In the
Supreme Court of Appeals
of West Virginia

Case No. 14-0642

JOSEPH A. BUFFEY,

Petitioner,

– v. –

DAVID BALLARD, Warden,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BRIEF OF *AMICI CURIAE* FORMER STATE AND FEDERAL PROSECUTORS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Amici are former state and federal prosecutors, most of whom held senior supervisory positions in their offices.[1] Our names and the positions that we held are listed in the Addendum. All of us share an abiding interest in the fair administration of the criminal law. Because of our backgrounds, we recognize the critical role that prosecutors play in our criminal justice system. As has often been said, a prosecutor is more than an advocate; he or she is a servant of justice. See Berger v. United States, 295 U.S. 78, 88 (1935)(a prosecutor is the "servant of the law [with] the two-fold aim . . . that guilt shall not escape or that innocence suffer").

We have joined together because this case presents an issue of paramount importance: does a prosecutor (or, more broadly, the State) have a duty to disclose exculpatory evidence -- here a DNA report -- to a defendant prior to a guilty plea. Neither this Court nor the United States Supreme Court has decided the issue. As discussed in this brief, we believe that the answer is "yes" -- that Brady v. Maryland is not just a "trial right," but an admonition to prosecutors to treat defendants fairly. We hope that our voices will assist the Court as it addresses the issue.

STATEMENT OF FACTS

A. The Crime

At around 6:00 a.m. on the morning of November 30, 2001, a white male broke into the Clarksburg, West Virginia home of Mrs. L, an 83-year-old widow, and robbed and

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[1] Counsel for a party has not made a monetary contribution intended to fund the preparation or submission of this brief. Nor has any person other than amicus curiae, its members, or its counsel made such a monetary contribution. Counsel for a party has also not authored this brief in whole or in part. Amici have given timely notice to the counsel of record for both parties and have moved for leave to file this brief pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure.

sexually assaulted her, penetrating her vaginally from behind three times and twice forcing her to perform oral sex on him. After the assault, the intruder tied Mrs. L's hands behind her back, warned her not to call anyone for 20 minutes, and fled from the house. Twenty minutes later, Mrs. L freed herself and called her son, a Clarksburg police officer, for help. Three police officers responded and took Mrs. L to the hospital, where evidence of the assault was collected.

B. Mrs. L's Hospital Statements

At the hospital, Mrs. L was first interviewed by a sexual assault nurse. She described the crime in some detail, telling the nurse that her assailant had not worn a condom and may have ejaculated. In response to the nurse's question "[w]ere there multiple assailants," Mrs. L answered "No." Although in "mild distress," Mrs. L was alert and lucid. She could not understand the "reasons why . . . a young boy would want an old woman." (A.III.3257-89).[2]

Later that day, Mrs. L gave a detailed, tape-recorded statement to the police. She explained that she awoke in the dark to find a man standing beside her bed demanding money. When she told him that her purse was downstairs, he instructed her to "get it." She then walked downstairs, and the intruder followed her, a flashlight and large knife in his hands. In the kitchen, Mrs. L gave the intruder what little money she had, and he directed her to go back upstairs to find more. Once upstairs, however, he told her to undress and "get down there beside the bed on [her] knees." He then sexually assaulted her as she begged for her life. Mrs. L described her assailant as a white male "in the 25 [year old] area." He wore blue jeans and a light colored t-shirt and hid his face with a white bandana. All that was visible was "his nose about up to . . . his forehead." The interview lasted about 15 minutes and ended with Mrs. L

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2 "A" refers to the Appendix to petitioner's brief to which Amici have been given access.

telling the officers that, during the incident, she had focused "as best [she] could so [she] could tell [her son] what happened." (A.III.3068-80).

C. Mr. Buffey's Arrest and Interrogation

One week later, on November 7, 2001, petitioner Joseph Buffey, then 19 years old, was arrested for burglarizing three Clarksburg stores.[3] That evening, at around 7:00 p.m., police officers began to interrogate Mr. Buffey, hoping to elicit a confession to the assault on Mrs. L. Although confessing to the store burglaries, Mr. Buffey repeatedly denied having any involvement with Mrs. L. At 3:25 a.m. the next morning, however, he briefly changed course: he "admitted" that he had broken into the old lady's house, but didn't remember having sex with her. The few details that he purported to recall were strikingly inconsistent with Mrs. L's account.[4] When the officers said that they knew Mr. Buffey could remember more and that they would give him one last opportunity "to sing," he retracted what he had said. "You really want to know the truth," he told the officers, "I didn't do it . . . I couldn't tell you what went on in there." Everyone was "breathing down [his neck]," he said, and so he had "made up [a] story" about what occurred. (A.III.3052-66).

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[3] Also arrested for the burglaries were 17-year-old Andrew Locke and 29-year-old Ronald Perry. In response to police questioning, Locke reported that Mr. Buffey had told him of having robbed an elderly couple at knifepoint on the early morning of November 30, 2001, after one of the store burglaries. See (A.III.3242-51)("I held them up . . . with a knife")(emphasis added). Locke's statement seems to have piqued the officers' interest in questioning Mr. Buffey about the assault on Mrs. L. Locke has since recanted his statement. (A.III.3294-98).

[4] A few examples show the wide variance between Mrs. L's account and Mr. Buffey's: Mrs. L said that she first saw the assailant "beside [her] bed"; Mr. Buffey said that he "might have [encountered her] in the dining room," and that he never went upstairs; Mr. Buffey "guess[ed]" that he "went in through a window." Mrs. L said that the intruder had covered his face with a bandana; Mr. Buffey said he "didn't have nothing over [his] face." Mrs. L said that the intruder had a flashlight; Mr. Buffey did not remember having one.

D. Plea Allocution

In January 2002, Mr. Buffey was indicted for the robbery and sexual assault of Mrs. L and for the three store burglaries. Thomas Dyer was appointed to represent him. On January 29, 2002, Mr. Dyer filed a Motion to Compel Production of Discoverable Materials, which noted that the prosecution had been ordered to produce within seven days of arraignment "all discoverable information . . . related to the alleged sexual assault" and had yet to do so. One day after filing the motion, and without receiving any response, Mr. Dyer commenced plea negotiations. Negotiations proceeded quickly, and on February 6, 2002, Mr. Buffey signed a plea agreement, under which he would plead to robbing Mrs. L and to two counts of sexually assaulting her, and the prosecution would dismiss the store burglary charges. (A.IV.4209-13). The charges to which Mr. Buffey pleaded carried a potential sentence of 40 years to life imprisonment.[5] The plea offer was a time-limited deal, and it was "take it or leave it." (A.II.1939)(Mr. Dyer: "we were put on a short fuse").[6] As he subsequently told the court, Mr. Dyer "strongly recommended" that Mr. Buffey take it, telling him that he was likely to get concurrent sentences. (A.IV.4294); see also (A.II.2087)(Dyer: "I thought we had a good chance to be doing 15").

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[5] More precisely, the robbery charge carried a minimum determinate sentence of 10 years with "no top end"; and the sexual assault charges each carried an indeterminate sentence of 15 to 35 years. In the plea agreement, the State committed to recommending no more than 40 years on the robbery count. The agreement also gave Mr. Buffey "coverage" for "any other crimes . . . , excluding murder or manslaughter, which [he] may have committed or aided . . . prior to February 6, 2002."

[6] According to Mr. Dyer, the plea offer would lapse "in the general area of . . . February 11th," and "the deal would [then] only get worse." (A.II.1940).

On February 11, 2002, Mr. Buffey allocuted to the three charges. See (A.IV.4214-67)("I broke into an elderly lady's house and robbed her and forced her to have sex with me"). The court, however, delayed accepting the plea to get "some additional information . . . to make sure [the] plea is the right thing to do." Id. It asked the Division of Corrections to conduct a pre-sentence evaluation of Mr. Buffey. That evaluation was completed on April 29, 2002. It reported that Mr. Buffey admitted the store burglaries, explaining that he stole to support his drug habit, but now denied sexually assaulting Mrs. L. (A.IV.4184-94)(Mr. Buffey: "I only actually did [the] three [store burglaries] . . . I didn't hurt anyone").

E. Accepting the Plea and Sentencing

The plea hearing resumed on May 21, 2002, and the court accepted Mr. Buffey's plea.[7] For his part, Mr. Dyer asked the court to "giv[e] serious consideration to running two or more of these sentences concurrently." The court declined the invitation: it sentenced Mr. Buffey to 40 years on the robbery charge and 15 to 35 years on each of the sexual assault charges, all to run consecutively, for an aggregate term of 70 to 110 years. (A.IV.4268-4303). No one mentioned that Mr. Buffey had told the Division of Corrections he was innocent.

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[7] The lead prosecutor, John Scott, urged the court to accept the plea because "given the age of the victim, given the amount of physical evidence in the case that the State has, it believes that it could save the victim undue burden and hardship of reliving some of these events through trial." (A.IV.4268-4303)(emphasis added). It is not clear what "physical evidence" Mr. Scott was referring to. As discussed below, the DNA report excluded Mr. Buffey if there was only one assailant. And the fingerprints that were recovered at the scene had "no comparison value" of evidentiary value. (A.IV.4177-78). In the grand jury, there was testimony that a knife Mr. Buffey owned and a flashlight stolen in one of the store burglaries matched Mrs. L's description of those items. Mrs. L, however, did not describe the knife other than to say it seemed bigger than a steak knife, and the police report on the store burglary does not list a flashlight among the stolen items. (A.IV.4126-41).

F. Lieutenant Myers' Report

As Mr. Buffey and his counsel were considering the State's time-limited plea offer, Lieutenant Brent Myers at the West Virginia State Police Forensic Laboratory was performing DNA analysis on the rape kit samples and determining that Mr. Buffey was likely not Mrs. L's assailant. The time line here is this: On January 22, 2002, Lieutenant Myers received the rape kit and began working on it. (He had been asked to expedite testing despite a backlog of 300 DNA cases.) Lieutenant Myers identified seminal fluid on a paper towel and panty liner and compared it to a blood sample from Mr. Buffey. By February 8, 2002, he had tentatively concluded that Mr. Buffey was not the assailant. Beginning on February 9, 2002, Lieutenant Myers retested the samples, and his conclusion was much the same. This time, however, he noted the possibility that there might be more than one male DNA source. That "low level" source also did not appear to be Mr. Buffey. (A.II.1657).. On April 5, 2002, six weeks before the court accepted Mr. Buffey's plea, Lieutenant Myers completed his report, which concluded that "assuming there are only two contributors (including [Mrs. L]), Joseph Buffey is excluded as the donor of the seminal fluid identified [from the rape kit] cuttings." (A.V.6731-34)(emphasis added).[8]

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[8] Although Lieutenant Myers did not complete his report until April 5, 2002, it seems that he spoke with the prosecutors' office about his results before then. A file note indicates that he had told Terri O'Brien, a prosecutor on the case, that he was "leaning towards excluding Mr. Buffey." (A.VI.8014). Ms. O'Brien's last day in office was March 28, 2002; she retired then because of concerns about the office's ethics. (A.VII.8140)(Ms. O'Brien: "I didn't care for the climate" of ethics). As noted above, the lead prosecutor in the Buffey case was John Scott. In October 2001, shortly before the assault on Mrs. L, an investigative panel of the West Virginia Lawyer Disciplinary Board issued a seven-count statement of charges against Scott for "conduct involv[ing] . . . lying to clients, judges, officers of the court, and falsifying documents." Lawyer Disc. Bd. v. Scott, 213 W.Va. 209, 215, 579 S.E.2d 550, 556 (2003). In March 2003, [this Court] "suspended [Scott] for three years with additional sanctions." Id. at 218.

There is no dispute that, before the court accepted Mr. Buffey's plea, Lieutenant Myers' report was not provided to the defense. Mr. Dyer has testified that he was "desperate" to learn the test results and "sure" that he regularly inquired about it prior to the May 21, 2002 court date. (A.II.1934-35). Had he known that the results excluded Mr. Buffey as the sperm source, he would have "put the brakes on the Judge['s] accepting the plea." In recent testimony, Mr. Dyer said this:

> Q: .... If you had known that by February 11th the West Virginia State Police Forensic Laboratory had reached some preliminary conclusions to the effect that if there were -- if there was only two people involved that would be the victim and the perpetrator, Joe Buffey was excluded ... would you have let Joe Buffey plead?
>
> A: Of course not.

(A.II.1940-41).[9]

G. DNA Retesting

In 2010, Mr. Buffey, represented by new counsel, filed a Motion for Post-Conviction DNA Testing under W.Va. Code § 15-2B-14. The motion was granted, and the results were profoundly exculpatory. Using newly developed testing methods, the examiners

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[9] Mr. Buffey first learned of Lieutenant Myers' report when he filed a pro se application for a writ of habeas corpus in November 2002. When the report was discovered, the court appointed counsel for Mr. Buffey and heard expert testimony about the DNA results. The 2002-2004 habeas proceeding ended poorly for Mr. Buffey. Neither assigned counsel nor her "expert" had command of DNA analysis, and the State's experts, including Lieutenant Myers, were permitted to testify that the test results were "inconclusive" because of the presence of trace amounts of DNA from a second male source. On that basis, the court denied Mr. Buffey relief. (A.VII.8998-9028)(the court: the experts "agreed that the DNA test results were inconclusive and that the Petitioner could not be excluded as a contributor to the DNA mixture"). At the 2004 habeas proceeding, Ronald Perry, one of the store burglars, testified that Mr. Buffe had admitted participating in the sexual assault. According to Perry, Mr. Buffey said that he and his cousin had taken turns raping the elderly lady with one "holding her down while the other would molest her." (A.IV.4577-95). That testimony, of course, is wildly at odds with Mrs. L's account. At the time, Perry was seeking a reduction of his sentence for the burglaries. (A.IV.4156-57, 4163-64).

obtained a robust, fully interpretable DNA profile from a primary sperm source, which was present on numerous items in Mrs. L's rape kit. Mr. Buffey was conclusively excluded as the primary sperm source. The DNA on the bedsheet, for example, was found to be "unique to one person who has ever lived on this planet," and Mr. Buffey was not the one. (A.V.6731-34). The examiners also identified trace amounts of a second male sperm source (as had Lieutenant Myers in 2002). That source was also definitively not Mr. Buffey. The very low level of DNA from this second source strongly suggested that the source was not an ejaculator -- that his sperm had been transferred to the penis of the single assailant prior to the assault.[10] Notably, Lieutenant Myers now agrees that Mr. Buffey can be conclusively excluded as both the primary and secondary contributor. (A.II.1696)(Lieutenant Myers: "[t]here is no information in the results that I've observed to indicate that Mr. Buffey is present").

Armed with the new DNA testing results, which excluded Mr. Buffey as either the primary or secondary sperm contributor, new counsel sought a writ of habeas corpus.

H. The CODIS Search

In December 2012, while the habeas petition was pending, the court authorized a search of the CODIS database to determine whether the primary sperm source could be identified. The search proved successful: the primary sperm source was Adam Bowers, then a West Virginia inmate. (A.I.1139). Bowers was 16 years old at the time of the sexual assault and lived a few blocks from Mrs. L. Even at 16, he had a history of sexual violence, having been accused of attempting to rape a young woman. (A.VI.7926-28).

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[10] Such "secondary transfers" are not unknown in the DNA literature. If male A has intercourse with a female, the sperm of her recent sex partner (call him B) may be transferred from her vaginal canal to A's penis. If A then has intercourse with a second female, A's semen and trace amounts of B's semen may be found on the second female. See generally, G. Meakin and A. Jamieson, DNA Transfer: Review and Implications for Casework, 7 Forensic Science International: Genetics 434-43 (2013).

I. Denial of the Habeas Petition

Mr. Buffey's application for a writ of habeas corpus was denied, with the court writing this:

> [T]his Court rejects the Petitioner's claims that the recent DNA testing analysis and CODIS search results purportedly identifying an individual other than the Petitioner herein as the primary (and arguably sole) contributor of the male DNA found at the crime scene is evidence sufficient to: (a) raise a sufficiently substantive question as to the actual guilt; (b) prove in and of itself the Petitioner's "actual innocence"; (c) show there presently being a "manifest injustice" imposed upon him by his present criminal convictions and related sentencing/incarceration; and/or (d) demonstrate a "manifest necessity" resulting all therefrom warranting this Court to grant his requested Habeas relief and allow him to withdraw his prior guilty pleas and order them vacated.

(A.VII.8998-9028). The DNA exclusions, the court concluded, did "not . . . unequivocally determine whether or not [Mr. Buffey] was actually present [at the crime scene] and a participant in the various activities giving rise to the . . . criminal charges." Id.

ARGUMENT

MR. BUFFEY'S BRADY RIGHTS WERE VIOLATED

Other than Gideon, no United States Supreme Court precedent is more critical to the fairness of our criminal justice system than Brady v. Maryland, 373 U.S. 83 (1963). As the Supreme Court observed, "our system of the administration of justice suffers when any accused is treated unfairly." Id. at 87. To prevent unfairness, the Brady Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id.

In the 50 years since Brady was decided, its precise boundaries have been much litigated, but its core has never changed. As this Court has repeatedly stated, "there are three components of a constitutional due process violation under Brady v. Maryland . . . (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 . . . ." State ex rel. Games-Neely v. Overington, 230 W.Va. 739, 749, 742 S.E.2d 427, 437 (2013), citing State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007). Evidence is material "if there is a reasonab[le] probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different." State v. Morris, 227 W.Va. 76, 85, 705 S.E.2d 583, 592 (2010), quoting United States v. Bagley, 473 U.S. 667, 682 (1985).[11]

As the United States Supreme Court has noted, a "prudent prosecutor will resolve doubtful [Brady] questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976). But there was nothing doubtful here. Prior to the court's accepting Mr. Buffey's plea, the State knew that DNA testing revealed that "[a]ssuming there are only two contributors (including [Mrs. L]), Joseph Buffey is excluded as the donor of the seminal fluid identified on [the] cuttings." That evidence was plainly favorable to Mr. Buffey, and it was not disclosed to him. See District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 55 (2009)(noting DNA testing's "unparalleled ability to exonerate the wrongly convicted and to identify the guilty"). Had it been known to Mr. Buffey's counsel, he would not "ha[ve] let [Mr. Buffey] plead."

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[11] "A prosecutor's disclosure duty under Brady . . . includes disclosure of evidence that is known only to a police investigator and not to the prosecutor." Youngblood, 221 W.Va. at 27; see also Kyles v. Whitley, 514 U.S. 419, 437 (1995)(a prosecutor "has a duty to learn of any favorable evidence known to others acting on the government's behalf").

As we understand it, the State has two responses to Mr. Buffey's Brady claim. The first sounds in materiality: that Lieutenant Myers' 2002 report did not exclude the possibility that Mr. Buffey was an accomplice to the crime, perhaps even a second rapist. But that response is fanciful. Mrs. L's statements at the hospital make abundantly clear that only one person entered her home, robbed her, and sexually assaulted her. That is what she told the sexual assault nurse in response to a direct question, and her subsequent statement to the police leaves no doubt on the point. Indeed, virtually every sentence in her police interview cries out that this was a one-person crime: "I awoke with this man standing beside my bed." "He had a knife in his hand and a flashlight." "I gave him all the bills I had." "He said, take off your clothes." "I saw his blue jeans drop to the floor." "He used his penis in my mouth." "He got down and he kept using me and using me and using me." "[H]e took the belts and he . . . tied my hands behind me." "He said, if you call anybody, within the next 20 minutes . . . I'll come back and kill you."

Mrs. L did not see a second man, hear one, or feel the presence of one at any time. And she was alert to every detail so that she could tell her police officer son what had happened. Suffice it to say that if Adam Bowers, who we now know committed this heinous crime, had a partner, the partner was the most inconspicuous accomplice in West Virginia history.

The State's second argument is premised on the fact that Mr. Buffey pleaded guilty to the crimes. That raises the central legal issue in this case. Does the prosecution have a duty to disclose exculpatory evidence at the plea stage, or is Brady just a trial right? Neither the United States Supreme Court nor this Court has yet to decide this question, and it is one of paramount importance. As this Court knows, nationwide, almost all criminal cases are resolved by guilty pleas. Plea bargaining is "not some adjunct to the criminal justice system; it is the

criminal justice system." Missouri v. Frye, 132 S.Ct. 1399, 1407 (2012); S. Rosenmerkel, et al., U.S. Bureau of Justice Statistics, Felony Sentences in State Courts, 2006 ("[m]ost (94%) felony offenders sentenced in 2006 pleaded guilty"). If Brady is just a trial right, it has become a hollow reed.

Any discussion of this issue must begin with United States v. Ruiz, 536 U.S. 622 (2002). There, the Supreme Court held that a defendant did not have a due process right to the pre-plea disclosure of impeachment information. As the Court saw it, there was a small risk that "in the absence of impeachment information, innocent individuals . . . will plead guilty," and a significant risk that requiring disclosure of impeachment material would "seriously interfere with the [prosecution's] interest in securing . . . guilty pleas . . . disrupt ongoing investigations, and expose prospective witnesses to serious harm." Id. at 631-32.

As former prosecutors, most of us believe that Ruiz was rightly decided. Requiring prosecutors to disclose impeachment material pre-plea could jeopardize on-going investigations and threaten the safety and privacy of witnesses. See M. Cassidy, Plea Bargaining, Discovery and the Intractable Problem of Impeachment Disclosures, 64 Vand. L. Rev. 1429, 1472 (2011)("mandated pre-plea disclosure of impeachment evidence might require prosecutors to reveal the identity of undercover [officers] and cooperating witnesses very soon after arraignment"). But providing information that tends to establish a defendant's factual innocence is quite different. For us, it is unthinkable that a prosecutor can sit idly by while a defendant pleads guilty, even though the prosecutor is in possession of information that negates the defendant's guilt. If that were the law, it would "cast[] the prosecutor in the role of an

architect of a proceeding that does not comport with standards of justice." Brady, 373 U.S. at 88.[12]

Not surprisingly, most of the courts that have considered the issue have held that a defendant is constitutionally entitled at the plea stage to evidence that would establish his factual innocence. See United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005)(the Supreme Court in Ruiz "did not imply that the government may avoid the consequences of a Brady violation if the defendant accept[ed] an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession"); United States v. Nelson, 929 F.Supp.2d 123 (D.D.C. 2013)("precluding a defendant from raising such a Brady claim after a guilty plea could create a risk too costly to the integrity of the system of justice to countenance"); United States v. Danzi, 726 F.Supp.2d 120 (D. Conn. 2010)("[t]he Court declines the Government's invitation to hold that Ruiz applies to exculpatory as well as impeachment material"); Ollins v. O'Brien, 2005 WL 730987 (N.D. Ill. 2005)("the Court finds the Ruiz distinction . . . persuasive and holds that due process requires the disclosure of information of factual innocence during the plea bargaining process"); see also McCann v. Mangialardi, 337 F.3d 782 (7th Cir. 2009)("[t]he Supreme Court decision in Ruiz strongly suggests that a Brady-type disclosure might be required" when the government possesses evidence that would exonerate the defendant); United States v. Fisher, 711 F.3d 460, 469 (4th Cir. 2013)("if a defendant may not raise a Brady claim

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[12] We recognize that in some cases, the distinction between impeachment material and exculpatory evidence may be difficult to draw, but this is not such a case. See United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998)(impeachment evidence "ha[s] the potential to alter the jury's assessment of the credibility of a significant prosecution witness," whereas exculpatory evidence "go[es] to the heart of the defendant's guilt or innocence"). Here, the DNA evidence goes to the heart of Mr. Buffey's guilt or innocence.

after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information"); but see United States v. Conroy, 567 F.3d 174 (5th Cir. 2009).[13]

Especially noteworthy is the decision in State v. Huebler, 275 P.3d 91, 97-98 (Nev. 2012), where the Nevada Supreme Court wrote this:

> While the value of impeachment information may depend on innumerable variables that primarily come into play at trial and therefore arguably make it less than critical information in entering a guilty plea, the same cannot be said of exculpatory information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate. For this reason, the due-process calculus also weighs in favor of the added safeguard of requiring the State to disclose material exculpatory information before the defendant enters a guilty plea .... [A] right to exculpatory information before entering a guilty plea diminishes the possibility that innocent persons accused of crimes will plead guilty .... In turn, the adverse impact on the government of an obligation to provide exculpatory information is not as significant as the impact of an obligation to provide impeachment information. And importantly, the added safeguard comports with the prosecution's "'special role . . . in the search for truth.'"

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[13] In McCann, the Seventh Circuit noted that Ruiz itself can be read to distinguish between impeachment material (no disclosure duty) and exculpatory evidence (a disclosure duty):

> In holding that the Due Process Clause does not require the government to disclose impeachment information . . . the Court in Ruiz . . . noted that "the proposed plea agreement at issue . . . specifies the Government will provide 'any information establishing the factual innocence of the defendant,'" and "[t]hat fact . . . diminishes the force of [defendant's] concern that, in the absence of the impeachment information, innocent individuals . . . will plead guilty." Thus, Ruiz indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if . . . government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information . . . before he enters into a guilty plea.

337 F.3d at 787-88.

See LaFave, et al., Criminal Procedure § 21.3(c)(concluding that Huebler expresses what is "certainly the better view").[14]

We return to the facts of this case. Joseph Buffey took a time-limited plea deal even as he protested his innocence to the Division of Corrections. His lawyer strongly recommended it, a recommendation that the lawyer would not have made had he known of Lieutenant Myers' results. The sad reality is that, on occasion, innocent people plead guilty thinking that the deck is stacked against them. See A. Hessick & R. Saujani, Plea Bargaining and Convicting the Innocent, 16 BYU J. Pub. L. 189, 199 (2002)("[e]ventually there may come a point where, even for the innocent, accepting the prosecutor's offer may seem more attractive than the risk of trial"). Indeed, of the 321 DNA exonerations to date, 30 were in cases in which a defendant had pleaded guilty. See Innocence Project, DNA Exonerations Nationwide.

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[14] One commentator has persuasively argued that the United States Supreme Court's recent decisions in Missouri v. Frye, 132 S.Ct. 1399 (2012), and Lafler v. Cooper, 132 S.Ct. 1376 (2012), which extend Strickland to the plea-bargaining process, support the recognition of exculpatory Brady rights during plea bargaining:

> Lafler and Frye suggest that the assertion that Brady is a "trial right" will not preclude it from being applied during plea bargaining. Effective assistance of counsel was traditionally considered a right that ensured only a fair trial, but in Lafler and Frye the Supreme Court expressly rejected that argument. Instead, the Court found that guaranteeing the right to effective assistance of counsel at all "critical stages of the criminal proceeding" was necessary for the fair administration of justice. The chief concern of the Supreme Court in both Lafler and [Frye] was ensuring a fair judicial process that results in just outcomes, not solely ensuring fair trials. This concern necessitates pre-plea disclosure of exculpatory Brady evidence, because just as a defendant "cannot be presumed to make critical decisions without counsel's advice," neither can he be presumed to make an informed decision to plead guilty without material exculpatory evidence.

See M. Petegorsky, The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining, 81 Ford. L. Rev. 3599, 3647-48 (2013).

One other point bears mention. On February 11, 2002, when Mr. Buffey allocuted to the sexual assault, the court delayed accepting the plea to get "some additional information . . . to make sure [the] plea is the right thing to do." Not until May 21, 2002, did it accept Mr. Buffey's plea. What if in the interim, the court had learned of Lieutenant Myers' report? Under Rule 11(f) of the West Virginia Rules of Criminal Procedure, the court has the responsibility to ensure that there is an adequate factual basis for a plea. Surely, had the court known about the DNA report, it would have seen this case differently. See United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994)("[w]ithout [the clearly exculpatory] evidence before it, the court . . . could not . . . satisfy itself . . . that there was nothing to question the accuracy and reliability of th[e] defendant's admission that he had committed the crime").

CONCLUSION

A guilty plea is a solemn act, and, as a general rule, our justice system depends on the finality that such pleas bring. Cf. State v. Olish, 164 W.Va. 712, 714, 266 S.E.2d 134, 136 (1980)("where the guilty plea is sought to be withdrawn . . . it should be granted only to avoid manifest injustice"). As former prosecutors, we know that finality matters to crime victims who often need closure to heal. But concerns about finality should give way to compelling claims of innocence.[15] When a defendant like Joseph Buffey has pleaded guilty without knowing that

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[15] In the court below, the State argued that "all issues and grounds for relief asserted by the Petitioner in the [2002-2004] Habeas Corpus proceeding which were ruled upon [against him] are precluded from being relitigated [now] under the Doctrine of Res Judicata." State of West Virginia's Proposed Finding of Fact and Conclusion of Law at 6. We leave it to Mr. Buffey's counsel to address the point. Our question is this: if we now know (i) that this was a one-person crime; (ii) that Adam Bowers was the one person; (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, then why should a prosecutor -- a "servant of justice" -- argue res judicata when application of the doctrine would perpetuate an injustice? See S. Bandes, Loyalty to One's Convictions, 49 How. L. J. 475 (2006)(a "disturbing theme that recurs in many cases is the refusal of prosecutors to concede that the wrong person was convicted, even after a defendant's exoneration"); see also United States v. Koubriti,

DNA evidence has excluded him as the assailant, he should not be imprisoned in his plea.

Accordingly, we urge the Court to grant Mr. Buffey relief.

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Respectfully submitted,

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336 F.Supp.2d 676, 679 (E.D. Mich. 2004)(in some instances, "confessing prosecutorial error . . . is not only the legally and ethically correct decision, it is in the highest and best tradition of [prosecuting] attorneys").

ADDENDUM

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