during the evidentiary Omnibus hearing wherein it denied "production of the prior statements of State's witnesses Daniel Moore and Shantell

Shaffer, as well as any other witness statements or investigative materials the State may have gathered (whether lodged in the file of Joseph Buffey, Adam Bowers, or both) in its investigation of the sexual assault against the victim.” (See Motion, *Id.*, on p. 2049).

Specific requests enunciated therein are for this Court to:

...order the State to make part of the record (1) the pre-hearing interview statements of Ms. Shaffer and Mr. Moore; (s) any notes or other records of interviews with any other persons who were asked by the State’s agents about the relationship between Joseph Buffey and Adam Bowers and whose statements may well have contradicted the testimony that they knew each other, much less had the close association that Ms. Shaffer and Mr. Moore alleged; and (3) any other information that may tend to support Mr. Buffey’s claim of actual innocence. (See *Id.*, p. 2058).

The State primarily relies on variously supported arguments and related prior rulings by this Court concerning the same and similar discovery requests as put forth in its Response. Particularly, in part, it incorporates a previous “review of the law regarding the good cause provision of Rule 7 of the Post Conviction Habeas Corpus proceeding Rules” contained in a prior Response and a matter of record herein. (See Response, *Id.*, p. 2167; *also see* such Response’s attached Exhibit 2, pp. 2175[a] – 2182[a]²⁵ which was originally filed herein on February 12, 2013, and contained in Civil Action File Binder No. 4, pp. 1163 – 1201).

Accordingly, this Court has additionally and reluctantly reviewed this particular Motion and various responsive pleadings arising out of the Petitioner’s desire for this Court to reconsider previous rulings addressing these particular discovery requests for witness statements (i.e.; Shantell Shaffer and Daniel Moore) and criminal investigatory

²⁵ Such Exhibit was submitted with each sheet containing separate pages of the original document copied on each side. In being made a matter of record herein, each two-page sheet was given a separate page designation rather than a separate page designation for each page copied thereon. Hence, this Court’s references the pertinent record pages herein with an additional “[a]”.

documents relating to Adam Bowers. It has further considered the parties' arguments all thereon as well as their respectively proffered case law citations, highlighted sections of the evidentiary Omnibus hearing transcript, statutory interpretations and application of pertinent *Rules Governing Post-Conviction Habeas Corpus Proceedings* for allowing this discretionary discovery.

Upon such review and appropriately conducted deliberations determined to be necessary all thereon, this Court hereby **FINDS** within its appropriate judicial discretion that the Petitioner's requests herein are without satisfactory merit there being insufficient good cause for reconsideration and/or favorable determination on his behalf.

Although factually related, this Court further **FINDS** no legitimate bases for invading the separate and ongoing criminal investigation, evidentiary record or related work product of the State as to the ongoing criminal prosecution of Adam Bowers in order to satisfy the Petitioner's discovery requests.²⁶

The Petitioner's Motion plainly asserts the Due Process Clause mandates, from a Constitutional perspective, that he have a reasonable opportunity to demonstrate his actual innocence. He further implores this Court to find that he "...is entitled to the prior statements of witnesses, police reports and other documents from the Bowers investigation pursuant to the West Virginia and United States Constitutions and/or the substantial need exception to the work product doctrine." (See Motion p. 3, ¶ 1; Civil Action File Binder No. 6, p. 2051).

²⁶ Those being in *State of West Virginia vs. Adam Derek Bowers*, Case No. 14-F-5-2, wherein that individual is charged with two (2) felony counts of First Degree Sexual Assault, one (1) felony count of Burglary and one (1) felony count of First Degree Robbery arising from alleged activities occurring on or about November 30, 2001, and involving the same victim and occurrences upon which the Petitioner's underlying criminal matters arose to which he voluntarily entered into a plea agreement, pleaded guilty accordingly, ultimately sentenced therein and presently incarcerated thereon.

This Court is quite aware of the procedural history on this particular discovery matter (stated in such Motion's "Statement of Facts", pp. 5 - 10/2053 - 2058) and its final considerations thereon during the evidentiary Omnibus hearing (stated in *Id.* p. 10/2058, ¶ 1).

It is the conclusion of this Court that even though such matters have been previously ruled upon by this Court and accordingly denied, the Petitioner has now been afforded yet another bite at this apple through its consideration of his additionally qualified arguments contained in this pending Motion and in light of the passage of time allowing for further criminal proceedings to have been undertaken with regard to Mr. Bowers. As readily stated, his "...present claim for access to the materials requested herein does not rely on *Brady*.²⁷ It rests instead on his far more basic due process right to a fair opportunity to present evidence of his actual innocence to the courts, in light of the State's assertions, testimony, and actions to date." (*See Id.*, p. 16/2064, ¶ 1).

This Court fully concedes that the Petitioner is afforded the basic guarantees of procedural due process provided under the Fourteenth Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution. In consideration of such guarantee to these instant matters, this Court **FINDS** and **CONCLUDES** that, to-wit: (a) it has already afforded the Petitioner an adequate and effective opportunity to present his claims in support of his averred grounds for Habeas relief absent this additional discovery so redundantly demanded on his behalf by his legal counsel; (b) these Habeas proceedings to date and all of the evidentiary record heretofore amassed herein are deemed to have provided to him an abundantly reasonable opportunity to assert his constitutionally-protected liberty interests in attempting to demonstrate his

²⁷ *Brady v. Maryland*, 373 U.S. 83 (1963)

actual innocence or sufficient question of actual guilt as well as any “manifest injustice” suffered by him; (c) a “substantial need” and “undue hardship” have not been demonstrated upon a sufficient showing of good cause for the requested discovery at issue; (d) a full, reasonable and fair forum in which to do so has been provided to the Petitioner; and (e) accordingly, such discovery is not presently necessary for a proper determination of his claims and grounds for habeas relief.

This Court will likewise concede that the Petitioner, through his legal counsel, has vociferously pursued this and other discovery issues with tenacious diligence throughout this proceeding. In its hindsight however, such unrelenting diligence may now be seen to have been, at times, mistakenly directed and/or inappropriately pursued and taken. As such, it cannot now be minimized or ignored solely upon allegations of gamesmanship by opposing legal counsel. With that, this Court particularly finds the Petitioner’s argument that he expressly relied on the State’s good faith in these particular discovery matters to be rather disingenuous given the multitude of the pleadings and exhibits herein where the State and its legal counsel were repeatedly accused by the Petitioner and his legal counsel of not acting in good faith.

This Court deems to have neither abused its discretion nor otherwise applied any relevant application of law incorrectly in its previous rulings on these matters. While it may not have fully articulated the bases for its prior rulings made on the record during the evidentiary Omnibus hearing, it considers such to have been fully addressed *infra*.²⁸

²⁸ This Court takes the pursuit of “manifest justice” to be one of paramount concern and worthy of the highest respect. However, it will not treat such ideal as being a magical wand, in and of itself, for a Petitioner to continually wave throughout a Habeas proceeding with the expectation that each and every discovery door he wishes to enter will automatically be opened for him by the State’s willing participation or an ongoing, unfettered judicial mandate granted to him. Manifest justice shall be judicially determined as fairly as possible by this Court for all parties pursuant to our legal system’s dictates.

Accordingly acting well within its discretionary authority on such matters, this Court hereby **ORDERS** that the Petitioner's *Motion To Reconsider Petitioner's Request For Witness Statements And Other Documents From The State's Investigation Of Petitioner And Adam Bowers* and is **DENIED** and that, *sua sponte*, he be and is **GRANTED** an appropriate objection and exception thereto.

Evidentiary Omnibus Hearing & Post Hearing Proceedings Discussion

Pursuant to this Court's Order (see Order list hereinabove *supra* at Item No. 21), the Petitioner and Respondent submitted their respective Witness and Exhibit Lists for the evidentiary Omnibus hearing on June 28, 2013.²⁹

On the appointed days theretofore previously set, an evidentiary Omnibus hearing was held on July 10, 11, and 12, 2013. Thereat, the following witnesses were presented by the respective parties before this Court to offer live testimony, to-wit:

(a) Petitioner's case-in-chief --- Robert Glen Matheny, Clarksburg Police Department, an investigating officer in the Petitioner's underlying criminal matters herein (See evidentiary Omnibus hearing Transcript, Vol. 1, pp. 43 – 172); Lt. H. B. Myers, West Virginia State Police Forensic Lab, testifying as to the original DNA testing in the Petitioner's underlying criminal matter, testimony in the Petitioner's 2002 Habeas proceeding and latest testing results (See *Id.*, Vol. 1, pp. 273 – 384); Allen Keel, testifying as an expert witness in DNA analysis (See *Id.*, pp. 389 – 461); Kelly Beal (See

²⁹ Legal counsel for the Petitioner submitted and filed via facsimile transmission his *Petitioner's List Of Witnesses And Exhibits* on the afternoon of June 28, 2013, wherein twenty-three (23) potential witnesses were listed in total. Although the Petitioner himself was not included in such original list, he was included on the Respondent's and was subsequently added by amendment as well.

Legal counsel for the Respondent filed its lists of witnesses and exhibits on July 1, 2013, having provided same to Petitioner's legal counsel on the early evening of June 28, 2013, via facsimile transmission, wherein twenty-one (21) potential witnesses were specifically listed along with two (2) general qualifications and one (1) rebuttal witness reservation. These lists were filed pursuant to this Court's prior Order entered on April 10, 2013.

Id., Vol. 2, pp. 7 – 18); Carrie Wyant, an individual from the underlying criminal investigations (*See Id.*, pp. 19 – 60); John A. Scott, Harrison County Prosecuting Attorney at the time of the Petitioner's 2002 criminal indictments, plea and sentencing (*See Id.*, pp. 63 – 96); Gina Lopez, private investigator for the Petitioner's legal counsel in the underlying criminal matters (*See Id.*, pp. 97 – 112); Thomas Gregory Dyer, Esq., the Petitioner's legal counsel on the underlying criminal matters (*See Id.*, pp. 113 – 302); Terri Lynn Tichenor, Esq., the Petitioner's legal counsel in his 2002 Habeas proceedings for the underlying criminal matters (*See Id.*, Vol. 3, pp. 4 – 107); Stephen G. Jory, Esq., testifying as an expert witness in regard to the Petitioner's ineffective assistance of counsel grounds for Habeas relief (*See Id.*, pp. 108 – 201); and the Petitioner, Joseph A. Buffey (*See Id.*, Vol. 4, pp. 52 – 197).

(b) Respondent's case-in-chief --- Daniel Ray Moore, Petitioner's former friend (*See Id.*, pp. 200 – 228); Dottie C. Swiger, Petitioner's Mother (*See Id.*, pp. 229 – 231); and Chantelle Shaffer, Petitioner's former girlfriend. (*See Id.*, pp. 231 – 278).

(c) Petitioner's rebuttal --- Ben Hogan, an employee of Petitioner's local legal counsel in this Habeas proceeding (*See Id.*, pp. 280 – 289); Kayla Nicole Buffey, Petitioner's sister (*See Id.*, pp. 290 – 318); and the Petitioner, Joseph A. Buffey, upon being recalled. (*See Id.*, pp. 323 – 328).

(d) There were no Sur-rebuttal witnesses offered by the Respondent State.

This Court's *Order Permitting Andrew Locke To Participate Via Video Conferencing In July 12, 2013, Hearing* entered on July 11, 2013, made such witness testimonial allowance. However, neither party called this individual to testify. In lieu thereof, the Petitioner requested and Respondent State agreed "...to permit submission of Andrew Locke's anticipated testimony in lieu of calling said witness by the affidavits

and other documents already in evidence as Exhibits...” and “...the letter written by Andrew Locke to the Charleston Gazette be admitted into evidence.” (See Order on p. 3 of 6 at ¶ 3, Civil Action File Binder No. 5 at p. 1820).³⁰

The parties agreed further that the depositions of John Sedlock (Clarksburg Police Department investigating officer in the Petitioner’s underlying criminal matters herein), David Wygal (Clarksburg Police Department investigating officer in the Petitioner’s underlying criminal matters herein) and Therese O’Brien (former Harrison County Assistant Prosecuting Attorney who prosecuted the Petitioner’s underlying criminal matters) would be admitted into evidence in lieu of their respective in-court testimony. (See Order Pgs. 3, 4 of 6 in *Id.*, pp. 1820 – 1821).³¹

Subsequent to this evidentiary Omnibus hearing being held an *Order Following Omnibus Hearing On Petition For Post Conviction Writ Of Habeas Corpus* was entered on August 16, 2013.³² (See Order in Civil Action File Binder No. 5, pp. 1818 – 1823). Pursuant thereto, in part, to-wit: (a) the Court Reporter was ordered to have prepared and delivered to the respective parties and their legal counsel the transcript of the evidentiary Habeas hearing; (b) the parties were to address and resolve all matters as to remaining witnesses to be presented by deposition and provide this Court with the deposition transcripts of all such witnesses released from testimony at this proceeding, and which the parties desired for this Court to consider; (c) the parties were to submit

³⁰ Petitioner Exhibit Nos. 17, 18(a), 18(b), 24(a) 24(b) and Respondent’s Exhibit No. 2 [tape and transcript]. (See State’s Exhibits Notebooks and Petitioner’s Amended Trial Notebooks).

³¹ Such Transcripts along with video recordings thereof were filed herein on September 19, 2013.

³² Such proposed Order was submitted to this Court by the Respondent State’s legal counsel after having been approved for entry by the Petitioner’s legal counsel.

and exchange detailed Findings of Fact and Conclusions of Law by date certain; and oral argument was to be held at a date and time certain with allotted presentation time.

On October 24, 2013, the Petitioner filed his *Petitioner's Proposed Findings Of Fact And Conclusions Of Law* (See Civil Action File Binder No. 6, pp. 2217 – 2357) as well as his *Petitioner's Post-Hearing Memorandum Of Law In Support Of His Petitioner For A Writ Of Habeas Corpus* (See *Id.*, pp. 2358 – 2441).³³

The Respondent State Of West Virginia's Proposed Finding [sic] Of Fact And Conclusions Of Law Denying Habeas Corpus Relief To Petitioner was filed on October 25, 2013. (See *Id.* Binder No. 7, pp. 2442 – 2475).³⁴

³³ The Petitioner's submissions contain two hundred seventy-nine (279) proposed findings of fact and eight (8) proposed conclusions of law.

His Memorandum of Law directly addresses five (5) matters, to-wit:

- (I) *Petitioner Need Not Prove that His Guilty Plea Was "Involuntary" at the Time it Was Accepted by the Court to Prevail on Any of His Current Claims;*
- (II) *Under State and National Authorities, the Record Contains More Than Sufficient Evidence of Petitioner's Actual or Probable Innocence to Grant Relief;*
- (III) *The State's Failure to Disclose Exculpatory DNA and Other Evidence in 2002 Violated Petitioner's Federal and State Constitutional Right to Due Process;*
- (IV) *Petitioner's Trial Counsel Was Ineffective;*
- (V) *This Court Need Not Find Constitutional Violations to Grant Relief Based on the New DNA Evidence (Question of Actual Guilt) or on Manifest Injustice.*

Additionally, it incorporates by reference the Petitioner's variously stated authorities and arguments as previously set forth in his April 24, 2012 Memorandum of Law in support of his original Petition, as well as his July 30, 2012, Memorandum of Law in support of his Amended Petition. Such incorporation is made to whatever applicable extent necessary given the subsequent discovery and testimony comprising the record. Such Memorandum is accompanied by additional legal citation authority, to-wit:

- (a) *People v. Coleman*, 2013 IL 113307, 996 N.E.2d 617 (2013);
- (b) *State of Ohio v. Douglas Prade*, Case No.: CR 1998-02-0463, *Order On Defendant's Petition For Post-Conviction Relief Or Motion For New Trial* filed on January 29, 2013, in the Court of Common Pleas, Summit County, Ohio, (which the Petitioner informed this Court by letter dated April 2, 2014, that it was reversed and remanded on appeal by the Court of Appeals of Ohio, Ninth Judicial District, Summit County, by Opinion decided March 19, 2014, C.A. No. 26775 [copy provided]); and
- (c) *Huffington v. State of Maryland*, Case No. 10-K-83-6373/6374, *Memorandum Opinion And Order* Decided on May 13, 2013, in the Circuit Court of Maryland, Frederick County.

³⁴ The Respondent State's submission contains a review of the Petitioner's 2002 Habeas Corpus proceedings along with discussions and proposed factual findings directly addressing: (a) Application of *Res Judicata*; (b) Ineffective Assistance of Habeas Counsel, Terri L. Tichenor; (c) There Was No Newly Discovered Evidence by Petitioner; (d) Suppression of Brady Material; and (e) "Actual Innocence"[.] Manifest Injustice and Credibility of Petitioner along with thirty-one (31) specific conclusions of law.

On December 4, 2013, this Court entertained closing oral argument of the parties through their respective legal counsel, to-wit: (a) Barry C. Scheck, Esq., and Allan N. Karlin, Esq., on behalf of the Petitioner, Joseph A. Buffey; and (b) David J. Romano, Esq., on behalf of the Respondent, State of West Virginia.

The transcript of *Oral Arguments Regarding Petitioner's Petitioner [sic] For Write [sic] Of Habeas Corpus* was filed on March 10, 2014, and a matter of record herein. (See Civil Action File Folder No. 6, Tr. Oral Arguments, pp. 1 – 102, filed loosely).

This Court has assiduously labored on the instant Order and devoted countless hours to its preparation. Such efforts have involved in-depth review, analysis and deliberation upon the extremely extensive record herein, prior habeas proceedings, multiple transcripts, the far-reaching arguments of respective legal counsel on behalf of the parties' litigant and pertinent legal authorities both submitted and independently researched.

Given the immense scope and breadth of these matters and this Court's allowance for a fully developed record, within its reasoned application of pertinent authority and judicial discretion, the extended time for completion of this Order has been most necessary and unavoidable. Such necessity being even further so given this Court's ever consuming and ongoing time requirements in managing its active docket.

Standard of Review

In general, the statute governing post-conviction habeas corpus proceedings contemplates that every person convicted of a crime shall have a fair criminal proceedings and trial in circuit court, an opportunity to apply for appeal to the Supreme Court of Appeals, and one omnibus post-conviction habeas corpus hearing to which the petitioner may raise any collateral issues which have not previously been fully and fairly

litigated. *Losh v. McKenzie*, 166 W.Va. 762, 277 SE.2d 606 (1981). Courts are typically afforded broad discretion when considering whether a habeas petition has stated grounds warranting the issuance of the writ. *State ex rel. Valentine v. Watkins*, 208 W.Va. 26, 537 S.E.2d 647 (2000).

When granted an omnibus habeas corpus hearing, the petitioner is required to raise all grounds known or that reasonably could be known by him. *Markely v. Coleman*, 215 W.Va., 729, 601 S.E.2d 49 (2004). Moreover, the petitioner is entitled to careful consideration of his claims for relief; this meticulous consideration is mandated in order to assure that no violation of the petitioner's due process rights could have escaped the attention of either the trial court or the Supreme Court of Appeals. *Id.*

This Court is required to evaluate any habeas corpus petition to determine whether claims (or grounds) asserted therein have been "previously and finally adjudicated or waived", or whether "the petitioner contains a mere recitation of grounds without adequate factual support". *R. Hab. Cor. 4(c)*. A claim (or ground) adjudicated in a previous post-conviction proceeding is not precluded unless it was an "omnibus Habeas Corpus proceeding" and the petitioner was either represented by counsel or knowingly waived his right to be represented by counsel. *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981); *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).

"[T]he burden of proof rests on the Petitioner to rebut the presumption that he intelligently and knowingly waived any contention or ground for relief which he could have advanced on direct appeal. ..." *Losh*, 765, 609. Further, he "has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." *State ex rel. Scott v. Boles*, 150 W.Va. 453, 147 S.E.2d 486, *Sy. Pt. 1*, (1996).

Any grounds (or claims) for habeas relief that could have been advanced in a previous post-conviction proceeding but were not are preclusively waived as to any further consideration unless such waiver can be shown by the petitioner to have been less than knowingly and intelligently waived. *W. Va. Code § 53-4A-1(c); Ford v. Coiner*, 156 W.Va. 362, 196 S.E.2d 91 (1972).

Upon a petitioner having been afforded a conclusive omnibus Habeas Corpus proceeding and with an appropriately entered final order therein in keeping with applicable habeas rules, any subsequent petition on that petitioner's behalf may only address one of the following narrow grounds for relief: (a) ineffective assistance of counsel during the omnibus habeas corpus proceedings; (b) newly discovered evidence; or (c) a change in the law favorable to the petitioner.³⁵ (*See Losh*).

This Court will contemplate allowance for reconsideration of previously adjudicated grounds for Habeas relief insofar as addressing pertinent application of additional overriding precepts, which could bar application of *Res judicata*, with regards to "actual innocence", "manifest injustice" and/or "manifest necessity". Such matters are specifically addressed and discussed herein below in significant detail *infra*.

Findings of Fact and Conclusions of Law
Including Analysis of Petitioner's Assignments of Error

1. The Petitioner was originally indicted by a Harrison County Grand Jury convened for the January 2002 Term under Indictment No. 02-F-9-2 and Indictment 02-F-10-2.
2. Indictment No. 02-F-9-2 charged the Petitioner with the following criminal offenses, to-wit:

³⁵ A fourth exception, very restrictive in nature, includes a limited number of cases involving testimony regarding serology evidence as specifically addressed and identified in *In re: Renewed Investigation of State Police Crim. Laboratory, Serology Div.*, 219 W.Va. 408, 633 S.E.2d 762 (2006)

(a) three (3) counts of breaking and entering under *West Virginia Code § 61-3-12*, which carried a sentence of one (1) to ten (10) years for each count;

(b) one (1) count of petit larceny in an amount less than \$1,000 under *West Virginia Code § 61-3-13*, which carried a sentence of not more than a year; and

(c) one (1) count of destruction of property in an amount less than \$2,500 under *West Virginia Code § 61-3-30*, which carried a sentence of not more than a year.

3. Indictment No. 02-F-10-2 charged the Petitioner with the following criminal offenses, to-wit:

(a) one (1) count of robbery in the first degree under *West Virginia Code § 61-3-11*, which carried a sentence of one (1) to fifteen (15) years;

(b) one (1) count of robbery in the first degree under *West Virginia Code § 61-2-12(a)*, which carried a sentence of not less than ten (10) years;

(c) five (5) counts of sexual assault in the first degree under *West Virginia Code § 61-8B-3*, which carried a sentence of fifteen (15) to thirty-five (35) years for each count;

(d) one (1) count of assault during the commission of a felony under *West Virginia Code § 61-2-10*, which carried a sentence of two (2) to ten (10) years; and

(e) one (1) count kidnapping under *West Virginia Code § 61-2-14*, which carried a sentence of three (3) to ten (10) years.

4. This Court appointed Thomas G. Dyer, Esq., a competent and licensed attorney-at-law with nearly twenty years of legal experience at such time (a majority of which involved criminal defense) to represent the Petitioner on these underlying indictments. Attorney Dyer had previous relationships with the Petitioner to-wit: professionally representing him in a felony criminal offense matter which had been ultimately resolved

via plea agreement and reduced to a misdemeanor; and personally, when the Petitioner performed contract work as a laborer on a job site at Dyer Law Office.

5. On February 11, 2002, the Petitioner proffered guilty pleas to one (1) count of robbery in the first degree and two (2) counts of sexual assault in the first degree. These offenses were included in Indictment No. 02-F-10-2. In exchange for the Petitioner's guilty pleas, the State of West Virginia (Respondent herein) agreed to move for dismissal on the remaining counts contained in Indictment No. 02-F-10-2 and all of the counts contained in Indictment 02-F-9-2.

6. Also in exchange for the Petitioner's guilty pleas, the State of West Virginia agreed that it would waive its right to prosecute the Petitioner for other crimes or offenses with which the Petitioner may have been associated and recommend to the Court that the maximum determinate sentence which the Petitioner should receive on the first degree robbery charge should be forty (40) years.³⁶

7. A plea hearing was conducted on February 11, 2002, during which this Court advised the Petitioner of the possible sentences for the offenses with which he was charged. More specifically, the Court advised the Petitioner that he could be sentenced to a minimum of seventy (70) years under the terms of the plea agreement. This Court then held in abeyance (i.e.; took under advisement) the Petitioner's guilty pleas to the offenses with which he was charged and for which he laid a factual foundation.

³⁶ As to "other crimes or offenses with which the Petitioner may have been associated" there were then specifically considered, to-wit: two (2) new grand larceny charges (Magistrate Case Nos. 02F-16 and 02F-31) then pending against the Petitioner which had been filed in Harrison County Magistrate Court as well as discussions concerning a statutory rape charge involving a girlfriend, that being at the time a 13 or 14 year old named Shantell Shaffer (One in the same called to testify herein by the Respondent State); possession of a firearm or other destructive device; providing false information to an officer or an employee of the Department of Public Safety; as well as any other crimes or offenses, charged or uncharged which he may have committed or aided or abetted at any time whatsoever prior to his signing such agreement (excluding only murder or manslaughter). See *State's Exhibit No. 19* identified as "Thomas Dyer Law Office File (ANK 001 – ANK 0328)", specifically pp. ANK 0006 and ANK 0007.

8. On May 21, 2002, this Court accepted the Petitioner's guilty pleas to one (1) count of robbery in the first degree and two (2) counts of sexual assault in the first degree. Upon careful consideration of the record then existing therein, respective argument of opposing legal counsel, and testimony offered by the victims; this Court proceeded to then sentence the Petitioner to forty (40) years for the offense of robbery in the first degree and an indeterminate sentence of not less than fifteen (15) nor more than thirty-five (35) years for each of the offenses of sexual assault in the first degree.

9. This Court mandated these sentences to run consecutively, resulting in a total sentence of at least seventy (70) years. Such lengthy sentence appeared proportional given the minimum one hundred thirty-six (136) to two hundred seventy (270) year sentence the Petitioner potentially faced in light of all the criminal offenses he was originally indicted upon as well as after accounting for the forty (40) year first degree robbery determinate sentence.

10. On December 10, 2002, the Petitioner filed a *pro se* Petition for Writ of Habeas Corpus setting forth two (2) grounds for this Court's consideration, to-wit: (a) ineffective assistance of counsel; and (b) prosecutorial misconduct.

11. On March 31, 2003, the Petitioner, by Habeas legal counsel subsequently appointed by this Court, filed an Amended Petition for Writ of Habeas Corpus setting forth three (3) grounds for this Court's consideration, to-wit: (a) new evidence; (b) ineffective assistance of counsel; and (c) prosecutorial and Clarksburg City Police misconduct.

12. On March 12, 2004, at the Omnibus Hearing in this matter, the Petitioner represented to this Court that eleven (11) grounds supported his Petition for Writ of Habeas Corpus. Those grounds included: involuntary guilty plea, failure of counsel to

take an appeal, coerced confessions, suppression of helpful evidence by prosecutor, ineffective assistance of counsel, refusal of continuance, sufficiency of evidence, question of actual guilt upon an acceptable guilty plea, severer sentence than expected, excessive sentence, and mistaken advice of counsel as to parole or probation eligibility.

13. In its *Final Order* entered on July 2, 2004, following thereafter, this Court determined that the Petitioner had expressly waived the following grounds (using the numbered Items from his *Losh Checklist*), to-wit:

- (1) trial court lacked jurisdiction
- (2) statute under which conviction obtained unconstitutional
- (3) indictment shows on face no offense committed
- (4) prejudicial pre-trial publicity
- (5) denial of right to speedy trial
- (7) mental competency at time of crime
- (8) mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate
- (9) incapacity of stand trial due to drug use
- (10) language barrier to understanding the proceedings
- (11) denial of counsel
- (12) unintelligent waiver of counsel
- (14) consecutive sentences for same transaction
- (17) State's knowing use of perjured testimony
- (18) falsification of a transcript by prosecutor
- (19) unfulfilled plea bargains
- (20) information in pre-sentence report erroneous

- (22) double jeopardy
- (23) irregularities in arrest
- (24) excessiveness or denial of bail
- (25) no preliminary hearing
- (26) illegal detention prior to arraignment
- (27) irregularities or errors in arraignment
- (28) challenges to the composition of grand jury or its procedures
- (29) failure to provide a copy of indictment to defendant
- (30) defects in indictment
- (31) improper venue
- (32) pre-indictment delay
- (34) refusal to subpoena witnesses
- (35) prejudicial joinder of defendants
- (36) lack of full public hearing
- (37) non-disclosure of Grand Jury minutes
- (38) refusal to turn over witness notes after witness testified
- (39) claim of incompetence at time of offense, as opposed to time of trial
- (40) claims concerning use of informers to convict
- (41) constitutional errors in evidentiary rulings
- (42) instructions to the jury
- (43) claims of prejudicial statements by trial judges
- (44) claims of prejudicial statements by prosecutor
- (46) acquittal of co-defendant on same charge
- (47) defendant's absence from part of the proceedings

- (48) improper communications between prosecutor or witnesses and jury
- (53) amount of time served on sentence, credit for time served

14. Also in that 2004 Final Order, this Court held that the Petitioner had failed to carry his burden with regard to the eleven (11) specific grounds for relief asserted therein (again using the numbered items from his *Losh* Checklist), to-wit:

- (6) involuntary guilty plea
- (13) failure of counsel to take an appeal
- (15) coerced confessions
- (16) suppression of helpful evidence by prosecutor
- (21) ineffective assistance of counsel
- (33) refusal of continuance
- (45) sufficiency of evidence
- (49) question of actual guilt upon an acceptable guilty plea
- (50) severer sentence than expected³⁷

³⁷ Such *Final Order* specifically states, in pertinent part, to-wit:

...[T]he transcript of the plea hearing in this matter indicates that this Court repeatedly advised the Petitioner as to the possible sentence for each and every offense with which the Petitioner was charged and to which he indicated a desire to plead guilty. The Court even calculated, for the Petitioner, the maximum and minimum number of years the Petitioner could be expected to serve if he plead guilty or was found guilty of all the pending charges. The Court further made clear that these figures (ninety-six (96) to two hundred thirty (230) years) were subject to the addition of the determinate first degree robbery sentence which the Court explained carried no maximum period of incarceration and a minimum of ten (10) years' incarceration.

While the Petitioner testified at the Omnibus Hearing that he anticipated concurrent sentencing, he also testified that he understood the plea agreement and knew that the State would be recommending consecutive sentencing. The Petitioner further testified that he specifically recalled this Court reminding him that his sentence could be greater than that which he bargained for and/or anticipated. Therefore, given the foregoing, this Court concludes that the Petitioner has failed to prove that he received a severer sentence than expected. (*See Final Order Denying Petition For Writ Of Habeas Corpus* entered July 2, 2004, in Civil Action No. 02-C-769-2, Binder pp. 344 – 373 [first set of pages 344 – 373]).

(51) excessive sentence

(52) mistaken advice of counsel as to parole or probation eligibility

15. Such *Final Order* dated July 2, 2004, and entered in Civil Action No. 02-C-769-2 denying the Petitioner's Petition and Amended Petition for Writ of Habeas Corpus was appealed with the filing of his *Petition For Appeal By The Petitioner Joseph A. Buffey*. It was presented to the West Virginia Supreme Court of Appeals, along with an accompanying designated record, on February 4, 2005. (See Civil Action No. 02-C-769-2 File Binder pp. 351 – 398).

16. Therein, he specifically stated his "Assignment of Error" on appeal as being that, to-wit; "The Circuit Court was clearly wrong in determining that Petitioner was not entitled to withdraw his plea based upon the ineffective assistance of counsel, the misconduct of the Prosecutor and the Clarksburg City Police and the discovery of the DNA evidence that was exculpatory." (See Petition on Pg. 6; *Id.* Binder p. 394).

17. That Petition for Appeal was refused by Order of our West Virginia Supreme Court of Appeals made and entered on June 14, 2005. A True Copy of such Order was filed and made a matter of record therein on June 17, 2005. (See *Id.*, p. 399).

18. This instant matter is the second Habeas proceeding allowed by this Court to the Petitioner including a second evidentiary Omnibus hearing (i.e.; the Petitioner's first evidentiary Omnibus hearing was conducted on March 12, 2004).

19. The Petitioner's initial Petition in this Habeas proceeding relates, (both reiterating and additionally stating) in pertinent part that, to-wit:

(a) In 2002, he originally filed a "Petition for Writ of Habeas Corpus (as Amended) Pursuant to WV Code § 53-4A-1 et seq." in the Circuit Court of Harrison County, West Virginia, with grounds raised including, "Involuntary guilty plea; failure of

counsel to take an appeal; coerced confessions; suppression of helpful evidence by prosecutor; ineffective assistance of counsel; refusal of continuance; sufficiency of evidence; question of actual guilt upon an acceptable guilty plea; severer sentence than expected; excessive sentence; mistaken advice of counsel as to parole or probation eligibility". Such Petitions were denied post evidentiary Omnibus hearing by Final Order dated July 2, 2004;³⁸ and

(b) He subsequently filed a "Petition for Writ of Habeas Corpus Pursuant to 28 USC § 2254" in the U. S. District Court for Northern District of West Virginia, wherein grounds raised included, "Ineffective assistance of counsel; prosecutorial and police misconduct; due process" which was ultimately denied without an evidentiary hearing by Order dated March 29, 2007. (See Petition on p. 3, Item No. 11; Civil Action File Binder No. 1, p. 4).

20. The instant Petition herein further identifies six (6) concise grounds upon which he bases his claim of being held unlawfully which are, quoting in part therefrom, to-wit:

(a) **"Actual Innocence/Question of Actual Guilt"** (post plea and sentencing) as to "newly discovered DNA evidence" which "proves that petitioner is actually innocent", "clearly establishes Petitioner's innocence" or "[A]t the very least, ... creates a serious question of his actual guilt";

(b) **"Actual Innocence/Manifest Injustice"** (post plea and sentencing) as to the State's refusal to allow him to withdraw his guilty plea in light of such "newly discovered DNA evidence";

³⁸ Such *pro se* Petition and related Motions were filed on December 10, 2002. An Amended Petition was filed on March 31, 2003, by and through his court-appointed legal counsel, Terri L. Tichenor, Esq., in what became styled as *State of West Virginia, ex rel. Joseph A. Buffey, Petitioner, vs. Michael Coleman, Acting Warden, Mount Olive Correctional Center, Respondent*, Civil Action No. 02-C-769-2. This Court's *Final Order Denying Petition For Writ Of Habeas Corpus* was entered therein on July 2, 2004. (See such Civil Action File Binder pp. 344 – 373).

- (c) **“Ineffective Assistance of Counsel”** as to investigation, discovery filings and evidentiary review with regard to his claim of innocence;
- (d) **“Ineffective Assistance of Counsel”** as to failing to challenge, discredit or otherwise attack his quasi-“confession” in regard to its reliability or voluntariness;
- (e) **“Due Process/Presentation of False Testimony”** (pre-Indictment) as to the State knowingly presenting false testimony to the grand jury that indicted him; and
- (f) **“Due Process/Suppression of Favorable Evidence”** (post indictment and pre-plea) as to the State failing to disclose material, exculpatory evidence before his plea hearing.

(Bold face type emphasis added by this Court). (See *Id.* on pp. 5, 6 at Items A through D and Addendum Page contained in Civil Action File Binder No. 1, pp, 6 - 7, 9).

21. The Petitioner specifically avers two (2) issues not previously presented in any other court, state or federal, as to this present Habeas proceeding, to-wit: “ (1) Newly discovered evidence, in the form of exculpatory DNA results obtained through a 2010 court order, that was unavailable at the time of prior proceedings; and/or (2) ineffectiveness of prior prior [sic] post-conviction counsel”. (See *Id.* on p. 6 at Item No. 13 contained in Civil Action File Binder 1, p. 7).

22. The Petitioner’s supportive pleadings proffer seven (7) separate arguments (previously referenced herein *supra*) which elaborate further on and are outlined as, to-wit:

(a) “Because this Petition is Based Upon New, Court-Ordered DNA Test Results Obtained in 2011, It is Not Procedurally Barred” (i.e.; *res judicata*);

(b) “New DNA Evidence Establishes Mr. Buffey’s Actual Innocence, Or at the Very Least Creates a Sufficient ‘Question of Actual Guilt’ to Warrant Habeas Relief”;

(c) “It Would Be a ‘Manifest Injustice’ to Allow Mr. Buffey’s Plea and Sentence to Stand in Light of the Exculpatory DNA Results”;

(d) “Mr. Buffey Was Deprived of Effective Assistance of Trial Counsel When His Appointed Attorney Failed to Conduct a Minimally Adequate Factual Investigation Into Petitioner’s Innocence Before Advising Him to Plead Guilty”;

(e) “Mr. Buffey Was Deprived of Effective Assistance of Trial Counsel When His Appointed Attorney Failed to Move to Suppress, or Otherwise Challenge, His Quasi-‘Confession’ to the Crime”;

(f) “Mr. Buffey’s Right to Due Process of Law Was Violated When the State Knowingly Presented Material, False Testimony to the Grand Jury”;
and

(g) “Mr. Buffey’s Right to Due Process of Law Was Violated When the State Withheld Material, Exculpatory Evidence from Him Prior to the Entry Of His Plea”.

(See Memorandum’s Table of Contents on Pgs. ii, iii and cumulatively therein *infra* on Pgs. 31 – 76 contained in Civil Action File Binder No. 1, pp. 11, 12, 43 - 88).

23. The Petitioner's prayer requests that this Court grant his Petition for a Writ of Habeas Corpus and vacate his convictions or otherwise permit him to withdraw his guilty plea; or, in the alternative, hold an evidentiary hearing on his claims for relief, permit pre-hearing discovery as determined by it under the *West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings* and the *West Virginia Rules of Civil Procedure*.

24. The Petitioner's "Amended Petition" essentially provides supplemental pleadings in further support of his original Petition pursuant to Rule 15(a) of the *West Virginia Rules of Civil Procedure*. However, in distinguishing such, he additionally avers only matters solely related to an individual, Andrew Locke (a purported accomplice of the Petitioner and a witness for the Respondent State in the underlying criminal matters herein and in the Petitioner's prior 2002 Habeas proceeding). Such matters purport to provide additional evidence from Mr. Locke that specifically and significantly support Grounds 1, 2, 3, 5 and 6 for the Petitioner's requested Habeas relief. (See Amended Petition's Addendum Page, Civil Action File Binder No. 1, p. 222).

25. By its Order entered November 5, 2013, among other rulings all therein, this Court denied the Respondent State's Motion to Dismiss; granted the Petitioner's Motion for Leave to File an Amended Petition; and granted the Petitioner's Motion for Discovery which formally began the development of the evidentiary record herein for further review and determinations.

26. The Petitioner's "Amended Petition" (see Petition in Civil Action File Binder No. 1, pp. 216 – 221) specifically identifies six (6) grounds (each accompanied by a brief summary of the purported facts supporting each ground) upon which he claims being unlawfully held and which are now quoted, to-wit:

(a) Ground One: Actual Innocence/Question of Actual Guilt

Newly discovered DNA evidence proves that petitioner is actually innocent. The victim in this case was an 83-year-old, sexually inactive widow who lived alone. On Nov. 30, 2001, she was raped and robbed by a single perpetrator. New DNA testing, obtained for the first time in May 2011, shows that spermatozoa found on multiple items in the victim's sexual assault examination kit comes from an unidentified male, not Petitioner. Because the only possible source of the spermatozoa is the actual perpetrator ... (continued on attached page) ... the new DNA evidence clearly establishes Petitioner's innocence. At the very least, it creates a serious question of his actual guilt. In addition, newly discovered evidence obtained from former State's witness Andrew Locke and United Hospital Center, in which Mr. Locke affirms that Petitioner never made the inculpatory statements attributed to him by the State, and which further reveals that Mr. Locke suffered from a drug overdose on the night his statement was taken by police, corroborates and strengthens Petitioner's innocence claim.

(b) Ground Two: Actual Innocence/Manifest Injustice

In light of the newly discovered DNA evidence, the State's refusal [sic] to allow Petitioner to withdraw his guilty plea is a manifest injustice. The new DNA evidence was obtained using technology that was unavailable to any party at the time of the 2002 plea or his initial writ hearing in 2004. It was also obtained pursuant to a statute (the Right to DNA Testing Act) that did not exist at that time. Moreover, the record is devoid of any other credible evidence supporting Petitioner's alleged guilt of these crimes ... (continued on attached page) ... and certainly not enough to outweigh the DNA evidence. In addition, the newly discovered evidence obtained from former State's witness Andrew Lock and United Hospital Center corroborates and strengthens Petitioner's innocence claim, and further establishes that it would be a manifest injustice for his 2002 plea and sentence to stand.

(c) Ground Three: Ineffective Assistance of Counsel

Petitioner's appointed counsel failed to conduct a minimally adequate factual investigation into Petitioner's claim of innocence before "strongly recommending" that Petitioner plead guilty. Counsel's representation [sic] was deficient and prejudiced Petitioner because, inter alia, he failed to obtain basic discovery from the State, file any substantive pretrial motions, review the State's exculpatory forensic and eyewitness evidence ... (continued on attached page) ... retain the services of experts, or interview key witnesses, including Andrew Locke.

(d) Ground Four: Ineffective Assistance of Counsel

Petitioner's appointed counsel also failed to take basic, reasonable measures to challenge Petitioner's quasi-"confession" before urging him to plead guilty. Counsel failed, *inter alia*, to file a motion to suppress the confession, seek a hearing as to its involuntariness or unreliability, or retain the services of an appropriate expert regarding false and involuntary confessions.

(e) Ground Five: Due Process/Presentation of False Testimony

Petitioner's due process rights were violated when the State knowingly presented false testimony to the grand jury that indicted him. The State presented the testimony of a police witness who repeatedly misstated the contents of Petitioner's "confession," and falsely told the grand jury that the confession was corroborated by certain extrinsic evidence, which the State knew was untrue. The State also presented the custodial statements of Andrew Locke to the grand jury as allegedly corroborating evidence, while failing to inform the jury about Locke's intoxication and overdose on the night the statement was given.

(f) Ground Six: Due Process/Suppression of Favorable Evidence

Petitioner's due process rights were violated when the State failed to disclose material, exculpatory evidence before his plea hearing. This included evidence that the victim did not identify Petitioner as her assailant, and that the State had excluded Petitioner as the source of all fingerprints from the crime scene. The State continues to refuse to provide access to this key evidence, or to other, potentially exculpatory contents of its files that may further exculpate Petitioner and identify the true perpetrator of this rape and robbery. In addition, the State knowingly suppressed exculpatory information it possessed regarding witness Andrew Locke, including the fact that was taken by police to be treated for a drug overdose at United Hospital Center.

27. As reflected in the various recitals herein *supra*, this Court granted and repeatedly allowed incredibly extensive discovery pre-evidentiary Omnibus hearing (as well as post-hearing) in addition to having conducted a full evidentiary Omnibus hearing. By this Final Order, it now fully addresses and rules in finality upon the Petitioner's Petition and Amended Petition for a Writ of Habeas Corpus.

28. The Respondent State argues that all grounds previously considered at the Petitioner's 2004 evidentiary Omnibus hearing within his 2002 Habeas action were

ultimately ruled upon in finality by this Court. Accordingly, it asserts that all such grounds should be precluded from further consideration as a result of proper application of *res judicata* and should not be re-litigated in this subsequent Habeas proceeding. As such, it further asserts that the only remaining applicable grounds that may be affirmatively raised by the Petitioner and considered by this Court in this instant proceeding should be: (a) ineffective assistance of 2002 Habeas counsel, Terri L. Tichenor, Esq.; and (b) “actual innocence”.³⁹

29. The applicable statutes for the issuance of a Writ of Habeas Corpus are contained in *West Virginia Code § 53-4A-1 et. seq.* The adopted and promulgated *Rules Governing Post-Conviction Habeas Corpus Proceedings In West Virginia* provide, supplement and, in some instances supersede, the statutory procedure for post-conviction habeas corpus proceedings set forth in such Code sections.

30. The Petitioner additionally asserts his right to withdraw his guilty pleas after sentencing upon providing further evidence herein sufficient to satisfy any “manifest injustice” test under relevant application within the *West Virginia Rules of Criminal Procedure*.

³⁹ The Respondent State alludes that the Petitioner is attempting to assert that he is factually innocent and relies on our State Supreme Court’s prior discussions in *State ex rel. Smith v. McBride*, 224 W.Va. 196, 681 S.E.2d 81 (2009). At n.44 therein, in pertinent part, it identifies that, to-wit:

... . [I]n federal jurisprudence, the phrase ‘actual innocence’ was developed as a term or art. ... [T]he actual innocence doctrine was developed for the purpose of permitting federal courts to review claims by a defendant that were procedurally barred:

An actual innocence claim is a gateway through which a habeas petitioner [may] have his otherwise barred constitutional claim considered on the merits. To succeed, the petitioner must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. Further, “actual innocence” requires the petitioner to show factual innocence, not mere legal insufficiency. *Barreto-Barreto v. United States*, 551 F.3d 95, 102 (1st Cir.2008)

31 This Court has reviewed the Petitioner's stated grounds of his instant Petition and Amended Petition, which are deemed so argumentatively interwoven each unto the other that they are being ruled upon under both State and Federal law, and now makes the following (with many overlapping) additional findings and conclusions thereon.

(Grounds 1 & 2)
New Evidence ~ Actual Innocence
Question of Actual Guilt ~ Manifest Injustice

32. The Petitioner contends that newly discovered DNA evidence establishes his actual innocence of the sexual assault and robbery of the victim in this case, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Art. III, §§ 10, 14 and 18 of the West Virginia Constitution. Alternatively, at a minimum, he asserts that such creates a *question* as to his *actual guilt* that is sufficient to warrant withdrawal of his guilty plea under the laws of the State of West Virginia. See *Losh v. McKenzie*, 166 W.Va. 762, 769-79, 277 S.E.2d 606 (1981).⁴⁰

33. The Petitioner further contends that the state-of-the-art DNA evidence, obtained between 2011 and 2013, as authorized under *West Virginia Code § 15-2B-14* and directed by this Court's Order, entitles him to present Habeas relief because expert analysis and testimony establish that he is neither the primary or secondary male contributor of any of the spermatozoa DNA recovered from the victim's sexual assault kit and/or bed sheets.

⁴⁰ The Petitioner freely acknowledges that the West Virginia Supreme Court of Appeals has yet to judicially recognize a freestanding claim of "actual innocence" under our state's constitution and that the United States Supreme Court has yet to expressly recognize it either as a matter of federal constitutional law. However, in advancing this claim for Habeas relief, he concludes that the evidentiary record developed herein satisfies the "clear and convincing evidence of innocence" test applied by other jurisdictions in adopting such a standard for relief.

34. Petitioner's claim(s) rest upon the following newly generated DNA analysis evidence as well as other related evidence and related testimony thereon now a matter of record herein, to-wit:

(a) DNA analysis report by Forensic Science Associates dated May 6, 2011 (Petitioner's Exhibit No. 30);

(b) DNA analysis report by Forensic Analytical Sciences, Inc., dated November 29, 2012 (Petitioner's Exhibit No. 31);

(c) DNA analysis report by Forensic Analytical Sciences, Inc., dated March 5, 2013 (Petitioner's Exhibit No. 32);

(d) *Stipulation Of The Parties* entered into between the respective parties, filed by this Court on July 10, 2013, at the evidentiary Omnibus hearing and made a matter of record by the Clerk of this Court on July 11, 2013. (See Civil Action File Binder No. 5, pp. 1742-1743);⁴¹ and

(e) Evidentiary Omnibus hearing testimony (as to such DNA reports, CODIS information, underlying data, interpretations and considerations as to prior DNA testing performed in the underlying criminal and first Habeas proceedings) provided by Lt. Howard Brent Myers, Forensic Analyst and CODIS Administrator at the West Virginia

⁴¹ Among other matters stipulated to thereunder, the parties specifically stipulated to-wit:

That a CODIS search was performed in December 2012, from some of the male DNA extracted from certain pieces of the evidence recovered in the underlying prosecution of Petitioner and the the [sic] West Virginia State Police was notified that the result of such search was the identification of Adam Derrick Bowers; and that in March 2013, the identification was confirmed through DNA testing of a known sample obtained from Bowers. (See Stipulation p. 2, ¶ 2).

West Virginia Code § 15-2B-3(1) defines "CODIS" as '...[t]he Federal Bureau of Investigation's Combined DNA Index System that allows the storage and exchange of DNA records submitted by federal, state and local forensic DNA laboratories.' CODIS is implemented in three tiers, those being, to-wit: (1) local ('LDIS'); state ('SDIS'); and national ('NDIS'). In essence, a law enforcement convicted-offender database

State Police Forensic Laboratory, and Alan Keel, DNA Section Technical Leader at Forensic Analytical Services, Inc., located in Hayward, California.

35. “Where a guilty plea is sought to be withdrawn ... after sentence is imposed, the withdrawal should be granted only to avoid manifest injustice.” *Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190 W.VA. 321, 438 S.E.2d 501, *Syl. Pt. 4*, (1993); *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134, *Syl Pt. 2*, (1980); *State v. Pettigrew*, 168 W.Va. 299, 284 S.E.2d 370 *Syl. Pt. 2*, (1981).⁴²

36. In the context of a guilty plea, there are many factors that may be considered in determining whether or not “manifest injustice” has or has not occurred. As to factoring DNA testing results for such determination, in an instance where a defendant entered a guilty plea(s) without any knowledge thereof while knowing that such testing was being conducted, if cannot be said that any such results influenced his plea. Such results, however conclusive, would have to have been communicated to him prior to his entry of guilty plea(s) and be shown that they were erroneous in order for this Court to substantively consider that matter further. *Matter of Investigation supra*; *U.S. v. Bowman*, 348 F.3d 408 (4th Cir. 2003).

37. *Syl. Pt. 3* contained in *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978), states, to-wit:

Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error.

⁴² Such an allowance for a post-sentencing withdrawal of a guilty plea is discretionary under limited circumstances that must support the much higher standard for granting (i.e.; manifest injustice avoidance) as opposed to pre-sentencing withdrawal standard (i.e.; any fair or just reason). (*See Olish* at p. 80).

38. “Newly discovered evidence” must (1) have been discovered after the trial, and, from the affidavit of the new witness, state what the evidence will be or its absence satisfactorily explained; (2) appear from the facts stated in plaintiff’s affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict; (3) be new and material, and not merely cumulative; (4) the evidence must be such as ought to produce an opposite result at a second trial on the merits; and (5) the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.” *State v. Frazier*, 162 W.Va. 935, 936, 253 S.E.2d 534, 535 (1979).

39. The Petitioner was well aware that DNA testing was being performed by the West Virginia State Police Forensic Laboratory on the crime scene evidence and that his blood had been voluntarily provided for analysis and comparison purposes following his arrest and indictment yet prior to entering his plea on February 11, 2002. (See Tr. 2013 Omibus Hrg. Vol 4, pp. 141 -145; Resp. Ex. 14 Buffey depo. Pp. 206 – 209; Resp. Ex. 13, Tr. 2004 Omnibus Hrg., pp. 240; 2253 – 254).⁴³

⁴³ Pursuant to an *Agreed Order To Obtain Nontestimonial Evidence Of The Defendant* entered on January 24, 2002, in *State of West Virginia v. Joseph A. Buffey*, Felony Case No. 02-F-9-2, the present Petitioner herein was then to provide a known sample of DNA, via a blood draw by the designated medical service contractor at the regional jail then housing him so that such sample could be appropriately provided and transported directly to the “West Virginia Crime Lab” for processing and comparison purposes. Therein, “[T]he parties agree this would be the most expedient course of action at this time.” (See such Felony Case Court File as well as Respondent State’s Exhibit No. 19, copy of such Order and Clerk certification marked therein as ANK 0071 – 73). Such Order further reflected representations by the State that “hair, blood, and other evidence was collected from the crime scene and hand delivered to the West Virginia crime lab on December 7, 2001, however results on those submitted items had not yet been forthcoming.

40. The Petitioner made it clear in these proceedings that he knew that DNA had been recovered from the crime scene and that his blood had been voluntarily given for comparison purposes and the he did not believe that his DNA would be found anyway.

41. The Petitioner was well aware that scientific tests were in the process of being conducted which theoretically would result in evidence either helpful or harmful to his case. He unequivocally stated that he was aware of the DNA testing but chose not to wait for the results before accepting the plea bargain:

Q. [Mr. Romano] Okay. One thing for sure, when you were discussing with Mr. Dyer the pros and cons of taking the plea bargain and adding up the years and doing all that, you knew that your blood had been taken for DNA testing?

A. [Petitioner] Yes.

Q. And you knew the test had not come back?

A. Yes.

Q. And you knew if you wanted to, you could wait for the test to come back, didn't you?

A. Yeah, I knew I could wait, but then, again, I knew waiting meant that plea agreement would expire. In my mind, that's what I thought.

Q. I understand that. What you're saying is, you knew you could wait and get the test results but if you did that, perhaps, that plea bargain right not be on the table again?

A. Right.

...

Q Okay. And also at that point in time, you had told him [Mr. Dyer] your DNA wouldn't be found anyway, didn't you?

A. Yes.

Q. So, really, you made your decision on whether to accept or reject the plea bargain regardless of the DNA result, didn't you?

A. I agreed to take the plea agreement because of not only the amount of time, but, you know, like I said, all the information relayed to me as to what the police had, what evidence they had.

Q. Is your answer yes? I didn't hear [sic] you.

A. Yes.

Q. You're shaking your head. Say yes or no?

A. Yes.

Q. Just so we'll be clear. You had all the facts about your blood being taken, DNA being tested at that time, you didn't have to accept the

plea bargain or you could go forward with it, you put all that on the table, looked at it, and made your decision? Fair statement?

A. I'll agree, yes.

Q. Now, there wasn't one thing about the DNA testing that you relied upon in order to determine your plea?

A. I mean – I mean, you just asked me if – if – did I rely on the DNA in taking my plea. No, because it wasn't complete.

Q. That's what I'm asking you. You couldn't rely on it because you didn't have it and you knew you didn't have it?

A. Right.

Q. And you also knew – at least, according to your testimony, that your DNA wouldn't be found?

A. Right.

Q. So it couldn't have factored into your decision, could it?

A. No.

(See Resp. Ex 14 Buffey Depo. Pp. 154 – 157; Tr. 2013 Omnibus Hrg. Vol. 4, pp. 141-145).

42. The Petitioner voluntarily chose not to wait for such results prior to voluntarily accepting the Plea Agreement proffered by the Harrison County Prosecuting Attorney's office and voluntarily entering his respective guilty pleas in return for the *nolle prosequi* of other criminal charges pending against him, immunity from prosecution on any other ongoing criminal investigations then presently involving him as well as for any future criminal matters that might subsequently arise regarding any other prior deeds other than for murder or manslaughter. (See Civil Action File 02-F-10-2, Binder 1, pp. 11 – 20, 26 – 34).⁴⁴

⁴⁴ The Petitioner's *Plea Agreement* specifically included in most pertinent part that upon his entering pleas of guilty to the felony charge of first degree robbery and two (2) felony charges of first degree sexual assault, the State would to-wit: (a) move to dismiss, with prejudice, the remaining counts in Indictment No. 02-F-10-2 and all of the counts contained in Indictment No. 02-F-9-2; (b) agree to forever waive its right to prosecute the Petitioner for any other crimes or offenses, charged or uncharged, excluding murder or manslaughter, which he may have committed or aided or abetted in the commission of such crime or offense at any time whatsoever prior to February 6, 2002, (c) agree and specifically acknowledge that such waiver of prosecution included then pending criminal warrants bearing Magistrate Case No. 02F-16 and 02F-31, possession of a firearm or other destructive device, providing false information to an officer or an employee of the Department of Public Safety and/or any and all sexual offenses which may come under the commonly known classification of "statutory rape" resulting from the Petitioner's relationship with Chantell Shaffer, whose age at such time was believed to be 14.

43. Such original DNA sample testing evidence at issue in the Petitioner's original criminal proceedings and his 2002 Habeas proceeding, in light of subsequent additional DNA sample testing which utilized advanced techniques as well as such results being submitted for a CODIS search/match analysis, may be fodder for this Court's analysis and potential determination as to whether or not such subsequent testing results and analysis should be precluded from consideration in this instant matter through determining whether or not such evidence is "cumulative" or "newly discovered" for procedural purposes of determining whether or not to affect *Res judicata* application.

44. However, in greater proportion to such *Res judicata* application upon this particular evidence, this Court is more concerned as to whether or not such additional DNA testing results analysis and search results provide a significantly adequate basis in light of the totality of procedural and evidentiary circumstances all being reviewed herein for determining that there, to-wit: (a) is "actual innocence" of the Petitioner as to the criminal offenses to which he voluntarily plead guilty; (b) is a sufficiently "serious question of actual guilt"; (c) exists a "manifest injustice" by allowing his present sentence to stand and not grant Habeas relief; and/or (d) exists a "manifest necessity", to adequately provide a requisite basis for ruling that the Petitioner's voluntarily entered guilty pleas pursuant to a valid Plea Agreement be voided, his convictions be vacated and his present incarceration be addressed relative to any other considered relief.

Also, by letter dated February 6, 2002, from the Petitioner's trial counsel Thomas G. Dyer, Esq., to John Scott, Esq., Prosecuting Attorney in and for Harrison County, West Virginia, written confirmation was provided regarding the Plea Agreement in *State of West Virginia v. Joseph A. Buffey*, (Felony Nos. 02-F-09-2 and 02-F-10-2). Such letter was respectively signed by the Petitioner herein (then Defendant) and Mr. Dyer with signatures dated 2-6-02. (See Felony Case Court File as well as Respondent State's Exhibit No. 19, copy of such letter marked therein as ANK 0006 – 0007).

45. The latest DNA testing results and CODIS searches appear to reveal a primary (as well as arguably sole) male contributor of the DNA samples taken from evidentiary items pertaining to the particular sexual assault incidents occurring in the early morning hours of November 30, 2001, as charged in Indictment No. 02-F-10-2 and to which the Petitioner pleaded guilty, as being distinctly identified in matching the male DNA profile of someone other than him.

46. The extensive evidentiary record contained herein pertaining to such DNA evidence testing and analysis as allowed by this Court includes a voluminous amount of expert testimony thereon from Lt. H. B. Myers and Allen Keel and admitted evidentiary exhibits (as well as Petitioner's exhaustive review and analysis all thereof as reflected in his proposed Findings of Fact and Conclusions of Law as well as Post-Hearing Memorandum of Law in Support; and with limited treatment thereof provided by the Respondent State in its proposed Findings of Fact and Conclusions of Law.⁴⁵

47. As such and upon all of which, this Court rejects the Petitioner's claims that the recent DNA testing analysis and CODIS search results purportedly identifying an individual other than the Petitioner herein as the primary (and arguably sole) contributor of the male DNA found at the crime scene is evidence sufficient to: (a) raise a sufficiently substantive question as to his actual guilt; (b) prove in and of itself the Petitioner's "actual innocence"⁴⁶; (c) show there presently being a "manifest injustice"

⁴⁵ See Tr. 2013 Omnibus Hrg. Vol. 1, pp. 273 – 384 and pp. 389 – 461; Petitioner's Exhibit Nos. 28, 30, 31, 32, 58 and 59 [applicable portions of respective DNA testimony and Court's previous findings/conclusions], 77, 78 and 79 [Keel's CV].

⁴⁶ The Petitioner argues that such DNA evidence, especially in light of the entire record now finally developed by his present legal counsel, sufficiently raises a "question of actual guilt" (identified under *Losh* Checklist Item No. 49 which additionally states "upon an acceptable guilty plea") upon which Habeas relief may be granted. This Court is mindful, too, that the Petitioner further believes he is entitled to Habeas relief separate and apart from a question of actual guilt that is based upon a claim of "actual

imposed upon him by his present criminal convictions and related sentencing/incarceration; and/or (d) demonstrate a “manifest necessity” resulting all therefrom warranting this Court to grant his requested Habeas relief and allow him to withdraw his prior guilty pleas and order them vacated.

48. Furthermore, this Court rejects the Petitioner’s claims that the recent DNA testing analysis demonstrably shows the Petitioner herein not to be either a primary or secondary contributor of the male DNA spermatozoa found at the crime scene and present in the tested items which therefore provides either preponderantly, sufficiently, clearly, convincingly or compelling evidence to: (a) raise a sufficiently substantive question as to his actual guilt; (b) prove in and of itself the Petitioner’s “actual innocence”; (c) show there presently being a “manifest injustice” imposed upon him by his present criminal convictions and related sentencing/incarceration; and/or (d) demonstrate a “manifest necessity” resulting all therefrom warranting this Court to grant his requested Habeas relief and allow him to withdraw his prior guilty pleas and order them vacated.

49. While such recent DNA testing analysis et al (regardless of such being determined to be “newly discovered evidence” or “cumulative evidence” for procedural applications) may very well exclude Petitioner’s DNA spermatozoa from being present and detectable at the crime scene, it does not in and of itself unequivocally determine

innocence”. Such claim he purports as allowing this Court, with supporting evidence, a “gateway” through with to test issues and allow and consider certain evidence, as a matter of state or federal constitutional law, which would otherwise be procedurally barred.

If this leap is deemed insufficient for providing the necessary basis for Habeas relief, the Petitioner attempted to jump such hurdle by offering that this Court still review all such potentially barred issues and/or grounds based upon its allowance and consideration of his allegation that Habeas counsel provided constitutionally ineffective assistance by failing to adequately preserve/present such claims in 2004.

whether or not he was actually present thereat and a participant in the various activities giving rise to the original criminal charges as contained in Felony Case No. 02-F-10-2.

50. In *Matter of Investigation Of W.Va. State Police Crime Lab. ("Zain I") Serology Division*, 190 W.Va. 321, 438 S.E.2d 501 (1993), our State Supreme Court recognized and further stated therein, in most pertinent part for application herein, to-wit:

...

...in Syllabus Point 2 of *State v. Pettigrew*, 168 W.Va. 299, 284 S.E.2d 370 (1981), that after a defendant enters a guilty plea and is sentenced, an attempt to withdraw the guilty plea only can be done on a showing of manifest necessity:

"Where the guilty plea is sought to be withdrawn by the defendant after sentence is imposed, the withdrawal should be granted only to avoid manifest injustice. Syl. pt. 2, State v. Olish, [164] W.Va. [712], 266 S.E.2d 134 (1980)."

...

Obviously, there are many factors that may be considered in determining, in the guilty plea context, whether a manifest injustice has occurred. ... the test still will be whether all the circumstances surrounding the plea and the evidence of the defendant's involvement in the crime warrant a conclusion that manifest injustice occur if the guilty plea is not set aside.

(Emphasis added by this Court). *Investigation Id.* at 326 – 327, 506 – 507.

51. Sufficient inferences from the evidentiary record necessarily may be made which support alternative explanations of how the Petitioner may well have been present at the crime scene and participated all and/or otherwise therein to whatever degree and nature without leaving a detectable and identifiable DNA presence.

52. Given the totality of circumstances surrounding the Petitioner's all leading up to his voluntarily foregoing his right to a jury trial and entering the guilty pleas that he did, upon which he was legitimately convicted and sentenced as to the developed evidentiary record at that time and now with inclusive consideration of the most recent

DNA testing and CODIS search results, this Court will not entertain the vast array of speculations, assumptions, inferences, explanations and interpretations offered by both the Petitioner in now asserting his innocence and the Respondent State in asserting the sufficiency of the record for maintaining the entirety of the Plea Agreement entered into below and upon which his present convictions and incarceration resulted all thereon. To do so, it believes, would only further muddy the factual waters surrounding the events that occurred in the early morning hours of October rather than clear them

53. Accordingly, with such lacking of unequivocal determination, this Court cannot and will not conclude that such DNA evidence provides a sufficient basis for: (a) demonstrating the Petitioner's actual innocence; (b) creating a sufficiently substantive question of his actual innocence; (c) concluding there being a manifest necessity now present that requires he be granted Habeas relief for his underlying convictions and sentencing as well as from his present incarceration; and/or (d) establishing the occurrence of a manifest injustice upon him by upholding his 2002 convictions and sentences occurring thereon upon disallowance of setting aside his guilty pleas.

54. This Court concluded in its July 2, 2004, Ruling Order on the Petitioner's first Habeas action that, to-wit:

...the hearing conducted in this matter was an Omnibus hearing. Therefore, the Petitioner has waived and is prevented from asserting any further grounds in a future Petition for Writ of Habeas Corpus. The Court notes that:

An omnibus habeas hearing as contemplated in W.Va.Code, 53-4A-1 et seq. occurs when: (1) an applicant for habeas corpus is represented by counsel or appears pro se having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently

waived his right to counsel; and, (4) the trial court drafts a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding. *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606, 607-608, Syl. Pt. 1, (1981).

In applying the standard to the instant case, the Court first notes that the Petitioner has been represented by Counsel throughout these proceedings. Second, the Court cautioned the Petitioner at the outset of the hearing that any grounds not raised in this hearing would be deemed waived. The Petitioner's waiver of these grounds is implied because he chose not to present any further evidence and he chose not to proffer any evidence concerning the grounds for written habeas corpus relief. Finally, the within Order has ruled on the merits of the grounds presented at the hearing as well as in the Petition, Amended Petition, Checklist of Grounds for Post-Conviction Habeas Corpus Relief, and "Proposed Findings of Fact and Conclusions of Law."

(See *Final Order Denying Petition For Writ Of Habeas Corpus*, p. 29 of 30, Civil Action No. 02-C-769-2 Binder p. 383).

55. Furthermore, "[T]he subjective but, in hindsight, mistaken belief of a defendant as to the amount of sentence that will be imposed, unsupported by any promises from the government or indications from the court, is insufficient to invalidate a guilty plea as unknowing or involuntary." *State v. Pettigrew*, Syl. Pt. 1, 168 W.Va. 299, 284 S.E.2d 370 (1981).

56. As a basis from which it analytically proceeded, this Court finds that *Res judicata* may have initially served as a preclusive barrier for the Petitioner's attempt to re-litigate any prior issue(s) or ground(s) for relief that were addressed, decided and/or determined to have been waived in his 2002 Habeas proceeding.

57. Applicable *West Virginia Code § 53-4A-1 et seq.* for Post-Conviction Habeas Corpus clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus

proceeding. *Syl. Pt. 1, Markley v. Coleman*, 601 S.E.2d 49 (2004) citing *Gibson V. Dale*, 319 S.E.2d 806 (1984). Given such *Res judicata* application to all matters raised, known or which could have been known with reasonable diligence, an applicant for further consideration of Habeas relief may still petition the appropriate court State court upon limited grounds, to-wit: (a) newly discovered evidence; or (b) a change in law favorable to the applicant, which may be applied retroactively. *Id*, citing *Losh v. McKenzie*, 277 S.E.2d 606 (1981).

58. Accordingly, there may be considered changes in the law of a sufficiently pertinent and favorable nature to the Petitioner's Habeas grounds for limited application herein as well as what may be deemed to be recently discovered evidence ("newly" or otherwise cumulatively developed during this instant matter).

59. Upon which, this Court has limited discretion to determine whether or not there may be legitimately identifiable and available procedural or substantive avenues warranted by the totality of the evidentiary record presently herein for it to grant his requested Habeas relief, allow him to withdraw his prior guilty pleas and order that his convictions and sentencing all thereon be vacated.

60. The statutory "Right to DNA Testing", as reflected in *West Virginia Code § 15-2B-14*, (such being an amendment to the codified "DNA Database and Databank Act of 1995" taking effect November 16, 2004), is deemed to allow such limited consideration.

61. However, there remain the following grounds or issues in this instant Habeas proceeding still to be addressed herein upon which the Petitioner additionally pursues for Habeas relief, to-wit: (a) ineffective assistance of his appointed 2002 Habeas legal counsel, Terri L. Tichenor, Esq., (including review of his ineffective assistance of trial counsel, Thomas G. Dyer, Esq., directly and/or via Ms. Tichenor's alleged

ineffectiveness), in Grounds 3 and 4 of his Petition and as Amended; or (b) his averred Due Process violations, in Grounds 5 and 6 of his Petition and as Amended.

62. This Court continues with necessary findings and conclusions thereon being based upon all relevant, credible and applicable evidence contained in the voluminous evidentiary record herein while reviewing the totality of circumstances involving the original criminal investigation, his original indictment, the underlying criminal proceedings, his eventual plea and sentencing and subsequent post-conviction proceedings and evidentiary development.

Grounds 3 & 4
Ineffective Assistance of Prior Habeas and/or Trial Counsel

63. This Court finds that Terri L. Tichenor's conduct, as the Petitioner's court-appointed legal counsel for his 2002 Habeas proceeding, meets the test set forth in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) and *State ex rel Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002) which respectively cite the standard for determining whether or not there was effective assistance of counsel as contained in *Strickland v. Washington*, 466 U.S. 668 (1984). Accordingly, her performance is determined to have been constitutionally sufficient and the Petitioner was not denied effective assistance of prior Habeas legal counsel.

64. As specifically quoted herein *infra*, such standard requires a two-pronged evaluation of a subject attorney's performance by the reviewing Court. First, whether counsel's performance was deficient under an objective standard of reasonableness; and second, whether there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different.

65. With regard to the first prong of the test, a petitioner must first “identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *State ex rel. Myers v. Painter*, 213 W.Va. 32, 35, 576 S.E.2d 277, 280 (2002) (citing *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066). The petitioner's burden in this regard is heavy, as there is “ ‘a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance....’ ” *Id.* (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065).

66. The second prong of the test looks to whether counsel's performance, if found to be deficient, adversely affected the outcome in a given case. *State ex rel. Myers v. Painter*, 213 W.Va. 32, 36, 576 S.E.2d 277, 281. Therefore, the Petitioner must demonstrate that the complained of deficiency or errors of counsel resulted in prejudice or a “reasonable probability” that in the absence of such errors the result of the proceedings would have been different.

67. “In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions.” Syl. pt. 6, *State v. Miller, supra*. Therefore, a reviewing court must ask “whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.” *Id.*

68. However, counsel's strategic decisions must rest upon a reasonable investigation enabling him or her to make informed decisions about how to represent criminal clients. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 423 (1995).

69. All such application falls under our West Virginia Supreme Court of Appeals firmly holding to the following review for allegations of ineffective assistance of counsel, to-wit:

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114, (1995).

70. More recently, it has been further reflected in Syl. Pt. 3, *Ballard v. Ferguson*, 232 W.Va. 196, ___, 751 S.E.2d 716, 717 (2013). further holds that, to-wit:

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 6, *State v. Meadows*, 231 W.Va. 10, ___, 743 S.E.2d 318, 321 (2013).

71. However, this Court relies on the holding that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Miller*, 194 W.Va. at 15, 459 S.E.2d at 126 (quoting *Strickland v. Washington*, 466 U.S. at 689).⁴⁷

72. Yet, this Court is quite mindful of, Syl. Pt. 4, *Ballard v. Ferguson supra*. There, our Supreme Court additionally determined that, to-wit:

⁴⁷ Recently reiterated by our State Supreme Court, there is "...a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." (*see Strickland* at 689). The Petitioner carries a formidable burden to "identify the acts or omissions" of Ms. Tichenor "that are alleged not to have been the result of reasonable professional judgment." *McDonald V. Plumley*, 2013 WL 1632550 (W.Va. 2013) (Memorandum Decision).

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation. Syllabus point 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

73. However, in so stating such presumption in regard to determining legal counsel's investigative adequacy or reasonableness upon which to base strategic decisions, our State Supreme Court qualified such, to-wit:

The *Strickland* Court pointed out that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. *Painter* at 36, 281.

74. Our law is clear in recognizing that the Sixth Amendment of the federal constitution and Article III, § 14 of the state constitution guarantee not only the assistance of counsel in a criminal proceeding but that a defendant has "the right to effective assistance of counsel." *Cole v. White*, 180 W.Va. 393, 395, 376 S.E.2d 599, 601 (1988). Our Supreme Court has further held that "[a] trial court lacks jurisdiction to enter a valid judgment of conviction against an accused who was denied effective assistance of counsel and a judgment so entered is void." Syl. pt. 25, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

75. This Court has previously noted that, "under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices." *State ex rel. Daniel v.*

Legursky, 195 W.Va. 314, 465 S.E.2d 416 (1995). See also *Ballard v. Ferguson*, 232 W.Va. 196, ___, 751 S.E.2d 716, 721 (2013). (J. Loughry dissent).

76. Syllabus pt. 6 of *Miller* further holds that, to-wit:

In reviewing counsel's performance, courts must apply an objective standard and determine whether, **in light of all the circumstances**, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. 194 W.Va. at 6–7, 459 S.E.2d at 117–18. (Emphasis added by this Court).

77. “Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused.” Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

78. “Failure to meet the burden of proof imposed by either part of the *Strickland/Miller* test, is fatal to a habeas petitioner's claim.” *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W.Va. 11, 17, 528 S.E.2d 207, 213 (1999), citing *State ex rel. Daniel v. Legursky*

79. This Court deems Ms. Tichenor's representation of the Petitioner in his 2002 Habeas proceedings, as his court-appointed legal counsel therein, to have sufficiently met the objective standard of reasonably competent legal counsel herein below outlined at length. She was a sufficiently experienced attorney at the time of her appointment, associated with an established law firm and maintained a legal practice primarily consisting of court-appointed work (i.e.; criminal, juvenile; juvenile abuse and neglect).

80. In so deeming her legal representation of the Petitioner to be reasonably competent, this Court specifically finds and concludes that she, to-wit:

(a) timely and adequately communicated with him at the outset of his Habeas proceedings in order to gain a sufficient understanding of his position and goals therein;

(b) regularly consulted with the Petitioner during her representation of him therein on multiple occasions (i.e.; at a minimum thirty (30) different times and which included not only though the evidentiary Omnibus hearing conducted therein but, the following appeal as well;

(c) specifically traveled to the West Virginia State Penitentiary located in Mt. Olive, West Virginia, in order to personally meet with the Petitioner and conduct specific consultations as to Habeas planning and strategy;

(d) availed herself to numerous contacts with members of the Petitioner's family who were attempting to assist in finding witnesses favorable to his position and who also received reports on the case's status which were relayed to him;

(e) retained an investigator, a retired West Virginia State Police trooper with twenty-five (25) years of service, whose services included assisting her in pre-evidentiary Omnibus hearing matters as well as conducting an involved investigation upon which she further expended much effort attempting to develop the evidentiary record supportive of the various claims of the Petitioner;

(f) retained an individual medical professional, upon the recommendation of a professional locator service that had been approved by this Court for such purposes, in particular, to review new DNA testing reports and provide expert testimony at an evidentiary Omnibus hearing as well as assist her in being properly prepared for representing the Petitioner on issues related thereto.

(g) maintained an active line of communication with this individual so as for her to substantively address such issues as well as prepare him for presenting his expert testimony thereon along with his report;

(h) proceeded to primarily pursue two (2) issues believed strongest for convincing this Court to grant Habeas relief, those being the voluntariness of the Petitioner's plea and actual innocence (with the best evidence at such time being the re-tested DNA results evidence);

(i) determined strategy with the Petitioner (having fully explained to him that they were in an omnibus habeas proceeding and not a re-litigation of a criminal trial that he did not have), as she discussed all aspects of this case with him, and specifically on what to pursue which did not include raising issues as to other evidence of the State that might have been presented at a jury trial but for his waiver of such right by pleading guilty as he did;

(j) presented witness testimony (including expert witness testimony as to Forensic DNA analysis) and documentary evidence in support of the issues being relied upon to convince this Court to grant Habeas relief as well as substantively cross-examined the Respondent State's proffered witnesses; and (upon a denial of any Habeas relief by this Court upon that then pending Petition/Amended Petition)

(k) prepared and filed a Petition for Appeal with the West Virginia Supreme Court of Appeals as well as argued before such Court (under the previous procedural rules then controlling) for the issuance of a *Writ of Certiorari* in an effort to have the appeal accepted for further, discretionary appellate review (which was subsequently denied *certiorari*).

81. The Petitioner places great weight upon the experience of his witness, Stephen G. Jory, Esq., and his testimony given at the evidentiary Omnibus hearing in offering opinions on the effectiveness (or lack thereof) of legal counsel assistance by attorneys practicing criminal law as well as related ethical obligations thereto in specifically reviewing both Ms. Tichenor's and Mr. Dyer's⁴⁸ representations.

82. This Court, upon the Petitioner's motion to qualify Mr. Jory as an expert in "lawyer conduct and effective and ineffective assistance of counsel in the representation of criminal defendants", recognized him within the stated field of expertise. (See *Tr.* 2013 Omnibus Hrg. Vol. 3, pp. 112-113).⁴⁹

83. Mr. Jory describes his understanding of the legal standard of ineffective assistance of counsel to essentially be determined under *Strickland* (and as similarly articulated in West Virginia citations), to-wit: "[T]he notion in judging an attorney, he must be reasonably effective, reasonably effective in light of all the facts and circumstances, and it must, any affairs on their part must have adversely affected the outcome." (See *Tr.* 2013 Omnibus Hrg. Vol. 3, p. 117).

84. This Court, although respectful of Mr. Jory's opinions in this case specifically as to Mr. Tichenor's handling of the relative DNA evidence and expert analysis as well as determinations on pursuing an ineffective assistance of counsel claim towards Mr. Dyer,

⁴⁸ Mr. Jory's testimony and opinions as to Mr. Dyer's legal representation of the Petitioner in the underlying criminal proceedings will be additionally addressed herein *infra*.

⁴⁹ This Court certainly respects and notes Mr. Jory's distinguishable career as an attorney in both Federal and State Courts in West Virginia primarily as a prosecutor on the Federal Court level and then in private practice performing criminal defense work. He has also served on the Lawyer Disciplinary Board (and its predecessor, the Legal Ethics Committee) as well as special counsel for the West Virginia Ethics Commission. (Mr. Jory described his practice as being "mostly federal criminal practice which does not often get into those issues" in light of his having "never presented DNA expert witnesses in any of the cases that he's been involved in"). (See *Tr.* 2013 Omnibus Hrg. Vol. 3, p. 155).

finds that such opinions reflected in the record do not sufficiently support the Petitioner's burden for having to overcome the strong presumption *Strickland* et al affords her professional conduct which is deemed herein to be well within the wide range of reasonably professional assistance allowable throughout his prior Habeas proceeding and does not rise to any actionable level of ineffective assistance of counsel.

85. *Arguendo*, even if any of Ms. Tichenor's acts of commission or omission in representing the Petitioner in his first Habeas proceedings would be deemed sufficiently deficient (therefore, meeting the first prong of the *Strickland* test for determining ineffective assistance of counsel), the record developed herein must further sufficiently demonstrate that such deficiency or error attributable to her representation resulted in prejudice or a "reasonable probability" that in the absence of such error or deficiency, the ruling of this Court in denying him any Habeas relief would have been different.

86. Accordingly, and in further *arguendo*, no quantifiable prejudice to the Petitioner, even if any of her act or acts would be deemed adequately demonstrated by the evidentiary Habeas record as to the deficiencies complained of, this Court would not find and conclude such to be deemed sufficient upon which to base a further finding or conclusion that absent any such alleged error this Court would have granted the Petitioner his requested Habeas relief in 2004 following his evidentiary Omnibus hearing at such time.⁵⁰

87. Having so found and concluded that the Petitioner's legal counsel in his first Habeas proceeding to not have been ineffective, such finding and conclusion should

⁵⁰ As this Court is further substantively reviewing the alleged deficiencies and errors in light of alternative grounds alleged, to-wit; actual innocence, question of actual guilt, manifest injustice and manifest necessity, for possibly granting the Petitioner his requested Habeas relief, such review and determinations all reflected herein further confirm this Court's "second-prong" analysis and rejection as a basis for the Petitioner's requested Habeas relief *arguendo*.

ordinarily preclude this Court from any further review or consideration of his averred ineffective assistance of legal counsel by Thomas G. Dyer, Esq., his legal counsel in the original criminal proceedings upon appropriate application of *Res judicata* under general considerations and directions as contained in *Losh*.

88. Such ground for Habeas relief (i.e.; "No. 21 - ineffective assistance of counsel" under *Losh* Checklist) was affirmatively raised in his original 2002 Habeas pleadings. However, it was not further addressed during his 2004 evidentiary Omnibus hearing therein and it was accordingly deemed to have failed and generally precluded from being asserted again by the Petitioner in any subsequent Habeas proceeding.

89. However, this Court is willing yet again, under an abundance of precaution and deference to making every legitimate effort within its judicial discretion, to re-review any substantive ground for potential Habeas relief that might be established to the Petitioner's benefit herein. Such allowance is based upon consideration of "manifest necessity" for potentially determining whether or not there be any occurrence of "manifest injustice" below and/or as a result of any allowable consideration of newly acquired evidence (cumulative or otherwise) and/or some material violation of his constitutional due process protections.

90. Accordingly, in light of the determinative test for ineffective assistance of counsel, as addressed and concluded hereinabove *infra* at Item Nos. 62 through 77, this Court finds that Thomas G. Dyer's conduct as the Petitioner's court-appointed legal counsel for his 2002 underlying criminal proceedings herein successfully meets the test set forth in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) and *State ex rel Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002) which respectively cite the standard for determining whether or not there was effective assistance of counsel as contained in

Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, his performance is determined to have been manifestly just as well as constitutionally sufficient and, therefore, the Petitioner was not denied effective assistance of legal counsel in his underlying criminal proceeding.

91. Further review has been given to his legal counsel's assistance in the underlying criminal proceedings as to pertinent factual considerations and proper additional application thereto of additionally related legal authority in light of the Petitioner having voluntarily pled guilty below. This is required due to his particularly requested Habeas relief herein, to-wit: that he be granted allowance to withdraw such pleas as well as either be released from further incarceration and/or granted an initial trial by jury (since the Petitioner voluntarily waived his right thereto and forewent a jury trial by entry of his guilty pleas in 2002).

92. The Petitioner's ineffective assistance of counsel claim towards Mr. Dyer also intertwines issues of competent advice given him specifically in regard to his voluntarily entered guilty pleas. Such issues inject additional considerations that address both discovery timeliness and depth of investigation in light of the limited availability for acceptance of the Respondent State's plea agreement.

93. Specifically in regard to an entered guilty plea pursuant to a valid plea agreement, our State Supreme Court of Appeals considers the following in determining the first prong of the *Strickland/Miller* test pertaining to ineffective assistance of counsel, to-wit:

...before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had

proceeded to trial; (3) the guilty plea must have been motivated by this error. Syl. Pt. 3, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978).

94. Furthermore, it has also previously also ruled in Syllabus Points 2 and 3 respectively in *State ex rel. Burton v. Whyte*, 163 W.Va.276, 256 S.E.2d 424 (1979) that:

Before an initial finding will be made that counsel acted incompetently with respect to advising on legal issues in connection with a guilty plea, the advice must be manifestly erroneous.

A guilty plea based on competent advice of counsel represents a serious admission of factual guilt, and where an adequate record is made to show it was voluntarily and intelligently entered, it will not be set aside.

95. Of significant interest to this Court in light of all such pending Habeas claims of the Petitioner herein, Syllabus Point 3 in *Becton v. Hun*, 205 W.Va. 139, 516 S.E.2d 762 (1999), enunciates that:

Objective professional standards dictate that a criminal defense attorney, absent extenuating circumstances, must communicate to the defendant any and all plea bargain offers made by the prosecution. The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of counsel, absent extenuating circumstances.

96. As discussed in *Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190 W.Va. 321, 327, 438 S.E.2d 501, 507 (1993), the test as to whether a defendant's guilty plea should be set aside is "whether all the circumstances surrounding the plea and the evidence of the defendant's involvement in the crime warrant a conclusion that manifest injustice [will] occur if the guilty plea is not set aside."⁵¹

⁵¹ This Court will re-address these particular matters factually *infra* given the overlapping nature of the Petitioner's averred grounds for Habeas relief and its reliance upon the particular procedural and substantive considerations reflective of the totality of circumstances below.

97. Additionally, “[w]here a defendant is aware of the condition or reason for a plea withdrawal, at the time his plea is entered [e.g.; he is innocent], a case for withdrawal is weaker.” *Duncil v. Kaufman*, 183 W.Va. 175, 179, 394 S.E.2d 870, 874 (1990).⁵²

98. Rule 32(e) of the *Rules of Criminal Procedure* specifically states with regard to withdrawal of a criminal plea, to-wit:

If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea if the defendant shows any fair and just reason. At any later time, a play may be set aside only on direct appeal or by petition under *W. Va. Code § 53-4A-1* (i.e.; writ of habeas corpus ad subjiciendum).

99. Generally considered, this Court acknowledges inherent duties under *Strickland* et al as to a defendant’s legal counsel conducting a meaningful investigation into the pending criminal case for evaluation purposes that sufficiently determine relevant courses of further defense actions on his behalf as well as for his making properly informed decisions. Such duties and effective assistance of legal counsel are afforded all defendants throughout the course of representation and specifically include any representation leading up to and including a defendant’s voluntary entry of guilty plea(s) in such pending criminal cases thereby electing not to go to trial.

100. In advancing expert opinion testimony of Mr. Jory on Mr. Dyer’s averred failure to properly investigate and defend him in his criminal case prior to his plea and sentencing hearings conducted on February 11, 2002 and May 21, 2002, respectively, the

⁵² *Duncil* establishes criteria for a reviewing Court to consider in deciding whether or not to set aside a guilty plea before sentencing base on factual (i.e.; actual) innocence. Such standard (i.e.; fair or just reason) is much lower than for consideration of a plea withdrawal following sentencing (i.e.; manifest injustice). Pre-sentence withdrawal of a plea generally occurs when a Motion to Withdraw Plea is lodged with the Court. Pursuant to our State Supreme Court’s guidance in *Duncil*, such reviewing Court should then consider, **within its discretion**, (emphasis added by this Court) such things as the timing between entering the plea and first expression of desire to withdraw presented the Court, why grounds for withdrawal were not presented sooner, to what extent the defendant maintained his innocence during the proceedings, any prejudice to the State’s case and the sufficiency of the defendant’s articulation of ground(s) supporting his innocence claim.

Petitioner relies specifically on the *ABA Standards for Criminal Justice* "Standard 4-4.1

Duty to Investigate" which states in pertinent part, to-wit:

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

101. Mr. Jory opines that *Strickland* makes such ABA Standards the basis for a reasonableness determination as to the effectiveness of legal counsel and, even though West Virginia does not have a comparable ethical rule of professional conduct, such standard articulates reasonable basis for conduct to be undertaken by defense attorneys in representing defendants and reflects the practices of attorneys engaged in the practice of criminal defense.⁵³

⁵³ Although not specifically addressed within the evidentiary Omnibus hearing nor in any subsequent pleadings or proposed findings and conclusions submitted by respective legal counsel herein, this Court finds of further noteworthiness the following ABA Standards 4-5.1, 5.2 and 6.2, to-wit:

Standard 4- 5.1 Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

Standard 4- 5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(i) what pleas to enter;

102. The Petitioner urges this Court, in its consideration of the evidentiary Omnibus hearing transcripts in addition the voluminous exhibits made a matter of record, to make a multitude of assumptions and inferences that support, to-wit: (a) the Petitioner's veracity and credibility as opposed to Mr. Dyer's; (b) his explanations of such evidentiary record's interpretation-all aligning to show Mr. Dyer's ineffective assistance of counsel by effectuating his guilty pleas upon accepting the involved Plea Agreement; and (c) allowing him to be ultimately convicted and sentenced without any further procedural delay save for a pre-sentencing evaluation and report pursuant to this

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- (ii) whether to accept a plea agreement;
 - (iii) whether to waive jury trial;
 - (iv) whether to testify in his or her own behalf; and
 - (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Standard 4- 6.2 Plea Discussions

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

(c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.

(d) Defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.

(e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

Court's direction upon holding its acceptance of such guilty pleas in abeyance. Such entertaining and all-consuming reliance upon these inferences and assumptions expected to now be made in hindsight interpretation and with liberal application all unilaterally favorable to the Petitioner this Court will not do.

103. The Petitioner significantly highlights in this developed record what he believes to be many discrepancies between Mr. Dyer's testimony from the first evidentiary Omnibus hearing in 2004 and testimony in the latest evidentiary Omnibus hearing in 2013. As such, he asserts these discrepancies not only undermine Mr. Dyer's recollections and overall credibility but, further establish a failure to effectively provide legal counsel to the Petitioner as guaranteed by the Sixth Amendment to the United States Constitution and Art. III, §§ 10 and 14 of the West Virginia Constitution. In addition, he asserts that they undermine this Court's confidence necessary to believe in the correctness of the Petitioner's guilty pleas thereby warranting relief based on "manifest injustice".

104. However, the totality of the evidentiary record now under consideration (including the evidentiary record developed in the Petitioner's 2002 Habeas proceedings), in light of the totality of circumstances at the time of the Petitioner's criminal proceedings in 2002, still lead this Court to conclude Mr. Dyer's legal representation of the Petitioner to have included a sufficient investigation performed by him, in relation to the then pending time constraints, and upon which he reasonably advised the Petitioner prior to his informed decision to accept the then pending Plea Agreement. Such conclusions deem that legal representation reasonable and within the bounds of contemporary assessment.

105. There was far-reaching value to the Petitioner contained in that agreement. It took into consideration not only the felonies to which he pled guilty but, numerous other

pending felonies which were to be *nolle prosequi* as well as provided him almost blanket immunity for other imminent felony charges, ongoing felony investigations and any other investigations and/or criminal charges for anything else that might arise from any other events having occurred prior thereto. (See additional detail thereon as reflected herein at n.36 *supra*).

106. Even in applying *Res judicata* to directly reviewing Mr. Dyer's effectiveness of legal counsel provided to the Petitioner in 2002 as such claim and ground was originally and fully addressed by this Court in its 2004 Final Order in prior Habeas proceedings, this Court has allowed its re-presentation for reconsideration tangentially through this second Habeas proceedings within his claims/grounds of ineffective assistance of Habeas counsel and "manifest injustice" as bases for prospective relief.

107. This Court has previously determined herein *infra* that Ms. Tichenor provided effective assistance of legal counsel to the Petitioner in his first Habeas proceedings, including therein that her strategic attention given to and afforded Mr. Dyer's underlying representation in criminal trial proceedings was not deemed to establish any ineffectiveness on her part.

108. Given the totality of the evidentiary record now under consideration (including the evidentiary record developed in the Petitioner's 2002 Habeas proceedings), in light of the totality of circumstances at the time of the Petitioner's criminal proceedings in 2002, this Court's full confidence and staunch belief in the correctness of the Petitioner's guilty pleas, convictions and sentencing presently in effect remains. Accordingly, it finds and concludes there to be no resulting "manifest injustice" being perpetrated upon the Petitioner therefrom.

Grounds 5 & 6
Due Process Violations

109. The now fully developed, evidentiary record herein is deemed to not contain evidence of a sufficient nature that would convince this Court to sustain independent constitutional violations of due process and the Sixth Amendment under the West Virginia and United States Constitutions as averred in the Petitioner's two (2) remaining grounds advanced in his Amended Petition for requested Habeas relief.

110. Although due process allegations have been advanced by the Petitioner in support of his "Ground 2 ~ Manifest Injustice" for Habeas relief and already addressed herein *supra*, mutually supportive factual averments may likewise be argued to support requested Habeas relief from a constitutional perspective as well.

111. Having heretofore already determined that the Petitioner's requested Habeas relief is insufficiently supported by such evidentiary record now contained herein with regard to "Ground 1 ~ Actual Innocence/Question of Actual Guilt" and "Ground 2 ~ Actual Innocence/Manifest Injustice", this Court specifically now addresses the Petitioner's claims that the Respondent State purportedly violated his due process rights and thereby violated the Fourteenth Amendment to the United States Constitution and Article III, §§ 4, 10 and 14 of the West Virginia Constitution which afford him additional protections.

112. The Petitioner contends that the State failed to disclose and/or otherwise withheld what he considers to be favorable exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), prior to his guilty pleas entry to-wit: (a) the results of the WVSPFL's DNA testing, as set forth in Lt. Myers's written report (dated April 5, 2002) and reflected in underlying data thereon (generated

in January and February, 2002); (b) securing his indictment through the presentation of knowingly false and misleading grand jury; and (c) failing to disclose ('newly discovered' for purposes of this Habeas proceeding) evidence purportedly showing that a witness for the State, Andrew Locke, was taken to the emergency room at United Hospital Center for a claimed drug overdose, the night of December 8, 2001, after he gave a custodial statement inculcating the Petitioner in the sexual assault and robbery to which he pled.⁵⁴

113. This Court ruled in 2004, as reflected in its Final Order entered the Petitioner's first Habeas proceeding, that there was no suppression by the State of the April 5, 2002 DNA Report prepared by the WVSPFL and that the Petitioner did not rely upon such results in deciding to plead guilty.

114. Syllabus Point 2 in *State v. Youngblood*, 221 W.Va. 20, 650 S.E. 2d 119 (2007) states, to-wit:

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

115. The Petitioner further asserts that by securing such indictment through such presentations and failing to disclose this information, such violation was material and prejudicial to the Petitioner's defense in that disclosure when viewed cumulatively with

⁵⁴ The Petitioner asserts another due process claims for Habeas relief being the State's failure to disclose to him fingerprint analyses from the crime scene which did not yield any fingerprints attributable to him as well as that the victim did not or could not identify him as the perpetrator. However, he subsequently conceded that these particular assertions do not rise to a sufficient level for establishing any independent grounds for Habeas relief due to the present non-availability of related evidence, he nonetheless urges this Court to consider other available evidence in finding that confidence in his conviction is undermined as well as the State's full compliance with evidentiary disclosure obligations.

other questionable *Brady* evidence, there would have been a reasonable likelihood of a different outcome (i.e.; not entering guilty pleas, being convicted and sentenced).

116. Upon a review of the totality of the evidence presently a matter of record herein pertaining to these claims, this Court finds and concludes that the Petitioner has not sufficiently demonstrated that the State intentionally engaged in misconduct or deliberately misinformed the grand jury about factual issues or so acted in any other way to cloud the propriety of such proceedings that would give rise to a due process violation.

117. Also upon such review, this Court finds and concludes that the Petitioner has not sufficiently demonstrated that information pertaining to Andrew Locke's being transported from custodial police interrogation to a local hospital's emergency room for a purported drug overdose was intentionally and/or inadvertently withheld from him prior to his entering guilty pleas.

118. Furthermore, this Court's review of the recording of Andrew Locke's taped interview/statement as well as the Clarksburg Police Department transcript thereof from December 7, 2001, show that the session began at 11:28PM and ended at 11:42PM, thereby lasting only fourteen (14) minutes. See Petitioner's Exhibit Nos. 18(a) and 18(b).

119. Such review unquestionably reflects to this Court's satisfaction that Andrew Locke was not under the influence of any narcotics of a mood or mind-altering nature during the time his interview/statement was conducted and recorded as his voice and expressed comments are clear and responsive.

120. The purportedly newly discovered evidence, that being the United Hospital Center emergency room documentation as to Andrew Locke's receiving treatment for a

drug overdose and his transport there by the Harrison County Sheriff's Department, show that he was admitted at 2:54AM and discharged at 4:45AM; over three (3) hours from the time his interview/statement took place.

121. Any "failure" to disclose the transport and ER treatment afforded Andrew Locke the early morning hours of December 8, 2001, is deemed by this Court to not have been material or prejudicial to the Petitioner's criminal defense in 2002 or in his first Habeas proceeding. Accordingly, there was no suppression of favorable evidence thereby.

122. The Petitioner argues that all the inferences he now suggests as to these circumstances and the purported evidence at that time makes Andrew Locke's statements "worthless, or certainly of far more dubious reliability" so that, at the very least, when viewed cumulatively with other suggested *Brady* evidence identified in this Habeas proceeding, there would be a reasonable likelihood of a different outcome had this information been timely disclosed. This Court adamantly disagrees. As such, it finds no compelling position favorable to the Petitioner as to information of Andrew Locke's subsequent Emergency Room visit hours after having given his recorded statement to the Clarksburg Police Department not being provided to the January 2002 term of Harrison County grand jury during presentment of Indictments on the Petitioner.

123. The "presentation of false testimony" claim as a Due Process grounds for Habeas relief, as presented by the Petitioner, focuses on one of the original investigating officers, Clarksburg Police Department Detective Matheny, and the then Harrison County Prosecuting Attorney, John Scott, Esq.

124. Given the totality of the evidentiary record now under consideration (including the evidentiary record developed in the Petitioner's 2002 Habeas proceedings), in light of the totality of circumstances at the time of the Petitioner's Grand Jury proceedings in

2002, this Court's full confidence and staunch belief in the correctness of the Petitioner's Indictments being properly presented to and returned by such reviewing body remains. Accordingly, upon there being no due process violations identified to this Court's satisfaction thereon, it further finds and concludes there can be no resulting "manifest injustice" being perpetrated upon the Petitioner therefrom as well.

125. This Court deems there to be no intentional failure or sufficiently significant inadvertence on the part of Detective Matheny in testifying and advising such convened grand jury, while under oath. Furthermore, any purported misstatements, inconsistencies or contradictions identified by the Petitioner herein as to Detective Matheny's presentation before such grand jury and in connection with his prior testimony are circumspect procedurally as such grounds were waived by him in his 2002 Habeas proceeding. Accordingly, any consideration now afforded the Petitioner thereon by this Court is done so with regard to whether or not any Habeas relief may be afforded him on grounds of "manifest injustice".

126. As such, there is no failure on the part of then Prosecuting Attorney John Scott, Esq., as there was no constitutional or procedural need to correct Detective Matheny as to any of his testimony before such grand jury. Furthermore, there is no recognizable deliberate intent upon Mr. Scott and/or Detective Matheny to misinform such deliberating body as to the Indictments presented to them on the Petitioner.

127. The Petitioner correctly argues that to in order to establish such as a due process violation, he must show that "...the Government intentionally engaged in misconduct [or] deliberately misinformed the grand jury" about factual issues; a due process violation may also lie where the indictment is otherwise "clouded by...Government impropriety." *U.S. v. Mills*, 995 F.2d 480, 488-89 (4th Cir. 1993); See also Syl. Pt. 3 and 6, *State Ex.*

Re. Pinson v. Maynard, 181 W.Va. 662 (1989), as to a defendant being entitled to dismissal of an indictment tainted by “willful, intentional” misconduct, “if it is established that the violation substantially influenced the grand jury’s decision to indict or if there is grave doubt that the decision to indict was free from substantial influence of such violations”. Accordingly, this Court deems that the Petitioner has failed to make such mandatory showing sufficient to meet his burden on such review, thereby failing to establish the necessary impropriety upon which any Habeas relief may be granted.

Additional Overlapping Matters from Original Trial Proceedings in 2002⁵⁵

128. The Petitioner’s underlying *Plea Agreement* specifically contained these further conditions and representations which he was fully aware of at that time in question during which he made a completely voluntary and informed decision to accept the proffered plea agreement from the Harrison County Prosecuting Attorney’s Office which had a limitation in acceptance time, to-wit:

...

6. Both the State and the defendant shall retain their respective rights to argue before the Court for that sentence which each party shall deem appropriate in this case, i.e., there are no agreements with respect to the appropriate disposition/sentences to be imposed upon the defendant as a result of the guilty pleas contemplated by this agreement, with the following singular exception: The State will recommend to the Court that the maximum determinant sentence which the defendant should receive as the result of his plea of guilty to the charge of robbery in the first degree shall be forty (40) years. (See Civil Action File 02-F-10-2, Binder 1, pp. 18 – 19).

...

9. That, except as set forth within this Plea Agreement, there have been no representations whatsoever by any agent or employee of

⁵⁵ This Court now reiterates, in part, in acknowledging its particular reliance thereon, the following matters and legal applications thereto for further consideration in addition to the earlier findings and conclusions herein *supra* concerning treatment afforded the Petitioner’s grounds based upon ineffective assistance of counsel.

the State or any other law enforcement agency as to what final disposition in these matters should and will be. The acceptance or rejection of this Plea Agreement and the matter of sentencing is left in the sole discretion of the sentencing Judge. ... (See *Id.*, p. 19).

...

This Plea Agreement falls within Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure, and the defendant is fully aware that the Court is not bound by any recommendations made by the State or by the defendant, and that if the Court does not accept the recommendations or requests of the State or the defendant, the defendant nevertheless has no right to withdraw his pleas, and the defendant well knowing this, still agrees to enter pleas of guilty on the basis aforesaid. (See *Id.*, p. 20).

129. At his plea hearing, this Court interrogated the Petitioner at length. It established that his representations formed a factual basis, pursuant to Rule 11(f) of the *West Virginia Rules of Criminal Procedure* and that he affirmatively informed and/or indicated to it, while under oath and in open Court, that he, to-wit:

(a) understood the nature of the charges and related statutory penalties for each offense as contained in Indictment No. 02-F-9-2 and Indictment No. 02-F-10-2;

(b) had consulted fully with his counsel and was fully satisfied with the services provided him by such counsel;

(c) understood that he had the right to public trials by impartial juries of twelve (12) persons whereat the State had to prove its cases beyond a reasonable doubt and whereat he could stand mute during such proceedings as well as confront and cross-examine his accusers, present witnesses in his own defense and to testify himself in his own defense;

(d) understood that he had the right to move to suppress illegally obtained evidence and illegally obtained confessions, the right to challenge at trial and on appeal all pretrial and trial proceedings; and

(e) executed the prepared "Plea Agreement" (along with his legal counsel, Thomas G. Dyer, Esq., the assistant prosecuting attorney then assigned, Terri O'Brien, Esq., and the then prosecuting attorney, John A. Scott, Esq.) as well as written plea agreements which were all tendered to this Court and made a matter of record therein.

130. Upon all such Court interrogation and inquiry conducted by this Court thereat as well as upon all submissions thereto, the Petitioner unequivocally indicated his desire to

knowingly and voluntarily give up and waive all such constitutional rights by entering such guilty pleas. (See *Order Following Entry Of Pleas* entered on February 15, 2002, in Civil Action File 02-F-10-2, Binder No. 1, pp. 26 – 34).

131. Between the time of his originally entering such guilty pleas on February 11, 2002, and his sentencing on May 21, 2002, there is no reflection or communication upon the record that the Petitioner expressed any concern as to his actual innocence other than for commentary contained in the report provided from the Anthony Correctional Center where he had been for purposes of having a sixty (60) day resentencing diagnosis/classification evaluation performed pursuant to *West Virginia Code § 62-12-7a*.

132. The Petitioner acknowledged before this Court on February 21, 2002, that he had received and reviewed such report as well as having been afforded an opportunity to address such report which he declined as he took no exception to the findings contained therein. Further, he was given the opportunity to exercise his right to allocution and he addressed this Court prior to the imposition of sentence. (See *Order Accepting Defendant's Offered Pleas Of Guilty / Sentencing Order* entered on May 29, 2002, *Id.*, pp. 67 – 75).

133. The Petitioner next appeared before this Court on June 27, 2002, for a Restitution Hearing which has been previously scheduled pursuant to prior Order entered therein. Thereat, it was represented to this Court through his legal counsel then appearing with him, Mary G. Dyer, Esq., that it was his position that he had not agreed, expressly or by implication, to restitution to any of the victims of the offenses other than the victim directly involved with the crimes to which he had previously pled and been sentenced. However, the record therein reflects that while before this Court for such

hearing he did not express any concerns as to any ineffectiveness of legal counsel, his actual innocence or any desire to withdraw his previously entered guilty pleas and voluntarily entered Plea Agreement either directly or through his legal counsel representing him thereat. (See *Order Resulting From Restitution Hearing* entered July 1, 2002, *Id.*, pp. 77 – 79).

134. By *Agreed Order Regarding Restitution* entered on July 18, 2002, the Petitioner specifically acknowledged his having read, understood and acknowledged the entirety of the contents therein whereby he agreed to making restitution to the therein listed victims as relating to criminal activities and offenses charged under Indictment No. 02-F-9-2 and Indictment No. 02-F-10-2. (See *Order Id.*, pp. 88 – 91).

135. After a considerable time having passed from the underlying criminal proceedings and the first Habeas proceeding, this Court directly received personal correspondence from the Petitioner which it accordingly filed therein on July 5, 2006, (postmarked June 30, 2006, and having originated from the Potomac Highlands Regional Jail). Such one and one-half page, hand printed letter addressed very personal issues concerning his time incarcerated and upcoming consideration for parole. However, this Court notes that such letter contains no references whatsoever by the Petitioner as to his purported “actual innocence”. Further, it does not mention any other concern he might have had at that time which could be identified as questioning his prior guilty pleas and resulting convictions/sentences by this Court or any lingering dissatisfaction or concerns whatsoever as to Mr. Dyer and his office serving as his court-appointed legal counsel in the underlying criminal matters or as to Ms. Tichenor as his court-appointed legal counsel in his first Habeas proceeding. (See *Felony File No. 02-F-10-2, Binder 1, pp. 109 – 110*).

136. Further, [a party] must carry the burden of showing error in the judgment of which he complains. Judgment of a trial court should not be reversed unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment. Syl. Pt. 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966).

137. "Before an initial finding will be made that counsel acted incompetently with respect to advising on legal issues in connection with a guilty plea, the advice must be manifestly erroneous." *State ex rel. Burton v. Whyte*, 163 W.Va. 276, 256 S.E.2d 424, Syl. Pt. 2, (1979).

138. "A guilty plea based on competent advice of counsel represents a serious admission of factual guilt, and where an adequate record is made to show it was voluntarily and intelligently entered, it will not be set aside." *Id.*, Syl. Pt. 3.

139. Specifically reiterating, with regard to the first prong of the *Strickland/Miller* test, when a plea of guilty is entered the West Virginia Supreme Court of Appeals has held that "[b]efore a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error." *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834, Syl. Pt. 3, (1978).

140. "Objective professional standards dictate that a criminal defense attorney, absent extenuating circumstances, must communicate to the defendant any and all plea bargain offers made by the prosecution. The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of

counsel, absent extenuating circumstances." *Becton v. Hun*, 205 W.Va. 139, 516 S.E.2d 762, Syl. Pt. 3, (1999).

141. The Petitioner, claiming that the results of the DNA testing would exculpate him, proffered his guilty pleas knowing that DNA testing was still being conducted, without any knowledge of the DNA results. Even if the Petitioner could show that the DNA results were communicated to him prior to the entry of his guilty pleas, the circumstances surrounding the plea and the evidence of the Petitioner's involvement in the crimes prevent this Court from concluding that "manifest injustice" will occur if his guilty pleas are not set aside.

142. In reiteration, as discussed in *Matter of Investigation of West Virginia State Police Crime Laboratory. Serology Div.*, 190 W.Va. 321, 327, 438 S.E.2d 501, 507 (1993), the test as to whether the defendant's guilty plea should be set aside is "whether all the circumstances surrounding the plea and the evidence of the defendant's involvement in the crime warrant a conclusion that manifest injustice [will] occur if the guilty plea is not set aside."

143. However, "[w]here a defendant is aware of the condition or reason for a plea withdrawal, at the time his plea is entered [e.g., he is innocent], a case for withdrawal is weaker." *Duncil v. Kaufman*, 183 W.Va. 175, 179, 394 S.E.2d 870, 874 (1990), citing *United States v. Spencer*, 836 F.2d at 239, citing, *United States v. Usher*, 703 F.2d 956 (6th Cir.1983); see also, *U.S. v. Davila*, ___ U.S. ___, 133 S.Ct. 2139, (2013).

144. At the plea hearing in this matter, the Petitioner laid a factual foundation for the offenses to which he was pleading. In addition, at the sentencing hearing, the Petitioner apologized to the victim's family for his "bad choices." It was only after this sentencing hearing (during which the Petitioner received consecutive sentences) and restitution

hearings that the Petitioner asserted his factual innocence for the first time by finally bringing it to this Court's attention in his first Habeas proceeding.

145. The physical evidence, testimony of co-defendant Ronald Perry, Petitioner's statements to law enforcement, Petitioner's lack of credibility and lack of reliance on any DNA testing including his repeated assumption that such DNA testing results would be exculpatory to him, and the non-exculpatory nature of the DNA test results as to his actual presence and participation (i.e.; exculpatory only insofar as not identifying the presence of his DNA at the crime scene from spermatozoa evidence), convince this Court that "manifest injustice" will not result if the Petitioner is not permitted to withdraw his guilty pleas. Consequently, the Petitioner has failed to meet his burden as to the ground of question of actual guilt upon an acceptable guilty plea; manifest justice (aka "injustice" and/or "necessity"); question of actual guilt.

146. "A criminal defendant can knowingly and intelligently waive his constitutional rights, and when such knowing and intelligent waiver is conclusively demonstrated on the record, the matter is *Res judicata* in subsequent actions in Habeas Corpus." *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665, *Syl. Pt. 2*, (1975).

147. "Where there is a transcript of the colloquy which occurred between the court and the accused before the acceptance of the plea of guilty, and where that transcript conclusively demonstrates that there was a knowing and intelligent waiver of those rights necessarily surrendered as a result of a guilty plea, the issue is *Res judicata* in a subsequent action in Habeas corpus and the petition for Habeas corpus may be summarily dismissed without an evidentiary hearing." *Id.*, at 195, 669.

148. At the plea hearing in this matter, this Court repeatedly advised the Petitioner as to the maximum penalties/sentence the Court could impose with regard to each and

every offense with which the Petitioner was charged and to which he indicated a desire to plead guilty. The transcript of the colloquy at the plea hearing conclusively demonstrates that the Petitioner knowingly and intelligently waived those rights necessarily surrendered as a result of a guilty plea.

149. Our State Supreme Court has previously stated in *State v. Greene*, 196 W.Va. 500, 505, 473 S.E.2d 921, 926 (1996), that, "...[i]f any principle is well settled in this State, it is that, in the absence of special circumstances, a guilty plea waives all antecedent constitutional and statutory violations save those with jurisdictional consequences." In so reiterating this, it further considered *Tollett v. Henderson*, 411 U.S. 258 (1973) which states that upon a criminal defendant openly admitting in Court that he is guilty of the offense charged, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea," he may only "attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was" constitutionally deficient. (See *State v. Hartley*, Memorandum Decision No. 13-0033, filed October 1, 2013).

150. There are and quite appropriately should be a distinct limitation on the right to collaterally challenge a criminal conviction where the conviction rests upon a guilty plea, where the concern for finality is particularly strong. Such is the matter presently before this Court and there being no special circumstances deemed by it to exist within the parameters of the Petitioner's stated grounds herein for Habeas relief.

151. A guilty plea is more than a mere confession. It is an admission that the defendant committed the charged offense. *United States v. Palmer*, 456 F.3d 484, 491 (5th Cir.2006). Guilty plea colloquies carry a strong presumption of verity. *Id.* at 491. Formal declarations in open court should be considered as solemn and entitled to a

strong presumption of truthfulness. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed 2d 136 (1977)

152. This Court has concluded that the hearing conducted in this matter was an evidentiary Omnibus Hearing held pursuant to and in satisfaction of Rule 9(c) of the *Rules Governing Post-Conviction Habeas Corpus Proceedings In West Virginia*. Furthermore, this is the second evidentiary Omnibus Hearing afforded the Petitioner. Therefore, the Petitioner has either fully addressed or waived any and all allowable Habeas grounds for relief and is estopped from asserting any further “Losh List” grounds in a future Petition for Writ of Habeas Corpus. The Court notes that:

An omnibus habeas corpus hearing as contemplated in W.Va. Code, 53-4A-1 et seq. occurs when: (1) an applicant for habeas corpus is represented by counsel or appears pro se having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently waived his right to counsel; and, (4) the trial court drafts a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding. *Losh v. McKenzie*, 166 W.Va. 762, 762, 277 S.E.2d 606, 607-608, Syl. Pt. 1, (1981).

Summary

This Court has afforded the Petitioner, within its considerable judicial discretion exercised upon review of all related pleadings and responsive briefs including proffered citation authority and pertinent research conducted thereon, what it believes to be fully sufficient opportunity to address, substantiate and/or completely develop any perceived actionable basis he and his legal counsel have put forth and upon which they believe Habeas relief could and should be granted.

As a result thereof and the voluminous record developed in this proceeding and which encompasses other related proceedings heretofore had, this Court has thoroughly reviewed, to-wit: (a) the entire underlying criminal proceedings including the Arraignment, Plea and Sentencing transcripts respectively; (b) the Petitioner's 2002 Omnibus Habeas proceeding records; and all documents, pleadings and other filings contained in this Civil Action file for this subsequent Habeas proceeding.

This Court has made every meaningful effort to efficiently yet fairly manage further proceedings and related pleadings herein. Accordingly, it has repeatedly exercised its aforementioned discretion in procedurally granting the Petitioner broad discovery in this Habeas proceeding in order to have as full, complete and appropriate evidentiary record as substantively possible. This being due to the totality of the attendant circumstances and averments underpinning the Petitioner's claims as stated in his original Petition and subsequent Amended Petition herein. Such discretion has certainly been equally exercised, when deemed appropriate, in regard to the Respondent as well. In essence, it has been fully exercised in the various findings, conclusions and ultimate rulings made herein.

The evidentiary record in its totality herein does not rise to the level of sufficient preponderance for this Court to determine, to-wit: any actionable Habeas ground presently remaining available to the Petitioner; his actual innocence; a sufficient question of guilt; and/or a manifest injustice being perpetrated against him as a result of his plea and resulting sentence that is the basis for his present incarceration. Furthermore, there is no manifest necessity established by such record herein for any such Habeas relief.

As such, this Court cannot and shall not, to-wit:

(a) grant the Petitioner's pending Habeas Petition;

(b) vacate his original guilty plea and plea agreement entered into by him with the State of West Virginia by and through the Prosecuting Attorney's Office for Harrison County, West Virginia;

(c) vacate its previously pronounced sentence duly imposed, within its sound judicial discretion, upon his informed and voluntarily entered plea;

(d) release him from incarceration; and/or

(e) revive the original indictments returned against him by the January 2002 grand jury for further proceedings and reset bail pending the Respondent State's determination whether or not to prosecute him upon any of the offenses he originally pleaded and was sentenced, other pending charges included in such indictments which were *nolle prosequi* as part of his 2002 plea agreement or subject of then ongoing investigations which were precluded by the immunity from prosecution which he was given by the Respondent State under such agreement.

In order that there is no misunderstanding, this Court now explicitly finds and concludes in particularly responsive summation mirroring the Petitioner's six (6) identified grounds averred and upon which his Habeas relief is sought. Accordingly, in utilizing the Petitioner's specific assertions contained in such grounds, it now unequivocally states, to-wit:

Ground One: Actual Innocence/Question of Actual Guilt

Newly discovered cumulative DNA evidence does not sufficiently prove that the Petitioner is actually innocent. New DNA testing, obtained for the first time in May 2011, purports to show that the major donor of spermatazoa found on multiple items in the victim's sexual assault examination kit comes from someone other than the

Petitioner. This “major donor” presence of particular spermatozoa does not conclusively determine there to have been only one actual perpetrator. The newly tested, cumulative DNA evidence does not clearly establish the Petitioner’s innocence in and of itself. Further, it does not create any sufficiently serious question of his actual guilt when considered in light of the totality of trial court proceedings below; the Petitioner’s 2002 Habeas proceedings; and now in this 2012 Habeas proceedings. In addition, the totality of evidence now on record concerning the former State’s witness Andrew Locke and United Hospital Center, does not convincingly corroborate and/or strengthen the Petitioner’s actual innocence claim.

The evidentiary record including purported newly discovered evidence as to the DNA evidence and Andrew Locke, even if fully accepted as being “newly discovered” and thereby allowed for the fullest consideration (or reconsideration as it may be in regard to the Petitioner’s prior Habeas proceedings), still does not rise to the level required to allow him to withdraw and/or for this Court to vacate his prior guilty pleas so as to entertain further criminal proceedings thereon or provide allowance for any other Habeas relief. Accordingly, the requested relief pursuant to GROUND ONE of the Petitioner’s Petitions claiming “Actual Innocence” and/or “Serious Question of Actual Guilt” should be DENIED.

Ground Two: Actual Innocence/Manifest Injustice

In light of the newly tested cumulative DNA evidence, the State’s refusal to allow Petitioner to withdraw his guilty plea is not a manifest injustice. Such DNA evidence was obtained using technology that was unavailable to any party at the time of the 2002 plea or for his first evidentiary Omnibus hearing in 2004. It was obtained pursuant to a statute (the Right to DNA Testing Act) that did not exist at that time. The totality of this evidentiary record as well as other related proceedings heretofore held contain sufficient evidence and developed proceedings upon which the Petitioner voluntarily admitted guilt of these crimes. It is not otherwise outweighed or discounted by this DNA evidence of any sufficient force to support any *vacatur* of such pleas. In addition, the totality of evidence now on record concerning former State’s witness Andrew Lock and United Hospital Center does not convincingly corroborate or strengthen the Petitioner’s actual innocence claim or further

establish there to be any manifest injustice by allowing his 2002 plea and sentence to stand.

The evidentiary record including purported newly discovered evidence as to the DNA evidence and Andrew Locke, even if fully accepted as being “newly discovered” and thereby allowed for the fullest consideration (or reconsideration as it may be in regard to the Petitioner’s prior Habeas proceedings), in addition to there being asserted that the record is devoid of sufficient credible evidence still does not rise to the level required to allow him to withdraw and/or for this Court to vacate his prior guilty pleas so as to entertain further criminal proceedings thereon or provide allowance for any other Habeas relief. Accordingly, the requested relief pursuant to GROUND TWO of the Petitioner’s Petitions claiming “Actual Innocence” and/or “Manifest Injustice” should be DENIED.

Ground Three: Ineffective Assistance of Counsel

Given the totality of circumstances at the time and contemporaneous assessment thereof, the Petitioner’s appointed trial counsel conducted, at the very least, an adequate factual investigation into Petitioner’s then pending criminal charges while contemporaneously reviewing the proffered plea agreement that was offered and timely accepted by the Petitioner. The record is devoid of any sufficiently credible evidence that the Petitioner communicated any claim of innocence to his trial counsel at any time prior to, during or after his voluntarily entering his guilty pleas, sentencing and restitution hearings. The record is further devoid of any sufficiently credible evidence that such legal counsel inappropriately forced, manipulated and/or otherwise pressured the Petitioner to accept the proffered plea agreement. Such counsel’s representation was not deficient and did not prejudice Petitioner. There was no trial. Had there been no plea agreement acceptance, there would have been in all likelihood a different and potentially more inclusive record of pre-trial preparation and investigation. Without which, this Court will not now speculate as to what trial counsel should or should not have done as to further investigation and trial preparation.

Ground Four: Ineffective Assistance of Counsel

Given the totality of circumstances at the time and contemporaneous assessment thereof, the Petitioner's appointed trial counsel, while operating within the time constraints such circumstances dictated, did not fail to take basic, reasonable pre-trial measures in light of the Petitioner deciding to accept the proffered plea agreement and voluntarily enter guilty pleas. Such counsel's representation was not deficient and did not prejudice the Petitioner. There was no trial. Had there been no plea agreement acceptance, there would then have been a further developed record of evidentiary discovery, investigation and trial preparation. Without which, this Court will not now speculate as to what trial counsel should or should not have done as to further discovery investigation and trial preparation. In light all thereof, such counsel is deemed to have not failed, *inter alia*, to file a motion to suppress the confession, seek a hearing as to its involuntariness or unreliability, or retain the services of an appropriate expert regarding false and involuntary confessions.

The evidentiary record pertaining to ineffective assistance of trial counsel, Thomas G. Dyer, Esq., due to the purported deficiencies and failures in his investigation and defense of the Petitioner prior to his acceptance of a proffered plea agreement, voluntary entry of guilty pleas and sentencing is precluded from further judicial review upon the application of *Res judicata*. Furthermore, even *arguendo*, such record developed herein being reviewed upon a purported bases of there being "newly discovered evidence" as well as upon asserted claims of "actual innocence" and "manifest justice" allowing for such, it still does not rise to the level required to vacate his prior guilty pleas so as to entertain further criminal proceedings thereon or provide allowance for any other Habeas relief. Accordingly, the requested relief pursuant to GROUND THREE and GROUND FOUR of the Petitioner's Petitions claiming "Ineffective Assistance of Counsel" should be DENIED.

Furthermore, the evidentiary record pertaining to ineffective assistance of post-conviction/habeas counsel, Terri L. Tichenor, Esq., due to the purported deficiencies

and failures as to: (1) her investigation and follow-up on matters directly involving Andrew Locke's prior (i.e.: 2001) statement inculcating the Petitioner retrieving certain medical records of his all from the particular night in question (December 7-8, 2001) when he was arrested and interrogated by the Clarksburg City Police; (2) her failure to have a better qualified DNA expert witness; and (3) her failure to additionally attack Mr. Dyer's representation of the Petitioner for purposes of demonstrating ineffective assistance of counsel at the trial level does not rise to the level required to vacate his prior guilty pleas and/or allow him to withdraw them so as to entertain further criminal proceedings thereon or any other Habeas relief. Accordingly, the requested relief pursuant to the additional "new" grounds contained in the Petitioner's Petitions claiming "Ineffective Assistance of Post-Conviction Counsel" should be DENIED.⁵⁶

Ground Five: Due Process/Presentation of False Testimony

The Petitioner's due process rights were not violated in that the State did not knowingly present false testimony to the grand jury that indicted him. As this particular ground for Habeas relief has been fully presented, reviewed and ruled upon in the Petitioner's previous Habeas proceeding, *res judicata* now precludes there being any further consideration thereof. However, *arguendo*, even allowing for additional consideration of the totality of evidence now on record concerning former State's witness Andrew Locke and United Hospital Center, such does not sufficiently support the Petitioner's violation of due process claim as a basis for disallowing his 2002 plea and sentence to stand.

Ground Six: Due Process/Suppression of Favorable Evidence

Petitioner's due process rights were not violated as there is insufficient evidentiary record to support that the State failed to disclose material, exculpatory evidence before his plea hearing. The

⁵⁶ Even the Petitioner's legal counsel, Allan N. Karlin, Esq., stated to this Court during the evidentiary Omnibus hearing (See Tr. 2014 Omnibus Hrg. Vol. 3, p. 74) that while being an experienced trial lawyer, he does not have the breadth, scope or depth of understanding DNA himself. Further, the Petitioner's expert witness, Steven Jory, Esq., also stated (See *Id.*, 155) that in his vast professional career as both federal prosecutor and in criminal defense work that he, too, has never presented DNA expert witnesses in any of the cases that he's been involved in.

State has produced voluminous evidence, via discovery in this instant matter, both voluntarily and in compliance with multiple rulings by this Court. No evidence produced thereto sufficiently convinces this Court that it fully exculpates the Petitioner as to the crimes to which he voluntarily entered guilty pleas. In addition, the State did not knowingly suppress information it possessed regarding witness Andrew Locke. Allowing for additional consideration of the totality of evidence now on record concerning the former State's witness Andrew Locke and United Hospital Center, including the fact that he was taken by police to be treated for a drug overdose at United Hospital Center, such evidence is deemed insufficiently credible and, accordingly, does not support or exculpate the Petitioner.

The evidentiary record pertaining to purported violation of the Petitioner's due process rights by the State, to-wit: presenting false and misstated testimony during its presentations before the grand jury which indicted him; failing to disclose material, exculpatory evidence before his plea hearing; knowingly suppressing exculpatory evidence and refusing to provide access to potentially exculpatory evidence and other file information in its possession, is precluded from further judicial review upon the application of *Res judicata*. Furthermore, even *arguendo*, such record developed herein being reviewed upon a purported bases of there being "newly discovered evidence" as well as upon asserted claims of "actual innocence", "question of actual guilt" and "manifest justice" allowing for such, it still does not rise to a constitutional or factual level required to vacate his prior guilty pleas so as to entertain further criminal proceedings thereon or provide allowance for any other Habeas relief. Accordingly, the requested relief pursuant to GROUND FIVE and GROUND SIX of the Petitioner's Petitions claiming "Due Process (violations)", "Presentation of False Testimony" and "Suppression of Favorable Evidence" should be DENIED.

Upon all of which, this Court finds and concludes that nothing contained in this extraordinary record presently before it (pertaining to the Petitioner's underlying criminal

proceedings that culminated in his present criminal convictions and sentencing and his first Habeas proceeding where no relief was granted) skewed the fundamental fairness or basic integrity of those proceedings to any actionable respect so as to necessitate Habeas relief presently. As such and in the totality of all substantive and procedural circumstances, all of these proceedings have not resulted in a miscarriage of justice.

Rulings

Accordingly, upon all of the foregoing exhaustive consideration and review, this Court hereby **ORDERS** that the requested relief as contained in *Petition Under W. Va. Code § 53-4A-1 For Writ Of Habeas Corpus* and the *Amended Petition and/or Supplemental Pleading In Support Of Petition For A Writ Of Habeas Corpus* filed on behalf of the Petitioner, Joseph A. Buffey, be and is hereby **DENIED**.

As this Order also contains rulings on particular Motions that were still outstanding at the time, this Court further recognizes that it may still be pending other Motions or requests that it inadvertently has failed to address. In the event there are any such Motions or requests still pending, this Court hereby **ORDERS** that they be and are **DENIED**.

Also, given the voluminous nature of this proceeding and the developed evidentiary record herein, in the event it failed to address the particular admission of any evidentiary matter properly presented and requested to be so admitted, this Court further hereby **ORDERS** any such evidentiary item still pending be and is **ADMITTED** into evidence and made a matter of record herein.

Having so ruled, this Court hereby further **ORDERS** that the respective parties herein be and are **GRANTED** all appropriate objections and exceptions to its rulings made herein.

So that there is a complete evidentiary record above and beyond all that presently comprises such, this Court *sua sponte* hereby **ORDERS** that the underlying felony case records and Habeas proceedings so described and stored as, to-wit: Harrison County Circuit Court Felony Number 02-F-9-2; Harrison County Circuit Court Felony Number 02-F-10-2; and Harrison County Civil Action Number 02-C-769-2, be and are incorporated by reference herein and made a matter of record in this Habeas proceeding. As such, they shall be included in the evidentiary record herein and in the event there may be any subsequent appeal, if any, timely and properly filed with the West Virginia Supreme Court of Appeals.⁵⁷

This is a comprehensive **FINAL ORDER** pursuant to and in accordance with *West Virginia Code Section 53-4A-7(c)* and Rule 9(c) of the *West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings*. Upon entry of such Ruling Order, either party may appeal by filing a notice of appeal and the attachments required under Rule 5(b) of the *West Virginia Rules of Appellate Procedure* with the Office of the Clerk of the Supreme Court of Appeals of West Virginia within thirty (30) days of the entry of this order and by serving a copy on the opposing party as well as the Clerk of the Circuit Court of Harrison County and this Court's reporter. Subsequent thereto, such appealing party must comply with Rules 5(f) and 5(g) of the *West Virginia Rules of Appellate Procedure*.

⁵⁷ This Court notes that Civil Action Number 02-C-769-2 contains filings for Civil Action Number 12-C-183-2. (*See* Civil Action File, Binder 1, pp. 428 – 485).

This Court further notes that not only does Felony Number 02-F-10-2 contain the entire record of the Petitioner's underlying criminal proceedings, it also contains related pleadings on his behalf as to DNA testing and analysis relevant herein and also pertaining to relating filings in Civil Action 02-C-769-2.

This Court still further notes that filings therein also relate to the Petitioner's request for transfer of evidentiary material for DNA testing and CODIS purposes related specifically to this Habeas proceeding. (*See Id.*, original pp. 419 – 466 and re-numbered pp. 417 – 427).

This Court hereby **ORDERS** that this civil action be and is **DISMISSED WITH PREJUDICE** and that any subsequent petition filed on behalf of the Petitioner, Joseph A. Buffey, for Habeas relief as to any and all grounds heretofore considered and ruled upon herein shall be summarily dismissed pursuant to Rule 4(c) of the *Rules Governing Post-Conviction Habeas Corpus Proceedings In West Virginia*.

Finally, this Court **DIRECTS** the Clerk of this Court to **DELIVER** or otherwise **PROVIDE** certified copies of this **FINAL ORDER** to the following legal counsel of record and, upon so doing, **REMOVE** this matter from its active docket:

Nina Morrison, Esq.
Barry C. Scheck, Esq.
Innocence Project, Inc.
40 Worth St., Suite 701
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Harrison County Courthouse
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Clarksburg, West Virginia
State of West Virginia

ENTER: June 3, 2014



THOMAS A. BEDELL, Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 3 day of June, 2014.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix
the Seal of the Court this 3 day of June, 2014.



Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia