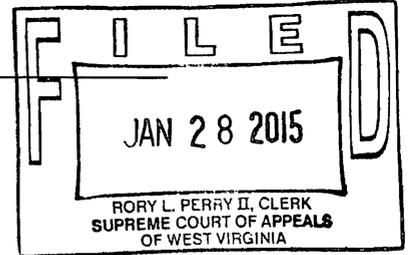

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston



JOSEPH A. BUFFEY,

Petitioner,

v.

DAVID BALLARD, WARDEN,

Respondent.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

ISSUES:

- I. Petitioner Was Not Denied Due Process When He Accepted a Plea Bargain, Voluntarily Pled Guilty and Knowingly Decided to Admit His Guilt Before Receiving the DNA Testing Results from Crime Scene Evidence:**
- a) No Brady Violation Has Been Substantiated;**
 - i) The 2002 DNA Report was not Exculpatory;**
 - ii) Buffey was not Prejudiced by Not Receiving the DNA Report Before Pleading Guilty as He Well Knew He Could Have Waited Until It Was Received Before Accepting the Plea and He Voluntarily Waived That Right;**
 - b) There Was No Constitutional Error Regarding Petitioner's Guilty Plea, So Petitioner Was Not Entitled to Raise Any Issue Not Raised on Direct Appeal or In His**

First Omnibus Habeas Proceeding in 2004.¹

- II. Petitioner Failed In Sustaining His Burden to Prove “Actual Innocence” Sufficient to Warrant Habeas Relief?**
 - a) **Petitioner Cannot Prove “Actual Innocence” i.e. no Possibility of Having Committed the Crimes to Which he Admitted;**
 - b) **Petitioner Plead Guilty to Sexual Assault and Robbery and Provided a Factual Basis for Both Crimes and Neither Petitioner’s Assertion that Only a Single Perpetrator Committed the Crimes nor the New DNA Test Results Prove Manifest Injustice;**
 - i) **DNA Test Results Have Absolutely no Bearing on Petitioner’s Plea to Robbery.**
- III. The Trial Court Did Not Believe the Petitioner’s Recantations or Habeas Testimony and Such Finding is Amply Supported by the Record.**
- IV. The Amicus Brief Misstates the Facts and Applies Incorrect Principles of the Law Regarding Brady Disclosures:**
 - a) **Ruiz Supports the Trial Court’s Ruling.**
- V. Petitioner’s Claims are Barred by *Res Judicata*.**
- VI. Petitioner’s Grounds for Relief, if Error, Were Harmless or Invited.**

STANDARD OF REVIEW:

“In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review.² We review the final order and the

¹ The Trial Court’s Final Order refers to Petitioner’s prior Omnibus Habeas proceeding as 2002, but it is referred to herein as the 2004 Habeas as that is when the Omnibus hearing was conducted.

² Mathena cited Phillips v. Fox, 193 W.Va. 657, 458 S.E.2d 327 (1995) for the standard of review where, in Phillips, this Court used the term “deferential standard” when describing the standard of review by this Court of a trial court’s final decision and findings of fact. *Id* at 331, 661

ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syl. Pt. 1, Mathena v. Haines, 219 W.Va. 417, 633 S.E.2d 771 (2006).

PRELIMINARY STATEMENT: OR SUMMARY OF THE CASE:

This Habeas involves Petitioner Joseph Buffey, who plead guilty to two counts of sexual assault in the first degree and robbery, of an 83 year old widow, committed during the early morning hours of December 1, 2001. The crimes occurred after Petitioner, with other cohorts committed a break-in and robbery of the Clarksburg Salvation Army facility which was a few blocks from the 83 year old victim’s home. The victim lived alone, making her an easy target and Mr. Buffey and his accomplice, Adam Bowers, both of whom were very familiar with the area of the victim’s home and the victim specifically.

Mr. Buffey had admitted to law enforcement after being arrested for his role in the Salvation Army crimes, as well as two of his associates, Ronald Perry and Andrew Locke, involved with him in the Salvation Army crimes having been arrested and interviewed by law enforcement. Petitioner’s associates revealed incriminating statements that Buffey had made to them regarding his participation in the sexual assault and robbery of the 83 year old victim. Mr. Buffey was observed by his conspirator in the Salvation Army robbery, Ronald Perry, leaving the group [Perry and Locke] and traveling in the direction of the victim’s home after the Salvation Army break-in. The next morning after the rape and robbery, Petitioner told Andrew Locke that Petitioner had also that night robbed an “old lady’s home” and “things went bad.” These two individuals, Perry and Locke, related this incriminating information to law enforcement. When Petitioner was arrested on December 7,

2001, for the robbery at the Salvation Army, he admitted to both the Clarksburg Police and the West Virginia State Police to being in the victim's home on the night of the attack, but claimed he could not remember whether he had committed any sexual assault. He also confirmed he was aware of the location of the victim's home and admitted that he had dated a girl who lived next door to the victim. Finally, Petitioner admitted that he had a condom on the night of the rape of the victim which fact had been known to his Salvation Army conspirator Andrew Locke and related to law enforcement. Petitioner also denied that he committed the rape in the same interview, but did not deny being in the victim's home. At the end of the interview, Petitioner was arrested for the sexual assault and robbery of the victim, among other crimes. Petitioner was indicted in early January 2002 and the criminal process began. As part of the criminal process, Petitioner was requested to voluntarily provide a blood sample as biological evidence had been recovered from the crime scene. Petitioner readily agreed to the blood sample and informed his counsel that his DNA would not be found on the evidence as Petitioner knew he had used a condom during the sexual assault. However, before the DNA testing was complete Petitioner was offered a plea bargain by the State. Petitioner accepted the plea bargain and plead guilty on February 11, 2002. He was sentenced in May 2002, at which time he apologized to the victim and her family for his crimes. At no time during the criminal proceedings did Petitioner assert to anyone that he was innocent, not to his counsel, not the Court, or anyone else. Petitioner only decided to assert his innocence to the Court when he thought he had developed Ronald Perry as an alibi witness while they were both in prison. Petitioner had asked Perry, while both were housed in Huttonsville Correctional Center, to lie for him and testify that Petitioner had gone with Perry after the Salvation Army robbery and had stayed with Perry the entire night. Petitioner offered Perry both money and protection while incarcerated in return for his

agreeing to support Mr. Buffey's alibi. However, Perry alerted law enforcement to Petitioner's plan when law enforcement asked Perry to provide a blood sample to test his DNA against an unknown male DNA profile obtained from the crime scene. Perry's DNA did not match the unknown male profile developed by the West Virginia State Police [WVSP] laboratory, but during that blood draw, Perry disclosed Petitioner's attempt to create a false alibi through Perry's testimony. Such conduct was significant in damaging Petitioner's credibility regarding his claim of innocence.

Another very important fact militating against Petitioner's claim of innocence was the substantial evidence that Petitioner had used a condom in committing the vaginal sexual assault on the victim. Both Locke and the Petitioner confirmed that Petitioner had a condom on the night of the assault.³ This evidence significantly undermined Petitioner's theory that he was actually innocent because the only full DNA profile recovered from evidence at the scene was not his. However, the DNA profile able to be checked against the CODIS⁴ database in 2012, while not belonging to Petitioner, did belong to his good friend and cohort in criminal activity, Adam Bowers, and both Bowers and Petitioner lived within a few blocks of the victim. Bowers actually lived on the same street as the victim and had been her paperboy. Petitioner's own expert testified at the current Habeas hearing that other male DNA, not attributable to Bowers, was found on the crime scene evidence. Petitioner's expert also testified that if Petitioner had used a condom during the assault that his DNA likely would not be found in the crime scene evidence.

Petitioner's claims in this current Habeas, which claims were totally rejected by the Trial

³ The victim was vaginally assaulted three times and assaulted orally twice; no evidence swabs were taken from the victim's oral cavity as she had used Listerine after the assault; [JA 3073, 3282].

⁴ CODIS is the Combined DNA Index System, incorporating all State DNA indexes and is overseen by the FBI.[<http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet>]

Court, rests on gross speculation as to the facts and a flawed theory of the law. Petitioner's assertion of actual innocence is only plausible if the Trial Court had accepted that everyone involved with Petitioner's case was lying except the Petitioner. The Trial Court soundly rejected such suggestion when it denied habeas relief to Petitioner which ruling was legally correct and a proper exercise of the Trial Court's discretion and amply supported by the Trial Court's determination of the facts which factual findings were not clearly erroneous.

FACTS:

In the early morning hours of December 1, 2001, _____, an 83 year old widow, living alone, was awakened in her bed by someone shining a flashlight in her eyes telling her that "This is a robbery, I need your money". [JA 3068] The victim was then marched downstairs from her bedroom to search for money. The only light was the flashlight being held by one of the perpetrators who was behind her and who also had a knife in his other hand. After Mrs. L _____ retrieved a small amount of cash from her purse, she was followed back upstairs to her bedroom purportedly to look for more money while being told by the perpetrator that he knew there was money upstairs as he had "been here before". [JA 3078] After being taken to her bedroom, Mrs. L _____ was placed on the floor, in a kneeling position, with her head in a pillow and was raped vaginally from behind at least three times, and orally twice. [JA 3073] The victim could not identify the perpetrator and generally couched her statement to police as though only one person was present, but she was never directly asked if more than one person could have been present and she clearly stated that it was dark, she was scared, and that she was forced to keep her head in a pillow the entire time she was being raped, including even when she was being orally assaulted. [JA 3070-71,

3075 “dark”; 3074 “scared”; 3069, 3075, 3264 “pillow”]. While she did not specifically articulate that there were two perpetrators, the victim did tell the police that she could not understand how she could be on her knees bent over with her head in a pillow, while being assaulted, yet she could see the legs of someone standing up. “He had me down on the floor all the time and he was always standing up, ...” She thought this was odd and would be “out of proportion” to what was going on with her during the assault. [JA 3075] This observation by the victim was confirmed by the Chief Investigator for the Clarksburg Police Department, retired Detective Robert Matheny, in his deposition in this Habeas [JA 8098-03] when he explained his original investigative checklist where he questioned how the victim could be raped while in the kneeling position yet see a perpetrator’s legs in the standing position behind her. [JA 7285] Detective Matheny believed that the victim’s statement indicated multiple perpetrators and not a single perpetrator. [JA 8098-8103]

One of Mrs. L’s attackers, Petitioner Joseph Buffey, was identified during the investigation of another felony committed late on the night of November 30, 2001 or the early morning hours⁵ of December 1, 2001 at the Clarksburg Salvation Army. The Petitioner, Joseph A. Buffey, along with two accomplices, Andrew Locke and Ronald Perry, had broken into the Salvation Army church and meeting hall and had stolen the Christmas gifts and numerous other items. Sometime after robbing the Salvation Army, Mr. Buffey had joined his friend and cohort in crime, Adam Bowers, and burglarized the victim’s home.⁶ Mrs. L lived alone and this was known

⁵ The exact time of the Salvation Army crime and the robbery and sexual assault of the victim involved in this Habeas is not precisely known; see Joint Appendix 7819 [hereinafter referred to as: “JA”].

⁶ Mr. Buffey and Mr. Bowers may also have broken into other houses that same evening; [JA 2429-31].

by both Bowers and Buffey as Bowers had been the victim's paper delivery boy and Buffey had dated a girl who lived in the house next door or two houses from the victim. [JA 4108, 2432-36 & 7781 girlfriend Holbert; 6634-35, 6660-61 paperboy]

Law enforcement learned that Joe Buffey had been one of the persons who robbed the Salvation Army after questioning Ronald Perry on December 6, 2001. Mr. Perry had been arrested for the Salvation Army robbery after stolen items from the Salvation Army were found in Mr. Perry's living quarters at the Parson's Hotel. During the questioning, Mr. Perry positively identified both Andrew Locke⁷ and Mr. Buffey as the other participants in the Salvation Army robbery. [JA 3119-20, 3123] Perry also confirmed that Mr. Buffey had separated from him [Perry] and Mr. Locke after the Salvation Army robbery. Perry stated that Mr. Buffey "went across the bridge", which led to Bridge Street where the victim lived. He also confirmed that Mr. Buffey had a large knife with him on November 30th during the Salvation Army robbery and that later Mr. Buffey indicated to Perry that he [Buffey] had broken into a house and "hit the jackpot." [JA 3120-25] Perry also stated that Mr. Buffey was wearing a hat on the night of the Salvation Army robbery and that he had it "on backwards." This would explain why the victim described her observation of something on the perpetrator's head but it had no bill, which is how a hat on backwards would appear. [JA 3079].

After Mr. Perry was arrested and questioned, law enforcement apprehended both Buffey and Locke on December 7, 2001, a week after the sexual assault and robbery of Mrs. L . Locke provided incriminating information to the police which had come from Mr. Buffey. Such information included Mr. Buffey's admissions to Locke made shortly after the rape and robbery of

⁷ Perry knew Mr. Locke as "Blair" but he identified him to Clarksburg Police from photographs; [JA 3123].

the victim that Buffey had not returned with Locke after the Salvation Army robbery, and Buffey had told Locke the next morning that he [Buffey] had "robbed other places in the same area" where the Salvation Army was located including robbing an "elderly lady's home." Buffey also told Locke that "things didn't go as planned" at the elderly lady's home because she was home during the break-in and he [Buffey] had used a knife to rob her; [JA 3242-45]; importantly, Locke also told police that he [Locke] on the evening of the sexual assault observed that Buffey had a condom with him before they robbed the Salvation Army and that it would be unlikely that Buffey's semen [DNA] would be found at the crime scene. [JA 3245] Locke also reported to authorities during his commitment evaluation on January 24, 2002, that Buffey had admitted to him [Locke] that he [Buffey] had committed the sexual assault and robbery of the "84 year old" victim. [JA 4109-10]

Mr. Buffey was also arrested on December 7, 2001, for the Salvation Army robbery in which he clearly participated.⁸ While being questioned about his participation in the Salvation Army robbery, Mr. Buffey was questioned about the rape and robbery of Mrs. I . Mr. Buffey admitted that he had been in the victim's house on the night of the rape and robbery. [JA 3053] When asked if he [Buffey] was involved in the entering of a residence he stated, "I, I don't believe that I was." *Id.* He then admitted he had broken into houses but that he "don't [sic] know what happened after that." *Id.* Buffey was then asked "What house did you break into Joe?" and he responded "This old lady's house." *Id.* He then admitted to the detectives that the old lady's house was in Hartland near the Pepsi Cola Plant.⁹ *Id.* Buffey also stated that the "old woman flipped on

⁸ Mr. Buffey's fingerprints were found on the Salvation Army safe that he attempted to drill open during the robbery on the evening hours of November 30, 2001. [JA 3088-89, 7763]

⁹ Hartland was where the victim lived and her home was within 100 yards of the Pepsi Cola Plant.

me, that's all I remember." *Id.* Buffey then confirmed that his prior girlfriend, Sarah Holbert, lived in the "same neighborhood" as did the victim. [JA 3054] Buffey also admitted that he had a knife with him when he entered the "old lady's" home and that he had cut the phone cord, which had been cut [JA 6878], and that all of this occurred on the same night that he had robbed the Salvation Army. [JA 3055] Buffey admitted that he did not go with Locke and Perry after they together robbed the Salvation Army, but that he stayed in the area¹⁰ and broke into the victim's house. [JA 3056] Buffey at first stated that he could not remember if "anything ... happened inside the house." *Id.* But when directly asked if he had sex with the "lady that was in the house" he responded that he didn't "remember." [JA 3054-56; 3059] In response to three separate questions by law enforcement about whether he had sex with the victim, Buffey responded, not that he was innocent, or that he had an alibi, but that he could not remember whether he had sex with the victim. *Id.* Buffey asked the detectives to turn off the tape recorder so he could think, which they did. [JA 3057] Thereafter, Buffey stated he could not remember what happened inside the victim's house, but he did admit to having a condom with him the night Mrs. L was assaulted. [JA 3058-59]

Mr. Buffey's recorded statement to the Clarksburg Police began at 3:25 a.m. and ended at 3:51 a.m. The delay was to accommodate Me. Buffey's request for a polygraph [JA 3182], which was administered by Sgt. Dallas Wolfe of the West Virginia State Police. Sgt Wolfe whose home was in Preston County, was contacted around 8:00 p.m. by State Police Sgt. Menendez at the request of Detective Matheny. [JA 3181] Sgt. Wolfe arrived in Clarksburg at approximately 9:30 p.m. to begin the polygraph process. He gathered some basic information and interviewed Andrew Locke

¹⁰ The victim's house was very close, within 300 to 400 yards of the Salvation Army building which Buffey had robbed that night.

who related to Sgt. Wolfe the admissions Mr. Buffey had made to him. [JA 3181-82]

Sgt. Wolfe *Mirandized* Mr. Buffey at 11:00 p.m. and continued the interview process until the polygraph examination ended around 1:00 a.m. [JA 3183] Mr. Buffey initially denied to Sgt. Wolfe that he broke into the victim's home or that he assaulted her. [JA 3182] Sgt. Wolfe then administered the polygraph asking if Mr. Buffey he had had sex with the "old lady", used a knife or stole money form the old lady's house. [JA 3183] Sgt. Wolfe's interpretation of the polygraph indicated that Mr. Buffey was being deceptive. *Id.* Sgt. Wolfe left the interview room at 3:18 a.m. and Detectives Matheny and Wygal entered to begin their interview of Mr. Buffey. *Id.* Detective Wygal then exited the interview room and related to Sgt. Wolfe that Mr. Buffey had admitted that he had entered Mrs. L 's house but he still denied that he raped her. Buffey then denied both statements to the Detectives. [JA 3183-84] Sgt. Wolfe re-entered the interview room with Mr. Buffey and Buffey admitted to Sgt. Wolfe that he had entered the victim's house but denied raping her. *Id.* ¹¹

At the conclusion of the interviews of Locke and Buffey on December 7th and early on December 8th, Joseph. Buffey was charged with the sexual assault and robbery of the victim, L

L : Experienced counsel was thereafter promptly appointed by the Court and Mr. Buffey's case bound over on December 13, 2001, to the January 2002 Term of the Grand Jury. [JA 0051-52] Plea negotiations were ongoing until February 11, 2002 when Petitioner and his counsel appeared in open Court and Petitioner entered guilty pleas pursuant to the written plea bargain. [JA 4214] The Trial Court desired a pre-sentence evaluation and deferred acceptance and

¹¹ After Sgt. Wolfe left the interview room Detective's Wygal and Matheny took Mr. Buffey's tape recorded statement where Mr. Buffey admitted being in the victim's house when she was robbed and assaulted. [JA 3052-66]

sentencing pending receipt of such evaluation which occurred on May 21, 2002. [JA 4268] Petitioner never asserted his alleged innocence¹² during the felony proceedings at any time prior to entering his plea of guilty on February 11, 2002, or thereafter during his sentencing or at his restitution hearing.¹³ [JA 4214, 4268, 6856] Even when Petitioner corresponded with the Trial Court in seeking assistance at his parole hearing in the Summer of 2006, Mr. Buffey did not assert that he was innocent of the rape and robbery. He also did not mention his being somewhere other than the victim's home when the assault occurred, i.e. present an alibi, nor did he deny assaulting and robbing her. [JA 104]; Petitioner's 2006 letter referenced by the Trial Court in its Final 9(c) Order denying habeas relief is not contained in the Joint Appendix but is attached to this Response Brief as "**Exhibit A.**"

Such conduct is not consistent with an innocent man wrongfully incarcerated. On the contrary, such conduct clearly invokes the United States Supreme Court's holding in U.S. v. Davila, ___ U.S. ___, 133 S.Ct. 2139, (2013) wherein the high Court held that a "silent defendant" i.e. one who does not complain about an obvious matter cannot later complain, like here where Joseph Buffey plead guilty while purportedly being innocent, and then three months later appears before the Court for sentencing, and not only fails to protest his innocence, but apologizes to the victim for

¹² Petitioner failed to tell his counsel, Thomas Dyer or attorney Dyer's investigator, Gina Lopez, who happened to be related to Mr. Buffey, or the Court, the Prosecuting Attorney's Office or anyone else who testified at Petitioner's 2013 Habeas hearing that he was innocent. [JA 4192]

¹³ The transcript of the restitution hearing conducted on June 27, 2002, contains several errors regarding the identity Buffey's counsel, who was Mary Dyer of Dyer Law Offices [JA 6858], and not the counsel listed on the cover sheet [JA 6857-58]; this is important as Mr. Buffey admitted and confirmed to his then counsel Mary Dyer at that hearing that he had raped and robbed the victim [JA 8699]; also the date of the proceeding identified as June 27, 2001 is incorrect as it was conducted on June 27, 2002 after Petitioner's May 21, 2002 sentencing hearing [JA 4268].

what he had done. Compounding these facts is Petitioner's appearance one month later before the Court for a restitution hearing, after having been sentenced to 70 years in prison, and confirms his guilt to his attorney Mary Dyer [JA 750, 790, 855, 863] and still does not protest his innocence to the Trial Court or anyone else. see State's Brief, *infra* at 33-34 for discussion regarding Petitioner's admission of guilt to his attorney at the restitution hearing. Such silence must be looked upon as highly suspicious and indicative of falsification, when suddenly, right before Mr. Buffey files a habeas petition, he asserts that he was totally innocent all along. The facts in Davila are strikingly similar and support a finding by this Court that Mr. Buffey had every opportunity to assert his innocence, if he was truly innocent, well before filing his first *pro se* Habeas action on November 13, 2002. accord, U.S. v. Bowman, 348 F.3d 408 (4th Cir. 2003).

Petitioner's habeas journey took many turns. Petitioner did not file his *pro se* Habeas complaint until after his sentencing on May 21, 2002, his restitution hearing on June 27, 2002 and his Motion for reduction of sentence on August 20, 2002. [JA 7819] Petitioner was provided a full Losh omnibus hearing on March 12, 2004 at which time the Trial Court [Judge Thomas A. Bedell] discussed the "Checklist of Ground for Post Conviction Habeas Corpus Relief." [JA 4309-16] The Trial Court inquired if the Checklist was accurate, completed without any duress and in consultation with his attorney, and then had Mr. Buffey and his counsel sign it and it was made an exhibit to the 2004 Habeas proceeding. [JA 4313]

Subsequently, Petitioner filed the instant Habeas proceeding on April 19, 2012. The Petition was permitted to be amended. [JA 0371] A second Omnibus habeas [Petitioner had his first

Omnibus hearing on March 12, 2004], lasting more than three full days,¹⁴ was held on July 10-13, 2013. [JA 1347-2696]. At the conclusion of the 2013 Omnibus Habeas hearing, after extensive post-hearing briefing and oral argument, the Trial Court [Judge Thomas A Bedell], denied relief to the Petitioner for various reasons including, Petitioner's failure to carry his burden of proof, application of *res judicata*, and lack of credibility of the Petitioner. [JA 001-119]

I. Petitioner Was Not Denied Due Process When He Accepted a Plea Bargain, Voluntarily Pled Guilty and Knowingly Decided to Admit His Guilt Before Receiving the DNA Testing Results from Crime Scene Evidence:

- a) No Brady Violation Has Been Substantiated;**
 - i) The 2002 DNA Report was not Exculpatory;**
 - ii) Buffey was not Prejudiced by Not Receiving the DNA Report Before Pleading Guilty as He Well Knew He Could Have Waited Until It Was Received Before Accepting the Plea and He Voluntarily Waived That Right;**
- b) There Was No Constitutional Error Regarding Petitioner's Guilty Plea, So Petitioner Was Not Entitled to Raise Any Issue Not Raised on Direct Appeal or In His First Omnibus Habeas Proceeding in 2004.**

Petitioner has asserted in this second successive Habeas Petition that his claims are not barred by *res judicata* as there is new evidence i.e. the 2012 DNA results that establish his actual innocence, as well as a Brady violation regarding untimely disclosure of the original WVSP DNA testing results. Both assertions were rejected by the Trial Court for multiple reasons including that such claims were made in the 2004 Omnibus Habeas and rejected at that time, and are thus barred by *res judicata*, and because the 2012 DNA test results are not substantially different than the original

¹⁴ The Omnibus hearing began each day at approximately 8:30 a.m. and lasted each day until after 8:00 p.m. except for the last day. [JA 1813, 2321 and 2695]

WVSP laboratory's DNA testing results which Petitioner knowingly decided not to wait for the results so that he could accept the proffered plea bargain. [JA 066-079]

The Petitioner asserted in his 2004 Habeas that his guilty plea was involuntary due to the late disclosure and/or the intentional suppression of the DNA results before he was sentenced on May 21, 2002. Petitioner asserted these claims based upon, *inter alia*, that the WVSP DNA report dated April 5, 2002 [JA 6731-33] which stated that "Assuming there are only two contributors (L [sic] L to the mixture of DNA identified... Joseph Buffey is excluded as the donor...." somehow affected the validity of his guilty plea. However, Petitioner did not provide any convincing evidence at either the 2004 Omnibus hearing or the 2013 Omnibus hearing demonstrating how his not being aware of the DNA test results influenced his decision to plead guilty.¹⁵ The Trial Court found in the 2004 Habeas that Petitioner had failed to prove any late disclosure of exculpatory evidence (Brady violation) or any intentional suppression of evidence amounting to prosecutorial misconduct. [JA 9007-09] Although such finding by the Trial Court constitutes *res judicata* under Markley¹⁶ in this current Habeas proceeding, the Trial Court made the same findings, albeit in more detail, in the Final Rule 9(c) Order entered in this Habeas where the Trial Court found that

¹⁵ Of course, Petitioner has provided no basis to overcome the presumption of waiver by his failing to raise this issue on direct appeal from his conviction upon his plea of guilty as required by law, as Petitioner did not appeal his conviction to this Court. [JA 4674]; Syl. pt 5 Lavigne, *supra*, citing W.Va. Code §53-4A-1(c); Petitioner had four months from his conviction and sentencing order to file such appeal; W.Va. Code ¶ 58-4-4, which one would think a truly innocent man would have asked his counsel to file or filed it *pro se*, as he did the first Habeas [JA 7704]; but Petitioner did not do so and this is telling; one explanation is that Petitioner had not yet executed his alibi conspiracy with Ronald Perry until they were incarcerated together in Huttonsville Correctional Center; [JA 7979]; the Trial Court found in the 2004 Habeas, as a matter of fact based on an evaluation of the credibility of Buffey's testimony and his counsel, Thomas Dyer, that Mr. Buffey had never requested an appeal be filed after his plea of guilty. [JA 9007]; this finding is *res judicata* foreclosing further inquiry in this current Habeas proceeding.

¹⁶ Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49 (2004).

Petitioner's guilty plea could not have been influenced by not receiving the 2002 WVSP DNA test results as 1) the Petitioner testified that he knew that the DNA testing was being done, but he freely chose not to wait for the results before accepting the plea bargain and voluntarily pleading guilty, 2) that he told his counsel that his DNA would not be found at the crime scene (most likely because Petitioner knew he had used a condom during the vaginal assault), and that Petitioner clearly stated that the outcome of the DNA test results was not a factor in his deciding to admit his guilt. [JA 2464-69; 068-71, ¶ 36-42 (¶ refers to Paragraph number in document)]. It is very clear that this claim, i.e. suppression of DNA testing results, cannot be grounds for habeas relief if the DNA testing results were not relied upon by Mr. Buffey in accepting the plea agreement and admitting his guilt as Mr. Buffey clearly testified that the DNA testing results were not a material consideration in his decision to plead and he would have pleaded guilty irrespective of such DNA results. *Id.* see, U.S. v. Ohiri, 287 Fed. App'x at 36, *infra*, ["In the context of an attack on the validity of a plea, evidence is considered material where there is a reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial."] The DNA test results had no effect on Petitioner's decision to plead guilty nor would they have changed Petitioner's decision to accept the plea bargain if he had received them prior to entering his plea.¹⁷

The Trial Court properly held under the law that a defendant who knows that forensic testing

¹⁷ Petitioner relies upon his counsel's statement that he would have "put the brakes" on the plea but the Record belies this statement as Petitioner told his counsel Mr. Dyer that his DNA would not be found on the crime scene evidence so Dyer already knew that the results would be favorable as Petitioner had used a condom during the assault; [JA 1942-43]; Dyer further testified that he told Petitioner that if his DNA was not going to be found why plead and that Petitioner still wanted to go forward with the plea which was his right to accept the plea bargain; [JA 2076-89], see State v. Hatfield, 186 W.Va. 507, 413 S.E.2d 162 (1991), overruled on other grounds, 878 F.Supp. 2d 633 (S.D. W.Va. 2012).

is ongoing but chooses not to wait for the results cannot later complain that such results may have been favorable. However, the DNA testing results were not totally exculpatory under the facts in this case¹⁸ as Petitioner asserts, and Mr. Buffey knew he could wait for such results if he so chose. However, he wanted to accept the plea bargain and perhaps admit his guilt due to his remorse regarding his heinous conduct. There can be no influence by DNA testing results of which Mr. Buffey was could have been aware, nor was there any suppression as Petitioner was not compelled to go to trial without the benefit of the DNA test results. Petitioner could have waited for the DNA test results and proceeded to trial. A Brady violation requires suppression that prejudices a defendant at trial. Not mere conjecture about what Petitioner may have done had the results been provided sooner when he was under not compulsion to plead when he did. The dilemma faced by Petitioner is one faced by all accused. That is the pressure of deciding how to proceed when a plea bargain is offered. However, the United States Supreme Court decided long ago that such pressures are not unconstitutional, or undue as they are faced by everyone in such serious and consequential situations. Even when a defendant is under threat of filing more severe penalties if a plea bargain is refused, the pressure, while severe, is not unconstitutionally undue. Bordenkircher v. Hayes, 435 U.S. 918 (1978).

The Trial Court also confirmed in its Final Rule 9(c) Order in this current Habeas, just as it found in the 2004 Habeas proceeding, that there was no suppression of the April 5, 2002 DNA results even though the Report was not returned to the Clarksburg Police until July 12, 2002, as it

¹⁸ The DNA mixture contained minor male DNA from males other than the major contributor Adam Bowers so these results cut both ways; its only if one believes that there was just one rapist that the DNA results become truly exculpatory as otherwise evidence that Buffey used a condom and the presence of other male DNA eliminates the exculpatory force of the DNA testing results.

was returned with the crime scene evidence that had been tested. [JA 9008] The reason for such delay was that Mr. Buffey had already plead guilty on February 11, 2002, which after admitting his guilt under oath in open Court, made the return of the crime scene evidence which included the report a lesser priority for law enforcement. [JA 4604-11 & 4417-19]

In arguing that such was a Brady violation, Petitioner ignores the factors necessary to be demonstrated before Brady is implicated. "There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83,83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Hatfield. 169 W.Va.191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) **the evidence must have been material, i.e., it must have prejudiced the defense at trial.**" State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119, (2007) (emphasis added). The Petitioner's evidence failed the second and third prongs of the Youngblood components sufficient to establish a Brady violation at trial. Petitioner chose to waive his constitutional right to a jury trial and there is authority that Brady obligations are different when a defendant maintains his innocence and proceeds to trial as opposed to admitting his guilt in a valid Rule 11 proceeding as did Mr. Buffey.

The United States Supreme Court held in U.S. v. Ruiz, 536 U.S. 622 (2002), that entry of a guilty plea waives any constitutional right to the disclosure of Brady impeachment evidence, and perhaps waives the right to receive exculpatory evidence unless such evidence demonstrably proves innocence, and the failure to receive such Brady material before a plea is entered may not be used as a ground to collaterally attack a guilty plea. [accord, Ankeney v. Jones, 2012 WL 4378215 (D.Col. 2012)]; this makes sense as a plea is voluntary, a defendant does not have to enter a plea, and

alternatively may seek trial with all its constitutional protections. This is especially true under the circumstances of this case where Mr. Buffey was well aware that forensic testing [DNA] was being conducted on crime scene evidence which might result in evidence either helpful or harmful to his case.¹⁹ In this case, the forensic results were neither exculpatory or inculpatory as the presence of multiple male DNA at the crime scene that could not have come from the major male DNA contributor, now known to be Buffey's good friend Adam Bowers, "cuts both ways" and is not the typical exculpatory evidence discussed in most Brady violations, especially when the defendant pleads guilty while being aware of the ongoing testing at the time of the plea. *Id.* Of greater significance was that Mr. Buffey was not prejudiced by not receiving the DNA report until after he was sentenced as Mr. Buffey had unequivocally stated that he was aware of the ongoing DNA testing but he chose not to wait for the results before accepting the plea bargain. [JA 066-079, 2464-66, 7786-88] Such voluntary decision to forgo waiting for forensic testing, even when your counsel recommends that you should wait as Mr. Dyer testified, cannot form the basis of a constitutional Brady claim, otherwise, the State would not be able to take a plea until all discovery materials had been obtained and provided to a defendant including results of all forensic testing regardless of whether the defendant wanted to admit guilt and accept a plea bargain. Such a legal requirement would be fraught with danger and cause chaos in the criminal justice system as prosecutors and courts would be reluctant to accept pleas until all discovery provided to a defendant, including forensic testing not yet begun, nor could testing ever be stopped regardless of a plea being entered. This is not a case where the defendant was unaware that DNA evidence had even been recovered or

¹⁹ State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982)[evidence at issue must be favorable to the defendant as exculpatory or impeachment] citing Brady v. Maryland, 373 U.S. 83 (1963).

not aware that it was being tested. Here, Buffey was well aware of what was being done. Brady is triggered when a defendant proceeds to trial and is deprived, either knowingly or inadvertently, of exculpatory evidence or significant impeachment evidence known to the State. That is the hallmark of a Brady violation which is not present in this case. State v. Elswick, 225 W.Va. 285, 693 S.E.2d 38 (2010)[“Suppressed evidence is considered material only if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed.”citing State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007)] As is clear from Petitioner’s own testimony, the DNA test results, even if favorable, would not have influenced his decision to admit his guilt to the crimes he committed. [JA 2464-69; 7786-88; 7800]

II. Petitioner Failed In Sustaining His Burden to Prove “Actual Innocence” Sufficient to Warrant Habeas Relief?

- a) **Petitioner Cannot Prove “Actual Innocence” i.e. no Possibility of Having Committed the Crimes to Which he Admitted;**
- b) **Petitioner Plead Guilty to Sexual Assault and Robbery and Provided a Factual Basis for Both Crimes and Neither Petitioner’s Assertion that Only a Single Perpetrator Committed the Crimes nor the New DNA Test Results Prove Manifest Injustice;**
 - i) **DNA Test Results have Absolutely no Bearing on Petitioner’s Plea to Robbery.**

Petitioner’s claim of “actual innocence” however identified, should fail as Petitioner never asserted such claim on direct appeal and such claim is therefore waived.²⁰ Also, this same claim

²⁰ See footnote 15 *supra*.

was decided adversely to Petitioner in the 2004 Habeas [JA 9010] and is *res judicata* precluding a second judicial review. State's Brief, *infra*, pp.54; Markley, *supra*.

Petitioner has also failed to sustain his heavy burden of proving manifest injustice i.e. factually impossible that Petitioner could have committed the crime, to demonstrate his alleged "actual innocence." Joseph Buffey failed to prove any facts or circumstances that would result in a finding of manifest injustice to him if his guilty plea was allowed to stand. This current Omnibus habeas proceeding was not a trial on the merits, but a discretionary hearing allowing Mr. Buffey to have every opportunity to demonstrate a clear constitutional violation that may have resulted in a manifest injustice. Although neither the Federal or State Constitutions recognize the freestanding claim of "actual innocence", what Petitioner is attempting to assert is that he is factually innocent. Smith v. McBride, 224 W.Va. 196, 681 S.E.2d 81 (2009) at f.n. 44. This is not the same as an insufficiency of the evidence claim or a claim that a reasonable jury may not have convicted Petitioner had he chosen trial instead of admitting his guilt. *Id.* at 93, f.n. 44. It is another means of asserting that it was factually impossible for the Petitioner to have committed the crimes to which he plead. Petitioner's burden in this regard is significant and practically insurmountable after a guilty plea where a factual basis for guilt is provided. Although this Court has not articulated the standard of proof for such a claim, if such a claim is recognized, it most definitely would require a showing, at a minimum, of manifest injustice, if not more.²¹ Matter of Investigation of West Virginia State

²¹ If considered as a stand alone ground for habeas relief rather than a means of circumventing procedural bars to habeas relief, a claim of "actual innocence" should require clear and convincing proof that it was factually impossible for the habeas petitioner who pleads guilty to have committed the crime he or she was convicted; such a situation would exist where the accused was undeniably in a location where it would have been physically impossible for the accused to have committed the crime; McBride at f.n. 44; otherwise, such claims merely become insufficiency of the evidence claims which are not cognizable in post-conviction proceedings and very suspect when a defendant has plead guilty in a proper

Police Crime Laboratory, Serology Div., 190 W.Va. 321, 327, 438 S.E.2d 501, 507 (1993).

Petitioner has not presented evidence to demonstrate that it was factually impossible for him to have participated in the sexual assault and robbery of the victim in this case. To the contrary, the evidence adduced at the recent Omnibus hearing does not in the least suggest that it would have been factually impossible for Petitioner to have committed the crimes to which he plead guilty. Unfortunately for Mr. Buffey, the evidence which he produced proved his involvement rather than his “actual innocence.” This was why the Trial Court found no manifest injustice and denied all relief. [JA 106-07, ¶ 143-45] The Record amply demonstrates that Mr. Buffey had the opportunity to have committed these crimes as he admitted his presence in the area of the victim’s home and his fingerprints were found at the Salvation Army crime scene [JA 7377], and two of his co-conspirators in that criminal activity confirmed his presence in the area and his leaving them after participating in the Salvation Army crimes which was two blocks from the victim’s home. He also had the motive for robbery of the victim, i.e. financial gain, as he had committed several robberies of other locations in the area immediately previous to the rape and robbery of the victim. All of which he admitted. [JA 7756-59]²² This evidence coupled with Petitioner’s incriminating admissions to law enforcement and his criminal associates and his attorney Mary Dyer, is more than sufficient for the Trial Court in its discretion to have denied habeas relief, especially when the Trial Court’s findings of fact are accepted by this Court unless clearly erroneous. See generally, McBride v. Lavigne, 230 W.Va. 291, 737 S.E.2d 560 (2012); State v. Robinette, 181 W.Va. 400, 383 S.E.2d 32 (1989) This

Rule 11 proceeding;

²² Petitioner also admitted to the Clarksburg Police and the West Virginia State Police that he was in the home of the victim on the night of the sexual assault and robbery; [JA 3054-56]

Court surely cannot conclude on this Record that the Trial Court's findings of fact, especially regarding credibility of the witnesses, was clearly erroneous.

Petitioner was also familiar with the area in which the victim lived and likely knew she lived alone as he had dated a girl who lived close to the victim [JA 3054, 4108, 2432-36 & 7781] Also the other perpetrator, who was Buffey's close friend, Adam Bowers, had been the victim's newspaper delivery boy and he also lived close to the victim; [JA 6634-35, 6660-61]; the statements of Ronald Perry [JA 3141-43, 4585-87] and Andrew Locke [JA 3242-45] regarding Buffey's admissions to them are convincing evidence of Petitioner's involvement in the rape and robbery. How else would they have known the details they related to law enforcement and what would be their reason for fabricating such as story. It is of no consequence for Petitioner to now claim that these individuals are not credible as such argument is for trial not habeas relief. However, it is only Petitioner's speculation as to the credibility of Perry and Locke. It is undeniable that both Perry and Locke had the opportunity to observe and hear what they related to law enforcement early in the investigation and for Petitioner to argue that these witnesses lack credibility proves manifest injustice is woefully misplaced, and bluntly a losing argument. Such assertions are more bluster than fact as Petitioner failed to call Andrew Locke as witness at the current Habeas hearing even after the Trial Court had arranged for Locke to appear by video conference. Petitioner failed to call Locke for the Trial Court to evaluate Locke's credibility or lack thereof and Locke was also supposed to be an important alibi witness. This failure is akin to the missing witness and a strong inference against Petitioner can be drawn from such failure to call Locke. [JA 2329-31] Most probably Locke was not called as Locke had previously reported to the authorities on January 24, 2002, that Buffey had admitted to him that he [Buffey] had raped and robbed the "84 year old woman". [JA 4110]

Petitioner's trial attorney Thomas Dyer testified that Petitioner never told him that he was innocent and that he had not committed the sexual assault or robbery of the victim, even after repeated requests by his counsel and opportunities to do so; Mr. Dyer's testimony at the 2004 Omnibus hearing and the 2013 Omnibus hearing is replete with testimony that he implored Petitioner to tell him he [Buffey] didn't commit the crimes, but Petitioner never did deny it; *see* generally, [JA 1994-98; 2012-14; 2064-65; 2078-80; 4484-4501] Petitioner also called as his witness Mr. Dyer's investigator, Gina Lopez, who also happened to be Petitioner's cousin. On cross-examination she testified that Petitioner never denied that he had committed the crimes when she, Petitioner and Mr. Dyer were discussing the plea at the Regional Jail; she stated that she would have remembered if Petitioner had said he was innocent or protested that he was considering a plea if he didn't do it, as she would not have "stood for that;" she also stated that Petitioner never asked to wait for the DNA test results before accepting the plea bargain; [JA 1918-23]; such testimony of Ms. Lopez supports Mr. Dyer's testimony because surely if Petitioner had told his attorney he was innocent, Mr. Dyer would have related that information to his investigator.

Petitioner also incredibly denied knowing or associating with Adam Bowers ²³ who has been identified as the major male DNA contributor of the DNA recovered from the crime scene. He did this for obvious reasons including that he did not want to be associated with Bowers now that Bowers' DNA has been placed at the crime scene on the victim's bedding. [JA 2414-13] The Trial Court heard Petitioner's testimony on this issue and could find it nothing but incredible.

²³ Adam Bowers gave sworn statements that he was not in the victim's home even though his DNA was found in her bedding and also that he did not know Buffey even though he frequently associated with Buffey and tried to have sex with Buffey's pregnant girlfriend in October 2001 prior to the rape and robbery [JA 6622; 6640]; see also State's Brief at Section III at 35.

Testimony provided by witnesses Shantelle Shaffer and Danny Moore²⁴ as well as the uncontroverted evidence that Adam Bowers had been at Joseph Buffey's home on October 28, 2001, approximately one month before the sexual assault and robbery, as established by the Clarksburg Police Incident Report where Adam Bowers attempted to have sex with her [JA 3224-26]²⁵ after all of them, Petitioner, Petitioner's sister, Adam Bowers and others had been hanging out at Petitioner's mother's home. Ms. Shaffer also testified that when she had stayed at Petitioner's home that he and Bowers would come there after robbing cars to count the money. Such testimony convincingly proved that Petitioner and Bowers were friends and criminal associates having previously committed crimes together. The lack of candor by Petitioner as to his relationship with Mr. Bowers, obviously lead the Trial Court to the ineluctable conclusion that Petitioner was trying to hide his relationship with Bowers because they both were the perpetrators who sexually assaulted and robbed the victim in this case. Petitioner most likely did not want his connection with Bowers to be discovered prior to accepting plea agreement and this attempt to hide Petitioner's connection to Bowers became obvious to the Trial Court during the current Habeas hearing. [JA 2523-50; 2555-68; 2590-97]; see also Brief *infra*, at Section III at 35.

Petitioner also failed to convincingly prove that the evidence demonstrated only to a single perpetrator. The evidence showed that the 83 year old victim was assaulted in her home during the

²⁴ Petitioner testified that Mr. Moore was his best friend. [JA 2495-96]

²⁵ Shantelle Shaffer was 13 years old at that time and pregnant with Petitioner's child; it is likely that Bowers had been told by his friend Buffey that he and Shantelle had been having sex and Bowers sought the same for himself; Petitioner had denied knowing that Shantelle was pregnant prior to his arrest on December 7, 2001, but he had told Andrew Locke she was pregnant as Locke disclosed this to law enforcement during his interview on December 7, 2001. [JA 3246; 2455-58]; Petitioner's testimony was deceptive at best.

early morning hours after being awoken from sleeping, that it was dark with the perpetrator using a flashlight to illuminate the immediate area, and that she could not view her surroundings well due to such darkness. The victim also stated in her police interview at the hospital that she was on the floor, facing away from her attacker the entire time of the assault and was also forced to place her head in a pillow so she couldn't see her assailants. [JA 3070-71, 3075 "dark"; 3069, 3075, 3264 "pillow"] She was even forced to put her head in a pillow while performing oral sex. *Id.* However, the victim told law enforcement that she could not understand how she could be on the floor, with her head close to the floor and yet the perpetrator always appeared to be standing when she was able to look back. This she thought was strange as it was disproportional to her position on the floor. [JA 3073-75] Petitioner speculates in his Brief that such a scenario, i.e. two perpetrators performing sex acts could not possibly occur without the victim not discerning it. Petitioner speculates that such is inconceivable. However, such a scenario is not inconceivable and the burden to prove Petitioner's impossibility to have committed these crimes rests with Petitioner to demonstrate manifest injustice which he cannot do by mere speculation. 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, especially if they did not speak to each other. Once the victim was forced to bury her face in a pillow they could have easily been in the same room and have communicated by hand motions or whispers and the presence of both attackers not be realized by the victim. That the victim might not perceive two attackers is not impossible considering she was 83, just awakened from her sleep, had a flashlight beam in her face where it was otherwise dark and was forced to cover her face and head in a pillow, was traumatized and scared. The victim's powers of observation were obviously less than ideal. The mere fact that the victim was forced to turn facing

away from her attackers and have her head buried in a pillow demonstrates a desire by her attackers to conceal their identity. Such a scenario of two perpetrators is not possible, but rather highly likely under the facts of this case.

The time to have tested such “inconceivable scenario” was at trial, not in a post-conviction habeas. However, Detective Matheny testified that at the time of his investigation he thought there could have been more than one perpetrator and noted it as part of his investigation. [JA 8098-03, 7285] Finally and importantly, Petitioner’s trial counsel, Thomas Dyer, testified that he believed there was more than one perpetrator based on Petitioner’s statements to him. [JA 1950-59] The evidence at the current Omnibus hearing indicated that more than a one male’s DNA was left at the crime scene. After identifying Adam Bowers as the major male DNA contributor at the crime scene, Petitioner’s expert’s DNA analysis found, as did the West Virginia State Police in 2002, that additional male DNA, other than the major male contributor Adam Bowers, was left at the crime scene, but the experts differed as to how the other male DNA contributors may have deposited their DNA at the crime scene. [JA 1774-83; 1801-09].

Petitioner still cannot be absolutely excluded as one of those minor male contributors even though such a finding was not necessary to demonstrate his presence at the crime scene as there was substantial circumstantial evidence to prove that Buffey was in the victim’s home and that he used a condom during the sexual assault. The Trial Court discussed the competing hypotheses as to how the various different male DNA was deposited at the crime scene and found that adopting any one theory was unnecessary as there was ample evidence that Buffey was a participant in the sexual assault and his use of a condom would have masked most, if not all, of his DNA. [JA 066-079; 1781-87] But even assuming that one accepts Petitioner’s DNA expert’s opinion as to how the

other male DNA was deposited at the crime scene, his opinion actually supports the Trial Court's original finding in the 2004 Omnibus proceeding that Petitioner could not be excluded as a contributor to the DNA mixture recovered from the crime scene. Petitioner's expert Alan Keel testified that there was definitely more than a single male contributor to the crime scene DNA mixture. [JA 1801-09] One could speculate, using Mr. Keel's theory as to how the unknown male's DNA was deposited at the crime scene, resulting in three different male's DNA found in the mixture. Mr. Keel postulated that Mr. Bowers had sex that same day with another person, presumably a woman, and then transferred a second male's DNA from that woman to the crime scene through surface contact with Bowers penis which still contained the other male DNA. Keel testified that for Buffey's DNA to be in the mixture recovered from the crime scene, there would have to be three different male's DNA in the mixture with Buffey being the third male requiring three perpetrators. [JA 1771-72; 1776; 1801-03] Assuming Mr. Keel's theory that Bower's transferred another male's DNA to the mixture from a prior sex act, then Buffey could be a contributor to the mixture and this would account for three male's DNA being in the DNA mixture when only two of them, Bowers and Buffey, were present to commit the sexual assault. *Id.* Thus, Buffey could not be excluded as a minor male contributor to the DNA mixture retrieved from the crime scene evidence which was the finding made by the Trial Court in the 2004 Habeas final order. Petitioner did not provide any new exculpatory DNA evidence different than that which was known to Petitioner prior to the 2004 Habeas and this issue is likewise barred by *res judicata* and alternatively the very testimony of Petitioner's own expert provides a basis to conclude, as the Trial Judge did in the 2004 Habeas proceeding, that Buffey could not be conclusively excluded as asserted by Petitioner. Trial Court found it unnecessary to determine in this current Habeas proceeding as there was sufficient credible

evidence to place Buffey at the crime scene and his DNA did not have to be present as he used a condom. DNA is only a means of proving that biological evidence was left in the place it was recovered. In this Habeas there was ample other evidence to demonstrate that Mr. Buffey was in the victim's house including his own admissions.

Also significant, Petitioner failed to call the victim as a witness at either 2004 or 2013 Omnibus Habeas proceedings. Petitioner's burden of proving manifest injustice is severe, so failing to call Mrs. L to testify was tantamount to conceding that her testimony would not have supported Petitioner's single perpetrator theory. There are also other reasons the victim should have been called to testify by Petitioner and the none of the reasonable inferences drawn from her absence assist Petitioner in proving manifest injustice. Neither did Petitioner's failure to call other witnesses that a fact finder would assume would provide helpful testimony if called such as Andrew Locke, Sgt. Dallas Wolfe, his mother Dottie Sue Swiger, "Jim", the friend of his Uncle from whom Buffey allegedly stole the knife recovered by law enforcement,²⁶ and his investigator for his 2004 Habeas, retired State Trooper Charles Bramble, who investigated Buffey's purported alibi. The resulting inference is that these witnesses would not support Petitioner's claims in this Habeas. This is especially true with respect to Petitioner's mother who Petitioner stated he told multiple times that he was innocent. Wouldn't such testimony by his mother have been beneficial for the Trial Court to consider? The State called Petitioner's mother Sue Swiger for other purposes and even then Petitioner's counsel did not ask her a single question about her son protesting his innocence. This leads one to a single conclusion—that Petitioner's mother would not have supported his claims of

²⁶ See discussion of Buffey's testimony about stealing the knife **after** the sexual assault; State's Brief *infra* at 37- 38.

innocence. [JA 2196-2203, 2482]

Regarding Petitioner's burden to prove manifest injustice, the Lavigne case is analogous and instructive to the case at Bar. In Lavigne, the father of a five year old child was convicted by a jury of first degree sexual assault. The defendant's appeal was refused and his habeas was granted by the trial court upon finding a constitutional error regarding an erroneous instruction, the disallowance of certain character witnesses, but primarily upon a claim of insufficient evidence as there was absolutely no biological evidence, DNA, linking the father to the sexual assault, only out-of-court statements by the child indicating that it was her daddy who hurt her, or someone who looked like her daddy which statements were not repeated by the child at trial. Lavigne maintained his innocence throughout the proceedings and afterward, including testifying at his trial that he did not commit the crime. This Court reversed the trial court's granting of habeas relief for insufficient evidence observing that "it is not up to a reviewing court, to decide how we would have resolved the case...." *Id.* at 304, 573. This Court took a dim view of the trial court substituting its judgment as to the evidence over that of the jury, especially the trial court's opinion that it would have been highly improbable that the father could have committed the assault with time to eliminate all biological evidence from the crime scene. The evidence in Lavigne, like that in Robinette, *supra*, was not overwhelming and the lack of DNA was no doubt a viable defense. However, the jury determined the facts adversely to Lavigne and Robinette just as the Trial Court determined the facts in this Habeas adversely to Petitioner. See also, State v. LaRock, 196 W.Va. 294, 303, 470 S.E.2d 613, 622 (1996) In the present case, there was no assertion of innocence by Mr. Buffey contrary to both Lavigne and Robinette both of whom asserted their innocence through the proceedings and went to trial. Mr. Buffey never indicated he was innocent of the crimes charged against him when

he plead guilty or afterwards, until he believed he had an opportunity to contest his plea by asserting his DNA wasn't found at the crime scene, and after concocting his scheme to create a false alibi with Ronald Perry. Petitioner believed that these together would win his freedom.

Finally, the Trial Court considered all of the facts and circumstances in this matter before denying Petitioner's request for Habeas relief. This also included the testimony of Petitioner's counsel Mary Dyer, who was a law partner with her husband Thomas Dyer. She testified that Petitioner unequivocally admitted to sexually assaulting and robbing the victim during preparation for a restitution hearing in that case. [JA 8697-99] Petitioner's counsel vigorously attempted to suppress this testimony, not because it wasn't true, but because it was so compelling. [JA 750, 790, 855, 863] The Trial Court however permitted Ms. Dyer's testimony to be substantively considered in this Habeas. [JA 035-36] Ms. Dyer's testimony was compelling because she only recalled Buffey's admission due to a visualization of her own grandmother being in that horrible situation, not because it was startling to her as Petitioner had just recently admitted his guilt at his plea hearing, and had also apologized in open court to the victim and her family for what he had done. [JA 8697-99; 4234-35; 4295-96] This corroboration of Buffey's prior admissions to law enforcement and to co-conspirators Perry and Locke, and his failure to deny that he had committed these crimes or to assert his purported innocence to his attorney and investigator, or to the Court or anyone else, until many months after he was sentenced, was not lost on the Trial Court when deciding the facts in this case. [JA 103-05, ¶ 130-35]

III. The Trial Court Did Not Believe the Petitioner's Recantations or Habeas Testimony and Such Finding is Amply Supported by the Record.

Petitioner answered all of the Trial Court's Rule 11 questions in a credible manner without any hesitation while under oath to the satisfaction of the Trial Court. He told the Trial Court that he understood the charges, had gone over them with his counsel Mr. Dyer, that he understood the potential sentences and the benefits he was getting from the plea bargain with the State. He provided a factual basis for his plea and acknowledged his participation in the crimes stating that he had "broke into a elderly lady's house and robbed her [victim] and forced her to have sex with me". [JA 4234-35] Importantly, he testified affirmatively that he believed his counsel had "done everything that he could or should on your behalf" and that his counsel had not done anything he shouldn't have done. That his counsel had spent sufficient time on the case and that he [Buffey] had no concerns with the quality of his counsel's efforts and that he was satisfied with his services. [JA 4230-33] In summary, he [Buffey] testified that he was completely satisfied with his counsel's representation of him in his criminal case. Petitioner also stated to the Court that he had not been threatened or promised anything and was entering into his plea "freely and voluntarily;" he acknowledged that he was waiving his right to jury trial and his other constitutional rights. [JA 4243-47] The Petitioner plead guilty to each Count of the Indictment as part of his plea bargain. [JA 4233-34] The Trial Court found Mr. Buffey's plea to be complete and consistent with the standards of Rule 11 and the Trial Court believed his statements then, and still believes them to be true today, not withstanding his recantations. Accordingly, the Trial Court denied all relief as to his claims in the 2004 Habeas proceeding which is a *res judicata* bar for any such decided claims in this current Habeas. [JA 9006-07; 077-78]

What Petitioner nor his counsel just do not understand is that the Trial Court's evaluation of Mr. Buffey's credibility was crucial to Petitioner's success in this Habeas as the fact finder must believe in the truthfulness of Mr. Buffey's habeas testimony to conclude that his prior statements made to his criminal cohorts, his attorneys, law enforcement, and the Trial Court were not true. It's as though Mr. Buffey's statements to his criminal cohorts that he was in the victims house, that "things went bad", that he can't remember if he raped the victim, that he tried to persuade Ronald Perry to support an alibi for him and told Perry that he [Buffey] and cousin had raped the victim, that he never told his counsel Thomas Dyer he was innocent, that he confirmed to his counsel Mary Dyer that he had raped and robbed the victim, that he stated under oath at his plea that he robbed and sexually assaulted the victim, that he apologized to the victim for what he had done to her, are to be ignored by the Trial Court and this Court. Such is absurd.²⁷ Petitioner and his counsel want this Court to turn a blind eye to the credibility evaluation faced by the Trial Court, which is understandable as it was adverse. The only way Petitioner is entitled to relief, if at all, is to believe only the Petitioner and to find that all other witnesses were deliberately lying. The Trial Court refused to engage in such fanciful speculation. [JA 107, 039, 093-94] The Trial Court did so with good reason as the Petitioner's conduct throughout both the 2004 Habeas, and this current Habeas demonstrated that he was not believable. The Trial Court weighed adversely to Petitioner many of

²⁷ Another interesting piece of testimony by Mr. Buffey is telling; the victim had told the nurse at the hospital where she was examined that she thought she would be killed by her assailant; she used the phrase "oh my god thought kid was going to kill me for nine dollars" [JA 3268]; when Buffey was asked by law enforcement what the victim said to him during the assault he stated "Oh my God! and stuff" [JA 3062]; during Buffey's habeas testimony he was asked what he had told law enforcement she had said and Buffey stated "along the lines of, oh, my god, don't kill me"; he was then asked is that what she said and Buffey replied "**Yeah-no**, that's what I told the police." Buffey realized what he had said and tried to change his testimony to that's what I told police; he had made a Freudian slip in stating that is what the victim said which was true because Buffey was there to hear it. [JA 2509-10]

his inconsistent and sometimes totally incredible statements, often made under oath, such as:

1) Petitioner's various admissions to Andrew Locke, Ronald Perry, Detectives Robert Matheny and David Wygal, Sgt Dallas Wolfe, WVSP, to his attorney Mary Dyer, to the Trial Court at his plea hearing and to the victim during allocution at sentencing, that he was in the victim's home on the night of the attack and that he had raped and robbed her; [JA 3242-45, 4109-10, 3053-59, 3181-84,4295-96]

2) Petitioner never asserted his innocence to his attorneys or the Court or in his 2006 letter to the Court; [JA 4214, 4268, 6856, **Exhibit A**];

3) Petitioner testified inconsistently about his desire to wait for the DNA testing results and whether such results had any influence on his decision to admit his guilt and accept the plea bargain; [JA 2464-69; 7786-88; 7800; 4543-46];

4) Petitioner claimed he had an alibi but in the 2004 Habeas hearing during questioning by his counsel, Mr. Buffey did not testify or even mention an alibi defense; [JA 4538-50]; this was due to his criminal cohort Ronald Perry having disclosed Buffey's scheme to attempt a false alibi defense with Perry's perjured testimony; however, Perry failed to complete the conspiracy by advising law enforcement of Buffey's plan; Perry testified to Buffey's plan to create a false alibi under oath twice, once in a deposition and at the 2004 Habeas hearing; [JA 4580-87; 3140-42; 1435-38]; Petitioner also listed Andrew Locke as an alibi witness but did not call him as a witness during the current Habeas hearing so that Locke's testimony could be elicited and his credibility evaluated by the Trial Court; [JA 2329-31], nor did he attempt to elicit such testimony from his Mother or Sister [JA 2552-54; 2613-24]; Mr. Buffey called only one witness to support his alibi theory, that being Carrie Wiant; Ms. Wiant testified at the current Habeas hearing that Mr. Buffey was with her

and her brother Andrew Locke all night on November 29, 2001[JA 1834-67]; Ms. Wiant's testimony was disjointed and incredible. She was not called as a witness by Mr. Buffey or anyone else at the 2004 Habeas hearing which would be odd if Buffey really had an alibi for the night of the rape and robbery; finally, Ms. Wiant had given a taped statement to law enforcement on December 7, 2001 and admitted to hiding Buffey from law enforcement and to having received a knife from Buffey similar to the one used to threaten the victim; in that statement Wiant did not mention anything about an alibi. [JA 3110-15];

5) Two glaring instances of incredulous sworn testimony illustrates why the Court gave no credence to any of Petitioner's testimony on important issues such as his claim of innocence; first, there was independent evidence given contemporaneously at the time of the commission of these crimes by Andrew Locke that Petitioner had a condom with him on the night that the assault occurred [JA 3245], and Petitioner told police that same evening, December 8, 2001, that he couldn't remember whether or not he had a condom with him the night of the assault and later gave equivocal answers about having a condom with him on the night of the assault; [JA 3058-59]; yet in Petitioner's deposition in this Habeas, more than 12 years after the crime, Petitioner testified that he had a specific recollection that he had a condom, but it was not on the night of the attack, but was several days before the attack, and he remembered in 2013 that he had thrown it away prior to the attack because it was broken; [JA 7783-84] Such recollection more than 11 years after the event is "hard to swallow" and seriously calls into question the veracity of Petitioner's testimony.

The second example of such unbelievable testimony by the Petitioner was his specific recollection in his 2013 deposition that the knife the police recovered in 2001, which was similar to the knife described by the victim to threaten her. Petitioner testified in 2013 that he had stolen the

knife several days after the sexual assault from a person named “Jim”, who lived on Sherman Street and whose last name Petitioner could not remember but who was a friend of Buffey’s uncle. [JA 7785-86] Petitioner testified that he couldn’t be sure if he told his attorney Thomas Dyer that the knife recovered by law enforcement was not in his possession until after the sexual assault which he may have been able to prove, assuming such testimony was true, and which may have negated Mr. Buffey having that knife during the attack on the victim. *Id.* Petitioner did not seriously raise the “knife alibi” in either Habeas proceeding. [JA 2440-42, 2518] Petitioner’s felony counsel, Thomas Dyer, was not questioned by Petitioner’s Habeas counsel at the hearing about the knife alibi, and assuming Petitioner told his current counsel²⁸ about this important fact, one would assume his counsel would have investigated it to confirm this favorable information for Petitioner’s claims of innocence. Either Petitioner told his current counsel about this purported favorable evidence and they did not use it, or more likely, current counsel also did not believe Petitioner’s incredulous statement or knew it was fabricated and chose not to elicit such testimony from Petitioner. A comparison of Mr. Buffey’s recorded interview with law enforcement with his deposition testimony and his current Habeas testimony regarding this issue amply demonstrates why the Trial Court disregarded his testimony in all regards. [JA 3055, 2440-42, 2518, 7785-86]

6) Finally, Petitioner was not candid when he testified both in his deposition and at the current Habeas hearing that he did not know Adam Bowers and had no prior relationship with Bowers. Petitioner needed to distance himself from Adam Bowers who left enough DNA at the crime scene to allow Bower’s full DNA profile to be generated for a CODIS search. It is highly

²⁸ Petitioner has been represented by at least four counsel, Barry Scheck, Allan Karlin, Nina Morrison and Sarah Montoro.

probable that Buffey knew that Bowers did not use a condom during his part of the rape as had Buffey, and therefore, Bowers' DNA was likely to be recovered while Buffey was confident his DNA would not be recovered from the crime scene. Buffey no doubt knew that if Bowers became known as the co-attacker, that Bowers would be linked by his DNA and a "airtight" case against both of them would emerge. Buffey vehemently denied during his deposition and at the current Habeas hearing that he knew Adam Bowers and further testified that he had never met him. [JA 7773-74; 7798-99] Buffey's counsel had showed concern for perjury as to whether Buffey was truthful regarding his knowledge of Bowers [JA 7806-07], which later evidence at the Habeas hearing proved to the Trial Court that Bowers not only was a good friend of Buffey, but that they had committed crimes together. The testimony of Shantelle Shaffer, who was Buffey's 13 year old girlfriend prior to and at the time of the rape and robbery, and who Buffey had gotten pregnant, provided significant testimony regarding Buffey and Bowers' relationship. She confirmed that Buffey and Bowers knew each other well and that they committed crimes together such as "carhopping" which she described as robbing a car. [JA 2567-68] Buffey and Bowers' relationship was also confirmed by Buffey's admitted best friend Daniel Moore²⁹. [JA 2525-29] Mr. Moore gave credible testimony accepted by the Trial Court as he had positively identified photographs of Adam Bowers as the person who he had observed many times with Buffey. [JA 2528-29; 7978].

Of course, it was in Petitioner's interest to distance himself from the condom and the knife evidence since the condom was important in explaining Petitioner's lack of DNA at the crime scene,

²⁹ Daniel Moore's testimony is worthy of substantial credibility as the Trial Court no doubt ascribed to it, as Petitioner himself stated that Moore was his best friend and that he lived with Mr. Moore for 4 to 6 months immediately prior to the rape and robbery. [JA 2495-96, 7744-46, 7806] Mr. Moore confirmed he was Buffey's best friend. [JA 2525]

and the knife was consistent with the victim's description of the attack. Even more crucial was Petitioner not being coupled to Adam Bowers so Petitioner decided to deny he even knew Bowers but other credible testimonial and documentary evidence proved otherwise to the Trial Court. No doubt, the Trial Court found that such obviously self-serving and incredible testimony demonstrated Mr. Buffey's disregard for his oath to tell the truth and exhibited a total lack of candor by Petitioner. The Trial Court having disregarded Petitioner's testimony, which as the fact finder the Trial Court was empowered to do,³⁰ ends all further inquiry relating to Petitioner's claims in this Habeas as a finding that Petitioner's assertions are false results in a failure to prove manifest injustice, or any other standard of proof, permitting relief to Petitioner from his voluntary guilty plea under oath.

IV. The Amicus Brief Misstates the Facts and Applies Incorrect Principles of the Law Regarding Brady Disclosures.

The Amicus Brief is flawed in several respects. First, it assumes as true several assertions that the Trial Court did not find to be proven, nor did the evidence definitively foreclose only one conclusion as accepted by the Amicus. Also what is glaring in the Amicus Brief is what it ignored,

³⁰ Evaluating a witnesses credibility is traditionally reposed to the judicial officer observing the testimony firsthand as that has been the best method of making such critical decisions; this is why fact finders, whether they be a jury or in this instance a judge, are accorded substantial deference under the clearly erroneous standard; Mathena, *supra*; sometimes what appears to be an inconsequential response demonstrates untruthfulness to the fact finder; for instance, it was important for Mr. Buffey to deny he had any association with Adam Bowers so when Buffey was asked what activities he did with his friends, which did not include Adam Bowers, Buffey responded stating playing basketball at "every park in Clarksburg" including Stealey park which was 2 to 3 blocks from the victim's home; but when asked if he played basketball at Hartland park which is about 200 feet from the victim's home and where Adam Bowers lived, Buffey repeatedly denied it. [JA 2498-03] However, Danny Moore confirmed that he, Buffey and Adam Bowers regularly hung out together including playing basketball. [JA 2526, 2538-40] Such testimony "tailored" to fit an interested party's position is telling to a fact finder and was telling to the Trial Court in this Habeas case.

including evidence of Petitioner's use of a condom,³¹ the improbable physical position of one of the attacker's, Buffey's failure to assert his innocence,³² Buffey's contemporaneous admissions of guilt to others and various other significant facts relied upon by the Trial Court to deny relief. [JA 039, 093-94 & 107] The Amicus, in arriving at its conclusion that relief is warranted, accepts certain helpful facts and rejects others unhelpful to conclude that the single perpetrator theory is unassailable. For instance, the Amicus ignores all other evidence of Buffey's presence in the victim's house including ignoring Buffey's statements to his criminal cohorts and law enforcement. Should such statements be ignored? Should the unassailable fact that Buffey had just committed similar crimes in the same area as the victim's home be ignored? Should Buffey's prevarications just be ignored? The Trial Court which observed the testimony of Petitioner and has presided over this case since the indictment in 2002, weighed all the testimony and found such fabrications and "changes in the story" should not be ignored. The Amicus gives no weight to the Trial Court's findings of fact which are accorded deference and are not disturbed unless clearly erroneous. Neither the Amicus nor Petitioner have provided this Court with any bases to determine that the Trial Court's

³¹ The singular reference to a condom in the Amicus Brief regards the nurse's intake sheet where it was checked that no condom used; [JA 3264 & 3266]; it is understandable that the victim would have known if either assailant used a condom during oral assault but it is not clear whether the victim could determine if a condom was used during the vaginal assaults when she was turned around with her head in a pillow; this is why Petitioner should have called the victim as a witness or the nurse who completed the victim questionnaire as it was Petitioner's burden to prove these assertions important to his case; this Petitioner did not do.

³² A clear misstatement by the Amicus highlights its factual confusion, and thus, its incorrect legal analysis; the Amicus asserts as fact, without reference to the Joint Appendix, that Buffey professed his innocence during his evaluation at the Anthony Correctional Center after his guilty plea but before his sentencing; Amicus at pg. 5; however, that statement is inaccurate as Buffey actually stated that "I was charged with fourteen felonies and I only actually did three of them...I plead guilty to get the immunity." which was exactly his plea two counts of sexual assault and one count of robbery; [JA 4187]; the Trial Court was not confused by this inaccurate assertion.

findings of fact and credibility assessments are clearly erroneous. Both merely ignore them. Mr. Buffey had the opportunity to commit these crimes, the motive, and he admitted to them both outside of Court and in a solemn plea proceeding in Court. While relying on self-created and self-serving data,³³ merely opining that some innocent persons have been known to plead guilty in other cases, has nothing to do with the facts of this case and is insufficient to warrant acceptance of Petitioner's claims of innocence based on the totality of the circumstances..

a) **Ruiz Supports the Trial Court's Ruling.**

The Amicus asserts that the Trial Court misapplied Ruiz³⁴ and that neither this Court nor the United States Supreme Court has definitively ruled whether Ruiz applies only to impeachment evidence or also to exculpatory evidence when known to exist by the State but failing to disclose it to a defendant before such defendant enters a guilty plea. Although one can conjure a factual scenario where the failure to disclose exculpatory evidence prior to a guilty plea may be error, Mr. Buffey's case is not such a case and the facts and the case law supports this. Ruiz was a unanimous decision reversing a 9th Circuit Court of Appeals panel which had held that the Government's failure to disclose Brady material i.e. **material** impeachment evidence, rendered a guilty plea involuntary. *Id.* at 622 (emphasis added) The Supreme Court in reversing held succinctly that:

³³ The Amicus references the Innocence Projects own data which is statistically deceptive; 30 of the IP's successes out of 321 were defendants who plead guilty; however no one knows, including this Court, how many assertions of innocence by defendants who plead guilty were investigated and found not to be valid nor is there a valid set of random data available to form any valid statistics as assumed by the Amicus; this same self serving statement was presented to the Trial Court by expert witness Kassin which the Trial Court rejected. [JA 8652-54]

³⁴ U.S. v Ruiz, 536 U.S. 622 (2002).

“The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. Although the Fifth and Sixth Amendments provide, as part of the Constitution's “fair trial” guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, see, e.g., Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, a defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees, Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. As a result, the Constitution insists that the defendant enter a guilty plea that is “voluntary” and make related waivers “knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.’ ” *Id.* at 623 (emphasis added)

Other cases, including a recent case from the 4th Circuit Court of Appeals, which was not cited by the Amicus, which held that a knowing and voluntary guilty plea waives any claim that exculpatory Brady material was not provided prior to his plea. U.S. v Moussaoui, 591 F.3d 263 (4th Cir. 2010). In Moussaoui the appellate Court citing Ruiz, held that the defendant had no grounds for relief as he knew at the time of his plea that there may be exculpatory materials which had not been provided to him but that he wanted to plead guilty and did so freely and voluntarily. Moussaoui at 285-88. As in Moussaoui, Joseph Buffey knew that his blood had been taken to be compared with biological evidence [DNA] taken from the crime scene. He knew it would be exculpatory as he told his attorney that his [Buffey's] DNA would not be found. He said this because he well knew he had used a condom during the assault. This issue of Buffey being prejudiced by not knowing that his identifiable DNA profile was not retrieved from the crime scene is without merit as Buffey himself testified that the DNA report had no bearing on his taking the plea bargain as he did not expect his DNA to be found in the evidence. [JA 2464-69; 068-71, ¶ 36-42] Under these circumstances Mr. Buffey, just as Moussaoui, could not have been prejudiced in entering his guilty plea even if one characterizes the 2002 DNA test results as being totally exculpatory which they were not. Buffey

could have waited for the DNA results but he knowingly and voluntarily chose not to wait, and this was the factual finding made by the Trial Court.³⁵ *Id.* accord, United States v. Conroy, 567 F.3d 174, 179 (5th Cir.2009) (rejecting the argument that “the limitation of the Court's discussion [in Ruiz] to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea” because “Ruiz never makes such a distinction nor can this proposition be implied from its discussion.”) The Petitioner also asserts that a hearing preparation note for the 2004 Habeas in the Harrison County Prosecutor’s file dated March 11, 2003 demonstrates suppression of the WVSP DNA report. That note cryptically stated: “told Terri leaning toward excluding him, but D pled guilty before final report done” Such note can have several meanings but it does not indicate when Lt. Meyers to whom the note is attributed, made this statement to the Assistant Prosecutor Terri O’Brien. It is clear that it was after Petitioner’s plea on February 11, 2002, but it is unclear whether it was before the sentencing or after. Ms. O’Brien had little memory of the Buffey case and her deposition reflects this. [JA 8127-28; 8131; 8135-36] Thus, the note is of little support to Petitioner regarding the voluntariness of his plea and his claim of actual innocence.

The Amicus refused in its Brief to acknowledge that Brady material is a trial right. Perhaps this is why the Amicus deleted the complete quote from this Court’s decision in Youngblood, *supra*,

³⁵ Importantly, the April 5, 2002 WVSP DNA report was not even prepared until almost 2 months after Buffey accepted the plea bargain and entered his guilty plea; Petitioner argues, without any legal support, that the State should have expedited the testing to be complete before the plea, or have provided daily updates to the Petitioner as testing was being completed; such argument contradicts Brady, Ruiz and Rule 11 and that is why Brady is a trial right, to ensure a fair trial, not to place near impossible burdens on the State during pretrial proceedings Ruiz at 632; the Trial Court made factual findings in the 2004 Habeas that the WVSP DNA report was not completed until after Buffey’s plea and that the State was unaware of its return until July 12, 2002, and that Buffey had voluntarily waived his right to any Brady material all of which is *res judicata* in this current Habeas; [JA 9007-09]

which held that the right to exculpatory material was a “trial” right. Youngblood at Syl. pt. 2 [“(3) the evidence must have been material, i.e., it must have **prejudiced the defense at trial.**”](emphasis added); Brady at 87; see also Moussaoui at 285-86. Numerous Courts have refused to interpret Ruiz as distinguishing between material impeachment evidence and exculpatory evidence. see discussion in Moussaoui at 285-89.

Ruiz, and Moussaoui rely on various cases, including Brady, Tollett,³⁶ at 267-68, Blackledge³⁷ at 29-32, and Alford³⁸ at 31-36, which hold that a guilty plea made with the advice of competent counsel, waives any independent constitutional claims occurring prior to the plea when the defendant solemnly admits in open court that he or she is guilty as the issue then becomes one of “voluntariness.” This is exactly what Petitioner did in this case, but Petitioner was also fully aware of potential exculpatory evidence that might be generated by the DNA testing but chose to forgo waiting for it so that he could take advantage of the proffered plea bargain which provided great benefit to Petitioner in granting him immunity. [JA002, 007 and 071]; See also U.S. v. Wells, 260 Fed. Appx. 902 (6th Cir. 2008)

The cases cited by the Amicus to support its argument that Ruiz does not control the disposition of this case at Bar are distinguishable or are not supportive. The Amicus relied upon the 10th Circuit Court of Appeals case of U.S. v. Ohiri, 133 Fed App’x 555 (10th Cir. 2005), which was an unpublished opinion. However, the Ohiri case was again before the 10th Circuit in 2008 on the same issues and the Panel, with the same Judge writing for the majority, essentially overruled its

³⁶ Tollett v Henderson, 411 U.S. 258 (1973)

³⁷ Blackledge v. Perry, 417 U.S. 21 (1974).

³⁸ North Carolina v. Alford, 400 U.S. 25, 31 (1970).

prior decision relied upon by the Amicus. U.S. v Ohiri, 287 Fed. App'x. 32 (10th Cir. 2008), cert. denied, 555 U.S. 1143 (2009). In the 2008 opinion the unanimous Appellate Court Panel held that it was unnecessary to decide whether the Government was required under Brady and Ruiz to produce an exculpatory document to Ohiri before his plea as the evidence, although exculpatory, was not material. *Id.* at 35. In other words, Ohiri had not been prejudiced by the non-production and neither was Mr. Buffey. and that is another reason why the Trial Court's decision in this matter was correct.³⁹ The out of jurisdiction cases such as U.S. v. Nelson,⁴⁰ and some of the other cases cited by the Amicus, are distinguishable on their facts from the case at Bar. For instance, in Nelson the Government stated under oath that all Brady material had been provided to the defendant and this was false. *Id.* at 127. Nelson plead guilty and the trial court granted relief vacating his plea based on the Government's conduct and the belief that Ruiz did not prohibit such relief after a plea of guilty. No appeal was taken by the Government. This case had bad facts and is inconsistent with the unanimous holding in Ruiz. However it is of little persuasive value in this Habeas where Buffey freely decided not to wait for what he characterized as negative finding of his DNA. However, the State agrees that there is not unanimity among courts considering this issue and most turn on the particular facts of the case rather than a *per se* holding of prejudicial error.

In U.S. v. Danzi, 726 F. Supp 2d 120 (D. Conn. 2010), the trial court refused to allow Danzi

³⁹ Respondent does not ascribe any bad motive to the Amicus in failing to cite and discuss the later Ohiri case in its Brief as the undersigned is very familiar with several of the attorneys listed as former State and Federal Prosecutors being supporters of the Amicus Brief, especially the West Virginia attorneys; it is an admirable endeavor for these attorneys to provide such assistance to the Innocence Project; Respondent does not believe any of these attorneys would knowingly fail to cite the later 10th Circuit case as required by the Rules; such must have been an oversight by the actual authors of the Amicus Brief.

⁴⁰ U.S. v. Nelson, 979 F.Supp. 2d 123 (DC Cir. 2013).

to withdraw his plea before sentencing [*Id.* at 126] even though the Court found that Brady material should have been disclosed prior to the plea, but denied any relief finding that the withheld Brady information was not material or prejudicial but that withdrawal would be prejudicial to the Government. *Id.* at 127-29. Of course in this Habeas, the DNA report was not complete until almost two months after Mr. Buffey plead guilty, and more importantly, the DNA test results were not “material, i.e., it must have prejudiced the defense at trial.” Also, such DNA testing results had no bearing on Mr. Buffey’s decision to plead guilty and this was made abundantly clear by his testimony in this Habeas. State v. Farris, 221 W.Va. 676, 656 S.E.2d 121 (2007). The Ollins v. O’Brien case, [2005 WL730987] was a civil case for damages after a trial and conviction by the State which was procured through deliberate framing of the defendants which facts are wholly inconsistent with those in this case. The holding in Ollins is of no persuasive value to this Court in deciding this case. U.S. v. Fisher case, 711 F. 3d 460 (4th Cir. 2013), involved deliberate falsification by the Government of material facts in search warrant affidavit going to the heart of case and relied upon by defendant in deciding to plead guilty. The McCann v. Mangialardi, 337 F3d 782 (7th Cir. 2003) was again a civil case where the appellate court offered dicta regarding whether the Supreme Court’s holding in Ruiz related only to impeachment Brady material or also exculpatory material.

The case of State v. Huebler, 275 P.3d 91 (NV 2012) supports the Trial Court’s ruling in this Habeas. In Huebler the appellate reversed the granting of habeas relief by the lower court holding that although failure to withhold exculpatory Brady information known to the prosecution prior to a guilty plea can be grounds for withdrawal of the plea but only if the withheld information was “material” in the context of the guilty plea. The Court in Huebler reasoned that materiality in the guilty plea context was not whether such Brady material might have created a reasonable doubt at

trial, but required the habeas petitioner to carry a heavy burden demonstrating “materiality that is based on the relevance of the withheld evidence to the defendant's decision to plead guilty: ‘whether there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to plead and would have gone to trial.’ ” *Id.* at 98-101 Under such standard, Joseph Buffey cannot prevail as the DNA results had no bearing on his decision to plead guilty. [JA 2464-69; 068-71, ¶ 36-42. Huebler is of no benefit to Mr. Buffey under the facts of his case.

While the State does not doubt that there can be cases with facts so compelling such as the intentional withholding of Brady information, so material and intertwined with a defendant's decision to plead guilty, that relief might be warranted even in view of Ruiz, this case is not one of them.

Finally, in attacking the Trial Court's denial of habeas relief the Amicus makes several unsupported assertions, as though they are proven fact, and then the Amicus poses a question which backhandedly attacks the State's *bona fides* in this case. See Amicus Brief at f.n. 15. The Amicus smugly state: “if we now know (i) that this was a one-person crime [**this was a two person crime which the Trial Court determined after evaluating all of the evidence**]; (ii) that Adam Bowers was the one person [**the Trial Court indirectly held that Adam Bowers was one of two attackers**]; (iii) that even if somehow one could believe this was a two-person crime, the secondary sperm donor was not Mr. Buffey; and (iv) that no one could believe this was a three-person crime [**Petitioner's own expert explained how two perpetrators could leave the minor males DNA which did not belong to Bowers i.e. one minor male DNA contributed by transfer from Bowers and the other minor male DNA contributed by a second perpetrator which could have been Buffey; but this was opinion testimony not absolute scientific fact, nor was it necessary for the**

Trial Court to determine how the multiple male DNA was contributed to the DNA mixture as Petitioner's use of a condom would explain the absence of any significant amounts of his DNA at the crime scene], then why should a prosecutor ~ a "servant of justice" ~ argue *res judicata* when application of the doctrine would perpetuate an injustice? (emphasis and commentary added)
The State will leave that question for this Court to resolve.

V. Petitioner's Claims are Barred by *Res Judicata*.

The Trial Court ruled that all of Petitioner's claims had been previously determined in the 2004 Habeas except Petitioner's current claims of "actual innocence", "manifest injustice" and/or "manifest necessity" related to Petitioner's assertions of newly discovered DNA evidence unavailable during the 2004 Habeas and the ineffectiveness of post-conviction counsel. [JA 051; 060] ⁴¹ While the Trial Court opined that *res judicata* applied as a bar to all claims waived or decided in the 2004 Habeas, it went on to hold that "out an abundance of precaution" it would review "any substantive ground for potential Habeas relief that might be established to the Petitioner's benefit herein." [JA 087-88] This was error, but harmless error as the Trial Court having examined all such substantive claims denied them based on the proof or lack thereof by Petitioner. [JA 117-19]

The Trial Court did hold that Petitioner's guilty plea was *res judicata* as it was entered into knowingly, freely and voluntarily, and thus, constitutes *res judicata* upon the proper Rule 11 colloquy made on the Record in this case. [JA 107-09]

⁴¹ In its Final Rule 9(c) Order, the Trial Court referenced the States submission outlining those habeas claims that had been waived by Petitioner and those that the Trial Court found adversely to him thus constituting *res judicata* prohibiting re-litigation in this current Habeas. [JA 048 fn 34; 1274-77]

VI. Petitioner's Grounds for Relief, if Error, Were Harmless or Invited.

Petitioner's claims of actual innocence have been waived or were invited when Petitioner decided to remain silent regarding his alleged innocence when he had multiple opportunities to advise the Trial Court if true. U.S. v. Davila, *supra*; U.S. v. Bowman, *supra*. By Petitioner's attempt to suborn perjury by asking Ronald Perry to fabricate an alibi for him. By Petitioner giving obviously false testimony and statements, inconsistent with each other, with no explanation of such false and inconsistent testimony, including Petitioner's 2006 letter to the Trial Court [**Exhibit A**, *supra*] where he did not mention even in passing that he was innocent of the crimes to which he plead. Petitioner's failure to file a direct appeal after his conviction asserting his actual innocence.

CONCLUSION:

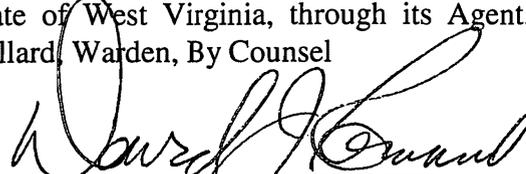
There was no Brady violation involving Petitioner's guilty plea as even assuming the State should have provided the April 5, 2002, WVSP DNA report to Petitioner prior to sentencing, such failure was not material given Petitioner's lack of reliance on the DNA testing results in deciding to accept the plea bargain. Petitioner would have accepted the plea regardless of the DNA testing results as he did not expect his DNA to be found in the crime scene evidence as he knew he had used a condom during the sexual assault of the victim.

This entire Record as a whole clearly conveys Petitioner's attempt to manipulate the criminal process in a concerted effort to undo his sentence which he believed should have been concurrent instead of consecutive sentences.⁴² [JA 7772]

⁴² While reasonable minds may differ as to the severity of Petitioner's sentence, such was the prerogative of the sentencing Judge as the Trial Court could have sentenced Petitioner to the same amount of incarceration for the robbery conviction alone as he received for all three charges of which he

Considering all the relevant circumstances, Petitioner's guilty plea was voluntary and sufficient and he has not carried his heavy burden of proving manifest injustice, or that Petitioner is actually innocent and the Trial Court's findings of fact are not clearly erroneous nor should the Trial Court's discretionary finding denying all habeas relief be disturbed.

Respectfully submitted,
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was convicted upon his plea of guilty.

CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 27th day of January, 2015, I served the foregoing "**BRIEF OF RESPONDENT STATE OF WEST VIRGINIA**" upon the below listed counsel of record by U.S. Mail to them their office addresses listed below:

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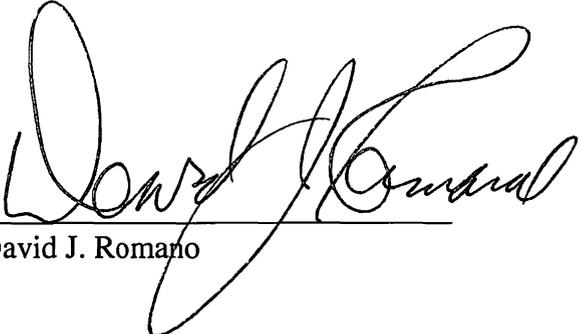
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