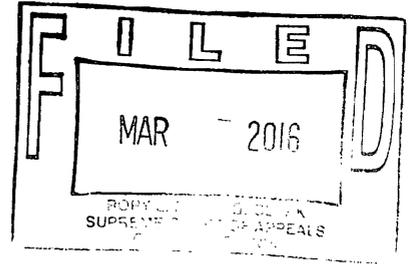


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff/Respondent,

V.

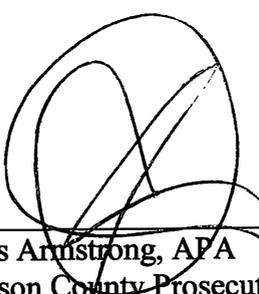
ADAM DEREK BOWERS,
Defendant/Petitioner.



Appeal No. 15-1017

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CASE NO. 14-F-5-2

RESPONDENT
STATE OF WEST VIRGINIA'S RESPONSE TO
PETITION FOR APPEAL



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RESPONDENT
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**I. RESPONDENT'S STATEMENT OF CASE AND
PROCEDURAL SUMMARY**

For the purpose of conforming with Rule 10 of the West Virginia Rules of Appellate Procedure, Respondent provides the following Statement of Case and Procedural Summary to address perceived omissions in the Petitioner's Petition for Appeal.

On or about November 30, 2001, Llundda "Dotty" Luzader was sexually assaulted during a burglary and robbery in Clarksburg, Harrison County, West Virginia. Specifically, and on November 30, 2001, Ms. Luzader, was an eighty three (83) year old woman who lived alone in the Stealey section of Clarksburg. Early in the morning hours of November 30, 2001, Ms. Luzader's home was broken into and Ms. Luzader was

sexually assaulted at knife-point, both vaginally and orally, in addition to being robbed of Nine Dollars (\$9.00). After being raped and robbed, Ms. Luzader was restrained with belts located in her home by the perpetrators prior to the perpetrators leaving her home.

After freeing herself from the belts with which she had been restrained, Ms. Luzader immediately contacted her son, Joseph Luzader¹, to advise him of the awful crimes that had just transpired.² Mr. Luzader advised that he received the telephone call from his mother between 6:00 and 6:30 a.m. on November 30, 2001. Trial Transcript, p. 188, line 5-7. The first thing the victim told her son upon Mr. Luzader getting on the phone was “they raped me.” *Id.* at line 5-6. Mr. Luzader advised, as could be imagined in light of the heinous nature of the crimes that had taken place, that his mother was hysterical and that she repeatedly told him that he need to come to her house immediately. *Id.* at line 10-12. Mr. Luzader advised that after receiving the call, he immediately left his home and drove to his mother’s home. *Id.* at line 17-22.

Upon arriving at his mother’s home, Mr. Luzader initially made contact with his mother in the dining room of the home where he observed her to be “absolutely hysterical.” *Id.* at p. 192, line 9-16. Mr. Luzader described his mother as “babbling” upon making contact with her and he thereafter attempted to “settle her down” in order to ascertain what had happened. *Id.* at line 17-24; p.193, line 1-4. Mr. Luzader advised that his mother told him “they robbed me, they raped me”, “they kept a flashlight in my eyes” and “they tied me up.” *Id.* at p. 193, line 5-10. Mr. Luzader was adamant that his mother

¹ Mr. Luzader was a Lieutenant with the Clarksburg Police Department when this incident occurred in 2001, however he did not participate in any part of the investigation due to his relationship to the victim.

² Mr. Luzader lived between approximately one and two miles from his mother’s home. *Trial Transcript*, p. 189, line 13-16.

used the word “they” in describing the perpetrators, thereby indicating that more than one individual had participated in the crimes. *Id. at line 11-19.*

Mr. Luzader advised that he thereafter called police and while awaiting the arrival of law enforcement, his mother provided a more detailed account of what had happened. Specifically, Mr. Luzader testified to the following during Trial³:

Joseph Luzader: Well, she initially told me that she was awakened in her bedroom upstairs and she – I have a brother that lives in Delaware and he has a key to the home. And when he would come in, he would just unlock the house and go in and he would just go upstairs and yell at my mother in the bedroom and say “Mom, I’m here.” And she said initially when she was real groggy – my mother’s deaf in one ear. And if her good ear is to the pillow, she wouldn’t hear anything to start with... And she said when she was first awakened out of a sleep, she thought for a second there that it was my brother that had come into the house and then she said she realized it wasn’t him.

Prosecutor: So this is up in her bedroom?

Joseph Luzader: Yes.

Prosecutor: Okay. After she was awakened she said “they shined a flashlight in my eyes?”

Joseph Luzader: Yes. She said they were behind her.

Prosecutor: Okay. And when she said that she was awakened by individuals in her bedroom, what did she say happened?

Joseph Luzader: My best recollection of what she told me was they took her downstairs and walked behind her with the light and told her “Don’t ever turn around. Don’t look.” And they took her down and wanted to know how much money she had, or something to that effect. There was very little cash in her purse, which she offered to them. And then they took her back upstairs where they sexually assaulted her.

Id. at p. 194, line 24; p. 195, line 1-24; p. 196, line 1-4.

Mr. Luzader stated that his mother told him that the sexual assault had occurred in her bedroom and that after being assaulted, she was tied up. *Id. at p. 196, line 11-18.* Mr. Luzader also advised that after arriving at his mother’s home he noted that the side door to her home was ajar. *Id. at p. 198, line 7-12.* Ms. Luzader was thereafter immediately transported to United Hospital Center (UHC) for medical treatment due injuries she had sustained during the assault and in order to have a sexual assault examination performed.

³ Prior to Trial, the State filed a Notice of Intent to Use Excited Utterances.

Upon arriving at the hospital, the triage nurse took an account of the manner by which Ms. Luzader had incurred her injuries. The account provided by Ms. Luzader was as follows:

SANE Nurse: He had navy blue boxers – boxer shorts on. Blue jeans. He was white. He told me he got in the side door. He robbed me first. I thought – I thought he was going to kill me. I thought, oh my God, that kid was going to kill me for nine dollars. I had a – he had a knife he kept saying do what I say and you won't get hurt. He kept sticking his thing in my mouth. He made me get down on the floor on my knees.

SANE Nurse: He made me put my face in a pillow and did it to me from behind. Oh my God, I'm so thankful to be alive...I really couldn't see his face real well...he never did reach a climax, or at least I don't think he did. Every time I would move he would say, put that pillow up. He wanted that thing over my eyes so I couldn't see. Why would a young guy want to do something like this? Why would he want to mess with an old lady?...He kept showing me the knife. He kept – and kept thinking oh my God, he's going to kill me. I kept saying “please don't kill me.” He counted the money after he raped me and said “all I got out of this was nine dollars?”...He was mad because he couldn't get it all in my mouth.
Id. at p.316, line 13-19; p. 317, line 4-5, line 10-23.

While at UHC, Ms. Luzader was diagnosed with a second degree tear of her anterior fourchette into the perineum, which required sutures, and pinpoint tears around the vaginal opening. *Id. at p.321, line 15-24; p. 322, line 1; p. 323, line 24; p. 324, line 1-2.* Additionally, a sexual assault kit was completed which entailed the collection of vaginal swabs and collection of the panty liner that the victim had been wearing. *Id. at p. 328, line 2-21; p. 335, line 7-22.* During the sexual assault examination, Ms. Luzader advised that her last sexual activity prior to the sexual assault was more than one (1) year prior. *Id. at p. 331, line 22-23; p. 332, line 1-7.*

During the law enforcement investigation of the rape, robbery and burglary, a tissue with which Ms. Luzader had cleaned herself following the sexual assault was collected. *Id. at p. 221, line 18-24; p. 222, line 1-11.* The bedding from the location of the

sexual assault - Ms. Luzader's bedroom - was also collected. *Id. at p. 224, line 15-24; p. 225, line 1-8.*

At some point during law enforcement's investigation, a suspect was identified. This suspect was Joseph Buffey, an individual who had been involved in other breaking and enterings involving businesses in Clarksburg. Mr. Buffey was taken into custody and subsequently charged with the crimes perpetrated against Ms. Luzader.⁴ Following Mr. Buffey's arrest, Mr. Buffey entered guilty pleas to one (1) count of First Degree Robbery and two (2) counts of First Degree Sexual Assault on February 6, 2002, before the Circuit Court of Harrison County, West Virginia. Said guilty pleas were subsequently invalidated by this Court upon appellate review of a habeas corpus proceeding involving Mr. Buffey's matter. See Buffey v. Ballard, *West Virginia Supreme Court of Appeals, Appeal Number 14-0642*.

During the pendency of the habeas corpus proceeding involving Mr. Buffey, forensic testing was performed on Ms. Luzader's bedding, the vaginal swabs collected during the sexual assault examination and the tissue that was collected from Ms. Luzader's residence. *Id. at p. 429, line 17-24; p. 430, line 1-9.* Said testing, performed by Forensic Science Associates/Forensic Analytical Sciences, resulted in the location of genetic material which was not attributable to the victim, Ms. Luzader. This genetic material was thereafter used to generate a DNA profile which was entered into the

⁴ The Respondent believes this Court is well versed in the details of Mr. Buffey's matter as said matter was before this Court in October of 2015 (Buffey v. Ballard, Harrison County Case Number 12-C-182-2; Buffey v. Ballard, West Virginia Supreme Court Appeal Number 14-0642). Respondent believes that a lengthy recitation of the factual and procedural history of said matter beyond that which is contained herein is unnecessary due to this Court's familiarity with said matter and because the majority of such a recitation is not in the record of these proceedings.

national Combined DNA Index System (CODIS) which produced a match for a convicted felon imprisoned in West Virginia, namely your Petitioner, Adam Bowers.

Once Mr. Bowers DNA profile was identified as matching the DNA profile generated from the items of physical evidence collected during the investigation into the crimes perpetrated against Ms. Luzader, Lieutenant Jason Snider of the Clarksburg Police Department travelled to Huttonsville Correctional Complex on December 3, 2012, to speak with Mr. Bowers.⁵ *Id. at p. 370, line 2-4.* Mr. Bowers was Mirandized and agreed to speak with Lieutenant Snider. *Id. at p. 372, line 9-16.* During the conversation with Lieutenant Snider, Mr. Bowers advised the Lieutenant that he had never been in the victim's home, that he had not participated in the crimes and that at the time of the crimes perpetrated against the victim he was living approximately two (2) blocks from the victim's home. *Id. at p. 373, line 17-24; p. 374, line 1-24; p. 375, line 1-15; p. 379, line 24; p. 380, line 1-4.*

Subsequent to Lieutenant Snider's meeting with Mr. Bowers at Huttonsville, Mr. Bowers was transferred to Northern Regional Jail and Correctional Center. Lieutenant Snider thereafter obtained a search warrant for a sample of Mr. Bowers' DNA via buccal (oral) swab. *Id. at p. 400, line 2-24; p. 401, line 1-24; p. 402, line 1-24.* On or about January 14, 2014, Lieutenant Snider executed the search warrant and collected three (3) buccal swabs of Petitioner's saliva which in turn contained Petitioner's DNA sample. *Id. at p. 403, line 11-24; p. 404, line 1-21; p. 405, line 1-24; p. 406, line 1-24; p. 407, line 1-9.* Once Mr. Bowers' DNA samples had been collected, the same were sent for forensic and comparative testing. *Id. at p. 410, line 10-24; p. 411, line 1-18.*

⁵ Mr. Bowers was serving a sentence at the facility as a result of prior unrelated convictions for the offenses of Breaking and Entering and Unlawful Assault.

As referenced above, Mr. Bowers was identified as a perpetrator of the crimes committed against the victim due to the location of male DNA at the crime scene which matched his DNA profile. Said forensic testing was performed by both Forensic Science Associates (FSA) and Forensic Analytical Sciences (FAS).⁶ *Id. at p. 428, line 6-11.* The lead scientist responsible for the forensic testing was Alan Keel, a criminalist and the supervisor of the Forensic Biology and DNA Analysis Unit at FAS.⁷ *Id. at p. 419, line 10-20.*

During the forensic testing that was performed, the first step of the process was to identify the genetic (DNA) profile for the victim, Ms. Luzader. *Id. at p. 435, line 4-21; p. 436, line 12-24; p. 437, line 1-22.* The next step was to test the items of physical evidence that had been submitted to determine whether there was biological material present that could not be attributed to the victim. The first items tested were the vaginal swabs that had been collected from Ms. Luzader. One of the vaginal swabs, designated as swab number four (4), tested positive for semen. *Id. at p. 431, line 16-20; p. 432, line 20-24; p. 433, line 1-11.* Once the genetic material which did not belong to the victim was isolated, an autosomal genetic profile for a male contributor was established which was calculated to occur in roughly one (1) out of forty million (40,000,000) people. *Id. p. 440, line 1-18.* After the autosomal profile was established, a Y chromosomal profile was established for the male contributor. This profile was determined to have originated from one (1) male contributor. *Id. at p. 441, line 3-24; p. 442, line 1-18.* This genetic profile was thereafter

⁶ Both companies were, in essence, one and the same. While the technicians and scientists who were performing the forensic testing for FSA were employed by said entity, FSA merged with FAS. *Id. at p. 418, line 3-24; p. 419, line 1-7.*

⁷ Mr. Keel is erroneously identified as "Allen Kehl" in the transcript of the underlying proceedings.

labeled as “Unknown Male Number One”⁸ and was determined to occur in approximately one (1) out of forty billion (40,000,000,000) people. *Id. at p. 442, line 19-24; p. 443, line 1-24.*

The next item tested were cuttings taken from the bedding of Ms. Luzader’s bedroom, the location of the sexual assault. Genetic material not attributable to the victim and containing semen was identified on a portion of the fitted sheet that had been on the victim’s bed at the time of the sexual assault. *Id. at p. 451, line 5-17; p. 452, line 14-24; p. 453, line 1-24; p. 454, line 1.* Testing of this material resulted in a genetic profile that was deemed to be unique within the human population. *Id. at p. 454, line 2-13.*⁹ Additionally, the DNA profile generated from the genetic material located on the victim’s bedding matched the DNA profile generated from the male genetic material located on the vaginal swab. *Id. at p. 455, line 23-24; p. 456, line 1-16.* Thus, the male who contributed the semen located on the vaginal swabs taken from the victim was the same male who contributed the semen located on the victim’s bedding. Again, this unique genetic profile was identified as “Unknown Male Number One.” *Id. at p. 456, line 21-24; p. 457, line 1-2.*

Once the DNA profile for “Unknown Male Number One” was determined from the testing performed on the vaginal swabs and bedding, said profile was statistically determined to be so unique that the occurrence of such a profile for an individual would not be expected to be occur “more than once among all the people that have ever lived on

⁸ At the time this testing was being performed, there was no comparison sample from Mr. Bowers to test this profile against (i.e. he had not yet been identified as a suspect), hence the reason the male contributing profile was designated as “Unknown Male.”

⁹ It should be noted that extremely small amounts of additional male DNA not attributable to the Petitioner were located but that due to the extremely low amounts (i.e. single alleles), no statistical comparison could be performed (in other words, one allele not attributable to Petitioner was discovered but because only one allele was present, a significant portion of the population may possess this allele making comparative testing meaningless). *Id. at p. 457, line 3-23.*

the planet.” *Id. at p. 458, line 4-13.* In other words, any match between any subsequently submitted DNA sample and the genetic profile generated for “Unknown Male Number One” would be certain to a point beyond statistical comprehension. As can be presumed, such a match did in fact occur once Mr. Bowers’ DNA was compared to the genetic profile of “Unknown Male Number One.”

In January of 2013, FAS received the buccal swabs from Lieutenant Snider that had been collected from Mr. Bowers. *Id. at p. 461, line 3-7.* Once these items were received by FAS, said items were tested and a complete autosomal and Y chromosomal profile for Mr. Bowers was established. *Id. at p. 462, line 15-24; p. 463, line 1-9.* This DNA profile matched the DNA profile for “Unknown Male Number One.” *Id. at p. 466, line 19-23; p. 468, line 1-7.* Thus, Adam Bowers, Your Petitioner, is “Unknown Male Number One” – the individual who left his semen and DNA inside of the victim’s vagina and on her bedding despite stating that he had never been inside the victim’s home. Put succinctly, the evidence demonstrating Petitioner’s guilt was proven in this matter not beyond a reasonable doubt, but beyond any doubt.

Prior to Trial in Petitioner’s matter, the State filed a Motion requesting that this Court preclude reference and admission at Petitioner’s Trial of the guilty pleas previously entered by Joseph Buffey in respect to the victim’s matter and any conduct of Mr. Buffey related to the crimes perpetrated against the victim. The Trial Court granted said Motion and the Trial Court’s ruling in regard to this Motion is one of the basis’ for the instant appeal.

II. RESPONDENT’S SUMMARY OF ARGUMENT

A. THAT THE TRIAL COURT PROPERLY PRECLUDED REFERENCE AT TRIAL BY PETITIONER TO THE GUILTY PLEAS AND CONDUCT OF JOSEPH BUFFEY IN PETITIONER’S TRIAL.

“For evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant.” State v. Frasher, 164 W.Va. 572, 586, 265 S.E.2d 43, 51 (1980). Rule 401 of the West Virginia Rules of Evidence defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 403 of the West Virginia Rules of Evidence provides in pertinent part that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury...”

In the present matter, the evidence demonstrating Petitioner’s involvement in the crimes perpetrated against the victim was definitive and unassailable. The male DNA located inside the victim and left by one of her attackers resulted in a genetic profile that is unique in the human population and matches the genetic profile of the Petitioner. As stated during Trial, the probability that another male left this genetic material is so incredibly infinitesimal that it is almost incalculable. Thus, Petitioner’s involvement in the crimes perpetrated against the victim was proven not beyond a reasonable doubt but beyond any doubt. As a result, it is impossible for Petitioner to demonstrate that the guilt of Joseph Buffey is inconsistent with the guilt of Petitioner.

Because Petitioner cannot demonstrate that the guilt of Joseph Buffey is inconsistent with the guilt of Petitioner, evidence of Mr. Buffey’s previously entered guilty pleas and any potential evidence of Mr. Buffey’s involvement in the crimes

perpetrated against the victim would clearly be inadmissible. Put simply, Petitioner's guilt was proven to such a level of certainty that any evidence of Mr. Buffey's participation would merely show complicity in the crimes perpetrated by Petitioner, not that Mr. Buffey was an alternative perpetrator to the exclusion of Mr. Bowers. Because of this, any evidence demonstrating Mr. Buffey's participation in the crimes for which Petitioner was convicted was inadmissible and irrelevant (admission of evidence of Buffey's conduct in light of the evidence would not make it more or less probable that Petitioner committed the crimes perpetrated against the victim and admission of such evidence would additionally confuse the issues).

In light of the foregoing, the Trial Court was correct in precluding reference by Petitioner to evidence of Mr. Buffey's guilt in the underlying proceedings.¹⁰

B. THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL.

"The function of [the court] when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

¹⁰ Interestingly, and although Mr. Buffey's case had not yet been heard at the time of Mr. Bowers' Trial, this Court subsequently invalidated the guilty pleas that had previously been entered by Mr. Buffey. Had the Trial Court ruled that such evidence could be used at Petitioner's Trial, and in light of this Court's subsequent rulings in the Buffey case, the result would have been the admission of incompetent evidence at Petitioner's Trial.

“A [court] must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility determinations that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.” Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

In the present matter, the State established all necessary elements of the crimes charged against Petitioner beyond a reasonable doubt. This is true regardless of how the evidence is viewed, let alone in a “light most favorable to the State.” *Id.* Petitioner specifically complains that the State failed to prove that he possessed a knife and that the victim’s home was burglarized. As shown by way of the victim’s statements to medical personnel and her son, and in light of the fact that Petitioner’s guilt in the sexual assault was so conclusively proven, the Petitioner’s use of a knife (or assisting, encouraging and aiding the one who did possess the knife) could easily and logically be inferred from the evidence as could the fact that the victim’s home was burglarized (she did not invite her attackers inside as clearly shown by her own statements).

Because the State proved each and every element of the crimes charged against Petitioner beyond a reasonable doubt, and because the evidence presented is to be viewed in a light most favorable to the State with all inferences credited thereto, the Trial Court

was correct in denying the Petitioner's Motion for Judgment of Acquittal and Motion for New Trial.

III. RESPONDENT'S STATEMENT REGARDING ORAL ARGUMENT

Respondent does not believe oral argument is necessary due to the clarity of the facts and law involved in this matter but that in the event this Court does decide oral argument is necessary, Respondent believes such submission should be under the parameters of Rule 19 as the issues in the pending Appeal involve a narrow issue of law.

IV. ARGUMENT AND ANALYSIS

A. THAT THE TRIAL COURT PROPERLY PRECLUDED REFERENCE AT TRIAL BY PETITIONER TO THE GUILTY PLEAS AND CONDUCT OF JOSEPH BUFFEY IN PETITIONER'S TRIAL.

“For evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant.” State v. Frasher, 164 W.Va. 572, 586, 265 S.E.2d 43, 51 (1980); also see United States v. Pannell, 178 F.2d 98 (3rd Cir. 1949). Rule 401 of the West Virginia Rules of Evidence defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 403 of the West Virginia Rules of Evidence provides in pertinent part that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury...”

In the present matter there are numerous reasons why evidence of Mr. Buffey's previously entered guilty pleas and conduct were properly excluded from Petitioner's matter by the Trial Court. First, and foremost, evidence of Mr. Buffey's conduct was

clearly not inconsistent with the guilt of Petitioner. To the contrary, evidence of Mr. Buffey's conduct was wholly consistent with the guilt of Petitioner.

As stated above, the evidence of Petitioner's involvement in the crimes perpetrated against the victim was unassailable. At the time the items of physical evidence collected at the crime scene were obtained by law enforcement, the Petitioner was not a suspect. Similarly, while the testing on the items was being performed, and prior to the genetic profile for Petitioner being entered into CODIS, Petitioner was not a suspect. Petitioner was only developed as a suspect when the genetic profile developed for the male whose semen was found inside of the victim and found on the victim's bedding, identified merely as "Unknown Male Number One", was entered into CODIS. Hence, it is indisputable that the methods used to identify the Petitioner as the perpetrator of the crimes were completely objective and scientific in nature.

After the genetic profile for "Unknown Male Number One" was arrived at via objective scientific means, a sample of Petitioner's DNA was lawfully obtained which resulted in a match to the DNA profile for "Unknown Male Number One." This match was not to a "reasonable degree of certainty", or even to significant odds of one (1) in a million (1,000,000) – the match was so conclusive that it almost defies statistical comprehension. As Mr. Keel stated during Petitioner's Trial, the genetic profile developed for the perpetrator from the male genetic material found inside of the victim and on her bedding, which identically matched the genetic profile of Petitioner himself, was so unique that the occurrence of such a profile for an individual would not be expected to be occur "more than once among all the people that have ever lived on the planet." Trial Transcript, at p. 458, line 4-13. As stated above, Petitioner's guilt was

therefore proven not beyond a reasonable doubt, but beyond **ALL** doubt [emphasis added].

The location of the Petitioner's semen and DNA inside of the victim and on her bedding is, in and of itself, sufficient evidence to conclusively establish Petitioner's commission of the crimes for which he was convicted. However, this guilt is only furthered strengthened by several facts present in Petitioner's matter. First, Petitioner advised Lieutenant Snider that he had never been inside the victim's home. Thus, there was no conceivable means by which Petitioner's DNA could have been deposited inside of the victim's home, let alone inside of her vagina, other than by way of Petitioner's commission of the crimes for which he was convicted. Second, the victim was an elderly woman who, while being examined, advised that her last sexual intercourse had occurred more than one (1) year prior to the crimes thus making it impossible that Petitioner had engaged in consensual sexual activity with the victim sometime prior to the commission of the crimes. Lastly, and importantly, Petitioner denied having committed any of the crimes thus negating any potential alternative means by which his DNA could have discovered in the locations where it was in fact discovered.

In light of the foregoing, Petitioner's participation in the crimes perpetrated against the victim was conclusive and clear. As a result, any evidence of Mr. Buffey's participation in the crimes would merely show that another individual participated in the crimes along with Petitioner thereby making Mr. Buffey's guilt consistent with that of Petitioner (it is also important to consider that the victim, in relating to her son what had happened, repeatedly used the word "they"). Because any evidence of Mr. Buffey's

involvement in the crimes for which Petitioner was convicted would have been consistent and cumulative, such evidence was properly excluded.

In respect to the guilty pleas previously entered by Mr. Buffey to First Degree Sexual Assault and First Degree Robbery, the same analysis used for a determination of the admissibility of Mr. Buffey's conduct is equally applicable to the admissibility at Petitioner's Trial of the guilty pleas he previously entered. In light of the conclusive evidence of Petitioner's commission of the crimes, evidence that Mr. Buffey had pled guilty to offenses arising from the assault on the victim would not be inconsistent with the guilt of the Petitioner. In Pannell¹¹, *supra*, a Defendant on trial for income tax evasion wished to introduce evidence of his wife's no contest plea to the same charge arising from the same conduct for purposes of establishing that she, not Defendant, was the one responsible for the criminal conduct.¹² *Id.* The court noted in Pannell that "[t]he fact that Mrs. Pannell may have admitted that she was guilty did not prove that her husband was not guilty also [and] this is not a case where admission or proof of guilt by one is inconsistent with guilt of another." *Id. at 100.*

As in Pannell, *supra*, evidence that Mr. Buffey had previously pled guilty to crimes associated with the assault of the victim would not demonstrate Petitioner's innocence – especially in light of the evidence. The only thing admission of said guilty pleas would accomplish would be to show that Mr. Buffey participated in the crimes with Petitioner, thus making such evidence consistent with Petitioner's guilt. Because such evidence would be consistent with Petitioner's guilt, the evidence of Mr. Buffey's previously entered guilty pleas was properly excluded by the Trial Court.

¹¹ Pannell is cited with approval by this Court in Frasher, *supra*.

¹² The court noted the rules governing the admission of *nolo contendere* pleas as opposed to guilty pleas, but nonetheless discussed the substantive aspect of why admitting such would not be proper.

Additionally, and because evidence of Mr. Buffey's participation in the crimes is consistent with Petitioner's involvement, such evidence is irrelevant. In other words, and in light of the consistent and conclusive nature of the evidence demonstrating Petitioner's commission of the crimes, evidence of Mr. Buffey's previously entered guilty pleas would not make "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 of West Virginia Rules of Evidence. The only thing admission of such evidence would have done would have been to confuse the jury (the jury would almost certainly have been left wondering why this evidence was coming in when the Petitioner's commission of the crimes was so conclusively established). Because evidence of Mr. Buffey's previously entered guilty pleas was irrelevant to a determination of Petitioner's matter in light of the facts and circumstances, the Trial Court's exclusion of such evidence was proper.

B. THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL.

Petitioner complains that the Trial Court erred when it denied his Motion for Judgment of Acquittal and Motion for New Trial. Petitioner asserts that both such Motions should have been granted due to the alleged failure of the State to prove that he utilized a knife during the crimes committed against the victim and the alleged failure of the State to demonstrate that the victim's home was broken into. Your Respondent submits that the evidence, both direct and circumstantial, presented at Trial clearly provided a basis from which the jury could easily find that the Petitioner did in fact

utilize a knife and did in fact break into the victim's home to commit the crimes he was convicted of.

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden.” Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). As this Court is well aware, “[t]he function of [the court] when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syllabus Point 1, Guthrie, *supra*. Importantly, “a [court] must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility determinations that the jury might have drawn in favor of the prosecution.” Syllabus Point 3, Guthrie, *supra*.

In the present matter, and as related in the “Statement of Case” section above, the State presented the following evidence from which the jury could, and did, find that the Petitioner utilized a knife during the commission of the crimes: That the victim described a knife being used; that the victim described being raped at knife point; that the victim advised that the perpetrator of the sexual assaults utilized a knife during the commission of the sexual assaults; that the perpetrator of the robbery utilized a knife during the commission of the robbery; that the perpetrator of the crimes left their DNA at the crime scene; and that the Petitioner's DNA matched that of the DNA left by the perpetrator of

the crimes. In other words, a person committed the sexual assaults using a knife, the same person committed a robbery using a knife, DNA was left at the crime scene by the person who committed the sexual assaults and the DNA matched that of the Petitioner. Hence, the State presented evidence from which the jury could, and obviously did, make an inference that the Petitioner used a knife in the commission of the crimes. As stated in Guthrie, *supra*, the court “must accept all reasonable inferences from [the evidence] that are consistent with the verdict.”¹³

In the present matter, and as related in the “Statement of Case” section above, the State presented the following evidence from which the jury could, and did, find that the Petitioner broke and entered the victim’s home: That the victim was asleep when the perpetrators entered her residence (i.e. she did not invite them in); that the perpetrators obviously entered the home; that the perpetrators committed a crime in the home; that the victim normally kept her doors shut and locked (the testimony of the victim’s son evidenced this by way of him relating instances when his brother would sometimes come to the home while in town); that one of the perpetrators stated entry was gained through the side door; and that it appeared to the victim’s son that the intruders gained entry through the side door (i.e. he noted the side door to be ajar after arriving at his mother’s home). Thus, based upon the evidence presented, the jury could, and did, easily find that the Petitioner broke and entered the home of the victim (Petitioner’s contention raises the

¹³ For arguments’ sake, even if Defendant was not the individual actually in possession of the knife, the evidence presented at Trial conclusively demonstrated that he was there participating in, encouraging, facilitating, assisting and aiding in the commission of the crimes for which he was convicted and, as such, he would be guilty of the substantive offenses as a principal in the second degree (although the State believes that the evidence clearly shows that the Defendant was in fact in possession of the knife). See State v. Miller, 204 W.Va. 374 (1998).

obvious question of how else would he have gained entry to the home to leave his genetic material in the locations where it was found?).

Because the State presented more than sufficient evidence, both direct and circumstantial, from which a jury could and did find that the Petitioner employed a knife during the commission of the crimes perpetrated against the victim and that the Petitioner broke and entered the victim's home, the Trial Court was correct in denying Petitioner's Motion for Judgment of Acquittal and Motion for New Trial.

V. CONCLUSION

Your Respondent submits that a review of the record of the underlying proceedings clearly demonstrates that said proceedings were regular and that the Trial Court's ruling to preclude admission of Mr. Buffey's guilty pleas and conduct was correct and proper. Additionally, the evidence presented by the State during Petitioner's trial was more than sufficient to prove each and every element of the crimes charged against Petitioner beyond a reasonable doubt.

WHEREFORE, based upon the foregoing, Respondent requests that this Court deny the relief requested in the instant Petition for Appeal.

Respectfully submitted,
STATE OF WEST VIRGINIA,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff/Respondent,

V.

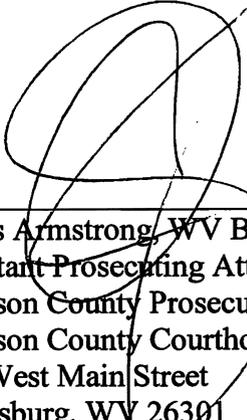
Appeal No. 15-1017

ADAM DEREK BOWERS,
Defendant/Petitioner.

CERTIFICATE OF SERVICE

I certify that on the 17th day of March 2016, I served the foregoing Response to Petition for Appeal upon the following party by depositing a true copy thereof, enclosed in a sealed envelope, postage prepaid, in the United States mail and addressed as follows:

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