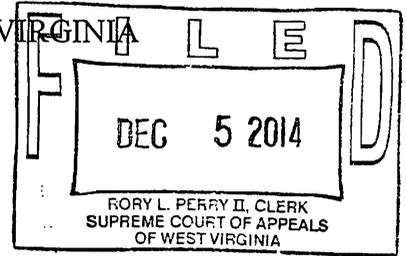


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JOSEPH A. BUFFEY,)
)
Petitioner)
)
v.)
)
DAVID BALLARD, WARDEN,)
)
Respondent)
)

Case No. 14-0642

PETITIONER'S BRIEF

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PRELIMINARY STATEMENT

This habeas proceeding presents this Court with the opportunity to correct two of the most serious errors known to our justice system: the wrongful conviction of an innocent man, and the suppression of exculpatory evidence by prosecutors and police.

Joseph Buffey has served the last twelve years in prison for a brutal rape and robbery he did not commit. His claim of innocence is neither belated nor speculative. It is based on state-of-the-art DNA test results that were not available to any party during the initial investigation, and which were obtained under a statute (the “Right to DNA Act”) that was unanimously enacted by the Legislature after his conviction. Nor does this case involve a “battle of the experts” with competing interpretations of highly technical DNA science. For the State’s own expert agrees that the DNA tests have conclusively indentified another violent felony offender, Adam Bowers -- not Petitioner -- as the source of the sperm recovered from the elderly victim. These results could not be more probative of Petitioner’s innocence, as the victim clearly told both police and hospital personnel that she was sexually assaulted and robbed by a single intruder in her home. Both sides’ experts further agree that not a single DNA test conducted, on any item of evidence, in any way inculpates Petitioner. Remarkably, however, the State refuses to concede that he is entitled to even a new trial in light of the DNA. Instead, it has insisted that Petitioner must have somehow acted as Bowers’s unseen accomplice. This is not only an entirely different theory than the one on which he was charged and convicted; it is also wholly implausible, if not impossible, given the victim’s own lucid account of her ordeal.

Equally troubling, however, is the evidence now before this Court that Petitioner’s wrongful conviction could -- and should -- have been prevented in the first place. In 2002, nineteen-year-old Mr. Buffey reluctantly entered a plea of guilty to two counts of sexual assault and one count of robbery, and was sentenced to more than 70 years imprisonment. He did so

only after his appointed lawyer made the remarkable predication that if he pled guilty, his sentence would likely not exceed what he would otherwise receive on a series of unrelated, non-violent property crimes. Unbeknownst to Petitioner or his counsel, however, more than six weeks before his final plea hearing, the State Police Forensic Laboratory issued a report on a series of DNA tests that clearly excluded Petitioner as the semen donor, and which the WVSP analyst immediately realized “did not in any way match what [he] was being told” about Petitioner’s alleged commission of this single-perpetrator crime. In the proceedings below, Petitioner also presented compelling evidence that Harrison County officials likely knew of the exculpatory DNA results well in advance of Mr. Buffey’s final plea hearing. This new evidence includes, *inter alia*, (1) previously-undisclosed notes of the lab’s communications with the prosecutor’s office about the DNA results before the final report issued; and (2) unrebutted testimony that trial counsel repeatedly asked police and prosecutors about the status of the DNA in the months prior to the final plea -- including in the six weeks after the WVSP issued this report -- but was falsely told that the testing was “not complete” and that “no report” existed.

In denying relief, the circuit court did not dispute these compelling new facts; instead, it misapprehended the law governing Petitioner’s right to relief. For example, the court did not dispute Petitioner’s claims that he has now been excluded as the source of the sperm collected from the victim; that the sperm has now been identified as coming from a convicted, violent felon; that Petitioner was prosecuted and his plea accepted on the theory that he alone committed the crimes; and that the WVSP’s 2002 DNA results were highly favorable to the defense, known to State officials before the plea was accepted, yet undisclosed.

Instead, throughout its opinion, the court found that Petitioner’s decision to enter a “voluntary” guilty plea in 2002 effectively trumped any present claim to habeas relief. Relying on the fact that Petitioner “chose” to accept the State’s plea offer at a time when (so far as he and

his counsel knew) the State's DNA testing was still pending, the court found that neither due process, nor any other principle of law, provided Petitioner with cause to vacate his plea based on either those DNA test results, nor any results obtained under a subsequently enacted statute. The court further found that no relief was required because, even assuming Petitioner was excluded from all DNA tested, that evidence was insufficient to "unequivocally determine whether or not he was actually present [at the scene] and a participant in the various activities giving rise to the original criminal charges[.]" This nearly insurmountable test is one the court appears to have invented, without precedent; neither this Court nor the United States Supreme Court ("USSC") has ever imposed such a burden on any habeas petitioner, in guilty plea cases or otherwise. Moreover, the court also failed to consider contrary authority from both high courts, including leading USSC cases concerning the right to due process in the guilty plea context.

It has long been established, under both West Virginia and federal law, that even a defendant who enters into a legally voluntary plea of guilty retains a fundamental, if limited, right to have that conviction vacated based on evidence that calls the correctness or fairness of the plea into serious doubt. Petitioner's new evidence does both. This Court should reverse.

ASSIGNMENTS OF ERROR

1. The circuit court erred in concluding that Petitioner is not entitled to habeas relief based on new DNA evidence obtained under the Right to DNA Act, where the evidence powerfully supports Petitioner's claim of actual innocence and raises, at the very least, a substantial "question of [his] actual guilt."

2. The court erred in concluding that it would not be a "manifest injustice" to continue to incarcerate Petitioner under his 2002 plea and sentence in light of the new DNA evidence; the prior exculpatory DNA results obtained by the State prior to Petitioner's plea but

which were not disclosed to the defense; the fact that this was a one-perpetrator crime; and the other facts and circumstances that led to the entry of Petitioner's plea and sentence.

3. The court erred in concluding that the State did not violate its duty to disclose exculpatory evidence in its possession prior to final acceptance of Petitioner's guilty plea and the imposition of sentence, including DNA test results obtained by the State Police laboratory six weeks before the final plea hearing, as required by the Fourteenth Amendment to the U.S. Constitution and Art. III, §§ 10 and 14 of the West Virginia Constitution.

4. The court erred in concluding that the Petitioner received the effective assistance of counsel required by the Sixth Amendment to the United States Constitution and Art. III, §§ 10 and 14 of the West Virginia Constitution.

5. The court erred in concluding that Petitioner's indictment was not secured through the State's presentation of false and/or misleading testimony to the grand jury, in violation of the Fourteenth Amendment to the U.S. Constitution and Art. III, §§ 4, 10 of the West Virginia Constitution.

6. To the extent that the court's opinion may be read to conclude that some of Petitioner's claims are barred by *res judicata*, this was error. Petitioner's claims are based on newly-discovered evidence, evidence suppressed by the State during the first habeas proceeding, and/or evidence that prior habeas counsel was ineffective in failing to discover and present. In addition, the present record establishes that the court's decision denying the first habeas petition was incorrect as a matter of fact and law under W.Va. Code §53-4A-1(b).

STATEMENT OF THE CASE

Petitioner appeals from a Rule 9(c) Order of the Circuit Court of Harrison County (Hon. Thomas Bedell) dated June 3, 2014, denying his Amended Petition for a Writ of Habeas Corpus under W.Va. Code §53-4A-1. Although this is Mr. Buffey's second habeas petition, the Court

permitted discovery and held a three-day Omnibus Hearing on the merits, recognizing that Petitioner's claims were based in whole or in part on DNA and other evidence that was not presented by counsel appointed to represent him on his initial, *pro se* petition in 2003-04.

I. Crime and Investigation

A. Elderly Victim Is Sexually Assaulted and Robbed by a Single Male Intruder

On the morning of November 30, 2001,¹ the victim, Mrs. L.L. of Clarksburg, was asleep in her bed when she awoke to find an intruder standing beside her. *See* A.III.3068. The intruder was a white male, whom Mrs. L. estimated to be 25 years old. A.III.3072.

Mrs. L. was an 83-year-old widow who lived alone. Her bedroom was on the second floor of her two-story home. A.III.3068. Brandishing a large knife and a flashlight, the intruder told Mrs. L., "This is a robbery, I need your money." *Id.* Mrs. L. informed him that her money was downstairs, and he forced her out of bed. *Id.*

The intruder took her down the stairs, through the hallway, and into the kitchen. *Id.* She gave the intruder all the cash from her purse, totaling nine dollars. *Id.*; A.III.3171. He then took her back upstairs to search for more cash, telling her, "I've been here before." *See* A.III.3078.

In the upstairs bedroom, the perpetrator ordered Mrs. L. to take off her clothes. A.III.3068. He told her to get on her knees and to place her face into a pillow. A.III.3068-3069. He proceeded to put his penis inside her vagina and raped her; she recalled noticing his bare, white legs while his pants were pulled down. A.III.3069, 3072-3073. During the assault, the man twice turned her around and forced her to perform oral sex, and raped her vaginally two more times from behind. Each time, he required her to turn around to change position. *Id.*

¹ The CPD investigative reports do not indicate what time the assault began or ended. They do reflect, however, that the initial responding officer received a page from the Chief of Police directing him to respond to a possible rape and robbery at the residence at 7:30 a.m. *See* A.III.3173. Medical records indicate that the assault commenced at approximately 6:30a.m. A.III.3266.

The perpetrator then tied Mrs. L.'s hands behind her back with two belts. A.III.3069. He ordered her to lie on the floor, and threatened to return and "kill" her if she called anyone in the next twenty minutes. *Id.* Mrs. L. heard the perpetrator leave on foot. It took her approximately 30 minutes to untie herself. *Id.* She discovered that the phone cord in her bedroom had been cut, but used another phone to call her son and daughter-in-law. A.III.3070, 3074.

At least three officers from the Clarksburg Police Department responded to the scene. *See* A.III.3173. After taking an initial statement from Mrs. L., police took her to the nearest hospital for treatment. *Id.* A sexual assault examination kit was collected. A.III.3172-3173.

At 8:10 am, the victim was examined and interviewed by a sexual assault nurse. A.III.3268. She described being sexually assaulted by a man who brandished a knife, vaginally raped her, and forced her to perform oral sex on him. A.III.3264, 3266. The victim was specifically asked, "Were there multiple assailants?" and told the nurse, "No." A.III.3266.

Back at the crime scene, the responding officers processed the entire home for fingerprints; Mrs. L. had reported that the perpetrator did not wear gloves. A.III.3072. They also collected numerous other items that may have been handled by the perpetrator or otherwise come into contact with his biological material, including Mrs. L.'s bedding. A.III.3172-3173.

At approximately 1:40 p.m. that same day, Mrs. L. provided Clarksburg detectives with an even more detailed statement; this one was tape-recorded and transcribed. *See* A.III.3081; A.III.3068-3080. She calmly and clearly recounted the painful details of the sexual assault and robbery. *Id.* In addition, she provided numerous details about the perpetrator's physical description and clothing. She stated that the assailant wore blue jeans (which she saw when he pulled them down during the sexual assault) and a "light colored" short sleeved T-shirt, both of which appeared "very clean." A.III.3071-3072, 3076. The perpetrator also wore "dark colored underwear." He had short hair, and "something on his head" which was also dark in color. Mrs.

L. thought it was a hat, but noted that “there was not a bill” on the brim. A.III.3079. When the perpetrator fled, she saw him put on what appeared to be sunglasses. A.III.3080.

She saw the assailant’s knife and flashlight, but reported no distinctive details about either item. A.III.3070. She recalled only that the blade was bigger than a steak knife and appeared to be the size of either a butcher knife or hunting knife. A.III.3070-3071.

At no point in the victim’s detailed, thirteen-page statement is there any suggestion that there was a second perpetrator present anywhere in the home, much less that a second male sexually assaulted her. Indeed, she refers to the assailant throughout as “he” or “the man,” and at no time expresses any uncertainty or confusion as to how many individuals were present. She also recounted, in the perpetrator’s exact words, numerous statements the assailant made to her during the robbery and assault, during which he always referred to himself in the first-person singular. *See, e.g.*, A.III. 3078 (assailant said he knew she had “money upstairs” because “I’ve been here before”); A.III. 3069 (ordering her to do what he said “[o]r I’ll give you this knife!”); *Id.* (“If you call anybody within the next 20 minutes, I’ll come back and kill you”).

At the time, Mrs. L.’s son was an officer with the Clarksburg Police Department. Mrs. L. made a point of noticing and remembering all of the details she could observe “so I could tell [my son] what happened” and aid the police in capturing her assailant. A.III.3079.

No State official harbored any concerns about Mrs. L.’s ability to provide reliable information. To the contrary: twelve years later, the original Assistant Prosecuting Attorney (“APA”) on the case still recalled her as “a very bright, alert, and articulate woman for being 83” years old, who understood the questions asked and whose memory was reliable. *See* A.V.6617; A.VII.8129-30. The sexual assault nurse at the hospital noted that the victim’s account “remained consistent” throughout multiple interviews. A.III.3260; see also A.III.3272 (noting that victim is “alert” and oriented, and is in “mild” distress). And the lead detective confirmed

that the victim “kept her faculties clear” even at this time of great crisis. A.II.1585.

B. Petitioner’s Arrest and Interrogation

One week later -- even after issuing a press release describing the lone assailant, and creating a tip line, *see* A.III.3180-- the police still had no suspects the rape and robbery of the mother of one of their fellow officers. On December 7, 2001, 19-year-old Joseph Buffey was arrested for three non-violent, breaking-and-entering offenses at businesses in downtown Clarksburg that took place between August and November. *See* A.III.3174; A.I.1326-33. A juvenile co-defendant in the Salvation Army case, Andrew Locke, was arrested along with Mr. Buffey; a second co-defendant in that case, 29-year-old Ronald Perry had been arrested the previous day, after goods stolen from the Salvation Army were found in Perry’s home. *See* A.IV.4181. Mr. Buffey’s fingerprint was identified on a broken safe from the Salvation Army break-in, which occurred on November 29, 2001, the night before Mrs. L. was raped and robbed. Immediately upon arrest, Mr. Buffey admitted his role in the break-ins of the three businesses; he has never denied responsibility for these property crimes.²

Mrs. L.’s home was located approximately three-tenths of a mile from the Salvation Army. However, the two crimes occurred more than eight hours apart.³ Nevertheless, Mr. Buffey was interrogated by multiple detectives about the rape and robbery over a nine-hour period, extending until nearly 4:00 a.m. They repeatedly accused him of committing these

² The first incident occurred on August 29, 2001, at a business called Stealey Pool. Mr. Buffey and a co-defendant stole approximately \$40.00 worth of food from a concession stand, and door locks worth \$40 were damaged. On November 18, 2001 Mr. Buffey and another male attempted to break in into a business called Smoker’s Choice; no items were taken and no damage to the business was reported. On November 29, 2001, Mr. Buffey, along with two other males, broke into the Salvation Army. They caused approximately \$2,400.00 in damages and stole numerous items from the store. *See* A.I.1326-1330; A.VI.4180-4183. The total damage caused by all three break-ins was approximately \$2500. *Id.*

³ Locke told police that the Salvation Army break-in had concluded at approximately 9:00 p.m. on November 29. A.III.3248. Police responded to Mrs. L.’s 911 call at 7:30 a.m. the following day.

crimes until finally, an exhausted Mr. Buffey gave a taped, partial confession -- one he promptly recanted, at which point the officers hastily ended the interview and turned off the recorder.

Mr. Buffey's interrogation began at approximately 6:55 p.m. *See* A.III.3172. At approximately 11:00 p.m., State Police Sgt. Dallas Wolfe III arrived at the C.P.D. to administer a polygraph. The polygrapher was advised that the perpetrator of Mrs. L.'s rape and robbery "matched the general description of Joseph Buffey." *See* A.III.3204. Mr. Buffey quickly admitted to the Salvation Army break-in. A.III.3205. But he adamantly denied committing rape or robbery against Mrs. L. or anyone else. A.III.3205-06. Even after Sgt. Wolfe spent several hours accusing Mr. Buffey of deception, he maintained his innocence. A.III.3206.

Sgt. Wolfe abandoned his efforts to extract a confession from Mr. Buffey at 3:18 a.m. *See id.* At that point, C.P.D. Dets. Matheny and Wygal took over. Before they began, Sgt. Wolfe advised them that, in his view, "Mr. Buffey was not telling the truth about [these crimes], but for some reason was unable to disclose what he had done." A.III.3206. Neither detective was trained in interrogation techniques: Det. Matheny had taken only a brief course in interrogation methods at the WVSP Academy when he joined the force, and Det. Wygal had "none." A.II.1495; A.VII.8156. Neither had any training in how prevent false confessions, nor how to recognize the difference between a reliable confession and a false one; Det. Matheny would later admit, candidly, that he had no interest in such training. A.II.1494-96.

Beginning at 3:25 a.m., the two detectives finally began to record their interrogation of Mr. Buffey. *See* A.III.3067; A.III.3052-66. By this point, he had been questioned for nearly nine hours, with no sleep or food. His last meal was at noon the previous day, and he had slept for less than three hours the night before his arrest. A.III.3210.

After telling an exhausted Mr. Buffey, "I feel that you're my friend, whether you believe that or not," Det. Matheny proceeded to question him yet again about the crimes against L.L.

Finally, Mr. Buffey “confessed” -- saying that he “broke into this old lady’s house” -- but he could not tell them anything about the location, other than that he “guess[ed]” it was in the same neighborhood where a girl he knew had once lived. Even when specifically prompted as to whether it was near “the Pepsi-Cola plant,” Mr. Buffey responded only, “I guess so.” A.III.3053. Indeed, nothing Mr. Buffey told investigators during the recorded statement demonstrated any independent knowledge of the crime. A.II.1501-1503. This was true despite the fact that the victim’s statement reflects a wealth of information that would have been known to the real perpetrator, including (a) she was tied up with belts after the rape, (b) the perpetrator commented on a photo of her granddaughter, (c) she was forced to perform multiple sex acts, (d) the perpetrator said he had been in the house before, and (e) he threatened to “come back and kill” her if she called the police before he had time to flee. A.III.3069, 3076, 3078; A.II.1501-1502.

Significantly, even when pressed, Mr. Buffey could only guess -- usually without success -- at what his interrogators wanted to hear. He was unable to supply even basic details that anyone who had actually been present at the scene would have known. A.II.1501-1503. And what little detail he did provide often conflicted with the victim’s account. For example:

- The victim awoke to find the perpetrator in her second-floor bedroom; after taking her downstairs to look for money, he walked her back upstairs, and assaulted her. A.III.3068. Yet when asked if he went upstairs at any time, Mr. Buffey responded, “No.” A.III.3063.
- The perpetrator searched the entire home for money and then robbed her of the nine dollars she had in her purse. A.III.3068; A.III.3171. Yet when asked if he gotten any money, Mr. Buffey responded that he had not. A.III.3055.
- Mr. Buffey was not able to describe how he allegedly entered the home, giving different answers each time: (a) “I guess through the window, through the door;” (b) “I went in through a window;” and (c) “I think it [the window] was on the side.” A.III.3057-58. Nor could he even say which side of the house the window was on, leading one detective to say in frustration, “Well, you can't remember, you remember going through a window but you don't remember if you're on the right side or the left side of the house?” A.III.3060. The actual point of entry was a sliding glass door at the back of the house. A.II.1468. None of Mr. Buffey’s guesses involved a back entrance of any kind.

- Anyone who had actually been to the victim’s house, much less entered the home through the sliding glass door, would not have confused that door with a side window. The sliding glass door is located at the back of the house. See A.V.6713; A.VI.7814. As the photos demonstrate, the sliding glass door is directly accessed through a back deck. And the windows toward the back side of the house are inaccessible without a ladder.
- The perpetrator had a flashlight. A.III.3070. Yet even when pressed, Mr. Buffey couldn’t “remember” whether he had one or not. A.III.3058.

Both detectives pressed in vain for more accurate details. Finally, as the interview wound down, Mr. Buffey stopped trying to make futile guesses about what his interrogators wanted to hear, and admitted that even his limited “confession” from minutes ago was false:

Q: I know you want to tell us, you're just scared. What are you scared of?
 A: You really want to know the truth?
 Q: Yeah, we want the truth.
 A: I didn't do it.

A.III.3065. He explained that he “made up a story” even though he knew nothing about the crime, because the detectives were “breathing down my throat, breathing down my neck, telling me ‘I did it’.” *Id.* The investigators’ response was simply to become angry at him (“you’re lying to us and you can see it in your face, you know that’s not the truth”). Less than a minute later, Det. Matheny hastily “conclude[d] the statement” and turned off the tape. A.III.3066.

C. Investigation Fails to Corroborate Statement or Otherwise Implicate Petitioner

In the six months between Mr. Buffey’s arrest and his final plea hearing in May 2002, the State’s investigation yielded no physical evidence, nor any credible witness testimony, against him. Indeed, the State’s own investigation only further called Mr. Buffey’s guilt into question.

1. No Eyewitness or Fingerprint Identification

Mr. Buffey was not identified by Mrs. L. as the man who robbed and assaulted her, either in a lineup or photo array, *see* A.III.3098-99, even though Det. Matheny noted “attempts to show [the victim] direct pictures” in his grand jury testimony. *Id.* Det. Matheny would later contend

that he did not ask the victim to try and identify her assailant, claiming, “She told me she couldn’t do that.” A.II.1449. Yet nothing in Det. Matheny’s investigative file or notes reflects any such reluctance on the victim’s part. Moreover, at no point in the victim’s detailed taped statement did she make any such remark; indeed, she describes several clear opportunities to view the perpetrator (including as he walked her downstairs, through the kitchen, and back upstairs to search for cash and valuables). A.III.3068-70, 72, 76. Similarly, even though the victim reported that her assailant did not wear gloves, no prints of Mr. Buffey’s were found at the scene, including those collected from the perpetrator’s apparent point of entry. A.IV.4178.

2. Petitioner’s Clothing and Knife Were Different From Perpetrator’s

Police seized a duffel bag of clothing at the home of one of Mr. Buffey’s co-defendants in the Salvation Army case, which he wore on November 29th and the next morning. A.III.3059-61. Yet these items differed from the perpetrator’s clothing, which Mrs. L. had taken such pains to observe and recall. For example, Mrs. L. noted that the assailant wore what appeared to be a hat, which was “plain and dark colored.” She specifically told police that “there was not a bill” on the hat. *See* A.III.3079-80. Yet Mr. Buffey’s bag contained a “green visor-type cap.” *See* A.III.3174. Similarly, although Mrs. L. told police that the perpetrator wore “blue jeans,” Mr. Buffey’s seized clothing contained green parachute-style pants. *See* A.III.3069, 3071; A.III.3060. Finally, Mrs. L. observed that the perpetrator’s underwear was “black or dark blue” - but the underwear Mr. Buffey wore on Nov. 29-30 was checkered. A.III.3072; A.III.3651.

On the day of Mr. Buffey’s arrest, police also seized a hunting knife that he had recently given to the sister of his juvenile co-defendant, Andrew Locke. A.III.3110-3111. Yet Mr. Buffey’s knife had highly distinctive features -- a black sheath, an Eagle insignia, a jagged blade, and a cord on the handle -- that Mrs. L. did not observe or report. A.III.3090, 3110, 3244.

C.P.D. detectives never asked the victim to view any of the seized items of clothing, or

the knife owned by Mr. Buffey, to see if she recognized them. *See* A.II.1451, 1453, 1486.

3. Co-Defendant Statement Conflicts With Known Facts of Crime

Investigators located only one witness who claimed to have any information linking Mr. Buffey to the crimes against Mrs. L. -- his juvenile co-defendant in the Salvation Army case, Andrew Locke, who was also interrogated while under arrest and facing burglary charges.

Like Mr. Buffey, Locke was separately interrogated (with no recording device used) for several hours upon arrest, chiefly about the crimes against Mrs. L. At 11:23 p.m., Locke gave a taped statement in which he claimed that he, Perry, and Mr. Buffey all left the Salvation Army at approximately 9:00 p.m. on November 29 and took the proceeds of the burglary to a room at the Parsons Motel (nearly two miles from Mrs. L.'s residence). *See* A.III.3242, 3247-48. He claimed that Mr. Buffey left the group at around 10:45 or 11:00 p.m., saying would be back the next morning. A.III.3242-43. Locke claimed he "ran into" Mr. Buffey at approximately 5:00 or 6:00 a.m. the next morning. At that time, Locke claimed, Mr. Buffey told him that after leaving the motel, he "broke into" a residence, but that "things didn't go as planned" because "they" turned out to be at home. He claimed that Mr. Buffey said that he "held them up" with a knife and "left." A.III.3243-44. Locke said the knife was "black" with a long blade. A.III.3244.

Like Mr. Buffey's "confession," however, Locke's statement was markedly inconsistent with the known facts of the crime. Notably, Locke claimed that Mr. Buffey made these statements when they ran into each other between 5 and 6 a.m. on November 30th -- yet this was well before the crimes against Mrs. L. had even begun. He claimed that Mr. Buffey had robbed a home while multiple residents were present, yet Mrs. L. lived alone. And of course, he made no mention of the acts of sexual assault that Mrs. L. so vividly described in her own statement.⁴

⁴ The reliability of Locke's statement would be further impeached in post-conviction proceedings,

D. Indictment

Mr. Buffey was indicted in the January 2002 term for (1) crimes involving breaking-and-entering and property damage, from the trio of after-hours break-ins he attempted with one or more co-defendants in August and November of 2001 (“the non-L.L.” charges); and (2) crimes arising from the robbery and rape of L.L., in which Mr. Buffey was alleged to have acted alone. The latter indictment included five separate counts of first-degree sexual assault (carrying a minimum sentence of 15 years, and a maximum of 35 years), and one count of first degree robbery (carrying a 10 year minimum and an indeterminate maximum). *See* A.I.1340-43.

The case for Mr. Buffey’s indictment was presented to the grand jury by Harrison County’s then-Prosecuting Attorney, John Scott. At the time, Mr. Scott was facing considerable personal and professional difficulties of his own, including charges of ethical misconduct that would ultimately lead to the suspension of his law license.⁵ Former APA Terri O’Brien assisted Mr. Scott with Petitioner’s case for a brief period of time in early 2002, before she resigned due to concerns over Mr. Scott’s ethics charges. *See* A.VII.8127, 8140; A.II.1878-79. However, Mr. Scott was in charge of the case at all times. A.II.1878-79; A.V.6621.

Mr. Scott called one witness before the grand jury: Det. Robert Matheny, who had taken

when (1) he repeatedly admitted (in an interview with habeas counsel in 2004, and in a sworn affidavit submitted in this proceeding) that Mr. Buffey never made these statements, and in fact was with him and his sister at the Parsons Hotel all night; and (2) hospital records revealed that Locke had been taken to the emergency room by Sherriff’s officials for a possible drug overdose just hours after giving his taped statement, where he tested positive for opiates and reported having taken “150mg morphine” earlier that evening. *See* A.III.3230, 3239. *See also* A.IV.4110 (state psychologist, evaluating Locke in 2002, found him to be “lacking in credibil[ity]” and exhibiting signs of dishonesty).

⁵ Unbeknownst to his constituents, Mr. Scott suffered from bipolar disorder. A.II.1910. In the same January 2002 Grand Jury term in which he secured Mr. Buffey’s indictments, he had wrongfully obtained an indictment against a defendant whose case had already been resolved in magistrate court, and then misled the Circuit Court judge into believing that the indictment had been sealed because it was a drug indictment. A.II.1907. Mr. Scott also obtained a series of indictments at a time when he was not licensed to practice law, *see, e.g.*, Case No. 01-P-20 (Circuit Court of Harrison County), and to have engaged in a pattern of deceptive behavior to cover up his misconduct, resulting in suspension. *See Lawyer Disc. Bd. v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

both the victim's detailed statements and Mr. Buffey's custodial "confession." Unbeknownst to Mr. Buffey or his counsel, however, the grand jury was repeatedly presented with evidence that Mr. Scott and Det. Matheny knew, or should have known, was false. For example:

- The grand jurors asked whether Mr. Buffey confessed to any of the acts of sexual assault that were described by the victim. Det. Matheny stated that he did not -- because Mr. Buffey claimed to have "blacked out" after encountering Mrs. L. in the dining room. See A.III.3102 ("[H]is story is once he confronted her, he blacked out and doesn't remember what happened"). In fact, even after Mr. Buffey's interrogators suggested a blackout as a way to explain his failure to "remember" the assault, Mr. Buffey told them that he had "never" blacked out and that it was "not possible" that he had done so here. See A.III.3057; A.III.3207 (emphasis supplied).
- Det. Matheny told grand jurors that Mr. Buffey said he entered the home through the "back" of the house ("he went through the back window into the dining room, which would have been the sliding glass door where the dogs had went to"). This statement was significant, Det. Matheny told the grand jurors, because the K-9 unit had tracked the perpetrator's scent in the rear of the house, and "there would have been no way of him knowing that that [back] window went into the dining room other than the fact that he had been there[.]" A.III.3097. However, Mr. Buffey stated no such thing. He was unable to correctly answer his interrogators' repeated questions about the perpetrator's point of entry -- ultimately guessing (incorrectly) that he entered through a "side" window, not through the back. Nor could he even tell investigators which side window he used to enter the home.⁶
- Det. Matheny claimed that Mrs. L. had seen her assailant carry a flashlight that was distinctly "similar in description to the flashlights that were stolen [by Mr. Buffey] at the Salvation Army." A.III.3097. This was false in both respects. Mrs. L. stated that she was unable to recall any distinctive details about the perpetrator's flashlight. See A.III.3070 ("Q: Can you describe the flashlight that he -- A: No."); *Id.* at 3071 ("It was black, it looked like it was black, and it, and it looked like a fair, just a regular home flashlight") (emphasis supplied). Worse, the police report specifically listing all the items stolen from the Salvation Army does not include any flashlights at all. See A.IV.4126-4141.

⁶ See A.III.3057 ("Q: How did you get in? A: I guess through the window, through the door."); A.III.3058 ("What window did you go in, on the side of the house, back of the house, front of the house? A: I think it was on the side."); A.III. 3060 ("Q: Well, you can't remember, you remember going through a window but you don't remember if you're on the right side or left side of the house? A: It was on one side of the house"). Moreover, anyone who -- unlike Mr. Buffey -- had actually been to the victim's house, much less entered the home through the sliding glass door, would not have confused that back sliding glass door with a "side window." The sliding glass door is located at the back of the house. The sliding glass door is directly accessed through a back deck. By contrast, the windows near the back side of the house are high and inaccessible without a ladder. See A.V.6713, 6715-6716; A.VI.7812-7814.

- Det. Matheny also claimed that the knife belonging to Mr. Buffey's that police later recovered "fit to a 'T' the knife that [Mrs. L.] described." The detective then described various distinctive features (including its handle, cap, and sheath) on Petitioner's knife. A.III.3090. Yet Mrs. L. did not describe any such features on the perpetrator's knife -- she said only that it had a long blade that appeared bigger than a steak knife. A.III.3070-71. Det. Matheny also falsely told the grand jury that Mrs. L. stated that the perpetrator's knife -- like Mr. Buffey's knife -- had "a black handle." A.III.3087. She made no such statement. *See* A.III.3068-3080.

E. Appointment of Counsel and Plea Offer

On December 18, 2001, attorney Thomas G. Dyer was appointed to represent Mr. Buffey. Mr. Buffey immediately told his lawyer that he had participated in all three of the non-violent break-ins of local businesses with which he was charged. A.II.2080; A.IV.4540. By contrast, as reflected in Mr. Dyer's notes, Mr. Buffey told him in their first meeting that he had recanted his false confession to the rape-robbery, and that he had an alibi -- that after leaving the Salvation Army, he went back to the Parsons Motel (two miles away from Mrs. L.'s house) with Andrew Locke and his sister. A.II.2089; A.VI.6854. All three stayed the night and did not wake up until after 7:00 a.m. (*i.e.*, when the perpetrator of Mrs. L.'s assault was fleeing), with Ms. Weyant's bed blocking the door as they slept. A.II.1838-39; A.III.3294. Per hotel policy, each guest was required to register and pay separately for the entire night's stay.⁷ A.II.1854-55.

Early in the case, Mr. Dyer was informed that the State intended to conduct DNA testing on Mrs. L.'s sexual assault kit. Mr. Dyer had numerous conversations with his client about the DNA testing. Mr. Buffey repeatedly assured his attorney that he had no objection to the testing; he "insisted that his DNA would clear him[.]" A.II.1933, 1956-57, 2017-2019.

On January 29, 2002, Mr. Dyer filed a Motion to Compel Production of Discoverable

⁷ It appears that Mr. Dyer did not try and obtain the hotel payment records, or locate the desk clerk on duty that night, to corroborate his client's alibi. However, both Carrie Weyant and Andrew Locke (whom Mr. Dyer did not interview) have now attested that he was, in fact, with them from 9:30 p.m. and did not wake up and leave the motel until after 7am. A.III.3294; A.II.1834-39.

Materials. He noted that the State had, at that time, provided “nothing” by way of “discoverable information . . . related to the alleged sexual assault and kidnapping of [L.L.],” despite a prior deadline. *See* A.IV.4773-4774. The following day, the Prosecuting Attorney made a plea offer: it would dismiss all actual or potential charges unrelated to the crimes against L.L., as well as certain counts in the L.L. indictment, if Mr. Buffey pled to the three most serious charges: two counts of first-degree sexual abuse, and one count of first-degree robbery. Each carried high minimums and (in the robbery) an indeterminate maximum; no sentencing offer was made.⁸

Mr. Dyer recalls that Mr. Buffey’s mental state at the time was “quite desperate.” A.II.2098. He told his client that the crimes against L.L. with which he was charged were among the most heinous in Harrison County history. A.II.2099. He warned Mr. Buffey that he faced decades, and potentially a lifetime, in prison if convicted at trial -- whether on the L.L. charges alone, or in combination with the lesser, unrelated property crimes. A.II.2050; AII.2404. The prosecutor had informed Mr. Dyer that the sexual assault counts “were going to be nonnegotiable,” and that “we have got to take [the initial offer] or leave it. It was just that simple.” *See* A.II.2080, A.IV.4512. The offer had a deadline, and if Mr. Buffey wanted to accept it before “the deal only g[o]t worse,” he needed to do so quickly. A.II.1940, 2105, 2405.

In counseling Mr. Buffey, however, Mr. Dyer did more than just advise him of terms of the plea and the risks he faced if he went to trial. He also told Mr. Buffey that, if he accepted the State’s offer, (1) because of Mr. Buffey’s age, Mr. Dyer fully expected that the court would allow him to serve concurrent sentences on all three counts, and (2) in a “numbers analysis,” this meant that Mr. Buffey would likely be no worse off than if he were acquitted of the L.L. counts,

⁸ In addition to the property crimes enumerated in Indictment No. 02-F-9-2, and two alleged vehicle theft charges that the Clarksburg Police Department filed against him in January 2002, the State had indicated that it might also seek to prosecute Mr. Buffey for statutory rape after it learned that his longtime girlfriend, Shantell Shaffer, had become pregnant at age 13. A.II.1933; A.IV.4211.

but pled guilty to the non-L.L. charges for which he had admitted responsibility. He even went so far as to predict that Mr. Buffey would likely receive a fifteen-year total sentence if he took the plea (*i.e.*, the minimum on both sexual assault charges, and fifteen years or less for the robbery, all running concurrent). A.II.2050, 2086-87, 2096. This was remarkable (and grossly inaccurate) legal counsel, given the horrific nature of the rape-robbery, as compared the non-violent nature and comparably low sentencing range of the other charges.⁹

Ultimately, Mr. Buffey decided to accept the offer before it expired. The written plea agreement was signed on February 6, and an initial plea hearing was set for February 11. Mr. Dyer told the court at the final plea hearing that he had “strongly recommended to Mr. Buffey that he enter into this plea agreement,” *see* A.IV.4294, consistent with Mr. Buffey’s recollection. A.II.2451. (Two years later, after the State’s DNA results came to light and Mr. Dyer was alleged to have been ineffective in recommending the plea to his client, Mr. Dyer would newly claim that Mr. Buffey had in fact pled guilty *against* his advice. However, Mr. Dyer’s own file notes do not corroborate this claim, and it is otherwise contradicted by the record.¹⁰)

What is undisputed is that, before both plea hearings, Mr. Dyer did make repeated efforts to learn the status of the DNA testing. Whether the State’s DNA tests had yielded any results was “of paramount significance” to the entire case, in part because Mr. Buffey had “made . . . very clear” that the DNA results would not inculcate him. A.II.1933-1936, 2017. Accordingly,

⁹ *See* Indictment (No. 02-F-9-2) in which Mr. Buffey was charged with (1) three (3) counts of breaking and entering under W. Va. Code § 61-3-12, which carried a sentence of 1 to 10 years; 2) one (1) count of petit larceny in an amount less than \$1,000 under W. Va. Code § 61-3-13, which carried a sentence of not more than a year; and 3) one (1) count of destruction of property in an amount less than \$2,500 under W. Va. Code § 61-3-30, which carried a sentence of not more than a year. A.I.1344-46. Indeed, Mr. Buffey’s two co-defendants in the Salvation Army case -- one of whom, Ronald Perry, was 29 years old and had a felony record -- served only 3.5 years on those charges. *See* A.VI.7949.

¹⁰ *See* A.I.1233-38 for further discussion of Mr. Dyer’s claims and the contradictory record evidence, including the absence of any file notes supporting Mr. Dyer’s account.

Mr. Dyer asked Mr. Scott and Det. Matheny about the status of the DNA testing “on probably an every other day basis” before the initial plea hearing. A.II.1935-1937, 1942. Each time, he was told the testing was not complete, and was given no other information. A.II.1944-1946.

At the February 11, 2001 hearing, Mr. Buffey entered the required admissions to the specific criminal acts to which he had agreed to plead guilty pursuant to W.Va. R. Crim. P. 11(f). *See* A.IV.4234-4235. The Court did not, however, accept the plea at that time. Instead, explaining that it wished to have “some additional information . . . to make sure that accepting your pleas is the right thing to do.” the court elected to hold it in abeyance, and to ask the Division of Corrections to conduct a pre-sentence evaluation of Mr. Buffey in the interim. A.IV.4262-63. The case was reset for a final plea hearing later in the year. A.IV.4268.

F. State Completes DNA Testing -- But Tells Defense “Not Done Yet”

Unbeknownst to Mr. Buffey or his counsel, however, in the days prior to that initial plea hearing, the State Police laboratory had in fact completed two rounds of DNA testing on Mrs. L.’s sexual assault kit, all of which were highly favorable to Mr. Buffey. Moreover, despite continued, repeated inquiries, the defense was never informed that the State Police laboratory issued its final DNA report to Harrison County officials on April 5, 2002 -- more than six weeks before the parties appeared in Court for the final plea and sentencing hearing on May 21, 2002.

1. DNA Data Generated in February, Reported in April

On December 18, 2001, Detective Matheny submitted the case to the WVSP laboratory for forensic analysis. A.III.3648. He informed the lab that the case involved the violent, home-invasion rape of an elderly victim, and requested it test the DNA evidence as quickly as possible. *Id.*; A.II.1512. Accordingly, despite a substantial and well-publicized backlog of approximately 300 cases, testing began almost immediately. A.II.1639-30. WVSP analyst Lt. Brént Myers began his examination of Mrs. L.’s sexual assault kit on January 22, 2002 -- the very same day it

was delivered to him. A.III.3654-55, 3672, A.V.6730.

In January and early February, Lt. Myers received frequent calls from Det. Matheny and the Prosecuting Attorney's Office -- "every day, if not every other day" -- asking about his DNA results. A.II.1636. Indeed, in high-priority cases such as this one, even before a report was issued, it was not uncommon for Det. Matheny to obtain preliminary oral reports from the DNA analysts "on what they're seeing in their testing" as it proceeded. A.II.1511.

During the week of February 4, 2002, Lt. Myers extracted male DNA from two items in Mrs. L's rape kit (a paper towel and panty liner) containing seminal fluid. As reflected in his charts and worksheets, on or before Friday, February 8th, he had obtained and analyzed DNA data clearly showing sperm on these items from a man who was not Joseph Buffey. A.II.1638-39, 1659; A.III.3559, 3561, 3567, 3600, 3603, 3606, 3608. Although the results were what he considered to be "low level," they revealed an apparent DNA exclusion of Mr. Buffey. A.II.1654-61; A.III.3655. Nor was there any indication of a second male.. A.II.1661.

Lt. Myers came back into the lab that weekend to continue his work. On Saturday, February 9th -- two days before the initial plea hearing in Mr. Buffey's case -- he conducted a second DNA data "run" on the samples. A.II.1667; A.III.3534, 3537, 3540. Here, Lt. Myers saw an indication of a possible third contributor (*i.e.*, someone other than the sperm donor and the victim), because of an additional "18" allele (genetic marker) at the D18 locus. However, Mr. Buffey does not have this allele, and could not have been its source. A.II.1659, 1668-1669. The other data was fully consistent with what Lt. Myers had previously obtained. A.II.1672-73.

Four days later, on February 13, Lt. Myers took additional cuttings from this evidence. He extracted and amplified these DNA samples over the next two weeks (finishing on February 27th). This was his final round of testing. A.II.1673, 1724-26.

By the time Lt. Myers had analyzed all of the data he had generated in February, it was

“absolutely” clear to him that (1) there was a primary sperm donor on all of this evidence, and (2) Mr. Buffey was not that man. A.II.1676. Lt. Myers also quickly realized that the data he had obtained “did not in any way match what [he] was being told” by local law enforcement -- namely, that the victim had been raped and robbed by a single assailant, and that Mr. Buffey had confessed to the crime -- which “bothered” him. A.IV.4403-04; A.II.1687-88. He also felt obligated to make sure that Harrison County prosecutors and police knew that his DNA results were inconsistent with their theory of the case. A.II.1731.

Lt. Myers clearly stated his conclusions in his final written report dated April 5, 2002, which he addressed to Det. Matheny at the Clarksburg P.D. *See* A.V.6731-6734 (“Assuming there are only two contributors (including [the victim]), Joseph Buffey is excluded as a donor of the seminal fluid identified” on victim’s pantyliner and paper towel) (emphasis supplied).

2. Despite Repeated Inquiries, Defense is Told “No Report” Exists

Neither Mr. Buffey nor his counsel was aware that the WVSPFL had completed all of its DNA testing by April 5th showing his “absolute” exclusion as the primary sperm donor, six weeks before his final plea hearing. They also were not aware that the initial DNA test results, fully consistent with the report’s final conclusion, were generated and reviewed by Lt. Myers the weekend before the parties presented their initial plea agreement to the court on February 11.

The defense’s ignorance was not for lack of effort. Mr. Dyer was “desperate” to learn the DNA test results before the plea was entered or accepted. A.II.1934. His client was “a 19 year old boy” who was facing “spending the majority or [even] the rest of his life behind bars.” A.II.1979. Thus, not only did Mr. Dyer specifically ask Det. Matheny and, in particular, PA Scott about the status of the DNA testing approximately “every other day” in late January and early February, he continued to inquire in the months that followed, *i.e.*, even after the initial plea was proffered on February 11th. A.II.1935-1937, 1940, 1942.

Mr. Dyer continued to make these inquiries because he was confident that he could “put the brakes on the judge accepting the plea” with favorable DNA results. A.II.1942-43. Given the obvious significance of the identity of the semen donor in this case, Mr. Dyer would have vigorously argued that Mr. Buffey was not bound by the earlier plea agreement, nor by his stated willingness to plead guilty in February. A.II.1942. Indeed, Mr. Dyer had successfully represented clients in their efforts to withdraw pleas after an initial hearing “many times in my career.” *Id.* In these habeas proceedings, when asked whether there was any circumstance under which he would have ever allowed Mr. Buffey to plead guilty had he known of the results stated in the April 5, 2002 DNA report -- *i.e.*, that semen from a man who was not Mr. Buffey was detected on Mrs. L’s sexual assault kit -- Mr. Dyer responded, “Of course not.” A.II.1940-41.

However, each and every time that Mr. Dyer inquired about the status of the DNA testing before May 21, 2002, he was assured by his contacts in Harrison County law enforcement that they had again checked with the laboratory, but that there was still “no report, that the analysis was not complete or something to that effect.” A.II.1935-36, 1944-46. If they had not assured him that they had inquired, he would have called the laboratory himself. A.II.1944. Neither Mr. Scott nor Det. Matheny disputes Mr. Dyer’s clear recollection on this point. A.II.1891-92.

II. Final Plea and Imposition of Sentence

Pursuant to the Court’s request, Mr. Buffey was interviewed at the Anthony Correctional Center on April 5, 2002. *See* A.IV.4184-94. The evaluator noted that Mr. Buffey had admitted his culpability for the breaking and entering offenses, explaining that he committed the thefts to support his habit of ingesting prescription and non-prescription drugs. *See* A.IV.4189. However, Mr. Buffey maintained his innocence of the crimes against Mrs. L., despite his earlier confession and plea. *See* A.IV.4192 (noting that Mr. Buffey had earlier “confessed to the sexual crime with the elderly lady [but] he acted as if he did not even commit the crime when

interviewed by this examiner”); *see id.* (noting “his inability to admit to the crimes”).

The final plea hearing was held on May 21, 2002. Although Mr. Buffey had no prior felony convictions,¹¹ given the seriousness of the crimes against Mrs. L., the Court sentenced him to 15-35 years on each sexual assault count, and to 40 years on the robbery, all running consecutively. A.IV.5062-63. This makes Mr. Buffey ineligible for parole until ~~2014~~. **2041.**

III. First Habeas Petition Under W.Va. Code § 53-4A-1 (2002-04)

On November 14, 2002, Mr. Buffey filed a *pro se* application for a writ of habeas corpus. He maintained that he did not commit the rape and robbery, and faulted the state for failing to conduct DNA testing (which he had no idea had been completed). *See* A.VI.7729 (“police had and should have DNA evidence that would eliminate your petitioner as a suspect or perpetrator of the crime but did not bother to have it tested”). He further alleged that police had refused to accept his assertions of innocence and coerced him into confessing falsely, and that that his counsel was ineffective for advising him to plead guilty. A.VI.7720, 7727-28.

A. April 2002 DNA Report is Disclosed

In early 2003, Terri Tichenor, Esq. was appointed to represent Mr. Buffey. When she first spoke with her client by phone, “one of the very first things he asked for . . . [was] that I get the results of the DNA” that was to have been tested by the State. A.II.2128-29. Mr. Buffey told Ms. Tichenor “many times,” in that conversation and others, that he was innocent. A.II.2130. Ms. Tichenor then asked APA Traci Cook (who was assigned to the writ, but had not worked on the initial prosecution) to inquire. Less than a month later, Ms. Cook called Ms. Tichenor back and said, “We have a problem.” A.II.2132-33. She informed Ms. Tichenor that she had just discovered that the State’s DNA tests had been completed and a report issued in April 2002, and

¹¹ Mr. Buffey had prior juvenile delinquency adjudications, and one adult misdemeanor (for petit larceny). All of these were property crimes, and none involved any acts of violence against anyone.

that “the results indicated that [Mr. Buffey] was excluded, based on the DNA.” A.II.2133.

Ms. Tichenor had been practicing law for three years when she was appointed to Mr. Buffey’s case, and had no experience with DNA evidence. A.II.2125. Once she realized that her client might have a DNA-based claim of innocence, “I didn’t know where to start[.]” A.II.2143. She did realize that it might help her to consult with a DNA expert, so she asked the Court for funds to hire one. *Id.* She outsourced the task of finding the right expert to a private search firm, which some colleagues had used to find experts in personal injury cases. She then hired the first and only candidate they sent her. A.II.2142-2145. However, that “expert,” Dr. Vimal Mittal, was a pathologist, not a DNA analyst. Dr. Mittal had never worked in a DNA laboratory; had never conducted a DNA test; and had no training in DNA science, no publications about DNA, and no prior qualification or experience as a DNA expert. A.II.2139-2142; A.IV.5323-24.

On March 31, 2003, Ms. Tichenor filed an Amended Petition, alleging, *inter alia*, that the State had suppressed the 2002 DNA report. The State opposed relief, and an Omnibus Hearing was held in March 2004. Prior the hearing, Ms. Tichenor requested a copy of the State Police laboratory file, but had it sent directly to Dr. Mittal. A.II.2194. She never reviewed the file herself, and was thus unaware of the fact that -- as clearly reflected on Lt. Myers’s worksheets and printouts -- the exclusionary DNA data was generated as early as February 8, 2002. *Id.* She also did not speak with Lt. Myers, who performed the testing, at any time to inquire about his testing process, timing, or conclusions. A.II.2147-49. Lt. Myers would later confirm (in the instant proceedings) that he was more than willing to speak with Ms. Tichenor and had, in fact, previously approached her in court to communicate that offer, but she declined. A.II.1705.

B. 2004 Omnibus Hearing and Order

At the 2004 hearing, the State contended that, notwithstanding the conclusion clearly stated in the WVSP DNA report, Mr. Buffey was not necessarily “excluded” after all. Instead,

the State now contended that the tests were “inconclusive.” This was not because there was any DNA evidence inculpatory Mr. Buffey, nor because the WVSP had changed its finding that sperm from an unknown male was present. Instead, Lt. Myers agreed that the results could be characterized as “inconclusive,” simply because Mr. Buffey could not be -- in APA Cook’s words -- “one hundred percent” ruled out as a *potential, minor* contributor.¹² And this was simply because the laboratory lacked (at that time) a known DNA sample from the unknown male whose sperm was clearly present in this mixture. This precluded Lt. Myers from determining which DNA alleles in this mixed sample came from the primary donor, as opposed to other possible donor(s); it did not mean that Lt. Myers had concluded that Mr. Buffey’s DNA was actually present in the sample. (As discussed *infra*, this misleading inquiry by the State obscured the actual, exculpatory nature of the DNA data that Lt. Myers obtained.)

A second expert for the State, and the pathologist retained by the defense, agreed that the DNA results could (under the State’s “not one hundred percent excluded” test) be characterized as “inconclusive.” A.IV.4392-93, 4427, 4447. However, none of these experts were asked about the actual likelihood (or unlikelihood) that, based on the data, Mr. Buffey was in fact present in this DNA mixture. *See* A.I.1172-79 (summarizing 2004 testimony and its limitations).

Alternatively, the State argued that the plea should stand because Harrison County officials were personally unaware of the April 2002 report at the time of Mr. Buffey’s final plea.

¹² Q: Now let me get to the crux of your testimony. Can you exclude by one hundred percent Joseph Buffey as a donor of that DNA reflected on the evidence that you tested?

A: Because we do not know the profile of the unknown individual, I cannot one hundred percent include or exclude Mr. Buffey.

Q: Can you by one hundred percent - well I guess you answered that - include or exclude.

A: That’s correct.

Q: It’s inconclusive.

A: Yes.

A.IV.4416.

The State offered a mail receipt showing that a box containing the physical evidence, which included a copy of the report, was sent to Det. Matheny on July 12, 2002; and both Det. Matheny and former PA Scott claimed that they had no recollection of seeing the report. (It was not until a decade later that the State disclosed APA Cook's notes revealing that Lt. Myers in fact told APA O'Brien about his DNA results, even before the final report issued. *See infra* at pp.30-31.)

Finally, the State offered the testimony of Ronald Perry, Mr. Buffey's former co-defendant in the Salvation Army case. After the new DNA report came to light, and police went to interview Mr. Perry, he asserted for the first time that Mr. Buffey told him that he and a "cousin" had both sexually assaulted Mrs. L. Yet Mr. Perry's claims were markedly inconsistent with the victim's own account of the crime; further, he was (unbeknownst to prior habeas counsel) actively seeking a reduction in his own prison time in exchange for his testimony.¹³

On July 2, 2004, the court denied the petition. The court accepted the claims of State officials that that they did not receive the WVSP's DNA report before the May 2002 plea hearing, based on the mail receipt for the return of evidence in July. A.VII.9008, 9016. It also found that the 2002 DNA results were, in any event, "inconclusive," because "the Petitioner cannot be excluded *as a contributor* to the DNA mixture" on the items tested. A.IV.9008-09 (emphasis supplied). However, the Order made no mention of the fact that all three testifying experts agreed that the WVSP's data clearly did show the presence of sperm from an unknown male, *i.e.*, someone who was not Mr. Buffey. Nor did the Court address how Mr. Buffey's plea and sentence could stand in light of that remarkable, undisputed fact.

¹³ For example, Perry claimed that Mr. Buffey and his unnamed "cousin"-accomplice took turns assaulting the victim while the other "held her down," which is entirely different than what the victim reported. Perry also claimed that the assailants broke in through a window screen; the perpetrator in fact entered through a back door and no screens (door or window) were damaged. *See* A.I.1251-53; *see also* A.I.1254-55 (discussing other inconsistencies in Perry's allegations, and his undisclosed efforts to use his testimony against Mr. Buffey to secure a sentence reduction in his own case).

IV. Post-Conviction DNA Testing and DNA Database “Hit” to Perpetrator

On July 1, 2010, represented by new *pro bono* counsel, Mr. Buffey filed a Motion for Postconviction DNA Testing under the Right to DNA Testing Act (W. Va. Code §15-2B-14). The Motion was granted, and a series of new tests by a private DNA laboratory between 2011 and 2013 yielded additional DNA data that was highly exculpatory, even beyond what the WVSP had found in 2002 with the more limited technology then available.

First, the new DNA tests identified the fully-interpretable DNA profile of a single male sperm donor on multiple items of evidence from Mrs. L.’s sexual assault kit and bedding -- including on items previously (but incorrectly) found by the WVSP to be “negative” for semen. The profile found is shared by only 1 in 400 billion males (*i.e.*, “unique to one person who has ever lived on the planet”) and unequivocally excludes Mr. Buffey as the source. Second, the new tests confirmed the initial finding by the WVSP that trace amounts of DNA from a second (minor) male donor are also present -- but whereas Lt. Myers could not previously eliminate Mr. Buffey as a possible, though highly unlikely, contributor, the new tests established that Mr. Buffey is also excluded as the secondary male donor on all of the evidence tested to date.¹⁴

This newly-available technology also made it possible, for the first time, to search the assailant’s DNA profile in the FBI’s CODIS DNA database, which contains the known profiles of millions of violent convicts nationwide. Yet even though a “hit” in CODIS could not only exculpate Mr. Buffey but also identify a dangerous sexual predator who might still be at large, the State opposed Petitioner’s request to conduct an additional round of testing (at his own expense) to permit such a search. The State asserted that there was simply “no good reason to do so . . . [because] the State does not believe such testing will or can prove [Mr. Buffey’s]

¹⁴ See A.III.3695-4107; A.II.1736-1809. For a more detailed summary of the advanced DNA testing conducted between 2011-13 under the Right to DNA Act, and the significance of the results as discussed by testifying experts for both parties at the Omnibus Hearing, see A.I.1140-45.

innocence after his guilty plea.” See A.VII.9036-37.

The circuit court overruled this objection, and the profile was finally searched in CODIS in November 2012. Weeks later, a CODIS “hit” identified the source: an state prison inmate named Adam Bowers. At the time of the crimes against L.L., Bowers was sixteen years old and lived just a few blocks away from the victim. Bowers went to high school and was friendly with Mr. Buffey’s younger sister, Kayla (who is five years his junior), although Mr. Buffey had no recollection of ever meeting him. A.II.2412-13, 2648-49; 2618.

Unlike Mr. Buffey, whose priors were all property crimes, Bowers already had a history of violence. Clarksburg Police Department (“CPD”) records indicate that Bowers was accused of attempted sexual assault on a young woman, Shantell Shaffer, on October 28, 2001; during the assault, he reportedly choked her to the point of unconsciousness. A.III.3224-36. In addition, on January 15, 2002 -- while the WVSP’s DNA testing was pending -- Det. Matheny (who took Mr. Buffey’s “confession”) had arrested Bowers and charged him with attempted first degree robbery, after he tried to rob a female convenience store clerk while holding what appeared to be a butcher knife to her throat (as Mrs. L’s assailant did). See A.III.3219-3223; A.II.1824.

Bowers was indicted for the sexual assault and robbery of Mrs. L. in January, 2014. His trial is presently scheduled for April, 2015.

V. The Instant Habeas Petition and Proceedings Below

In April 2012, Petitioner filed a new petition under W. Va. Code § 53-4A-1. In the petition, and in subsequent filings, he asserted, *inter alia*, that (1) the new, previously-unavailable DNA testing and CODIS “hit” established his actual innocence, or at the very least, created a sufficiently serious “question of actual guilt” as to entitle him to relief; (2) the State violated *Brady* by suppressing favorable evidence it possessed prior to his final plea, including the 2002 DNA test results, as well significant impeachment material regarding State’s witness

Andrew Locke; (3) the State secured his indictment through grand jury testimony that it knew to be false; (4) prior counsel were ineffective in failing to discover and present such evidence; and (5) in light of all the new evidence, a “manifest injustice” would result if his plea and sentence were allowed to stand. *See State v. Olish*, 164 W.Va. 712, 715, 266 S.E. 2d 134, 136 (1980).

An Omnibus Hearing was held on July 10-12, 2013. The WVSP’s Lt. Myers testified, as did Alan Keel, the independent DNA analyst who had performed the new testing. They offered virtually identical opinions as to all of the DNA testing to date. Both agreed that Adam Bowers - - not Joseph Buffey -- was clearly either the primary and/or sole sperm donor on every item of evidence tested by both laboratories. Further, they agreed that while far smaller amounts of DNA from a second male appeared to be present on some items,¹⁵ Mr. Buffey is now wholly excluded as not just the primary, but also a secondary, male donor, on all of these items. That is, even if two males raped Mrs. L., and each deposited sperm during the crime, the new DNA shows unequivocally that Mr. Buffey could not have been either one of those two males. *See* A.I.1141-44 (explaining new DNA data and experts’ conclusions). In Lt. Myers’s words, after reviewing all the DNA testing done to date, there is simply “no support [for] the conclusion that Mr. Buffey is present” on any item of evidence. A.II.1723.

Mr. Buffey also presented significant new evidence regarding the WVSP’s 2002 DNA test results. First, he offered unrebutted testimony that the 2002 results were in fact exculpatory, not “inconclusive.” DNA experts for both sides now agree that (1) Mr. Buffey was “absolutely”

¹⁵Importantly, the presence of trace amounts of DNA from a second male on the evidence does not establish that two perpetrators committed this crime, *i.e.*, it does not mean the DNA comes from a second assailant. Indeed, as Mr. Keel explained, without rebuttal, the extremely low levels of DNA from the possible third source seen here are wholly inconsistent with what the data would show if a second male had assaulted the victim in this case. They are instead consistent with the secondary transfer of another man’s DNA by the lone assailant (Bowers) at the scene. *See* A.II.1801-09. Although that may seem unlikely, as Mr. Keel explained (and documented in his initial report), it is a recognized phenomenon in the forensic DNA field and the relevant literature. *See id.*

excluded as the primary sperm donor as of April 2002, and (2) the data also strongly indicated that he was also excluded, *even at that time*, as a minor contributor. Indeed, Mr. Keel opined that as of April 2002, the WVSP data excluded Mr. Buffey “unequivocally,” and Lt. Myers readily concurred that, at the very least, it was extremely “unlikely” that Mr. Buffey was present anywhere in this mixture. Further, had Lt. Myers been asked such questions at any time after issuing his report, he would have shared that opinion with defense counsel and the Court.¹⁶

Second, Mr. Buffey presented substantial new evidence that Harrison County officials were in fact aware of the exculpatory DNA results before his final plea. This included both testimonial and documentary evidence (*see supra* at pp.19-21) regarding the highly expedited nature of the State’s DNA testing, including the initial exclusion in early February; the defense’s repeated inquiries as to the status of the testing between January and May; and the Prosecutor’s false assurances that “no report” had issued. Moreover, after the Omnibus Hearing, counsel for the State belatedly turned over a file notation revealing that Lt. Myers specifically notified the Prosecuting Attorney’s Office about exculpatory nature of his initial DNA results before his report was published. The note revealed that on March 11, 2003, while preparing for the first habeas hearing, former APA Traci Cook spoke with Lt. Myers, who clearly recalled that in 2002, he “told [former APA] Terri [O’Brien] that he was leaning towards excluding him, but D[efendant] pled guilty before final report done.” *See* A.VI.8014. Since Ms. O’Brien resigned on March 28, 2002, the Myers-O’Brien conversation (1) must have occurred before publication of Lt. Myers’s report and before the May 21st plea hearing, and (2) put the Prosecuting Attorney on notice that a highly exculpatory DNA report was likely to be issued soon. This impeached the

¹⁶ *See* A.I.1173-77 (summarizing testimony and DNA data). As the experts explained, this conclusion is based upon the fact that so many of Mr. Buffey’s known DNA alleles were not present in the results obtained by Lt. Myers. Given the particular DNA alleles that Mr. Buffey possesses, for such “allelic dropout” to occur (independently and simultaneously) is highly unlikely, if not impossible.

2013 habeas testimony of Ms. O'Brien, Lt. Myers, and PA Scott that as far as they could recall, no such pre-plea communications had ever occurred -- and raised new questions about the integrity of the State's case at the 2004 habeas hearing.¹⁷

Former United States Attorney Steven Jory also testified as a *pro bono* expert regarding the ineffectiveness of Mr. Buffey's trial and prior habeas counsel, particularly regarding (1) Mr. Dyer's failure to investigate Mr. Buffey's defense prior to acceptance of the plea, and (2) Ms. Tichenor's failure to prepare for and effectively present the exculpatory DNA evidence at the 2004 hearing. *See* A.I.1218-30, 1238-39 (summarizing testimony and exhibits).

For its part, the State argued that, notwithstanding the DNA and other new evidence, Mr. Buffey was entitled to no relief because it was not "factually impossible for him to have participated" in the crimes as Bowers's unseen accomplice. A.I.1291. It called just two witnesses to support this hypothesis -- both former friends of Mr. Buffey's who claimed that, as teenagers in Harrison County, he and Bowers were friendly. Yet each had personal motives to aid the State, and each was impeached by other witnesses and their own prior inconsistent statements.¹⁸ More fundamentally, neither claimed to have any information that the two young men had acted in concert to commit these crimes; nor, apparently, did any other source contacted by the State in its seven-month reinvestigation of the crime after the CODIS hit to Bowers.¹⁹

¹⁷ *See* A.VI.8014; *see also* A.I.1190-94, 1200-01 (discussing significance of file notation in light of entire record). That former APA Cook authored this note is also troubling, since she argued in the first habeas proceeding that -- because WVSP records reflect that the report was mailed to police along with the physical evidence in July 2002 -- the PA's office was unaware of the DNA results before the May 2002 plea. Certainly, Ms. Cook was obligated to correct the highly misleading impression left by her presentation: *i.e.*, to disclose that less than a year earlier, she was specifically told by Lt. Myers that he discussed his results with the PA's office before the report even issued.

¹⁸ *See* A.I.1259-66 (discussing testimony of Shantell Shaffer and Daniel Moore); A.I.0895-0953 (discussing additional, post-hearing evidence impeaching claims of State's witnesses).

¹⁹ In the proceedings below, the State refused to disclose the results of this "investigation," or

On June 3, 2014, the circuit court issued a Final Rule 9(c) Order, denying relief on all claims. *See* A.I.0001-0120. This appeal follows.

SUMMARY OF ARGUMENT

This is an extraordinary case, in which a series of DNA tests conducted a decade apart by two independent laboratories have now yielded powerful, scientific evidence supporting Petitioner's claim of actual innocence. In finding that the DNA test results did not raise, at the very least, a sufficiently serious "question of actual guilt" to vacate Petitioner's plea and sentence, the circuit court misapplied the law; failed to give proper weight to the substantial evidence that these crimes were committed by a single perpetrator (*i.e.*, the man inculpated by the DNA); and failed to give effect to the Legislature's intent in enacting the Right to DNA Act.

The State also violated *Brady* by failing to disclose the results of a DNA report issued by the WVSP six weeks before Petitioner's final plea hearing -- which every expert and official involved the case now agrees was highly favorable to him -- notwithstanding repeated inquiries from defense counsel, who was falsely told that the testing was "not complete." Moreover, the present record (including newly disclosed file notes) also strongly suggests that Harrison County officials were personally aware of the DNA results well before the final plea hearing; while not required for relief under *Brady*, this raises further serious concerns about the fundamental fairness of the plea. In denying relief despite these undisputed facts, the court misapprehended

even permit *in camera* review of its investigative materials, to allow the Court to see if it had yielded any *Brady* material as to Mr. Buffey. Mr. Buffey argued that this violated due process, because, since the State was now asserting that he and Bowers were "associates" who committed these crimes together, Mr. Buffey was entitled to any evidence the State possessed that tended to disprove that contention (for example, interviews with witnesses who confirmed the two men had no prior relationship), or which supported Mr. Buffey's own sworn testimony that he did not recall ever meeting Bowers, much less associating regularly with him. *See* A.I.0867-94 (summarizing dispute and legal claims).

the fundamentals of *Brady* and related authorities. This Court should reverse, both to give effect to *Brady*, and to reaffirm the State's essential legal and ethical obligations.

Finally, this Court may also consider other due process violations now on record as further grounds for relief, including (1) trial counsel's failure to properly advise his client and conduct a reasonable pre-plea investigation; (2) State misconduct before the grand jury; and (3) the incomplete and misleading record on which the first habeas petition was denied, in part because of prior habeas counsel's ineffectiveness and the State's failure to disclose evidence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to W.Va. App. Proc. Rule 10(c)(6) and 18(a), Petitioner requests oral argument. This case is suitable for oral argument under Rule 20, in that it involves a compelling, DNA-based claim of actual innocence and further raises legal issues of first impression and/or considerable public importance. *See* W.Va. App. Proc. Rule 20(a)(1) and (2). These include, *inter alia*, (1) what showing is required to obtain habeas relief from a guilty plea and sentence when favorable post-conviction DNA results are obtained under W. Va. Code §15-2B-14 (a statute that was enacted only after Petitioner's plea and sentence); and (2) whether the State is obligated, under *Brady v. Maryland* and related authorities, to provide the defense with exculpatory DNA evidence it possessed prior to entry of the defendant's final plea and sentence.

ARGUMENT

I. The New (2013) DNA Evidence, Including the CODIS "Hit" to the Real Perpetrator, is Powerful Evidence of Petitioner's Factual Innocence and Entitles Him to Relief

The results of Petitioner's post-conviction DNA testing -- obtained between 2011 and 2013 under W. Va. Code §15-2B-14, using previously-unavailable technology -- are profoundly exculpatory. Because this new evidence calls Petitioner's factual guilt and the "manifest . . .

justice” of his conviction and sentence into grave doubt, habeas relief should be granted.

A. Legal Framework and Circuit Court’s Decision

As this Court has explained, W.Va. Code §53-4A-1’s scope is limited to its fundamental purpose: to grant relief from convictions “which constitute a fundamental miscarriage of justice or which result in the imprisonment of a innocent man[.]” *Pethel v. McBride*, 219 W.Va. 578, 594, 638 S.E.2d 727, 743 (2006). Neither this Court, nor the State Legislature, has ever suggested that defendants who plead guilty are not entitled to these core protections. To the contrary: this Court made clear more three decades ago that defendants who pled guilty (even if the plea itself is voluntary and otherwise “acceptable”) are fully eligible for habeas relief, particularly if new evidence shows (a) that there exists a sufficiently serious “question of actual guilt” to warrant withdrawal of the plea, *see Losh v. McKenzie*, 166 W.Va. 762, 769-70, 277 S.E.2d 606, 611 (1981), and/or (b) that a “manifest injustice” would result if the plea is permitted to stand, *see Olish*, 164 W.Va. at 715.

The Legislature has taken a similar view regarding DNA evidence. In November 2004, it unanimously enacted the Right to DNA Act (“the Act”). In so doing, the Legislature made clear that persons who plead guilty are no less entitled to use DNA testing to contest their guilt than those who chose to go to trial. Indeed, it declared that a convicted defendant’s right to prove his claim of innocence through DNA testing “is absolute and may not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.” W.Va. Code §15-2B-14(m) (emphasis supplied).

This case provides this Court with its first opportunity to consider the Act’s relationship to *Losh* and *Olish* -- that is, to decide what evidentiary showing will suffice to overturn a defendant’s plea after he obtains favorable DNA test results under §15-2B-14. But however this Court resolves the legal issue, Petitioner’s right to relief on these facts could not be clearer.

The relevant facts are undisputed. In denying Petitioner's DNA-based claims, the circuit court did not disagree with his assertion that the new DNA evidence has revealed that another man, Adam Bowers, is the source of sperm found on multiple items recovered from the elderly, sexually-inactive victim. Nor did it dispute that Petitioner is excluded as even a minor donor. *See* A.I.0073. It also did not dispute (1) that the victim consistently, and with remarkable clarity, reported being raped and robbed by a single assailant, and (2) that the record contains no evidence supporting (and much to contradict) the State's hypothesis that Bowers acted in concert with anyone. Instead, the court summarily held that the new DNA evidence "does not in and of itself unequivocally determine whether or not he was actually present thereat and a participant in the various activities giving rise to the original criminal charges" at issue. A.I.0074-75. This was the beginning and end of the Court's discussion; at no time did it explain why, in its view, the DNA evidence was insufficient to establish Petitioner's innocence, or even call his guilty plea into doubt under *Losh*. The court simply declared that it would not "entertain" what it called "the vast array of speculations, assumptions, inferences, explanations, and interpretations" needed to resolve the parties' competing claims about the significance of the DNA because "[t]o do so, it believes, would only further muddy the factual waters surrounding the events th[at] occurred in the early morning hours of October [*sic*] rather than clear them." *See* A.I.0076.

This was error. First, the circuit court neglected its obligation, as the trier of fact under *Losh*, to review the record and consider whether the new evidence called Petitioner's "actual guilt" into doubt. Second, by requiring Petitioner to show that the DNA alone "unequivocally determine[s]" that he was not anywhere "present" at the crime scene, the circuit court applied a near-insurmountable test for relief, and one that is entirely of its own design. No prior decision of this Court (or any other) has suggested that a petitioner seeking to vacate a guilty plea must satisfy such a burden, and with good reason: it would likely be impossible to prevail on such a

claim, no matter how favorable the new DNA evidence. For under the court's test, a petitioner who pled guilty must show that under no scenario could he have possibly been a "participant" in "various activities giving rise to" a series of criminal acts committed by another person. To defeat a claim under the court's test, the State need only hypothesize that the petitioner was a phantom accomplice of the real perpetrator, however unlikely that hypothesis might be, without (1) ever asserting the specific role(s) he allegedly played in the crime, or (b) producing any reliable evidence that a second person was actually present at the scene.²⁰

Third, the court's test also brings §53-4A-1 into unnecessary conflict with the Right to DNA Act. The Act's purpose is not to allow prisoners to obtain DNA testing for its own sake. Instead, as the circuit court recognized when granting Petitioner's DNA testing motion in 2011, "the Act was designed to take advantage of modern DNA testing in order to assist in freeing the wrongfully accused" (A.I.0204 (emphasis supplied)), that is, to allow prisoners to challenge their convictions with DNA evidence. However, the Circuit Court ruling thwarts this mandate as to one class of the Act's intended beneficiaries: persons who entered pleas, but who retain, under the Act, a non-waivable right to contest their guilt with new DNA evidence. *See* §15-2B-14(m). By making it virtually impossible for a petitioner to actually succeed in vacating a guilty plea under §53-4A-1, no matter how favorable his new DNA testing under the Right to DNA Act, the circuit court's ruling fails to give effect to the Legislature's clear intent and brings the two statutes into unnecessary conflict. *See, e.g., Community Antenna Serv., Inc. v. Charter Comms. VI, LLC*, 227 W.Va. 595, 712 S.E. 2d 504 (2011) ("We must apply statutes so that no legislative enactment is meaningless, and to read them to harmonize with legislative intent. Statutes which

²⁰ Notably, in the more than three years since the first round of post-conviction DNA results were obtained, the State has repeatedly declined to specifically identify what acts it believes Mr. Buffey committed, *i.e.* whether it believes that Mr. Buffey joined Bowers in sexually assaulting the victim, and/or assisted Bowers with the robbery. It is highly troubling that the State seeks to condemn one of its citizens to spend decades more in prison without even asserting the specific criminal acts it alleges he committed.

relate to the same subject matter should be read and applied together”).

This Court should resolve the conflict by applying a more reasonable test. The most logical choice is the standard this Court has already adopted to evaluate claims of newly-discovered evidence obtained after a trial: whether the new evidence is (1) non-cumulative and (2) of such a nature that it “ought to produce an opposite result” (*i.e.*, acquittal) if presented at trial. *See State v. Stewart*, 161 W.Va. 127, 135, 239 S.E.2d 777, 782 (1977). Applying this test is consistent with, and gives effect to, the Legislature’s choice to afford equal access to DNA testing to persons who pled guilty. Of course, by requiring a petitioner to show that a reasonable jury would, in all likelihood, vote to acquit him after hearing all the evidence, the test is still a demanding one. But it nonetheless requires a court to consider the specific impact of the new DNA evidence on the existing record, and whether (consistent with *Losh*) that record creates substantial doubt as to a defendant’s actual guilt. It also consistent with how many other states evaluate claims for relief based on new DNA evidence, whether after a trial or a guilty plea.²¹

²¹ *See, e.g., Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (actual innocence relief requires “clear and convincing evidence that no reasonable juror would have convicted” in light of newly discovered evidence); *Ex parte Phillips*, 2008 WL 4417288 (Tex. Crim. App. Oct. 1, 2008) (not designated for publication) (applying *Elizondo* to grant relief from numerous sexual assault convictions to which petitioner had pled guilty, based on DNA exclusion on rape kit evidence in one of the incidents); *People v. Washington*, 665 N.E.2d 1330, 1336-37 (Il. 1996) (actual innocence relief requires “new, material, noncumulative evidence [that] would probably change the result on retrial”); *People v. Thames et. al.*, 2011 WL 5826964 (Il. Cir. Ct. Nov. 6, 2011) (relief granted where DNA excluded four defendants from semen in rape-murder victim, despite confessions and Thames’ guilty plea, would probably change result at new trial). *Bedingfield v. Comm.*, 260 S.W.3d 805, 810-15 (Ky. 2010) (DNA test excluding defendant from semen in rape kit “would have probably induced a different conclusion by the jury had the evidence been heard,” despite defendant’s confession and identification by rape victim); *Comm. v. Reese*, 663 A.2d 206, 209-10 (Pa. Super. 1995) (DNA test excluding defendant from semen on victim’s clothing “would likely have affected the outcome,” despite uncertainty as to whether or not rapist had ejaculated); *In re Bradford*, 165 P.3d 31, 34-35 (Wash. App. 2007) (exclusion of defendant from DNA on duct tape from rapist’s ski mask “would probably change the result,” despite confession and dispute over alibi).

B. Because the Record Shows That These Crimes Were Committed by a Single Assailant and the DNA Evidence Proves that Mr. Buffey Was Not That Man, Relief is Required Under Any Reasonable Application of §53-4A-1

The circuit court not only analyzed Petitioner's DNA-based claim under an improper legal standard; it also failed to give due consideration to the new DNA evidence in that analysis. The Court characterized the DNA results as "exculpatory only insofar as not identifying the presence of [Petitioner's] DNA at the crime scene from spermatozoa evidence." A.I.0107. This is incorrect. The DNA testing did far more than just fail to "identify" the "presence" of Mr. Buffey's DNA at the scene: they unequivocally demonstrated that another man's sperm was present, and identified Adam Bowers as that man. This fact has required the State to assert a new theory of criminal liability, entirely different than the one on which Petitioner was charged. Although the "absence" of Petitioner's spermatozoa on the victim's vaginal swabs, bedding, and other items in the sexual assault kit could have been reconciled with his original plea (*i.e.*, he could still have been the sole rapist-robber, but left no DNA behind because he wore a condom or did not ejaculate), the State now asserts that he was an unseen and unheard accomplice of Adam Bowers. Because any objective review of the record yields no credible evidence to support this new theory, and much to contradict it, this Court should grant relief.

1. The State's New, Two-Perpetrator Hypothesis is Not Supported by the Evidence, Nor Any Reasonable Inferences from the Evidence

From the moment the rape-robbery was first reported, through Mr. Buffey's arrest, plea, and sentencing, not a single individual involved in the investigation ever believed that more than one perpetrator was involved. *See* A.I.1152-53. This conclusion was, and is, well-founded.

Immediately after the assault, Mrs. L. was interviewed by both hospital staff and police. She was asked if there were "multiple assailants," to which she answered "no." She then gave a lengthy, taped statement to Det. Matheny recounting her ordeal in excruciating and lucid detail,

including how the perpetrator (1) woke her from her bed, then took her on a search at knifepoint throughout the home in a quest for money and valuables, all the while talking with her and issuing commands; and (2) took her back up to the bedroom and subjected her to five acts of sexual assault, the sequence and nature of which she calmly and carefully described. Throughout this thirteen-page transcribed, the assailant is consistently referred to as “he” or “the man.” It contains no suggestion whatsoever that a second male was present in the home -- much less participated in sexual assault and robbery that she described so clearly.²² .

The State’s new, two-perpetrator theory thus requires one to conclude that the victim somehow did not see, hear, feel, or otherwise detect the second man’s presence at any time. This is particularly difficult to credit in light of the fact that the crimes took place over an extended period of time (beginning at approximately 6:30am), during which time the victim walked with the perpetrator throughout her home (in the bedroom, down to the kitchen, and back upstairs).

Even more implausible is the suggestion that the victim would have not noticed a second assailant’s presence during the five separate acts of sexual assault that she endured. As she calmly and clearly recounted that day, she was subjected to vaginal rape from behind, and then ordered to turn around and perform oral sex on the assailant. These acts, and the victim’s change of position, were repeated in sequence yet again, followed by a final (third) forced act of vaginal intercourse. It is simply inconceivable that two separate assailants could (or would) have so carefully orchestrated these attacks in silence, as well as perhaps in darkness.²³

²² Should this Court have any doubt about the victim’s ability to detect and report the presence of a second “participant” in these crimes if there had been one, Petitioner respectfully urges the Court to listen to the audiotape in which she describes her assailant in such calm and lucid detail. *See* A.III.3081.

²³ The State has previously suggested that the victim may not have noticed a second assailant because the home was dark. However, the crime occurred around daybreak (between 6:30 and 7:00am). Even if true, however, the State’s theory would require the dubious assumption that the alleged second perpetrator quietly maneuvered in the darkness without benefit of a flashlight or disclosing his presence.

Nor has the State explained why, if two men were present, the victim at no time saw a second set of hands, feet, or legs (in fact, she reported that during the assault, she looked behind her and saw just one set of legs); never heard another man's footsteps entering or leaving the bedroom, including while repeatedly turning around and changing her position; not once heard the sound of a second voice or a second person's breathing; and failed to see, hear or otherwise detect any signs of a second person moving through the house, on the stairs or in the bedroom. And, of course, this theory would require a conclusion that the victim never realized, during these highly intimate invasions of her person, that two different males were raping her.

Nor is there any reason to believe that if the primary assailant had an accomplice, he would have gone to such extraordinary lengths to keep the second man's presence a secret. To the contrary, the real assailant clearly intended to (and did) intimidate Mrs. L. into submission, by threatening, for example, to "use this knife" on her if she did not obey him, and to "come back and kill" her if she reported the crime without giving him 20 minutes to flee. Thus, if a second perpetrator had been present anywhere in the house, he would have bolstered his threats by stating that, if she called the police, ". . . *we'll* come back and kill you." For that reason, the lead detective in the case has admitted that the State's two-perpetrator theory is, at best, a "possibility," and he knows of no evidence developed since that time (other than what he had heard was "some type of mixture in the DNA") to support that theory.²⁴ A.II.1417.

²⁴ The notion that two perpetrators might have been involved did not occur to Det. Matheny until after the WVSP's initial DNA exclusion came to light in 2003. At that time, he took a now-discredited statement from Ronald Perry, a prison inmate who claimed that Mr. Buffey had raped the victim along with "his cousin" (Adam Bowers and Mr. Buffey are unrelated). Det. Matheny was unaware that Mr. Buffey had subsequently been excluded as the secondary male DNA donor. A.VII.8100. He also cannot explain how or why, if another perpetrator had been present, the victim would have failed to detect the second male's presence at the scene. A.II.1417, 1425-26. Nor did he ever conduct any investigation to try and identify the alleged second perpetrator, even after he took Perry's statement claiming that this second man was "cousin" of Mr. Buffey's. A.II.1439-40.

2. State's Other Evidence Does Not Prove Guilt, and Raises More Doubt

The exculpatory DNA test results are not outweighed by any other evidence of Petitioner's alleged guilt. The State continues to cite his custodial statement -- given after nine hours' interrogation, while he was hungry and exhausted -- to argue that Mr. Buffey "admitted . . . that he was in the home of the victim" that night. A.I.1291. But as one of the nation's leading experts on false confessions explained below, this statement fails to include any of the indicia of reliable confessions long recognized in both the psychological literature and police guidelines. For example, Mr. Buffey's statement contained no facts the police did not supply, and which only the real perpetrator would have known. Instead, he guessed incorrectly when asked about basic facts of the crime that would have been known to anyone who was present. The detectives who took Mr. Buffey's statement no doubt failed to recognize its unreliability because they lacked proper (indeed, virtually any) training. But honest intentions do not necessarily yield reliable results. And when Mr. Buffey's statement is scrutinized in light of the entire record (including, but not limited to, the new DNA), it raises only further doubts about his guilt.²⁵

As for other evidence, the two former convicts who alleged, more than a decade ago, that Petitioner made admissions to these crimes have either recanted or been wholly impeached by DNA and other evidence. Not a single item of physical evidence inculpates Petitioner: in fact, he was excluded from all viable crime scene prints, and the clothing and knife seized by the police do not match the perpetrator's descriptions. And the evidence presented by the State that Petitioner was a "cohort" of Bowers' (A.III.2748) was of such dubious reliability that the court did not mention any of it in the 119-page Order, even while denying relief on all claims.

²⁵ See A.I.1240-52, and *supra* at pp. 8-11 (discussing testimony by Dr. Saul Kassin as to police interrogation techniques shown to reduce risk of false confessions, phenomenon of false and involuntary confessions generally, and indicia of unreliability in statement taken from Mr. Buffey).

3. Analogous Cases and Legal Rulings

Modern DNA testing has exonerated factually innocent prisoners in numbers never previously imagined. The attention DNA has brought to the risk of wrongful conviction has, in turn, increased judicial scrutiny of non-DNA evidence used in criminal investigations and trials. Together, these cases have shown that false guilty pleas and false confessions by the innocent are disturbingly common. In approximately 10% of the more than 315 DNA exoneration cases to date, one or more defendants pled guilty to crimes they did not commit; the same percentage holds among the nearly 1,500 non-DNA exonerations documented since 1989.²⁶ False confessions by the innocent occur at even greater rates, factoring into approximately 30% of all DNA exoneration cases; they also appear to increase the risk of a subsequent, false guilty plea.²⁷

For this Court to hold that the new DNA evidence does not warrant so much as a new trial would be virtually unprecedented. Undersigned co-counsel at the Innocence Project is unaware of any case in the twenty-five years since forensic DNA testing became available in which (1) a sexually inactive victim reported an assault by a single perpetrator, and (2) DNA testing revealed that the convicted defendant was not the source of spermatozoa from the rape kit or scene, but the defendant's conviction (whether by plea or after trial) was not vacated. Indeed, courts around the nation have repeatedly overturned convictions even where the DNA evidence is far less exculpatory than in a single-perpetrator rape case, finding that a new trial (and in many

²⁶ See Jed Rakoff, *Why the Innocent Plead Guilty*, NEW YORK REV. OF BOOKS (Nov. 20, 2014), available at <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/> (citing comprehensive data sets maintained by the National Registry of Exonerations and the Innocence Project).

²⁷ See The Innocence Project, *False Confessions*, available at <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Dec. 3, 2014) ; A. 8637-38. As Dr. Kassin explained, false confessors are significantly over-represented among exonerees who pled guilty, with approximately 26% of false confessors having entered guilty pleas to crimes they did not commit. This may be because those who falsely confess have greater reason to fear wrongful conviction (or are so advised by their counsel) if they go to trial. See A. 8638-39.

cases, outright dismissal) is required where DNA testing contradicts the State's original case. These include, for example, numerous homicide cases in which the total number of perpetrators is not known (and the State argues -- as here -- that the man whose DNA was found must have acted in concert with the convicted defendant(s)), as well as cases in which defendants gave highly detailed and seemingly-accurate confessions.²⁸ Moreover, this Court has granted relief in numerous other cases based on new evidence far less probative than DNA, after finding that it so undermined the State's original case that it "ought to produce an opposite result" at retrial.²⁹

4. "Manifest Injustice" Would Result from Denial of Relief

The court also erred when it found that no "manifest injustice" would occur if Petitioner were not allowed to withdraw his plea in light of the new DNA. The court appears to have based its conclusion on its view that, having forgone the opportunity to offer favorable DNA testing at trial in 2002, Petitioner cannot now use the results of even *newly-available* testing to challenge his plea. *See* A.I.0106 ("Petitioner . . . proffered his guilty pleas knowing that DNA testing was being conducted, without any knowledge of the DNA test results").

Again, this reasoning conflicts with the Right to DNA Act. Since the Legislature has

²⁸ *See, e.g., Brewer v. State*, 819 So.2d 1169 (Miss.2002); *People v. Rivera*, 962 N.E.2d 53 (Ill.App.Ct. 2nd Dist. 2011); *In re Bradford, supra*; *Bedingfield v. Comm., supra*; *see also People v. Coleman*, 996 N.E.2d 617 (Il. 2013) (granting relief in multi-defendant homicide case based on recanted witness testimony, but no DNA evidence); *and see generally* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010) (analyzing forty confessions given by defendants convicted of rape and/or murder that were later proven false by DNA evidence, including five cases in which the factually innocent defendant(s) pled guilty). For further discussion of these cases and their relevance to Mr. Buffey's claims, *see* A. A.I.0292-97; A.I.1056-58.

²⁹ *See, e.g., Stewart*, 161 W.Va. at 139 (granting relief based on paid informant's testimony that officer had fabricated records in narcotics investigation, which impeached officer's trial testimony and supported defendant's alibi); *State v. O'Donnell*, 189 W. Va. 628, 433 S.E. 2d 563 (1993) (same, based on letter purporting to be from alleged sexual assault victim indicating consent to sex acts in question); *State v. William M.*, 225 W.Va. 256, 692 S.E.2d 299 (2010) (same, based on post-trial disclosure of photographs of alleged child sexual abuse victim, combined with opinion of defense's medical expert that injuries testified to by State's expert at trial were not apparent); *State v. Wolfe*, 166 W. Va. 815, 277 S.E.2d 640 (1981) (same, in grand larceny case, based on evidence impeaching testimony of chief state's witness as to his prior work history).

decreed that the right to a post-conviction DNA test is “absolute” and “can never be waived,” then how can a defendant who obtains DNA results under the Act be barred from habeas relief simply because (as here) he accepted a time-limited plea offer without awaiting the results of pre-conviction DNA testing? In other words, the court’s reasoning conflicts with the purpose of the Act by placing defendants like Mr. Buffey in a worse position than defendants who *formally waived* the right to any and all future DNA testing as a condition of their plea agreements.

Second, it is not true that Mr. Buffey “knew” the State’s DNA testing would exculpate him. For DNA to be exculpatory in a case such as this one, the tests would need to show that someone else committed the crime. Mr. Buffey had no idea whether the real perpetrator ejaculated or not, or if he wore a condom. He also had no idea whether the State’s DNA laboratory would obtain (and accurately report) the assailant’s DNA profile even if sperm were present. Indeed, his trial counsel admitted to his own lingering distrust of the WVSP laboratory’s competency and ethics based on its history in the 1990s, *see* A.II.1956, which he may well have conveyed (even inadvertently) to his client. Third, the Court’s characterization of this entry of his plea “without knowledge of the DNA results” omits the critical fact that the reason Mr. Buffey and his counsel were ignorant of these results is not that they had no interest in learning them. Instead, after agreeing to a time-limited, “take it or leave it” plea offer, the defense was falsely told there was “no DNA report,” when preliminary results had been communicated to APA O’Brien before the end of March and the final report was issued six weeks before the circuit court accepted the plea.

Last, but not least, regardless of whether Mr. Buffey “voluntarily” accepted this plea without reliance on DNA testing, the factual predicate on which the court accepted it under Rule 11(f) was incorrect. As other courts (including the U.S. Supreme Court) have recognized, even absent State misconduct, there is a strong *systemic interest* in the integrity of criminal

convictions, *i.e.*, justice requires reversal where previously unavailable DNA evidence reveals that the factual premise on which a conviction rested was incomplete, inaccurate, or both.³⁰

II. Because the State Did Not Disclose an Exculpatory DNA Report It Possessed More Than Six Weeks Before the Final Plea Hearing and Because the Defense Was Falsely Told That No Report Existed, Relief is Required Both as a Matter of Due Process, and to Avoid “Manifest Injustice”

The Due Process Clause obligates prosecutors to disclose all “evidence favorable to an accused” that is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In the fifty years since *Brady*, neither the USSC nor this Court has ever suggested that a defendant’s willingness to plead guilty relieves the State of its duty under *Brady* to disclose exculpatory evidence, including DNA test results, before the plea is final. To the contrary, less than two years ago, the USSC issued a pair of decisions noting the central role of plea bargains in our nation’s justice system, and underscored its commitment to due process for those who are considering a State’s plea offer. *See Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). Moreover, both this Court and the USSC have granted *Brady* relief based on undisclosed evidence that is far less exculpatory and reliable than DNA.

In denying Petitioner’s *Brady* claims, the circuit court failed to consider (much less distinguish) these authorities; it also misunderstood *Brady*’s basic requirements. These legal errors were significant, because the key facts underlying Petitioner’s *Brady* claim are now undisputed, to wit: (1) the West Virginia State Police issued its final DNA report six weeks before Petitioner’s final plea hearing; (2) the DNA results were not “inconclusive,” but in fact

³⁰ *See, e.g., House v. Bell*, 547 U.S. 518, 536, 539, 552-54 (2006) (finding “miscarriage of justice exception” to procedural bar was satisfied, where DNA testing excluded habeas petitioner as source of sperm on murder victim’s nightgown, contradicting State’s theory that motive for murder was to prevent victim from reporting sexual assault); *Ex parte Chabot*, 300 S.W.3d 768, 771-72 (Tex. Crim. App. 2009) (as matter of due process, DNA test identifying state’s trial witness as source of sperm, thereby impeaching witness’s claim that he had not participated in sexual assault of victim but had only accompanied defendant to scene of rape-murder, required state habeas relief).

were highly favorable to him; (3) despite repeated inquiries to the State before and after the report issued, neither Petitioner or his counsel knew of the DNA results; and (4) had the report been disclosed, neither Petitioner or his lawyer would have gone through with the plea.

The court also erred in finding that no “manifest injustice” would result if Petitioner’s plea and sentence remain intact despite the DNA evidence, *see Olish*, 164 W. Va. at 715. That is particularly so since the record now contains compelling evidence that Harrison County police and prosecutors were aware of Lt. Myers’ favorable DNA test results well before Petitioner’s final plea hearing, yet told his counsel that the testing was “not complete.”

A. Circuit Court Misunderstood Fundamentals of *Brady*

1. Prosecutor’s Knowledge of Favorable Material Not Required

First, in denying Petitioner’s *Brady* claims (including, but not limited to, his claim based on nondisclosure of the 2002 DNA results) the court repeatedly cited what it believed to be a lack of evidence proving that Harrison County officials had “intentionally” violated the law. *See, e.g.*, A.I.0098 (Petitioner “has not sufficiently demonstrated that the State intentionally engaged in misconduct”); A.I.0116 (finding that State “did not knowingly suppress” alleged *Brady* material): *id.* (refusing to revisit claim that State “knowingly suppress[ed] exculpatory evidence . . . in its possession” because a related *Brady* claim was denied in 2004).

Yet *Brady* is a strict liability rule, “irrespective of the good or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. Thus, “the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police,” and *Brady* applies “whether the prosecutor succeeds or fails in meeting that obligation.” *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *see also* Syl. Pt. 2, *State v. Youngblood*, 221 W.Va. 20, 22, 650 S.E.2d 119, 121 (2007). In this case, it is undisputed that at least some (and potentially many) individuals in the State’s employ possessed the DNA report or otherwise knew

about the results prior to the final plea hearing. Under *Brady*, knowledge of favorable evidence by a police official is imputed to the prosecutor. See *Kyles*, 514 U.S. at 437-39. Here, Lt. Myers -- the author of the report, and a member of the State Police -- knew that Mr. Buffey had been excluded as the primary sperm donor long before the final plea hearing. That alone is sufficient to trigger the State's disclosure obligation under *Brady* and *Kyles* -- even without the additional evidence now on record indicating that Lt. Myers specifically told Harrison County officials about his results.³¹ It is also undisputed that the Prosecuting Attorney did not advise the defense about Lt. Myers's test results, or provide a copy of the WVSP's final report, at any time prior to the final plea and sentencing. Thus, the first two elements of *Brady* are satisfied.

2. Undisclosed Evidence Need Not "Fully Exculpate"

The circuit court also appears to have misunderstood what is required under the final ("materiality") prong of *Brady*. Without any discussion of what the 2002 DNA results actually revealed (a notable omission, given the near-total agreement on this point by both sides' experts at the recent Omnibus Hearing), the Court summarily rejected Petitioner's *Brady* claim because it was not "sufficiently convince[d]" that this evidence "fully exculpates the Petitioner as to the crimes to which he voluntarily entered guilty pleas." A.I.0116.

The court cited no authority for the proposition that a habeas petitioner must be "fully exculpate[d]" by the suppressed evidence to prevail under *Brady*. And there is none. To the contrary, his burden is to show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985) (emphasis supplied). Moreover, "a showing of materiality does not

³¹ Indeed, Lt. Myers conducted the DNA testing on a highly expedited basis and received calls "every day, if not every other day" from prosecutors and police regarding its status before the initial (Feb. 11th) plea hearing. The first two rounds of testing, which he quickly recognized to be an apparent exclusion of Mr. Buffey as the source of the semen, were conducted before that initial hearing. And Lt. Myers issued his final report on April 5, 2002, six weeks prior to the final plea and sentencing hearing.

require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.” *Kyles*, 514 U.S. at 434. Instead, relief is required whenever the State’s failure to disclose favorable evidence “undermine[s] confidence in [his] conviction.” *Smith v. Cain*, 132 S.Ct. 627, 631 (2012) (internal citations omitted).

The USSC has also given particular guidance in how materiality shall be weighed in “specific request” cases such as this one. In *Bagley*, the Court instructed that where (as here), defense counsel requested production of certain evidence that the State was later found to have suppressed, there is a presumption that the violation was material. *See Bagley*, 473 U.S. at 682-83(nondisclosure “impair[s] the adversary process” because “the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption”). Troublingly, the circuit court’s order did not mention *Bagley*, despite it being briefed below. Nor did the court acknowledge trial counsel’s uncontradicted testimony that prior to both plea hearings, he made numerous requests about the status of the DNA testing, but was told that it was not complete.

B. “Voluntary” Plea Does Not Waive *Brady* Claim Based on Suppressed DNA

The court’s opinion is also troubling in light of its broad and emphatic view that Petitioner’s “voluntary” guilty plea not only constitutes a binding waiver of certain enumerated trial rights, but that out of “concern for finality,” it should also bar virtually all the constitutional claims he has asserted in this habeas proceeding. *See* A.I.0101-09.

None of the cases cited by the court have so held. Indeed, most were not habeas cases at all. For example, the court cited *State v. Greene*, 196 W.Va. 500, 473 S.E.2d 921 (1996) for the proposition that “absent special circumstances,” a guilty plea waives all virtually all claims related to constitutional or statutory violations occurring prior entry of the plea. *See* A.I.0108.

Yet *Greene* was a civil forfeiture case in which the only issue presented was whether the defendant's double jeopardy claim -- which he sought to assert on direct appeal -- had been properly preserved in the trial court.³² The court also cited *State v. Hartley*, 2013 WL 5476395 (W. Va. Oct. 1, 2013) (Mem.) for the rule that a defendant "may not raise" a claim of the alleged deprivation of rights prior to a guilty plea, save ineffective assistance of counsel. *See* A.I.0108. Yet *Hartley*, a memorandum decision, was not a *Brady* case, nor even an innocence case; the defendant fully admitted his guilt to the charged robbery, and sought review on double jeopardy grounds (that his plea was defective because both robbery counts arose from a single incident). Moreover, *Hartley* held only that such a challenge was not cognizable on direct appeal, and was, in fact, more properly raised on habeas. *See* 2013 WL at *1. The court even invoked *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966) to reject Petitioner's due process claims, citing it for the rule that a plea, as a "judgment" of the trial court, is entitled to the "presumption of correctness" -- even though *Morgan* was a personal injury case, in which the defendant challenged evidentiary rulings by the trial court that led a jury to rule in favor of the plaintiff.

Equally troubling, the court failed to consider, much less distinguish, leading authorities that are highly relevant to Petitioner's claims. The USSC has not yet had occasion to consider whether a "voluntary" guilty plea relieves the State of its duty to disclose either (a) exculpatory DNA evidence, or (b) other evidence material to a defendant's actual innocence. But the Supreme Court's prior opinions provide critical guidance on this issue, and suggest that it is highly unlikely -- if not inconceivable -- that it would sanction such nondisclosure.

In *U.S. v. Ruiz*, 536 U.S. 622 (2002), the USSC held that *Brady* did not require

³² Further, the quotation cited in *Greene* was from a concurring opinion by a single Justice of this Court, and one which emphasized -- in a passage not cited by the Circuit Court -- that the waiver principles at issue were "procedural rules of discretion" meant to encourage, but not require, such claims to be raised in the trial court at the time a plea is entered. *See Greene*, 196 W.Va. at 505.

prosecutors to disclose information that tended to impeach an informant witness between a defendant's plea and sentencing. But *Ruiz* limited its holding to impeachment evidence, as opposed to exculpatory evidence. Indeed, the Supreme Court noted the government's continuing duty (under its plea agreement) to disclose any information demonstrating Ruiz's "factual innocence." *Id.* at 625. For this reason, virtually every court to consider the issue post-*Ruiz* has held that *Brady* continues to apply in full force where potentially exculpatory, as opposed to "mere[] impeachment," information is concerned. *See, e.g., U.S. v. Nelson*, 979 F.Supp.2nd 123, 128-31 (D.D.C. 2013) (surveying cases, and granting post-plea *Brady* relief).

The circuit court did not mention *Ruiz* or its progeny. Nor did it mention any of the line of cases decided over the last three decades in which the USSC specifically rejected the view that defendants who "voluntarily" pled guilty waived other core due process rights, such as the right to effective assistance of counsel, prior to entry of the final plea. *See, e.g., Hill v. Lockhardt*, 474 U.S. 52 (1985); *Padilla v. Kentucky*, 559 U.S. 356 (2009); *Frye*, 132 S.Ct. 1399; *Lafler*, 132 S.Ct. 1376. The court's failure to consider *Frye* and *Lafler* is particularly troubling. Decided two years ago, they are the USSC's most recent decisions in this area of law; they also reflect its commitment to ensuring due process for defendants who plead guilty. *See, e.g., Frye*, 132 S. Ct. at 1407 (noting that "because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process . . . '[P]lea bargaining . . . is not some adjunct to the criminal justice system; it is the criminal justice system'").

Nor, did the court consider any of the USSC's recent cases involving either DNA or *Brady*. *See, e.g., Dist. Atty's Ofc. v. Osborne*, 557 U.S. 52, 55 (2009) ("DNA testing has an unparalleled ability both to exonerate the wrongly convicted and identify the guilty"); *Maryland v. King*, 133 S.Ct. 1958, 1966, 1972 (2013) (noting that "DNA technology is one of the most

significant scientific advancements of our era,” and citing the “unparalleled accuracy DNA provides” in criminal cases). The USSC has been particularly rigorous of late in its enforcement of *Brady*. See *Smith*, 132 S.Ct. 627 (reversing, 8-1, a capital murder conviction under *Brady* after State withheld information impeaching the testimony of a single eyewitness). Similarly, this Court has readily granted *Brady* relief to habeas petitioners when the State failed to disclose evidence relevant to a defendant’s innocence, even when far less probative than DNA in a rape-robbery case. See e.g., *State v. Farris*, 221 W. Va. 676, 656 S.E.2d 121 (2007) (*Brady* violated by failure to disclose evaluation by forensic psychologist of a non-testifying complainant, whose findings “tend to contradict and impeach the testimony of the alleged [testifying] victims”).

C. State’s Undisputed Failure to Disclose Favorable Results of DNA Testing on Sexual Assault Kit of Elderly Rape Victim Entitles Petitioner to *Brady* Relief

The record before this Court provides ample, undisputed evidence entitling Petitioner to *Brady* relief based on nondisclosure of the 2002 DNA results alone. The key facts relating to Petitioner’s claim were not disputed by the State’s witnesses, nor by the Circuit Court. For the materials produced and testimony given at the 2013 hearing showed, *inter alia*:

- The State’s 2002 DNA results were not “inconclusive.” The WVSP conclusively identified a primary sperm donor on the rape kit, and excluded Mr. Buffey as that man. Moreover, Lt. Myers has now conceded that it was, in his scientific opinion, “unlikely” that Mr. Buffey’s DNA was present, even as a minor donor.
- No witness for the State disputes that these results were material to Mr. Buffey’s defense. Lt. Myers agreed they are, at the very least, “potentially exculpatory” and “bothered him” from the start. He also agreed they are “certainly inconsistent” with what police told him about the case: that Petitioner, the lone suspect, had “confessed” to raping and robbing a sexually inactive, elderly victim. PA Scott agreed that the defense had a strong interest in obtaining the test results.
- From the date the rape and robbery were reported by the victim, up to and through Mr. Buffey’s final plea and sentencing, every single official involved in the case believed that these crimes were committed by a single perpetrator.
- Defense counsel Dyer specifically asked both PA Scott and/or Det. Matheny about the status of the testing many times prior to the final plea hearing. Each

time, he was told that the DNA was “not complete” and there was “no report.”

- The report was issued by the WVSP on April 5, 2002. Lt. Myers would have provided it to “anyone who asked” after that date, and certainly the prosecutor.
- Neither Petitioner nor his counsel were given the DNA report or informed of the results at any time prior to his final plea and sentencing hearing.
- If the defense had been given the report, or otherwise known that the WVSP had found sperm from another assailant on this evidence, it would have never proffered and/or immediately moved to withdraw the plea -- something Mr. Dyer had done “many times in my career” based on far less compelling evidence.

Thus, all three of *Brady*’s requirements are satisfied: (1) the WVSP’s DNA testing was favorable to Petitioner, (2) it was not disclosed to the defense; and (3) there is a reasonable probability that the result of Petitioner’s plea hearing would have been different had the DNA been disclosed. *See Youngblood*, 221 W. Va. at 28-31. And if this Court follows *Bagley*’s directive -- to heavily weigh the fact that the State failed to produce the DNA report despite numerous specific inquiries by defense counsel -- a finding that the State’s nondisclosure “undermine[s] confidence in [Petitioner’s] conviction,” *Smith*, 132 S.Ct. at 631, is inescapable.

D. “Manifest Injustice” Would Result from Denial of Habeas Relief

After sentencing, a defendant may withdraw his plea if he demonstrates that it is necessary “to avoid manifest injustice.” *Olish*, 164 W. Va. at 715. No case previously before this Court has asked whether the failure to disclose favorable DNA results, completed by the State Police Laboratory prior to a defendant’s sentencing in a rape-robbery case, constitutes “manifest injustice.” In holding otherwise, the circuit court erred.

1. “Knowledge” of One’s Own Innocence Does Not Excuse State’s Suppression of Exculpatory DNA Test Results

The court found that no “manifest injustice” resulted from the State’s failure to provide the defense with the April 2002 DNA results because “Petitioner, claiming [to his counsel] that the DNA results would exculpate him, proffered his guilty pleas knowing that DNA testing was

still being conducted, without any knowledge of the DNA results.” A.I.0106; *see also* A.I.0070-0071, A.I.0097 (Petitioner “did not rely” on the DNA results in deciding to plead guilty). This reasoning is highly problematic, for several reasons.

First, the two cases cited by the court to support this proposition are inapposite. *See* A.I.0106. In *Duncil v. Kaufman*, 183 W.Va. 175, 394 S.E.2d 870 (1990), this Court held, *inter alia*, that the trial court did not abuse its discretion in failing to permit the defendant to withdraw his plea based on a bare claim of actual innocence. Yet in *Duncil*, this Court found withdrawal impermissible precisely because the defendant had no evidence to support his claim, much less evidence that was withheld from him before sentence was imposed. Petitioner’s case could not be more different, since it turns on (1) undisclosed DNA test results that were known to the State, and (2) new, advanced DNA test results (*see* Part II, *infra*) that the Circuit Court conceded (at p.112) were “unavailable to any party” at the time of his plea and sentence. *U.S. v. Davila*, 133 S.Ct. 2139 (2013), was an even more puzzling citation by the circuit court.³³

Second, the Circuit Court failed to discuss the reason that Petitioner did not have “any knowledge of the DNA results” at the time (A.I.0106): because State officials repeatedly and wrongly informed his counsel that the report was “not complete.” In fact, it is undisputed that Mr. Dyer repeatedly asked Det. Matheny and former PA Scott about the status of the DNA before both plea hearings, and that the defense did rely on the State’s false representations.

Third, the Circuit Court placed great (indeed, dispositive) weight on the fact that Petitioner “knew” he was innocent and that the DNA tests would not inculcate him, but, after consulting with counsel, chose to accept the State’s plea offer. This logic is troubling. There is a

³³ *Davila* considered whether prejudice under Fed. R. Crim. Proc. 11 resulted from a magistrate’s admittedly improper remarks during plea negotiations, about which the defendant did not complain until after his plea was entered. It involved no claim of innocence, *Brady* violations, or any other factors that appear to be relevant to this case.

great difference between a young man's personal knowledge that he was not the perpetrator of this rape-robbery (what courts call a "bare assertion") and DNA test results obtained by the State that objectively corroborate his claim by identifying another man's spermatozoa on the evidence. The circuit court's suggestion that a case like *Duncil*, in which the record contained nothing to support the defendant's post-sentencing innocence claim -- much less favorable DNA results obtained by the State six weeks before sentencing --- is remotely equivalent to this case is troubling indeed. Indeed, the Court's reasoning would make it more difficult for the innocent to prevail on a claim of "manifest injustice" than the factually guilty -- since innocent defendants, by definition, "know" they did not commit the crimes charged. Similarly, the Court's reasoning would seem to immunize the State from any claim that exculpatory DNA results were wrongfully withheld from a defendant, in any case in which the defendant "chose" to proceed to sentencing. This could in turn create, for some prosecutors, a disincentive to comply with *Brady* -- an unwanted result indeed, particularly as plea bargains now constitute the overwhelming majority of all criminal adjudications. *See Frye*, 132 S. Ct. at 1407.

2. New Evidence that Prosecutor Was Aware of the DNA Results in 2002

Lastly, a finding of "manifest injustice" is warranted because of the compelling new evidence developed below that the Prosecuting Attorney's office in fact knew of the WVSP's DNA results in 2002, well before Petitioner's plea. While such actual knowledge is not required under *Brady*, this new evidence further establishes that his conviction is manifestly unjust.

There are at least four reasons why the record now supports such a finding of actual knowledge. First, notes from the Prosecutor's file reveal that Lt. Myers "told [former APA] Terri [O'Brien]" that he was "leaning towards excluding" Petitioner before his report was done. And there is every reason to believe that Ms. O'Brien informed then-PA Scott of the results, as she worked under PA Scott's direct supervision on this case. Second, the WVSP file (which

prior habeas counsel never reviewed) and testimony revealed that the DNA testing was conducted on a highly expedited basis -- with Lt. Myers coming in over the weekend before the initial plea hearing to review his data, and Harrison County officials calling him "every day, if not every other day" about his progress. Third, defense counsel repeatedly asked then-PA Scott to inquire whether the DNA was complete before sentencing; PA Scott did not dispute this, and said that he would have inquired of the lab if asked; and Lt. Myers would have given the report "to anyone who asked" on or after April 5, 2002. And fourth, Lt. Myers was fully aware of his own ethical obligation (if only because of his own lab's troubled history) to ensure that all parties were promptly made aware of any potentially exculpatory test results -- particularly in a violent crime such as this one, when the real assailant could still be at large and a threat to public safety.

Thus, on the present record, it is difficult to credit the State's claim that July 12, 2002 (the date the evidence was mailed to Det. Matheny) was the *first and only* time that Lt. Myers orally communicated his final conclusions and/or transmitted a copy of his report to anyone in Harrison County. It is a fair inference from the record that Lt. Myers would not have let this expedited DNA testing report, which excluded the State's one and only suspect as the primary sperm donor, sit on his desk for over *three months* after its completion. Instead, he had every reason to mail, fax, and/or email the Prosecuting Attorney's office a copy of the report as soon as he published it. At the very least, he would have had reason to verbally inform his contacts in Harrison County that he had finished his testing, and that the exclusionary results were fully consistent with the initial conclusions he had communicated to APA O'Brien. Alternatively, had Mr. Scott even once picked up the phone or emailed Lt. Myers in April or May 2002-- as he repeatedly assured defense counsel he had -- Lt. Myers would have sent the report immediately.

It is, of course, theoretically possible that (1) Mr. Dyer never made any inquiries to Mr. Scott or Det. Matheny about the status of the testing, despite testifying under oath that he was

“certain” he did, or (2) that Mr. Scott falsely told Mr. Dyer he had repeatedly called the laboratory in response to these inquiries, when in fact he had not done so. In either case, such deliberate deception by counsel for either Petitioner or the State would be a “manifest injustice.”

In sum, no credible evidence any longer supports the State’s claim that Harrison County officials were unaware that, in this high-profile case involving the mother of a police officer, the expedited testing they had requested was completed weeks before sentencing. And while such a finding is not necessary to grant relief under *Brady*, it adds further weight to Petitioner’s claim that his plea and sentence should be vacated on grounds of manifest injustice.

III. Petitioner’s Trial Counsel Was Ineffective

Certainly, no errors by defense counsel can excuse the apparently deliberate deception by State officials when counsel repeatedly inquires about the results of DNA testing. Nonetheless, trial counsel’s own conduct raises independent concerns about the “manifest injustice” and constitutionality of Petitioner’s plea and sentence, for at least three reasons, each of which are based upon undisputed facts from the documentary and testimonial evidence now on record.

First, Mr. Dyer testified below that when discussing the State’s plea offer with his client, he presented him with a deeply flawed “numbers analysis” as to its likely outcome. Specifically, Mr. Dyer predicted that the ultimate sentence on the rape and robbery charges would, in all likelihood, not exceed what Petitioner would otherwise have received *were he to be acquitted of the crimes against L.L., but plead to other unrelated, non-violent offenses*. See *supra* at 17-18. This was a remarkable (and inaccurate) assessment that no reasonable attorney could possibly have made. In particular, the three offenses for which Mr. Buffey was also indicted in January 2002 were non-violent break-ins of local businesses with no one else present, and damages totaling less than \$2500. And while the sentencing range was 1-10 years on each count, there

was no reason to conclude that Mr. Buffey would have been given the maximum, given the lack of “shock value” in these thoughtless but nonviolent crimes, and as was borne out by his co-defendant’s sentence. By contrast, the two felony sexual assault counts alone carried 15 year minimums, while the robbery had no upper sentencing limit; and the crimes themselves were of such a heinous nature, and against such a vulnerable and sympathetic victim, that any reasonable attorney would have advised his client that he was unlikely to receive either minimum or concurrent terms -- much less to receive both, as Mr. Dyer did. And erroneous counsel as to the legal risks and benefits of a plea violates *Strickland*. See, e.g., *Lafler*, 132 S.Ct. at 1388-91 (citing *Strickland v. Washington*, 466 U.S. 668 (1984); Syl. Pt. 2, *State ex. Rel Burton v. Whyte*, 163 W.Va. 276, 256 S.E.2d 424 (1979)).

Second, as expert Steven Jory explained, Mr. Dyer did virtually no legal or investigative work on his client’s behalf before counseling him about the State’s plea offer. During this entire “critical” stage of the case, see *Lafler*, 132 S.Ct. at 1385, Mr. Dyer spent just *one-half hour* reviewing witness statements, including the victim’s and his client’s; never went to the crime scene; never interviewed his client’s alibi witnesses; and never viewed the physical evidence. See A.II.1963-68, 1986-87. For this reason, Mr. Jory’s conclusion that Mr. Dyer’s lack of effort in this regard was not just deficient under the professional norms, but “appalling,” is well-founded.³⁴ Similarly, counsel failed to take readily-available, independent steps to determine the status of the DNA testing before the final plea hearing (such as contacting the lab in April or May, 2002, at which time Lt. Myers would have immediately advised Mr. Dyer about the results and sent him the report). And because Mr. Dyer has made clear that under no circumstances would he have let the plea go forward had he known the DNA results, *Strickland*’s second prong

³⁴ See A.I.1218-34 (summarizing Mr. Jory’s conclusions, including how counsel’s performance was deficient under ABA standards and *Strickland/Miller*).

is also satisfied. *See, e.g., Hill*, 474 U.S. 52 (prejudice exists if a reasonable probability that, but for counsel’s errors or omissions, defendant would not have pled guilty).

IV. Petitioner’s Indictment Was Secured Through False Grand Jury Testimony

The Fourteenth Amendment to the U.S. Constitution and Art. III, §4, 10, and 14 of the West Virginia Constitution forbid State officials from presenting false evidence to a grand jury. To prevail, a petitioner must show that “the Government intentionally engaged in misconduct [or] deliberately misinformed the grand jury” about the evidence; 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* Syls. Pt. 3, 6, *State Ex. Rel. Pinson v. Maynard*, 181 W.Va. 662 (1989) (indictment will be dismissed if official misconduct “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”).

Former PA Scott and Det. Matheny made at least four untrue, material assertions of fact to the grand jury. These were: (1) that Petitioner claimed to have “blacked out” after encountering the victim in the dining room; yet despite repeated pressure from detectives to say as much, he clearly stated that had “never” blacked out, either at L.L.’s home or elsewhere; (2) that he “knew” that the perpetrator entered through a back door, when in fact Petitioner had guessed (incorrectly) that it was a “side” window; (3) that the perpetrator’s flashlight was similar to one stolen from the Salvation Army the night Petitioner and his friends broke in, when in fact *no flashlights* were stolen from the S.A.; and (4) that a knife of Mr. Buffey’s “fit to a T” the knife described by the victim, when it did not (*and* the State had not shown it to her).³⁵

³⁵ *See supra* at pp.14-16; *see also* A.I.1209-18 for more detailed discussion of false grand jury presentation by Det. Matheny and former Prosecuting Attorney Scott.

The circuit court rejected this claim because it “deem[ed] there to be no intentional failure or sufficiently significant inadvertence” by State officials. A.I.0100. Yet nowhere in the Court’s order did it explain how the false statements at issue could possibly have been inadvertent. Each one was directly contradicted by the limited investigative file the State possessed at the time, with which both Det. Matheny and PA Scott were familiar. Nor did the State offer any evidence at the Omnibus Hearing to explain how Det. Matheny could have been genuinely confused as to any (much less all) of these key facts. As such, there is nothing to support the court’s finding of “[in]significant inadvertence.” Moreover, the court failed to even mention former PA Scott’s deeply troubled history and the substantiated ethics charges that were pending against him at the time -- a significant additional factor, given the role he played here.³⁶

Nor can there be any doubt as to the impact of these violations. Det. Matheny’s misstatements were numerous and significant. What had been a charge supported only by an uncorroborated, inaccurate custodial “confession” became -- in Det. Matheny’s retelling -- an investigation “solved” by matching physical evidence and the suspect’s alleged inside knowledge of the crime scene. But none of it was true. As such, due process was violated.

V. None of Petitioner’s Claims are Barred by *Res Judicata*

It difficult to determine which, if any, of Petitioner’s claims the circuit court found to be barred by *res judicata*. The court denied each on its merits, yet at times referred back to and/or declined to revisit certain findings from its 2004 Order denying relief. To the extent the State may again assert *res judicata*, however, it is without merit. This is because: (1) Petitioner’s new

³⁶ In addition to his failure to correct Det. Matheny’s misstatements, Mr. Scott elicited detailed testimony from Det. Matheny about the polygraph that Petitioner allegedly failed (A.III.3091-93) (which, in fact, he appears to have passed, *see*, A.I.0696-0700) -- even though it was well-settled that polygraph results are inadmissible in trial or pretrial proceedings. *See, e.g.*, Syl. Pt. 1, *State v. Chambers*, 194 W.Va. 1, 459 S.E.2d 112 (1995); *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 123 (1981).

DNA evidence was obtained under W. Va. Code §15-2B-14, which was not enacted until *after* his 2004 Omnibus Hearing; (2) the State suppressed critical evidence at the 2004 hearing, including file notes revealing that the WVSP's DNA results were communicated to the HCPA before April 2002; (3) Petitioner's prior habeas counsel was ineffective in failing to discover and present evidence that was material to each of his claims, and failed to understand and assert basic legal and factual principles; and (4) the circuit court's 2004 findings are not supported by competent evidence or legal authority.³⁷ *See Losh*, 166 W. Va. at 768 (outlining exceptions to *res judicata*); W.Va. Code §53-4A-1(b) (no *res judicata* when prior decision on merits is "clearly wrong"). This Court may also recognize a "fundamental miscarriage of justice" exception to any otherwise-existing procedural bars, as adopted by the USSC in federal habeas and by other courts as a matter of state constitutional law. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 327 (1995) (where new evidence shows that "it is more likely than not that no reasonable juror would have convicted" a petitioner at trial, habeas court shall review merits of all claims); *Clay v. Dormire*, 37 S.W.3d 214, 217-18 (Mo. 2000) (same).

CONCLUSION

Wherefore, for the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment below, grant his petition, and vacate his May 21, 2002 convictions and sentences; in addition, should this Court conclude that the record and history of this case warrants such relief, Petitioner requests that the indictment be dismissed with prejudice.

³⁷ A more detailed discussion of why each claim is based on newly-discovered evidence, suppressed State's evidence, and/or evidence that prior habeas counsel was ineffective in failing to discover is in Petitioner's proposed Findings below. *See, e.g., A.I.1146-49, 1184-90, 1201-04.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, ALLAN N. KARLIN, attorney for the petitioner, do hereby certify that true and correct copies of the foregoing "Petitioner's Brief" and Appendix were served upon the following addressed as follows:

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