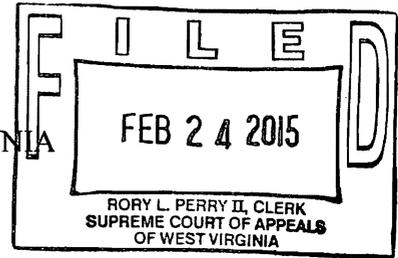


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Case No. 14-0642

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**PETITIONER'S REPLY BRIEF**

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## INTRODUCTION

Thirteen years ago, Harrison County officials charged 19-year-old Joseph Buffey with the rape and robbery of an elderly widow – crimes for which he was sentenced to more than seventy years in prison. At that time, relying on the victim’s remarkably lucid account of her ordeal, every official involved in the case was confident that this was a one-perpetrator offense. Yet six weeks before the final plea hearing, and despite repeated requests from Mr. Buffey’s counsel to learn the results of the DNA testing before and after Mr. Buffey entered his plea, the State never disclosed a DNA report stating that he was “excluded” as the semen donor. When the report finally came to light in 2003, the prosecutor newly assigned to the case immediately admitted to Mr. Buffey’s counsel, “We have a problem.” A.II.2133.

Sadly, this candor was short-lived. Instead, exploiting the fact that Mr. Buffey had been assigned to inexperienced habeas counsel with no DNA background (and whose retained “expert” also had none), prosecutors convinced the circuit court in 2004 that the DNA results were so partial as to be “inconclusive,” and that Mr. Buffey might be a *second* male semen donor. And to account for the fact that its DNA report clearly showed semen from a male other than Mr. Buffey, the State adopted the uncorroborated claim, made by a prisoner seeking parole, that Mr. Buffey and an unnamed “cousin” committed these crimes together. Yet it had so little confidence in this story that it took no steps to identify or apprehend this alleged co-rapist.

Now, a decade later, the State’s revised theory (that Mr. Buffey was a second male semen donor) has also collapsed. Through advanced DNA testing under W.Va. Code §15-2B-14, both parties’ experts now agree that Mr. Buffey is excluded not just as the primary, but also a possible *secondary*, donor of the semen. The new testing has also identified the actual rapist, who is not a “cousin” of Mr. Buffey’s. Yet instead of at last conceding its error, or even allowing Mr. Buffey to take his claim of innocence to trial, the State has offered yet *another* theory of Mr. Buffey’s

purported guilt, even more speculative than the last: that he was “good friends” with the real assailant, and that his DNA is not present because he “wore a condom” during the rape.

The State has little authority to defend its position. Its 49-page brief does not challenge Mr. Buffey’s claim that the circuit court failed to correctly apply *Brady*; nor that the WVSP possessed a highly favorable DNA report weeks before Mr. Buffey’s final plea hearing, with knowledge of the report imputed to the prosecution. Nor does it deny that Mr. Buffey’s counsel was falsely told, in response to his repeated requests, that the State’s DNA testing was “not complete.” The State offers no rebuttal to Mr. Buffey’s claim that the DNA creates, at the very least, a grave “question of actual guilt.” *Losh v. McKenzie*, 166 W.Va. 762, 769-70, 277 S.E.2d 606, 611 (1981). It insists that two perpetrators raped and robbed the victim, but admits that it can only “speculate” as to how a second male could have taken part in these crimes without the victim noticing. Nor does it dispute that this State’s Legislature, as well as scholars and judges who have studied the issue, have recognized that innocent persons can and do plead guilty; that they should have a meaningful opportunity to exculpate themselves through DNA evidence, even after sentencing; and that this right is so fundamental to the fair administration of justice in this State that it cannot be waived, even “voluntarily.” The State has cited no case in its favor with analogous facts or evidence *i.e.*, any conviction involving sexual assault, whether upon a plea of guilty or after trial, in which any court has held that such DNA evidence did not require relief.

With the law squarely on Mr. Buffey’s side, the State claims that the factual record supports a two perpetrator theory (with Mr. Buffey the alleged second assailant), and that this theory somehow provides legal justification for its failure to disclose the frequently requested DNA report before Mr. Buffey’s plea to a *single* perpetrator rape was accepted by the court. To the extent that this Court considers the State’s two-perpetrator theory in this habeas (rather than reserving that issue for a jury trial), it should do so with great caution. For the State’s brief

repeatedly makes statements of “fact” that are not supported by and/or misrepresent the record.

This Court has long emphasized that a prosecutor occupies a unique, “quasi-judicial role” in our legal system, explaining, “[A] prosecutor's duty to the accused is fairness. Though the public interest demands that a prosecution be conducted with energy, skill and zeal, the State's attorney should see that no unfair advantage is taken of the accused.” *State v. Britton*, 157 W. Va. 711, 715-16, 203 S.E.2d 462, 466 (1974); *id.* at 243, 203 S.E.2d at 716 (further noting prosecutor’s “quasi-judicial position” and “duty to set a tone of fairness and impartiality”). It appears that Harrison County prosecutors long ago lost sight of this aspect of their duties in their zeal to secure, and then defend, Mr. Buffey’s flawed convictions.

### **REPLY TO STATEMENT OF FACTS**

The Respondent’s Brief (“RB”) relies on egregious misstatements of the evidence that, whether intentional or the result of carelessness, seem designed to deflect attention from both the misconduct that has tainted the prosecution of Joseph Buffey from its inception and the compelling proof of innocence that arises from a fair and common sense review of the evidence. Below are but a few examples of some of the State’s most significant factual errors<sup>1</sup>.

1. The State claims, relying on a letter it attached to its Response without leave of the Court, that “[e]ven when [Mr. Buffey] corresponded with the Trial Court in seeking assistance at his parole hearing in the summer of 2006, [he] did not assert that he was innocent of the rape and robbery.” RB 12. This is simply untrue, as *the letter in question is not, in fact, from Petitioner*. The writer is Joseph G. Buffey (Petitioner is Joseph A. Buffey); as shown on the

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<sup>1</sup> Unfortunately, page limitations preclude the undersigned from addressing all of the State’s errors in this Reply, including its misrepresentations of the factual record and how the State characterizes the findings of the circuit court. To the extent this Court has concerns about any assertions by the State or any aspect of the circuit court’s order that are not discussed here, counsel will welcome the opportunity to address them at oral argument, or in a supplemental brief if requested by the Court.

envelope, the writer's inmate number is #1061169 (Petitioner's is #30713; *see* A.VI.7983); the letter was mailed from a regional jail where Petitioner never served time; it discusses events at a sentencing hearing which clearly did not occur in this case; and it references a 2006 parole hearing date that is 35 years before Petitioner will be eligible. (*See* Mot. to Supp. filed 2/24/15.)

The State's assertion compounds a mistake originally made by the circuit court, which cited a July 5, 2006 letter allegedly authored by Mr. Buffey in its Order. *See* A.I.104. Although the letter in question was not an exhibit at the Omnibus hearing -- nor mentioned by any party in post-hearing briefing or argument -- the court appears to have relied heavily on this wholly unauthenticated document to question Mr. Buffey's good faith and credibility. *See id.* (noting "that such letter contains no references whatsoever by the Petitioner as to his purported 'actual innocence,'" does not "question[] his prior guilty pleas," and does not "mention . . . any lingering dissatisfaction or concerns whatsoever" with his appointed trial or habeas counsel). The court's error may reflect a lack of care in reviewing the record and making factual findings; it may also indicate bias against Mr. Buffey on the part of the court. In either case, its error illustrates why this Court should not rely on any credibility (or other factual) findings by the circuit court, as they appear to have been tainted by the court's mistaken belief that Mr. Buffey authored this letter. That the State appended the letter to its Response is equally troubling, because it well knows the history of Mr. Buffey's case, custody, and parole status, all of which are plainly inconsistent with the letter's contents and envelope.

2. The State claims that the victim "was never directly asked if more than one person could have been present" at the scene. RB 6. This is false. When interviewed by the sexual assault nurse at the hospital, at 8:10 a.m. on the morning of the assault, Mrs. L was expressly asked, "Were there multiple assailants?" and she clearly answered "No." *See* A.III.3266.

3. The State claims that Petitioner's "failure to call the victim as a witness . . . was

tantamount to conceding that her testimony would not have supported Petitioner's single perpetrator theory." RB at 29. This claim is not only false, but astonishing. The State neglects to disclose its own statement, in its very first pleading in this habeas, that "[i]t has been conveyed to the State by family members of the victim, who is now 94 years of age, that she suffers from the effects of aging, including dementia." A.I.0329 n. 10.<sup>2</sup>

4. The State claims that lead Det. Robert Matheny "believed that the victim's statement indicated multiple perpetrators and not a single perpetrator," and that he flagged this issue in his "original investigative checklist." RB, at 7. Both assertions are false. In fact, Det. Matheny has testified that from the date he first charged Mr. Buffey, through the final plea hearing, he believed that the victim's statement (and every other item of evidence known to him) established that this was a *single* perpetrator crime. A.II.1413-1414. Det. Matheny told the grand jury, "whoever did that break in is the same one that sexually assaulted her." A.III.3093. (emphasis added). His January 22, 2002 report of his investigation describes a crime by a single male, as does every other official report prepared in the case in 2002. *See, e.g.*, A.III.3170-3175; A.III, 3177-3178, A.VI.6998-6999, 7028, 7030. The Department's press release seeking the public's assistance referenced a single perpetrator. A.VI.7120. And the alleged "investigative checklist" (A.VI.7285) is nothing of the kind. Det. Matheny admitted creating this document to prepare for the 2004 habeas hearing, not at the time of his investigation.<sup>3</sup> A.II.1590.

5. The State claims Mrs. L could not tell if there were two assailants because "she was on the floor, facing away from [the attack] the entire time . . . and was forced to place her head in a pillow so she couldn't see her assailants." (R. Br. 26). Both claims are false. Mrs. L's

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<sup>2</sup> However, there is no question that Mrs. L was lucid in 2001-02. *See* A.VII.8129-8130.

<sup>3</sup> Furthermore, when asked about the items on the "checklist" list, Matheny's responses confirmed that they did not provide any convincing evidence of Mr. Buffey's guilt. *See, e.g.*, A.II.1599-1615.

face was not covered with the pillow at all times. She had multiple opportunities to observe her assailant, including during the sexual assault. She saw “that his blue jeans [had] drop[ped] to the floor”; that “[h]e had on blue boxer shorts”; that his legs “looked like young legs”; that he “had white arms because he had a short sleeve shirt on”; that he wore a hat without a “bill”; that his hair was “cut . . . like [hers]” and “didn’t stick out”; that he had on “a white bandana” covering his face “from his nose about up to the middle of his forehead”; and that “when he left [he put on] glasses [that] looked like sunglasses.” A.III.3069-3080. Nor was the victim either “on the floor” or “facing away” from the perpetrator throughout the attack. She was “kneeling at the side of the bed” while her “upper body [was] on the bed.” And she certainly was not facing away from her assailant when she was at least twice ordered to engage in oral sex. A.VI.7200-7206.

6. The State claims Mrs. L’s vision was impaired by a “someone shining flashlight in her eyes” and a “flashlight beam[ing] in her face” RB 6, 26. Yet, nowhere in Mrs. L’s detailed statement, nor in any other document, does she ever describe “a flashlight in her eyes” or any other light shined directly at her -- a fact that Det. Matheny confirmed. A.II.1585.

7. The State claims there is “substantial evidence that [Mr. Buffey] used a condom in committing the vaginal sexual assault on the victim.” RB 5. This is false. When asked at the hospital whether her assailant used a condom, the victim answered: “No.” A.III.3266. No condom or condom packaging was found at the scene. The only “evidence” of alleged condom use is that Mr. Buffey may have had a condom in his jacket pocket the day before the crime. Yet no doubt hundreds of young men in the area carry condoms. It requires an enormous leap of logic to conclude that, because a 19 year old may have had a condom, he sexually assaulted a woman who clearly stated that her assailant did not use one.

8. The State contends that “Petitioner’s own expert explained how two perpetrators could leave the minor males [sic] DNA which did not belong to Bowers,” because the expert

observed “minor male DNA contributed by a second perpetrator which could have been Buffey.” (RB at 46) (emphasis supplied). This is false. In fact, defense expert Alan Keel testified (without rebuttal) that trace amounts of DNA detected from male(s) other than Bowers could not have come from a “second perpetrator,” because the extremely low levels of spermatozoa detected from these minor donor(s) were inconsistent with direct ejaculation at the crime scene. Moreover, both Mr. Keel and the State’s expert, Lt. Myers, agreed that Mr. Buffey was excluded not just as a primary, *but secondary donor*, and that (in Lt. Myers’ words) there is simply “no support to reach the conclusion” that Mr. Buffey’s DNA is present on any item tested.<sup>4</sup>

9. The State repeatedly claims that the circuit court made factual “findings” that, in 2001, Mr. Buffey had a “close relationship” with the actual perpetrator, Adam Bowers, and made “credibility” findings in favor of the two State witnesses who so testified.<sup>5</sup> Not true. *Nowhere in its 119-page Order does the court even mention the State’s allegation* that the two men knew one another at the time of the crime -- much less find the State’s witnesses credible on this point.<sup>6</sup>

10. The State claims “[t]he evidence at the Habeas hearing proved to the Trial Court

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<sup>4</sup> See A.II.1721-1722 (Lt. Meyers) and A.I.1140-45 (summarizing expert testimony).

<sup>5</sup> See, e.g., RB at 37, n.29 (claiming that “[state witness] Daniel Moore’s testimony is worthy of substantial credibility as the Trial Court no doubt ascribed to it,” when in fact, neither Moore nor his allegations are mentioned in the Order); see also *id.* at 38. 38 n.30. 39. That the court ignored Moore’s testimony is unsurprising. For example, Moore initially claimed that Bowers socialized with Mr. Buffey “on a daily basis,” but when pressed, could only recall seeing them together “a few times.” At the time he testified, Moore was on bond for a pending felony charge, and feared losing his only child to foster care if he did not testify for the State. In addition, days before the hearing, he told a law clerk working for Petitioner’s counsel that he was aware of no prior relationship between Mr. Buffey and Bowers – and then sought to distance himself from his prior statements by, incredibly, denying he had been asked a single question about Bowers during that interview. See A.I.902-95 (summarizing and citing testimony).

<sup>6</sup> Mr. Buffey’s counsel also presented substantial impeachment evidence as to both witnesses that the court declined to admit into the post-hearing record. See A.I. 895 *et. seq.* Respectfully, this was error. The witnesses’ false statements to counsel before the hearing, and the State’s refusal to provide counsel copies of their statements to police or to allow them to be deposed before the hearing, made it impossible for the undersigned to know – and therefore, be prepared with witnesses to rebut their false allegations at the hearing itself. See A.I.895-955 (summarizing case history, testimony, and impeachment evidence).

that Bowers [and] Buffey . . . had committed crimes together.” Again, the court made no such findings. Moreover, the only “crime partner” evidence offered by the State came from Chantelle Shaffer, Mr. Buffey’s girlfriend in 2001 and a cousin of the prosecutor. Ms. Shaffer claimed that she had once seen the two young men counting out change they had stolen from a car. Yet this testimony was at odds with what Ms. Shaffer had previously told defense counsel: that Mr. Buffey did not even know Bowers. A.II. 2590-2591. Moreover, at the time of the hearing she spoke daily with her live-in boyfriend, who was jailed on pending criminal charges in Harrison County, giving her a motive to help the State. A.II.2569, 2580-2581; *see also* A. I.895-905, II.1261-1263 for a more detailed discussion of the many problems with Ms. Shaffer’s credibility. Thus, it is not surprising that the circuit court did not rely upon her testimony.

11. The State repeatedly claims that Mr. Buffey is not entitled to habeas relief because of his “failure to deny that he had committed these crimes or assert his purported innocence” until “many months after he was sentenced[.]” RB 31; *id.* at 4 *see also id.* at 10, 34, 48. Yet the record contains at least five occasions when Mr. Buffey stated, before sentencing, that he did not commit the crimes against Mrs. L: (1) to detectives, at the end of his taped interrogation at 3:51 a.m. (A.III.3065); (2) to the same detectives in the hours of unrecorded interrogation (A.III.3205); (3) to the police polygrapher (A.III.3182); (4) to his mother, as soon as he was arrested and throughout the proceedings;<sup>7</sup> and (5) to correctional staff in his April 2002 pre-sentence evaluations.<sup>8</sup> In addition, in September, two months after the hearing, Mr. Dyer

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<sup>7</sup> *See* A.IV.4520. The State claims that the failure to call Mr. Buffey’s mother to testify on this issue at the 2013 hearing leads to the conclusion “that she would not have supported his claims of innocence.” RB 29-30. But her prior, un rebutted testimony on precisely this point was an exhibit at the hearing. *See* A.IV.4520 (“he said . . . ‘Mom, I didn’t do this’”), *id.* at 4520 (“he said he was innocent”).

<sup>8</sup> *See, e.g.,* A.VI.4192 (criticizing “his inability to admit to the crimes and take responsibility for his actions,” including “the sexual crime with the elderly lady”): A.VI.4188 (quoting Mr. Buffey’s assertion to correction staff, “I was accused of hurting people, but I didn’t hurt anyone”).

suddenly found the only notes he had retained from any client discussions.<sup>9</sup> Those notes confirm that Mr. Buffey told Mr. Dyer in their very first meeting that he had recanted his “confession”; that he had an alibi; and provided Mr. Dyer with the names of both of his alibi witnesses.<sup>10</sup>

13. The State claims that Mr. Buffey never challenged the truth of a claim made by Mary Dyer, the wife and law partner of his trial counsel, that Mr. Buffey told her that he sexually assaulted the victim. See RB 31. The State also claims that the circuit court “considered” Ms. Dyer’s claim to be strong “corroboration of Buffey’s prior admissions” to police and jailhouse informants. *Id.* Neither assertion is true. First, Mr. Buffey argued vigorously below (and still maintains) that Ms. Dyer’s testimony was both inadmissible (as a violation of the attorney-client privilege) and wholly unworthy of belief.<sup>11</sup> A.I.0750 *et seq.* Second, nowhere in the court’s 119-page Order does it even mention (much less find “compelling”) the substance of Ms. Dyer’s allegations. The reasons why Ms. Dyer’s testimony was unreliable, set forth in detail at A.I.0757-0768 include, but are not limited to: (1) she did not tell her husband and law partner, about this alleged “confession” for more than ten years, even though she surely knew that he was, in his words, “haunted” by Mr. Buffey’s case and the fact that Mr. Buffey might be innocent (A.II.2031; A.I.769-70); (2) she did not share Mr. Buffey’s “confession” with her

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<sup>9</sup> Trial counsel had produced his file at Petitioner’s request before the hearing, but it did not include any notes from any attorney-client meetings or telephone calls. A.IV. 4630-31.

<sup>10</sup> The State seizes on Mr. Buffey’s alleged “failure” to affirmatively assert his innocence to Gina Lopez, an investigator whom Mr. Dyer briefly retained to assist him on this case. See RB at 12 n.12, 24. Yet Ms. Lopez only participated in one conference with Mr. Buffey in the six months between Mr. Buffey’s arrest and sentencing, and did not know what was discussed at other meetings. A.II.1925.

<sup>11</sup> Respectfully, though the harm from the circuit court’s decision to allow Ms. Dyer’s false allegation into the public record is now largely irreversible, that ruling was erroneous. The court found a waiver of privilege on grounds not even put forward by the State (*i.e.*, implied waiver due to a claim of ineffectiveness). Instead, it held that Mr. Buffey’s claim of actual innocence waived his attorney-client privilege as to any “aggravating evidence” that is “potentially relevant” to such a claim. See A.I.0034-0035. The court cited no authority for such a sweeping waiver of the attorney-client privilege – one of the most sacred protections in our legal system – and the undersigned know of none. *But see* A.I.750-68 (citing numerous authorities in support of continued application of privilege).

husband when, in 2003-2004, he was accused of ineffective assistance for inducing an innocent man to plead guilty (A.I.769); (3) she had no prior relationship with Mr. Buffey, giving him no reason to suddenly “confess” to her; (4) her recollection of what Mr. Buffey allegedly said changed significantly from when she first spoke to the prosecutor about her newfound memory to when she was deposed weeks later (A.I.770); (5) the story she told was inconsistent with the case facts (A.I.770-71); and (6) her own bias and ethical lapses, demonstrated by, *inter alia*, contacting the prosecutor to disclose this “confession” without consideration of the ethics rules, and boasting to a group of local attorneys on Facebook that she would soon be, in her words, “the star witness” against Mr. Buffey at the Omnibus Hearing (A.I.754) (emphasis added).

14. The State relies on the claim by juvenile informant Andrew Locke in 2001 that Mr. Buffey admitted robbing an “old lady’s home” (RB 3). But it fails to inform the Court that Locke repudiated his statement numerous times since then, including (a) to Mr. Buffey’s first habeas attorney; (b) to the *Charleston Gazette*, in an unsolicited letter, after reading about this case in the news (A.III.3292-3293) and (c) after writing to the *Gazette*, in a sworn affidavit to Mr. Buffey’s counsel (A.III.3294-3298). Nor does the state mention that Locke admitted he had falsely incriminated Buffey because the police had promised he “wouldn’t have to serve time for the Salvation Army Burglary” if he implicated him in the crime. A.III.3296. The State also neglects to mention that (a) in the middle of the night after his police interview in 2001, where he had just assured the police he did not “do pills,” Locke was taken to the hospital for overdosing on “morphine 150 mg” (A.III.3230, 3296 ¶ 14); and (b) the psychologist who evaluated Locke for the court in 2002 did not consider Locke to be credible. A.IV.4109-10.

15. The State writes, “How else would [informant Ronald Perry] have known the details [he] related to law enforcement and what would be [his] reason for fabricating such as [sic] story.” (RB 23). First, Perry did not “know[] the details” of the rape or robbery. He

claimed Mr. Buffey told him that he (Mr. Buffey) and “his cousin” broke into the victim’s house and took turns sexually assaulting Mrs. L: “[o]ne . . . would hold her down while the other would molest her.” A.IV.4585. However, no one “held [Mrs. L]” down during the sexual assault, as her careful recounting of the assault makes clear. *See* A.III.3069-75. Perry also claimed Mr. Buffey told him that he and his cousin entered the home by crawling through a screen. A.II.1440, A.III.3133; *but see* A.II.1440 (Det. Matheny) (no evidence that screen was point of entry). Perry also had difficulty keeping the alleged “details” straight, changing key facts when he made his statement to the police, was deposed, or testified. *See* A.II.4582-4585.

The record also shows that Perry repeatedly tried to capitalize on his testimony to win his own release from prison. In April 2002, he filed a motion for reconsideration of his sentence based on his “history of mental problems and hospitalization for same,” and the fact that he had “significantly and substantially cooperated” in the State’s investigation of Mr. Buffey. *See* A.IV.4156-4161. Then, on January 29, 2004, shortly before the March 2004 Omnibus Hearing, Perry sent a letter to APA Traci Cook, counsel for the State in Mr. Buffey’s then-pending habeas, asking for her “help with a reconsideration that I’m going to file to the judge[.]” Mr. Perry reminded Ms. Cook that he “was the one who helped [her] with the Joseph Buffey case....” *Id.* That same day, he filed his motion, again citing “the fact I help the State with its Joseph Buffey case[.]” A.IV.4163. Thus, when he testified in 2004, his request for help from the prosecution was pending, but the prosecution never disclosed that critical fact. A.II.2161-2162.

To date, Perry has yet to be cross-examined about the obvious problems with his story.<sup>12</sup> But even on the present record, it is clear that Perry’s “details” of the crime were wrong and inconsistent, and his “reason for fabricating such a story” is self-evident. *See also* A.I.1251-1255

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<sup>12</sup> Prior habeas counsel did not press Perry about the inconsistent and inaccurate details in his

(providing more detailed discussion of Perry’s lack of credibility). For this reason, it is unsurprising that Harrison County officials themselves apparently did not believe his account.<sup>13</sup>

## **REPLY TO ARGUMENT**

### **I. The State Does Not Dispute the Essential Facts and Law Regarding Its Failure to Disclose Exculpatory DNA Evidence It Possessed in April 2002**

#### **A. Undisclosed State Police DNA Report Requires *Brady* Relief**

The State’s brief is remarkable for its failure to dispute virtually any of the key facts or legal authorities that underlie Mr. Buffey’s *Brady* claim. For example, the State does not challenge Mr. Buffey’s claim that the circuit court erred in failing to consider leading USSC cases concerning *Brady*, due process and guilty pleas (including *Ruiz*, *Bagley*, *Hill*, *Frye*, *Lafler* and others – see PB 45-51). The State does not deny that the circuit court erred when it held that a “voluntary” plea waives any claim for *Brady* relief based on the State’s failure to disclose exculpatory evidence that is material to a defendant’s claim of innocence (rather than mere impeachment evidence) and by failing to acknowledge, much less consider, *U.S. vs. Ruiz*, 536 U.S. 622 (2002). Moreover, while making the unsupported contention that “*Ruiz* supports the trial court’s ruling,” the State nowhere disputes that the vast majority of post-*Ruiz* courts have either held or presumed that prosecutors have a continuing, affirmative duty under *Brady* to disclose material exculpatory evidence, even after entry of a guilty plea – as is strongly implied in *Ruiz* itself. See PB 49-50; *Brief of Amici Curiae* at xi-xiii (discussing *Ruiz*, and citing cases).

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account. A.IV. 4592. Nor did she obtain Perry’s court file and discover the motion he had pending (which, of course, did not relieve the prosecution of its own duty to disclose the motion, nor the letter he had sent the State). Present counsel could not ask Perry about these issues (nor about whether he stood by his false claims from 2002-04) because neither party could locate him before the 2013 hearing. A.I.1251.

<sup>13</sup> The State apparently had so little faith in Perry’s veracity that it never bothered to investigate whether there was a second violent rapist (the alleged “cousin” of Mr. Buffey’s) running loose in Harrison County at any time after Perry so alleged. Nor did it ever investigate whether Mr. Buffey’s mother tried to solicit perjured testimony to help her son, as Perry had falsely claimed. See, e.g., A.II.1438-1442.

The State also does not challenge Mr. Buffey's claim that the circuit court further erred in holding that the suppressed evidence must "fully exculpate" to constitute *Brady* material. *See* PB 47-48. It does not deny that Lt. Myers's own knowledge of the DNA report is automatically imputed to local prosecutors. *Id.* at 46-47. And it nowhere challenges Mr. Buffey's claim (at PB 47-48) that the inference that the nondisclosure of the WVSP's DNA report was "material" is even stronger where, as here, the defense made numerous, specific requests for the DNA results before the final plea and sentencing hearing, but was affirmatively misled about the status of the DNA testing. *See, e.g., U.S. v. Bagley*, 473 U.S. 667, 682-83 (1985).

Nor are there any material facts now in dispute regarding the results of the 2002 DNA testing itself: what the State's DNA data actually showed, and how those test results contradicted the entire theory of culpability upon which Mr. Buffey was charged, convicted, and sentenced.<sup>14</sup> The State has not identified *a single law enforcement official* involved in this case who, at any time prior to sentencing, considered the crime to be anything but a single-perpetrator rape and robbery of a sexually inactive, elderly victim, in which the lone assailant was the only potential source of semen found.<sup>15</sup> It does not dispute that at least *six weeks* before Mr. Buffey's final plea and sentencing, the State Police had clearly identified a sperm donor who was not Mr.

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<sup>14</sup>The State argues elsewhere in its brief that the DNA evidence "cuts both ways" because it not only excluded Mr. Buffey but implicated Bowers and thus, according to the State, is not material. RB at 19. This argument is disingenuous. *Brady* and *Youngblood* direct the court to consider the impact that disclosure may have had at the time of the original conviction, *i.e.*, whether there is a "reasonable probability that the result of the proceeding would have been different." The State argues that the CODIS hit to Bowers (which Mr. Buffey sought for over a year over the State's objection, *see* A.VII.935-38) is not exculpatory. This is incorrect (*see infra* pp. 25-28). Regardless, the recent identification of Bowers was only possible due to advances in DNA technology and Bowers' subsequent felony convictions which put his DNA into the database. All that was known to the State in 2002 is that its laboratory discovered sperm, at the crime scene, which was left by an unknown rapist who was clearly not Mr. Buffey. The relevant question under *Brady* is whether that information is reasonably likely to have led Mr. Buffey to reject the plea or move to set it aside, had it been disclosed before the final plea hearing as required.

<sup>15</sup> The State did contend in its brief that Det. Matheny "believed the victim's statement indicated more than one perpetrator," but this is incorrect. *See supra* p. 5.

Buffey on the victim's intimate samples. It does not dispute that, even with the more limited methodology available in 2002, Lt. Myers concluded that Mr. Buffey was not the primary sperm donor, and in all likelihood, he was also excluded *as even a potential minor contributor*. See PB 19-21, 29-30. And it does not deny that Lt. Myers generated the first of these exculpatory results, on a highly expedited basis, on February 8<sup>th</sup>, even before Mr. Buffey's initial plea hearing on February 11, 2002. See PB 19-21; see also RB 11 (State notes that "plea negotiations were [still] ongoing until February 11"). The State also does not challenge trial counsel's sworn testimony that he repeatedly asked County officials whether the State's DNA testing was complete well before the final plea hearing – including in April and May 2002, *after* the report was published – but was falsely told that "no report" existed. See PB 21.<sup>16</sup>

Nor, finally, does the State deny that the critical facts set forth above were not before the circuit court in 2004, when it found that the DNA results were "inconclusive" based on an incomplete and misleading presentation of the DNA evidence at the first Omnibus Hearing. See PB at 29-30; 59-60. (Notably, the circuit court no longer refers to the 2002 results as "inconclusive." It instead found that prosecutors did not "knowingly" suppress the 2002 DNA results, and that the results did not "fully exculpate[]" Mr. Buffey (A.I.116) -- a statement that reflects a fundamental misunderstanding of what *Brady* requires.) And the State's boilerplate assertion of *res judicata* (RB at 47) fails to address the exceptions that apply to this claim.<sup>17</sup>

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<sup>16</sup> Because there is no question that the WVSP's final report was issued six weeks before the final plea hearing in May, this Court need not decide whether the State's *Brady* obligation was triggered even before the initial February 11<sup>th</sup> plea hearing, when the DNA exclusion was first apparent to Lt. Myers. However, that exculpatory DNA results were generated before Mr. Buffey entered even his initial plea is a fact this Court should consider as part of its "manifest injustice" analysis. In particular, the fact that Lt. Myers not only expedited the testing, but came into the lab over the weekend before the Feb. 11<sup>th</sup> plea hearing to review his data, makes even more suspect the State's claim that at no time between February and May was the prosecutor's office aware that Lt. Myers had obtained any DNA results.

<sup>17</sup> These exceptions and the reasons why they are satisfied are summarized in Petitioner's opening

That leaves the State’s final defense to the *Brady* claim: that, even though the State failed to disclose a DNA report showing semen from a man who was not Mr. Buffey, which it possessed weeks before the final plea hearing, the violation was not “material.” As the State concedes, to establish materiality, Mr. Buffey needs to show only that “there is a reasonable probability that but for the failure to disclose the Brady material, [he] would have refused to plead and would have gone to trial.” RB at 46 (internal citation omitted). That is, he does not need to show that the DNA results prove his actual innocence, nor that he would have been acquitted at trial had a jury known of the results (even though, given the nature of the crime, the DNA evidence here does both). Indeed, the State’s entire argument hinges on the premise that since Mr. Buffey accepted the State’s initial, time limited offer in February, and proceeded to a final plea hearing in May, without benefit of the DNA results, he would have made the same decision if the actual results (as Lt. Myers described them at the hearing in this case), had been disclosed to him and his counsel. Specifically, the State argues that because “the DNA test results had no bearing on Mr. Buffey’s decision to plead guilty,” giving the defense a copy of the report before the plea was final, as *Brady* requires, would have had no impact whatsoever on the ultimate outcome. See RB 46; *id.* at 41 (no reasonable probability of a different result because “the DNA report had no bearing on his taking the plea bargain”); *id.* at 45 (same, because “such DNA testing results had no bearing on Mr. Buffey’s decision to plead guilty”).

This argument is deeply flawed, for at least four reasons. First, the reason “the DNA report had no bearing on” Mr. Buffey’s decision whether to enter his plea is because the State *withheld the report* from him and his counsel. The fact that Mr. Buffey and his counsel

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brief at 23-26, 59-60, and set forth in his Proposed Findings below at A.1169-75, 1184-90, 1238-40 (discussing the inexperience and ineffectiveness of prior habeas counsel – including her failure to retain a qualified DNA expert, review the file, or meet with the Lt. Myers despite his invitation to do so – and the State’s nondisclosure and misrepresentation of evidence relevant to the *Brady* claim).

proceeded to sentencing after being told (falsely) that “no report” existed poses an entirely different question than what they would have done had the State provided them with the actual DNA test results before the final sentencing hearing, as *Brady* requires. See PB 53-54.

Second, the State fails to address— much less answer — the point made in Mr. Buffey’s opening brief to this Court (at 53-54): There is an enormous difference between knowing that one is innocent and, thus, that his DNA will not be found on evidence from the crime scene, and knowing that the State’s test results would contain exculpatory evidence -- *i.e.*, that the WVSP lab identified DNA from someone other than Mr. Buffey in seminal fluid left by the rapist. Mr. Buffey told his attorney (correctly) that he would not be inculpated by any DNA testing, but, until the DNA testing was done, he could not know whether the real perpetrator had ejaculated at the scene; whether the WVSP would succeed in detecting that man’s DNA; and whether the WVSP would accurately report such results.<sup>18</sup> The actual DNA results obtained by the WVSP turned out to be highly exculpatory evidence for the defense – but neither Mr. Buffey nor his counsel had the benefit of that report at any time prior to acceptance of his plea.

Third, *Mr. Buffey and his trial counsel are in complete agreement* that disclosure of the WVSP’s DNA results at any time before sentencing would have led them to withdraw the plea. When asked whether there was any circumstance under which he would have allowed Mr. Buffey to plead guilty had he actually known of the WVSP’s DNA results in 2002, Mr. Dyer responded, “Of course not.” A.II.1940-41. Most important, Mr. Dyer expressed no doubt that he could have successfully moved to withdraw the plea had the State disclosed the DNA report – pursuant to his repeated requests -- as he had done “many times” for other clients after an initial plea hearing, as state law clearly allows. A.II.1942; *Olish*, 164 W.Va. at 715. Mr. Buffey also

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<sup>18</sup> Indeed, Mr. Dyer testified that at the time he represented Mr. Buffey and counseled him whether to accept the State’s plea offer, he remained distrustful of the WVSP laboratory. See A.II.1961.

stated that he would have done so. The State's excerpts from Mr. Buffey's testimony omit the key portion in which he was *specifically asked* about this very issue – whether, had he known about the WVSP's DNA report prior to sentencing, “would you have then insisted on withdrawing your plea?” – to which he answered “yes” without equivocation. A.VII.8285-86.

Fourth, the Court should consider the undesirable public policy implications of the State's position. Whether the State can, consistent with *Brady* and this Court's own jurisprudence on “manifest injustice,” withhold the results of exclusionary DNA testing that it obtains after a defendant accepts an offer to plead guilty to sexual assault, but prior to the court's acceptance of that plea, is a matter of first impression in this Court. That thirty respected former state and federal prosecutors, from this State and around the nation, joined the *amici* brief urging this Court to vacate Mr. Buffey's plea and sentence under *Brady* demonstrates the broader implications of this case. And while the State places great weight on the fact that Mr. Buffey “knew” the State's DNA testing was pending, told his counsel that the results would not implicate him, yet still accepted the State's plea offer, none of these experienced prosecutors considered these factors to in any way justify the State's failure to disclose the DNA report. Nor did any of the *amici* consider Mr. Buffey's decision to accept the plea under the difficult circumstances he faced to be persuasive evidence of his actual guilt -- much less that the State's nondisclosure of the DNA report was not “material.”

As the *amici* argued, this Court should be wary of any ruling that might appear to sanction the State's failure to disclose highly relevant forensic evidence in its possession, particularly DNA evidence, whether or not the defendant has entered an initial plea of guilty. Moreover, the risk that a ruling for the State might be misinterpreted to approve *Brady* noncompliance is particularly great in a case like this one -- where the defense not only made numerous requests for the DNA report, but was falsely told each time that it did not exist.

None of the cases cited by the State (at pp. 40-46) are remotely analogous to Mr. Buffy's.<sup>19</sup> The State further errs by falsely contending that counsel for the *amici* cited a Tenth Circuit opinion that was “essentially overruled” by the circuit three years later, when the subsequent opinion, did no such thing, and if anything *reaffirmed* the holding cited by *amici*.<sup>20</sup> Most importantly, the State has cited no case in the entire country (and the undersigned know of none) in which any court has held that a defendant is not entitled to *Brady* relief when the State failed to disclose a laboratory report showing that the defendant was excluded as the source of DNA from a crime scene, either before a trial or upon a plea of guilty.

**B. State Neither Rebutts Nor Denies Substantial Evidence That Harrison County Officials Knew of DNA Results Well in Advance of Final Plea Hearing**

*Brady* applies whenever the State fails to disclose evidence favorable to a defendant, “either willfully or inadvertently.” Syl. Pt. 2, *State v. Youngblood*, 221 W.Va. 20, 22, 650 S.E.2d 119, 121 (2007) (cited at RB 18). This Court need not determine whether prosecutors personally knew of the DNA results before the final plea hearing in order to grant *Brady* relief. But there are ample grounds for the Court to so find, and grant relief on that basis.

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<sup>19</sup> For example, the State places great weight on *U.S. v. Moussaoui*, 591 F.3d 263 (4<sup>th</sup> Cir. 2010), a complex, multi-year international terrorism prosecution that is hardly comparable to the proceedings in this case. The State specifically claims that Moussaoui is on point because the defendant pled “knowing that there may be exculpatory materials which had not been provided to him” (RB at 41) – neglecting to mention that *the materials had all been provided to defense counsel* before the plea (although national security rules kept Moussaoui from personally reviewing them). See 591 F.3d at 287 (rejecting *Brady* claim because “the Government produce[d] the evidence” in question. Here, by contrast, the State not only failed to produce the DNA report to defense counsel, but falsely told him it did not exist.

<sup>20</sup> See RB 43-44 (citing *U.S. v. Ohiri*, 133 Fed.Appx. 555 (10<sup>th</sup> Cir. 2005) and *U.S. v. Ohiri*, 287 Fed.Appx. 32 (10<sup>th</sup> Cir. 2008) (“*Ohiri II*”). In *Ohiri II*, the 10<sup>th</sup> Circuit left undisturbed its 2005 holding that *Brady* and *Ruiz* required the government to disclose “all known exculpatory information” prior to the defendant’s plea; it merely found that the evidence at issue (a statement of a co-defendant) was “not material and [therefore] no *Brady* violation occurred” when it was not disclosed. As the State surely knows, that the Circuit ultimately denied relief based on the facts of the case before it in no way “overrule[s]” its prior legal holding that *Brady* and *Ruiz* require prosecutors to disclose any material, exculpatory evidence they may possess at the time of a defendant’s plea.

As a threshold matter, the State does not dispute that, if the record indicates that local police or prosecutors did know about the April 5, 2002 DNA results at any time before the final plea and sentencing – despite assuring the defense that “no report” existed – that alone would require relief in the interests of justice. *See State v. Olish*, 164 W.Va. 712, 715, 266 S.E. 2d 134, 136 (1980) (providing for withdrawal of plea after sentencing “to avoid manifest injustice”).

Notably, however, the State fails to address – much less rebut – the substantial evidence presented below on that issue. This includes, *inter alia*, the undisputed facts that, (a) at the State’s request, the WVSP conducted testing on a highly expedited basis, ahead of hundreds of cases in its backlog at that time; (b) prosecutors’ repeated assurances that they had inquired if testing was complete; (c) the DNA analyst’s testimony that he would have given the report to “anyone who asked” on or after April 5, 2002; and (d) the Prosecuting Attorney who handled the case committed misconduct during the same term of court in another matter. *See* PB 14 n.5, 18-22, 51-52; *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 216, 579 S.E.2d 550, 557 (2003). Even if local officials made no inquiries about the test results, the WVSP had reasons of its own to make sure that the April 2002 report was immediately provided to both the prosecution and the defense: they include not only clearing a potentially innocent suspect, but also putting local officials on notice that the real perpetrator might still be at large and a threat to the public. *Id.*

The only piece of evidence on the issue of prosecutors’ knowledge of the DNA that the State addresses is the HCPA file note from March 11, 2003 (A.VI.8014), noting that Lt. Myers told the Prosecuting Attorney’s Office about the initial DNA findings even before his final report was released. And the State’s argument only strengthens Mr. Buffey’s claims. The State contends that the note is “cryptically stated” and “can have several meanings” (RB 42). Yet it offers not a single one to counter what the note plainly shows -- *i.e.*, that Lt. Myers told former

APA Terri O'Brien, who appeared at the initial plea hearing, that he had obtained useful DNA data and was "leaning towards excluding" Mr. Buffey even before he issued his written report.

The State goes on to claim, without citation, that "it is unclear whether [this communication] was before sentencing or after." (RB 42). But, as the State told Mr. Buffey's counsel, Ms. O'Brien's last day as a prosecutor in Harrison County was March 28, 2002 – which was not only before the April 5<sup>th</sup> DNA report, but *two months before the May 21, 2002 sentencing hearing*. A.I.1192, n.28. Moreover, for the State to contend that the date of the Myers-O'Brien communication is "unclear," when its counsel suppressed the note for over a decade, failing to turn it over until two weeks after the close of Mr. Buffey's hearing, is inexcusable. The prosecutors who handled both Omnibus hearings were aware that the note was in their files (indeed, the 2004 habeas prosecutor authored the note), and that it memorialized a clear recollection by Lt. Myers that he had discussed his preliminary DNA findings with former APA O'Brien. Yet the State not only failed to disclose the note before either hearing, but stood mute as both Lt. Myers and Ms. O'Brien testified that they had no recollection of any verbal communications about the DNA test results at any time, and that, to the best of their recollections, none had occurred. A.VII.8131; A.II.1671. Then, after belatedly disclosing a redacted version of the note, the State refused to make either Lt. Myers or Ms. O'Brien available for depositions – thus ensuring that neither could be asked to clarify the timing or substance of the 2002 conversation(s) that the State now urges this Court to find are "unclear." A.I.842-53.

That the State feels the need to argue that Lt. Myers might have given this critical information to APA O'Brien "after sentencing" (despite its knowledge that Ms. O'Brien departed from the office nearly two months before sentencing) is telling. The State knows that, if anyone in the prosecutor's office was in fact told, at any time *before* May 21, 2002, (1) that Lt. Myers' DNA data appeared to exclude Mr. Buffey from the DNA, thus (2) putting the

prosecution on notice that the final DNA report was forthcoming, yet (3) not only failed to disclose the information, but (4) falsely led the defense to believe that the testing was “not complete,” then its conduct would constitute a “manifest injustice,” which this Court should not condone. Because the record so demonstrates, relief should be granted under *Olish*’s “manifest injustice” rule, as well as on the independent *Brady* grounds set forth *supra*.

**II. The Combined Effect of the Complete DNA Results, the CODIS Hit to Bowers, and the Victim’s Clear Account of this Single-Perpetrator Crime Requires Relief**

The State also fails to make any credible arguments to counter Petitioner’s claim that the newly discovered DNA evidence entitles him to relief. That evidence includes, *inter alia*, the advanced DNA tests obtained in 2011-2013 under the Right to DNA Act (W.Va. Code §15-2B-14), and the resulting CODIS hit to Adam Bowers. Instead, it asks this Court to deny relief under a legal standard that is without precedent (*i.e.*, that Mr. Buffey must prove it is “factually impossible” for him to be guilty) and ignores relevant authority in this State and other jurisdictions. It then attacks the reliability of its own complaining witness, and misstates the DNA evidence, even though both sides’ DNA experts were *in clear agreement* as to the results’ significance. Ultimately, the State urges this Court to place greater weight on the dubious claims of informants than on the account given by the woman who was the victim of the crime.

**A. No Law Supporting State’s Position, and Substantial Contrary Authority**

**1. No Precedent for Denying Relief With Comparable DNA Evidence**

The State has not identified a single case, in this State or any other, in which any court has denied post-conviction relief based on remotely comparable DNA evidence -- either after trial, or upon a guilty plea. That is, the State has identified no case on record in which a court declined to vacate a conviction from crimes involving the rape of a sexually inactive victim, after DNA testing identified semen from someone other than the defendant. Moreover, the State fails

to mention, much less distinguish, the many cases cited by Petitioner, in this Court and in the proceedings below, in which such relief was granted. *See* PB 42-43, 48, A.I.288-90, 295-99, 1057-58. Many of these cases were much “closer calls” than Mr. Buffey’s. For example, they include unwitnessed homicides in which the number of perpetrators was unknown; in which one or more defendants not only pled guilty, but gave false testimony against alleged accomplices; or in which the DNA evidence was offset by inculpatory evidence (such as a confession with details “only the perpetrator could know,” or identification by multiple eyewitnesses) that is absent here. *See id.* Nor did the State make any effort to distinguish those cases in which this Court has granted relief based on other favorable post-conviction evidence, including evidence far less probative than male DNA collected from a rape victim. *See id.* at 43 n.29 (citing cases).

In urging this court to deny relief based on the new DNA evidence, the State cites only two cases, which it claims are “analogous and instructive.” *See* RB 30 (*citing McBride v. Lavigne*, 230 W Va. 291, 737 S.E.2d 560 (2012), and *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996)). But neither involved a claim of newly discovered evidence, much less DNA evidence tested under a newly available statute. Instead, in both *Lavigne* and *LaRock*, this Court addressed only whether the evidence at the defendants’ trials was legally insufficient to sustain the convictions; and after emphasizing that such claims require every favorable inference be given to the State, the Court found no basis to disturb the jury’s verdicts.<sup>21</sup> The State’s errors are not limited to citing inapposite cases. As noted *supra*, it repeatedly holds Mr. Buffey to a legal burden that this Court has never adopted. *See, e.g.*, RB 21 (“failed to sustain his heavy burden of proving . . . [that it was] factually impossible that [he] could have committed the

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<sup>21</sup> That the State would cite *LaRock* as remotely “analogous” is bizarre, since *LaRock* never denied that he killed the victim, but challenged only whether the State had proven premeditation. Mr. Buffey, by contrast, maintains that he was not at the scene and is innocent of the crimes against Mrs. L.

crime”); *id.* at n.21 (record must show it was either “factually impossible” or “physically impossible for the accused to have committed the crime”); *id.* at 22 (same); *id.* at 26 (“the burden to prove Petitioner’s impossibility to have committed these crimes rests with Petitioner”). Yet the State cites not a single decision in which this Court – or any other – has even discussed this “factually impossible” standard, much less held it to be the test for relief under §53-4A-1.<sup>22</sup>

## 2. State’s Argument Fails to Account for Right to DNA Act

The State also fails to make any attempt to refute Petitioner’s claim (*see* PB 34-37) that the circuit court erred in failing to take into account the Right to DNA Act – specifically, the Legislature’s decision to ensure that persons who plead guilty have an equal opportunity to challenge their convictions through DNA testing as those who elected a trial, which “is absolute and cannot be waived.” *See* W.Va. Code §15-2B-14(m). The State has no qualms about stating that the “factually impossible” test for relief it proposes would, in practice, be “practically insurmountable after a guilty plea where a factual basis for guilt is provided” (which, of course) Rule 11(f) requires in all plea cases). RB 21. Thus, under the State’s proposed rule, persons who pled guilty could obtain a post-conviction DNA test, but it would be virtually impossible for any of them to set aside their pleas because, according to the State, the very fact of a “voluntary” plea overrides DNA evidence. Nowhere does the State deny that such a rule would render §15-2B-14(m) effectively meaningless. And it would do so despite the now well documented fact that innocent defendants do sometimes plead guilty, a fact recognized by the Legislature when it enacted W. Va. Code § 15-2B-14(m). *See* PB 42; A.VII.7.8637-8638. The State may not agree

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<sup>22</sup> Instead, the State cites only to FN 44 of this Court’s opinion in *Smith v. McBride*, 224 W.Va. 196, 681 S.E.2d 81 (2009), which includes brief *dicta* on how federal courts and certain states evaluate a so-called “freestanding claim of actual innocence. Nowhere in *Smith* does this Court mention a “factually impossible” test for relief in any jurisdiction, or suggest that it should apply in this State. Indeed, the cases cited in *Smith* all address whether the petitioner’s new evidence would satisfy a jury that “reasonable doubt” exists as to his guilt – precisely what Mr. Buffey has asserted. *See id.* at 209 n.41.

with the application of the Act to convictions based upon guilty pleas, but that does not give it license to nullify the statute by applying a standard that virtually no petitioner can ever meet.

3. **No Dispute That DNA Creates a “Question of Actual Guilt” Under *Losh***

The State also does not challenge Mr. Buffey’s assertion that he has claim for relief based on newly discovered evidence under existing law. *See* PB 34-36. Mr. Buffey has asserted that the combined effect of DNA results and the evidence that this was a single-perpetrator crime are sufficient to prove his “actual innocence,” should this Court join other states that have recognized such claims under the State Constitution (that is, providing for relief based on actual innocence, where no other procedural vehicle exists). But the State never addresses (and thus, implicitly concedes) that this Court need not reach this constitutional issue, since Mr. Buffey has a vehicle for relief under existing law. This is because (1) as the circuit court recognized, the present DNA results and CODIS hit to Bowers were obtained through a statute and advanced technology not available at the time of Mr. Buffey’s first Omnibus Hearing in 2004; and (2) this Court may therefore grant relief if it finds that the DNA creates a sufficiently serious “question of [his] actual guilt,” a claim this Court has long recognized as cognizable under W.Va. Code §53-4A-1. *See Losh v. McKenzie*, 166 W.Va. 762, 769-70, 277 S.E.2d 606, 611 (1981).

Notably, the State does not anywhere address Mr. Buffey’s claim that his new DNA evidence clearly satisfies *Losh*, or other decisions by this Court granting relief based on newly discovered evidence. *See* PB 37 (suggesting that this Court should, consistent with the Right to DNA Act’s equal treatment of guilty plea cases, apply a similar test (“ought to produce an opposite result”) as is used in cases involving convictions after trial).

4. **Waiver Inapplicable to DNA-Based Innocence and *Brady* Claims**

Finally, the State asserts that under W.Va. Code §53-4A-1(c), Mr. Buffey “waived” his present claims because he failed to file a direct appeal and present them at that time. *See* RB 15,

20, 48. This argument was not raised by the State below, and with good reason: it is wholly meritless. First, the statute clearly states that such waiver applies only to factual or legal contentions that a petitioner “could have” advanced within the time to file a direct appeal, and further that he “knowingly” failed to do so. But there is no dispute that the 2011-13 DNA results, as well as the WVSP’s 2002 DNA report, were not known to Petitioner or his counsel at that time – the former because the technology (and enabling statute) did not exist, and the latter because the State did not disclose the WVSP’s DNA report until long after his time to take an appeal had expired. Second, this Court has made clear the proper forum for claims regarding constitutional violations and/or actual innocence is habeas, not direct appeal. See *Pethel v. McBride*, 219 W.Va. 578, 592-94, 638 S.E.2d 727 (2006). The State’s belated and inaccurate assertion of “waiver” suggests that it understands the weakness of its other procedural defenses.

**B. Victim’s Lucid, Detailed Account of a Single Perpetrator Crime Was Reliable**

Ultimately, the State’s defense of Mr. Buffey’s conviction hinges on its claim that “[t]he victim’s powers of observation were obviously less than ideal.” RB 26. According to the State, so impaired was the victim that not only did she fail to notice the presence of an alleged second *intruder* in her home, she also failed to realize that “two perpetrators were taking turns performing sex acts” upon her during this intimate violation of her person. *Id.*<sup>23</sup>

Far from “obvious[],” these assertions are wholly false. See *supra* pp. 5-6 (summarizing numerous, specific details she observed and reported). Indeed, so unable is the State to explain how the victim could have failed to detect a second assailant based on the undisputed record – including the trial prosecutor’s recollection that she was “very bright [and] alert” (A.V.6617) --

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<sup>23</sup> It should be noted that the State does not argue that the record convincingly shows that the victim was in fact sexually assaulted by two different men, nor even that it was likely. Instead, the State argues that it is “not inconceivable” and/or “not impossible” based on the record. RB 16.

that it simply invents “facts” (such as being blinded by a “flashlight shining in her eyes”) to bolster its position. *See supra* p. 6. In this vein, the State proceeds to argue, “it is not difficult to envision both Buffey and Bowers in the victim’s home and being in different rooms at different times so that the victim would not perceive both attackers together [as they] communicated by hand motions or whispers with each other.” (RB 26) (emphasis supplied). But the notion that that two brutal rapists would keep to two different rooms, and use hand motions and whispers to communicate in a house that the State itself claims was “dark” (*id.*), is nothing short of ludicrous.

The only record “evidence” of a second perpetrator’s presence cited by the State is the victim’s observation that the perpetrator’s legs seemed “out of proportion” while assaulting her from behind because, when she turned around and briefly observed him during intercourse, he appeared to be in a “standing” position. RB 16; A.III.3075. From this, the State argues that what the victim actually saw were the legs of a *second* male (not the person actually raping her, but one standing near him). This is simply absurd. First, while Ms. L. did not indicate how much of the perpetrator’s legs she saw, her assailant would logically be in a standing position (even if his upper body were bent over), as the victim was either “on [her] knees” or “laying” part of her body on the bed during the assault. (A.III.3074-75.) Second, if the State’s scenario were true, Mrs. L. would have seen that there were two males when she looked behind her, not just one. Again, the State proffers hypotheses as “facts” that do not withstand basic scrutiny.

### **C. DNA Evidence is Undisputed, and Identifies Single Perpetrator**

Thanks to the sensitivity, precision, and objectivity of today’s DNA technology, there is no “battle of the experts” when it comes to the DNA evidence. Both Petitioner’s expert and the State’s original DNA analyst, Lt. Myers, are in complete agreement that, in Lt. Myers words, there is absolutely “no data” showing that Mr. Buffey’s DNA is present on any item of evidence tested, either in 2002 or today. By contrast, the post-conviction DNA tests conducted between

2011-13 revealed (1) the unique (1 in 400 billion), fully interpretable DNA profile of a single male sperm donor, Adam Bowers, on multiple items of evidence; and (2) a second “minor” male contributor, whom both experts agree *is not Mr. Buffey* (and who, furthermore, could not have been a second *assailant*, because the extremely low levels of sperm could not have been deposited through ejaculation during the crime). For this reason, no longer does any expert claim that DNA is in any way “inconclusive,” as the court was incorrectly led to believe in 2004. For this reason, the State’s claim that “Petitioner cannot be absolutely excluded as one of [the] minor male contributors” (RB 27) is grossly misleading. Both experts repeatedly opined that Mr. Buffey is conclusively excluded as both the primary *and* secondary male DNA donor(s). It is only if one *hypothesizes* the presence of a third male that it is even *theoretically possible* to include Mr. Buffey.<sup>24</sup> And as Lt. Myers confirmed, to reach such a conclusion is unscientific, as “no data” exists from which any DNA analyst could responsibly conclude that Mr. Buffey’s DNA is present.<sup>25</sup> Equally egregious is the State’s claim that the circuit court “rejected” Mr. Buffey’s DNA-based *Brady* and innocence claims in part “because the 2012 DNA test results are not substantially different than the original WVSP laboratory’s DNA testing results” (RB at 14). The court made no such finding. Indeed, while the court evaluated the DNA evidence under an incorrect legal standard, it acknowledged that the post-conviction DNA provided a wealth of new scientific information not available to the WVSP, and not barred by *res judicata*.<sup>26</sup>

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<sup>24</sup> See also A.II.1585-86 (Det. Matheny agrees there is “not one iota of evidence” that three perpetrators committed these crimes, and he does not believe that three men were present).

<sup>25</sup> Page limitations for this Reply preclude a more detailed discussion of the basis for the experts’ opinions as set forth above and citations to each page of the record in which they appear. However, a summary of the relevant testimony, DNA reports, and data (with full citations to the underlying record) is set forth in detail in Petitioner’s Proposed Findings below, at A.I.1138-48, 1168-77 of the Appendix.

<sup>26</sup> Compare, e.g., A.VII.9016 (2004 Ord.) (finding 2002 DNA testing “inconclusive” as to Mr. Buffey) with A.I.0073 (2014 Ord.) (“The latest DNA testing results and CODIS searches appear to reveal

Ultimately, in among the most revealing passages in its brief, the State admits that in light of the new DNA evidence, the most it can do is “speculate” as to how Mr. Buffey *might* have committed the sexual assault and robbery along with Bowers.<sup>27</sup> But speculation is not evidence. Nor is it a substitute for due process or a jury trial.

**D. Dubious Lay Witness Testimony Does Not Outweigh DNA or Victim’s Account**

None of the State’s other “evidence” is sufficiently reliable or probative to outweigh the combined exculpatory force of the DNA results and the victim’s clear single-perpetrator account. As noted *supra*, the claims of the lay witnesses upon whose allegations the State relies are both uncorroborated and unreliable. For example, it repeatedly cites the testimony of two convicted felons (Andrew Locke and Ronald Perry) who have either recanted their prior statements (Locke), are impeached by the new DNA evidence and the known facts of the crime (Perry), and/or were seeking leniency from the State at the time they attempted to inculcate Mr. Buffey (both). *See, e.g.*, RB 3-5, 7-8, 31, 33-34; *but see supra* pp. 7-8 (discussing impeachment evidence). And while the State disingenuously asks, “what would be their reason for fabricating” such accounts (*id.* p. 26), this Court – as well as judges nationwide – have long stated the reasons why such informant testimony is inherently suspect.<sup>28</sup> For different but no less substantial reasons, this Court should also be duly skeptical of the claim made for the first time

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a primary (as well as arguably sole) male contributor of the DNA . . . [which is] distinctly identified in matching the male DNA profile of someone other than him”); *see also* A.I.0078 (rejecting State’s claim that *res judicata* is barrier to consideration of new DNA results obtained under Right to DNA Act); A.I.1142-45 (citing detailed testimony by Lt. Myers as to how post-conviction DNA results are different than, and significantly improve upon, his original data and findings).

<sup>27</sup> *See* RB at 28 (arguing that “[o]ne could speculate” that Bowers transferred DNA from a second male onto the victim when he ejaculated, and that Mr. Buffey “could be a contributor to this mixture” as a hypothetical *third* donor) (emphasis supplied).

<sup>28</sup> *See, e.g., State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980) (noting that “[a] long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony”)

last year by Mary Dyer – the wife and law partner of Mr. Buffey’s trial counsel – that she recalls Mr. Buffey spontaneously “confessing” that he sexually assaulted Mrs. L. in 2002. *See supra* pp. 9-10 (discussing numerous grounds to doubt Ms. Dyer’s account). Notably, the circuit court’s Order did not discuss the details of Ms. Dyer’s allegations, much less rely upon them. *See id.*

That leaves the State’s claim that it proved Mr. Buffey and Adam Bowers to be “good friends” and “crime partners.” The State’s case in this regard is perhaps most notable for what it lacks: no testimony, much less extrinsic evidence, placing the two men together at the crime scene, nor even in the days preceding the crime. Instead, after an eight-month investigation into its hypothesized Buffey-Bowers connection, the State could only find two witnesses who claimed that the two men even knew one another, each of whom had personal reasons to aid the State. *See supra* pp. 7; *see also* A.I.0867-94 (discussing State’s refusal to disclose remainder of Bowers file). The circuit court neither relied upon, nor made findings about, the testimony of either of the State’s witnesses. Moreover, even if their allegations were true (which they are not), at the very most, they impeach Mr. Buffey’s testimony that he did not know Adam Bowers. That alone is insufficient to outweigh the compelling DNA and other evidence warranting relief.

### **III. State Does Not Dispute Critical Elements of Remaining Due Process Claims**

With respect to Mr. Buffey’s ineffective assistance of counsel claim, the State’s brief is again silent on the key issues with regard to both trial and habeas counsel. With regard to trial counsel, it asks this Court to affirm the circuit court’s finding that trial counsel was not ineffective, because there is no “sufficiently credible evidence that [Mr. Dyer] inappropriately forced, manipulated and/or otherwise pressured the Petitioner to accept the proffered plea

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(internal citation omitted); Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1383 (1996) (“[Informants’] willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including – and especially – the prosecutor”).

agreement.” (A.I.113) (emphasis supplied). But no case (in this Court or any other) has ever held that the only way for a defendant who pled guilty to prevail on an ineffectiveness claim is by establishing that trial counsel engaged in such coercive behavior. The law is, in fact, to the contrary. *See* PB 56-58; A.I.1065-7 (citing cases on pre-plea duties of counsel). Significantly, the State nowhere denies that (1) the court failed to consider USSC precedent which holds that manifestly incorrect counsel about the risks and benefits of a plea can constitute ineffectiveness; and (2) Mr. Dyer gave patently incorrect counsel when he told Mr. Buffey that he would likely receive *equivalent prison time* under the State’s offer as he would if convicted of the unrelated, *non-violent* offenses that the State had agreed to dismiss in exchange. *See* PB 16-18, 56-58.

The State also nowhere disputes that Mr. Dyer failed to take reasonable measures to independently determine the status of the State’s DNA testing (as opposed to merely inquiring verbally with police and prosecutors) before allowing his client to proceed to sentencing. *See id.* Nor does the State ever address or rebut the expert conclusions of Stephen Jory as to the standard of care for an attorney in the context of a plea and how Mr. Dyer failed to satisfy it. As Mr. Jory explained, these facts provide grounds for relief -- *even if one credits Mr. Dyer’s recollection over Mr. Buffey’s* on other disputed issues, such as whether Mr. Buffey ever directly asserted his innocence, or whether Mr. Dyer “strongly recommended” the plea to him. *See* A.I.1218-28; *see also* A.I.1238-1240 (Jory conclusions as to why 2004 habeas counsel was ineffective).

Finally, the State remains notably silent in response to Mr. Buffey’s serious and well-pled claim that the State presented knowingly false testimony to the grand jury. *See* PB 14-16, 58-59 (citing at least four material misrepresentations of fact that cannot fairly be deemed inadvertent). The State’s failure to dispute the merits whatsoever (arguing on *res judicata* instead) provides further grounds for this Court to overturn Mr. Buffey’s 2002 conviction in light of the present record, as both a “manifest injustice” and a violation of due process.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, ALLAN N. KARLIN, do hereby certify that on the 24<sup>th</sup> day of February, 2015, I served the foregoing "Petitioner's Reply Brief" upon the below listed counsel of record by U.S. Mail, addressed as follows:

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