

18-8425

CASE NO.

ORIGINAL

IN THE
SUPREME COURT
OF THE UNITED STATES

FILED
FEB 11 2019

OFFICE OF THE CLERK
SUPREME COURT U.S.

HENRY JOHNSON LUCAS, JR.,

PETITIONER

v.

S.K. YOUNG, WARDEN

RESPONDENT

ON PETITION FOR A WRIT OF

CERTIORARI FROM THE

VIRGINIA SUPREME COURT

HENRY JOHNSON LUCAS, JR.
PSCC #1200103
P.O. BOX 518
POCAHONTAS, VA. 24635

COMMONWEALTH OF VIRGINIA, Attn: GENERAL
MR. PAUL WALTHER MARCHELLING
418 WEST DAVIS STREET 202 N. 9th St.
CULPEPER, VA. 22701
Richmond, VA. 23219

QUESTIONS PRESENTED

- I. Did the Virginia Supreme Court rule erroneously in dismissing petitioner's appeal as being untimely under Rule 5:9(a) of the Supreme Court of Virginia.
- II. Did the Circuit Court of Culpeper County, Virginia the last court that ruled, erroneously dismiss petitioner's Motion For a New Trial under Rule 1:1 of the Rules of the Supreme Court of Virginia.
- III. Did the Circuit Court of Culpeper County, Virginia the last court that ruled, erroneously rule that the Culpeper, Virginia Police Department was not in violation of Code of Virginia §19.2-59 illegal search, and Amendment Four of the United States Constitution, and Brady v. Md.
- IV. Did the Circuit Court of Culpeper County, Virginia the last court that ruled, erroneously rule when it dismissed petitioner's Motion For a New Trial on newly discovered missing evidence, exculpatory, and impeachment evidence after 21 days has expired, and Brady.
- V. Did the Circuit Court of Culpeper County, Virginia the last court that ruled, erroneously rule when it did not grant a new trial based on prosecutorial, police misconduct
- VI. Did the Circuit Court of Culpeper County, Virginia the last court that ruled, erroneously did not grant petitioner a New Trial when the conviction was principally based on perjury.
- VII. Did the Circuit Court error when the Commonwealth failed to deny that there were four incidents of sexual intercourse not one incident of rape, Brady v. Md.

Questions Presented

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OPINIONS BELOW

The Virginia Supreme Court's Order dismissing petitioner's appeal is at addx. C. The Circuit Court of Culpeper County, Virginia's Order dismissing petitioner's Motion For a New Trial is at addx. N. The Order denying petitioner's Petition For Rehearing Final Order Circuit Court Culpeper County is at addx. K.

JURISDICTION

The Circuit Court of Culpeper County entered judgment September 17, 2018 (Final Order). The Virginia Supreme Court entered judgment November 14, 2018, U.S.C., §1254(1).

PROVISIONS INVOLVED

Relevant statutory provisions are at addx. E, F, H, U, V,

STATEMENT

Petitioner Henry Johnson Lucas Jr.. was convicted on several charges involving his wife Patricia Lucinda Knight Lucas.

Petitioner filed suit on or around January 27, 2008 against his then ex-wife. Petitioner was granted discovery on a limited basis to obtain answers via interrogatories.

Petitioner wrote the Defendant's Counsel Mr. Thomas C. Palmer, Jr. #VSB05144 for documents. The documents were from the Culpeper Police Department. On June 27, 2016 and August 3, 2016 petitioner received several dozen undisclosed documents having exculpatory and impeachment value. The evidence was violative of the agreed order for discovery.

Petitioner moved the Circuit Court of Culpeper County for a successive Petition, For Habeus Corpus denied November 1, 2017. Petitioner appealed to the Virginia Supreme Court case is currently under review.

Petitioner filed a Motion For a New Trial June 27, 2017 (Mail Box Rule). On July 20, 2017, the Commonwealth Attorney filed a Motion to Dismiss. The Circuit Court of Culpeper County entered an Order to Dismiss petitioner's case on August 10, 2017, Petition For Rehearing denied August 24, 2018. The Commonwealth of Virginia did not deny any of petitioner's allegations in its Motion to Dismiss.

Petitioner appealed to the Virginia Supreme Court. The Court entered an Order

denying the petition as untimely on November 14, 2018. The Court's Ruling was based on Rule 5:9(a) of the Rules of the Supreme Court of Virginia. In Virginia a general law enacted by the General Assembly prevails over a rule of the Supreme Court of Virginia. The ruling of the Court in Rule 5:9(a) is in conflict with Code of Virginia §8.01-671.

The General Assembly has not enacted a Notice of Appeal as a requirement for filing in the Virginia Supreme Court. It has enacted a 90 day rule for filing a petition in the Virginia Supreme Court under §8.01-671.

The General Assembly has however under §8.01-675.3 requiring a Notice of Appeal in the Virginia Court of Appeals.

With that said petitioner filed a Notice of Appeal of the Circuit Court of Culpeper County's Final Order, ALTHOUGH NOT REQUIRED.

REASONS FOR GRANTING THE PETITION

This petition presents six questions meriting review. First, the Courts below adopted erroneous decisions based on two Rules of the Supreme Court of Virginia. In descending order Rule 5:9(a) Notice of

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Appeal (a) filing deadline ... No Appeal shall be allowed unless, within 30 days after the entry of Final Judgment or other appealable order In Rule 5:9(a) by plain language "or other appealable order's is limiting. Petitioner appealed the "Final Order". There have been several decisions by the Virginia Supreme Court wherein the decision was based on the "Final Judgment" order. Petitioner moved the Circuit Court for a Petition For Rehearing and appealed based on the Final Order. Petitioner filed a Notice of Appeal and the appeal both within 30 days of the Final Order. Notice of appeal not req.

Second, the Circuit Court decision was erroneous based on Rule 1:1 of the Rules of the Supreme Court of Virginia. Rule 1:1 Finality of Judgments. All Final Judgments, Orders, ... shall remain under the control of the trial court ... for twenty-one days after the date of entry, and no longer. ...

However, Rule 1:1 is not absolute. The Commonwealth Attorney and the town of Culpeper Virginia Police Department obstructed petitioner. Therefore, Code of Virginia §§8.01-229 (D)

is applicable.

Third, the Circuit Court erroneously based its decision to deny petitioner's motion for a new trial on newly discovered evidence of an illegal **search** of petitioner's residence under Code of Virginia §19.2-59 and Amendment Four of the United States Constitution. No **consent to search or search warrent at the time of seizure**.

Fourth, the Circuit Court erroneously denied petitioner's motion for a new trial based on newly discovered missing evidence.

Fifth, the Circuit Court erroneously denied petitioner's motion for a new trial on newly discovered exculpatory/impeachment evidence that the conviction was based principally on perjury.

Sixth, the Circuit Court erroneously denied a new on newly discovered evidence of prosecutorial misconduct.

Seventh, the Circuit Court erroneously ruled in that it did not grant a new trial when the con- was principally based on perjury.

Petitioner appealed the final order. See appx. J, K. Petitioner filed the notice of appeal after the Petition For rehearing was denied. see appx.L, M.

I. Did The Virginia Supreme Court Rule Erroneously In Dismissing Petitioner's Appeal As Being Untimely Under Rule 5:9(a) of The Supreme Court Of Virginia., It merits this Courts review.

The Supreme Court of Virginia committed error when it dismissed petitioner's appeal from the trial court as being untimely. The court entered an order denying the appeal based on Rule 5:9(a) of the Rules of the Supreme Court of Virginia.

See appx. D. The Code of Virginia §8.01-671 Time within which petition must be presented. A. In cases where an appeal is permitted from the trial court, no petition shall be presented for an appeal to the Supreme Court from **any final judgement** whether the Commonwealth be a party or not, (i) which shall have been rendered more than 90 days before the petition is presented,

The Code of Virginia **does not prescribe a filing of a notice of appeal** in the case of an appeal to the Virginia Supreme Court. It does however prescribe such a notice of appeal in the Court of Appeals of Virginia. The Code §8.01-675.3 Time within which appeal must be taken, notice. ... notice of appeal to the Court of Appeals in

any case within the jurisdiction of the court shall be filed within 30 days from the date of any final judgement order, decree or conviction.

A. The Opinions Below Conflict With The Court Of Appeals Of Virginia, Virginia Supreme Court And This Court.

1. In Toghill v. Com., 289 Va. 220 (Va.2015), in quoting Ayotte, Id. at 328-29, 126 S. Ct. 961(... frame work for discerning the proper remedy to be applied when a statute is unconstitutional as applied)..In Lahey v. Johnson, 283 Va. 225 (2012)... the extent however that any of those rules could be construed as conflicting with the statute, the statute would "prevail [] over [them]." Turner v. Com., 221 Va. 513, 519-20, 273 S.E.2d 36, 40 (1980) ("The Constitution of Va., Art., VI, §5, prohibits the promulgation of any court rule 'in conflict with the general law as the same shall from time to time, be established by the general assembly'"); see Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 257 Va. 1, 21-23, 509 S.E.2d 307, 319 (1999)(same) see also Code §8.01-3(D) ("In the case of any variance between a rule and an enactment of the general law, the rule is unconstitutional as applied."))
THE DECISION IS UNCONSTITUTIONAL AS APPLIED. VIOLENTS OF THE 14TH AMENDMENT.

eral Assembly such variance shall be construed so as to give effect to such enactment"). See appx. G, H, T, *Smith v. Com., 263 Va. 132, 63 VA.13 (2002), Apx.T.*

Petitioner moves to the language in Wellmore Coal Corp., v. Harman Mining Corp., 264 Va. 279 (Va. 2002), II. Analysis Rule 5:9(a) provides that "no appeal shall be allowed unless, within 30 days after the entry of final judgement ... counsel for the appellant files with the clerk of the trial court a notice of appeal" "date of entry of any **final judgement** shall be the date the judgement is signed by the judge."

Petitioner filed a notice of appeal based on the final judgement. See appx. J, K. Notwithstanding the fact that the statute Code of Virginia §8.01-671 prevails over a rule of the Supreme Court of Virginia, petitioner filed a notice of appeal with the trial court. With that said it was within 30 days and timely. See appx. A, B, G. ... time for the purposes of appeal begins to run from the date **final judgement** is entered. Peyton v. Ellyson, 207 Va. 423, 150 S.E.2d 104 (1966).

2. In discussing the Virginia Court of Appeals, Supreme Court of Virginia and this Court in Smith

v. Com., 56 Va. App. 351 (Va. App. 2010), Prior to its decision in Jay, both our Supreme Court and this Court have historically dismissed appeals when the mandatory requirements of the rules have not been adhered to,

The holding of Jay could hardly be clearer, "[b]y dismissing rather than denying the appeals the Court of Appeals rendered the requirements of Rule 5A:20 jurisdictional." 275 Va. at 517, 659 S.E.2d at 315. Jay commands that we do not dismiss an appeal except on the grounds that this Court lacks jurisdiction, It follows that a rule of court cannot convey or limit jurisdiction. (FN6)

Indeed, a court refusing to exercise its jurisdiction or erroneously limiting its jurisdiction, precludes the parties from being able to litigate an issue as surely as if the court was without jurisdiction.

Although a court cannot confer jurisdiction upon itself, it does have the power to determine whether it has jurisdiction.

Gibson v. Gibson, 5 Va. App. 426, 433, 364 S.E.2d 518, 522 (1988). (emphasis added)

The appellate courts of the Commonwealth are not alone in promulgating confusing jurisprudence on this issue. In Kontrick v. Ryan, 540 U.S. 443, 453, 124 S. Ct. 906, 914 (2004), the United States Supreme Court recognized that it has created similar confusion in the Federal arena, [56 Va. App. 358] noting that it had been "less than meticulous" in its use of the term "jurisdictional" to describe timeliness requirements. The Supreme Court then observed that "[i]t is axiomatic that court-prescribed rules of practice and procedure, as opposed to statutory time limits, do not create or withdraw ... jurisdiction." Id. (emphasis added). Again in Bowles v. Russell, 551 U.S. 205, 210-12, 127 S. Ct. 2360, 2364-65 (2007) the Supreme Court noted that although several of our recent decisions have undertaken to clarify the distinction between claims processing rules, jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute.at *769.

No rule of court actually conveys, expands or restricts the "jurisdiction" of the courts of Commonwealth.

In McQuiggin v. Perkins, 133 S. Ct. 133 S. Ct. 1924 (U.S. 2013), at 1932: As just noted, see supra, at 1931-1932, we have held that the miscarriage of justice exception applies to state procedural rules including filing deadlines, Coleman 501 U.S., at 750, 111 S. Ct. 2546 (1991).

The timeliness requirements in the Virginia Supreme Court are outlined in Code of Virginia §8.01-671 for appeals in the Virginia Supreme Court.

II. Did The Circuit Court Of Culpeper County Rule Erroneously When It Based Its Decision To Dismiss Petitioner's Motion For A New Trial On Rule 1:1 Of The Rule⁵ Of The Supreme Court Of Virginia.

A. The Rules of the Supreme Court of Virginia do not convey or restrict jurisdiction. The Commonwealth Attorney of Culpeper County, Virginia in its motion to dismiss relied on Lewis v. Com., 18 Va. App. 5 (1994), holds that a trial court lack's jurisdiction to decide on a request for a new trial after the expiration of the 21-day period if it did not retain jurisdiction in any other way; see appx. P.

- The Circuit Court of Culpeper County, Virginia retained jurisdiction over the case this based on Code of Virginia §8.01-229(D).

B. The Code Of Virginia And The Decision In The Case Below Conflict With The Courts Decision.

In pertinent part Code of Virginia §8.01-229(D) Obstruction of Filing by Defendant.-- ... or (ii) using any other direct or indirect means to obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought. See appx. U.

In Hicks v. Director Dept., of Corrections, 288 Va. 289 (2015), The Commonwealth correctly argues that in previous cases we have said that to invoke the tolling provisions of Code §8.01-229(D), the obstruction by the defendant "'must consist of affirmative acts of misrepresentation'" and that "'[t]he fraud which will relieve the bar of the statute must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his action.'" Culpeper Nat'l Bank v. [289 Va. 298] Tidewater Improvement Co., 119 Va. 73, 84, 89 S.E. 118

121 (1916). See appx. W. We apply the ends of justice exception to Rule 5:25 in limited circumstances. Applying the exception is appropriate when error as contemplated by the appellant and when the failure to apply the exception would result in a grave injustice. Gheorghiu, 280 Va. at 689, 701 S.E.2d at 413. The reliance on Lewis is misplaced. See appx. P, 5), 6). See also appx. V... .

III. The Newly Discovered Evidence of An Illegal Search Of Petitioner's Residence And An Illegal Search And Seizure Of Evidence Merits This Court's Review.

On June 27, 2016, petitioner received **several dozen items** of exculpatory and impeachment evidence.

The items were mailed to petitioner by Mr. Thomas C. Palmer, Jr., a Fairfax City, Virginia attorney VSB# 05144. See appx. **Z2**.

The evidence contained a **previously undisclosed consent to search** signed by the victim. The form was signed at **1932hrs. or 7:32pm**, on February 11, 2006. See appx. W. On the above referenced date Culpeper Police officer Stephen C. Frazier arrived at the home at **1258pm** in the afternoon. See the

Field Investigation reports at appx. **X**. Officer **U.S.V. AGUIN 427 U.S. 97 (1976) (FN13)** "THE PETITIONER WAS DENIED DUE PROCESS... SUPPRESSION OF EVIDENCE, B6FONE, TRIAL AGSAN. THE PROCEEDING MUST COMMENCE... STAGE WHERE PETITIONER WAS OVERREACHED... DENIAL OF DUE PROCESS VITIATED THE VERDICT. SENTENCE: ROGERS V. RICH, 365 U.S. 534, 545. VERDICT NOT SAVED... COLOMBEJ, CT; 367 U.S. 568, 621. (BRUF. BRAV V. MD, NO. 490, O.T. 1963, p. 6.

Frazier seized and collected ~~the~~ evidence by 1430hrs. This despite no verbal or written consent to do so. See Chain of Custody at appx. Z. The chain of custody documentation is proof that is beyond any doubt that Frazier's search is in violation of Code of Virginia §19.2-59 and the Fourth Amendment of the United States Constitution.

A.V.. The Opinions Below Conflict With The Decision Of The Circuit Court Of Culpeper County, Va., Virginia Supreme Court And This Court.

1. In Toghill v. Com., 289 Va. 220 (Va. 2015), in quoting Ayotte, Id. at 328-29, 126 S. Ct. 961 (... framework for discerning the proper remedy when a statute is unconstitutional as applied). In Lahey v. Johnson, 283 Va. 220 (2012)... the extent however that any of those rules could be construed as conflicting with the statute, the statute would "prevail [] over [them]."
Turner v. Com., 221 Va. 513, 519-20, 273 S.E.2d 36, 40 (1980) ("The Constitution of Va. Art., VI, §5, prohibits the promulgation of any court rule 'in conflict with the general law as the same shall be established by the general assembly'"); see Pulliam v. Coastal Emergency Servs. of Richmond,
VIOLATIVE OF THE 4TH, 14TH AMEND. (CONFRONTATION CLAUSE),
14TH AMEND. DUE PROCESS.

Inc., 257 Va. 1, 21-23, 509 S.E.2d 307, 319 (1999) (same) see also Code §8.01-3(D) ("In the case of any variance between a rule and an enactment of the general assembly such variance shall be construed so as to give effect to such enactment"). In Hicks v. Director Dept. of Corr., 288 Va. 289 (2015), The Commonwealth correctly argues that in previous cases we have said that to invoke the tolling provision of Code §8.01-229(D), the obstruction by the defendant "'must consist of affirmative acts of misrepresentation'" and that "'[t]he fraud ... relieve the bar of the statute ... which involves moral turpitude, ... effect of debarring or deterring the plaintiff from his action.'" Culpeper Natl Bank v. [289 Va. 298] Tidewater Improvement Co., 119 Va. 73, 84, 89 S.E. 118 121 (1916).

2. (The law requires a chain of custody or a chain of possession. "' not a chain of packaging)
Jones v. Com., 288 Va. 427 (1984).
"A challenge to the chain of custody is a challenge to the admissibility of the evidence." Anderson v. Com., 274 Va. 469, 650 S.E.2d 702 (2007) not the sufficiency."

3. In Robinson v. Com., 212 Va. 136 (Va. 1971) at 181, ... the Commonwealth failed to establish this vital link in the chain of possession. We cannot assume these exhibits were properly handled. Without an unbroken chain of possession of the panties, ..., they were not admissible as evidence insofar as they supplied a basis for the opinion of the FBI agents, who examined them. Thus, the opinion of the FBI agents were also not admissible. See evidence vouchers, letter dated July 7, 2006 to trial counsel from Commonwealth Attorney ~~(stipulation)~~ to the evidence, Dan Art's TT at 392. His testimony was that he "checked evidence out several times. The evidence vouchers and chain of custody do not reflect him having never checking out any evidence. Appx. Y, Z reflect no movement of any evidence until trial. The chain of custody reflects items 2-6, 22, 37-38 as the only items that were removed to court and no where else. Constructive knowledge is attributed to the prosecutor where information is in the possession of the police. Lilly v. Com., 258 Va. 548 (Va. 1999), at 209: (Thus before a federal constitutional error ... held harmless ... must be able to declare belief harmless

beyond a reasonable doubt; otherwise the conviction must be set aside.) Chapman v. Calif., 386 U.S. 18 (1967).

4. In Mapp v. Ohio, 367 U.S. 643, 655 (1961)(barring use in state court of evidence seized in violation of 4th Amendment).
5. Petitioner cites U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (U.S. Dist. Col. 1974), at 3108: "The very integrity of the judicial system and public confidence in the system depend on **full disclosure** of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for production of evidence needed by the prosecution or the defense. Beyond any doubt a Brady violation.
6. The case of Rakas v. Illinois, 439 U.S. 128, 133-34 (1978)(internal citations omitted)(A person who is aggrieved by an illegal search and seizure ... evidence secured by the search of a third person's premises or property has not had any of his Fourth Amendment rights infringed," Id. at 134. In previous cases involving the Attorney General and this petitioner the allegation was that petitioner was a (...FUNCTION OF THE COURT IS TO ENFORCING LAW ACCORDING TO THE STATUTE)CAMINETHIV.U.S.,242 U.S.470(1917),IS APPLICABLE TO ALL CLAIMS.

third party and had no protection under the Amendment 4. This due to a preliminary protective order that was in place. The Code of Virginia §16.2-253.2 A:3 did not divest petitioner of any rights. See appx. Z1 for property at the home and an interest in the property itself.

The Commonwealth Attorney in Culpeper County has conceded this argument. Hash v. Johnson, 845 F.Supp.2d 711 (W.D. Va. 2012)(FN24) The Culpeper Circuit Court and the Virginia Supreme Court ... respondent conceded this argument when he failed to challenge it in briefing before the Virginia Supreme Court, Hash, 686 S.E.2d at 212. In Zemene v. Clarke, 768 S.E.2d 684 (Va. 2015)"It is also well settled that where, as here, the well pleaded allegations of the petition are not denied they must be accepted as true." Morris v. Smyth, 202 Va. 832, 833, 120 S.E.2d 485, 466 (1961)(per curiam). See also Rules of the Supreme Court of Virginia SA:20(d).

The agent of the Commonwealth the Culpeper Police had the evidence and the Commonwealth had constructive knowledge. They failed the discovery order.

IV. The Newly Discovered Missing, Exculpatory And Impeachment Evidence Merits This Courts Review.

On June 27, 2016, petitioner received several dozen items of evidence from Mr. Thomas C. Palmer, Jr., a Fairfax City, Va., attorney VSB#05144. On July 28, 2016 Mr. Palmer responded to a letter in part: "I actually got a call from the Police Department indicating that there was a **very substantial amount of material** and they wanted to know whether I needed it all." See appx.²²~~23~~. The only discovery that petitioner was granted in Culpeper County Circuit Court Case No. CL08-560-00 was interrogatories. The evidence was mailed freely just by asking for it. On September 6, 2006 the court in Culpeper entered an Agreed Order For Discovery And Inspection, appx.²³~~24~~. The Rule 3A:11 of the Rules of the Supreme Court of Virginia did not govern discovery the Agreed Order took precedent.

A. The **missing evidence** has been reported to petitioner by two sources Mr. Thomas C. Palmer, Jr., and Ms. Sharon Brown of the Culpeper Police Department. The CD/DVD with the victim's credit report is dispositive of the victim's allegation that she was abducted and held in the master bedroom closet for 1.5-2.0hrs. while the petitioner discussed the \$30,000

in debt that he had caused her. The debt was non-existent.

ABUNAAJ v. Com. 28 VA. APP. 47 (VA. APP. 1998) (CONSENT DISCOVERY ORDER); Williams v. Com. 16 VA. APP. 928, 934-35, (VA. APP. 1993) (ENFORCING .. DISCOVERY ORDER...).

The item the CD/DVD is not listed in the Chain of Custody documentation. This was beyond any doubt withheld by the prosecution. Petitioner wrote the Commonwealth Attorney the Honorable Paul Walther and asked for the CD/DVD. See appx. He did not respond to my request. The photo log that was mailed to petitioner by Mr. Palmer is also missing evidence. See appx. ~~25~~. Petitioner on multiple occasions wrote the Police and the Clerk of the Court. Petitioner was given conflicting information. The Police wrote that the Clerk had the photographs. This was based on a conversation with the Chief Deputy Clerk, Ms. Virginia Coppedge. Petitioner wrote the Clerk and was told that the Clerk only had what was admitted into evidence. However the Chain of Custody reflects that the Court obtained several rolls of **film on various dates as follows:** Items 2-6 2/9/07, items # 37-38 were released to the Court on 2/9/07 as well. As of 1/26/12 items #2-6 were at the Circuit Court, As of 5/6/10 items #37-38 were at the Circuit Court. See appx. See also Memorandum Of Law In Support of New Trial at appx. Q, page 5, (5), (6), page 7, (10), page 9, (6), (7), page 10, (10). See also reports at appx ~~25~~.

The **exculpatory/impeachment evidence** withheld. The evidence has been reported by two sources Mr. Thomas C. Palmer, Jr. VSB#05144 and Ms. Sharon Brown of the Culpeper Police. The Memorandum In Support of A New Trial appx. outlines various items that are of exculpatory and impeachment value. See app. Q. See also appx. W,X,Z,Z2,Z5,Z6,Z7,Z8,Z9,Z10,Z12 for other items of exculpatory and impeachment evidence.

A. The Opinions Below Conflict With The Decision of The Circuit Court Of Culpeper County Virginia, The Court Of Appeals Of Virginia And This Court.

1. In Gagelonia v. Com., 52 Va. App. 99, 661 S.E.2d 502 (2008), a panel of this Court synthesized the holding of those two cases, observing that

a defendant seeking a new trial on the basis of missing evidence formerly in the Commonwealth's possession must show that (1) the evidence possessed an apparent exculpatory value, (2) the defendant could not obtain comparable evidence from other sources, and (3) the Commonwealth, in failing to preserve the evidence, acted in bad faith. *Id.* at 115, 661 S.E.2d at 510.

2. As cited in Workman v. Commonwealth, 272 Va. 633 (Va. 2006), at 375: More specifically, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the

Brady v. MD, 373 U.S. 83 (1963) (FNI) (...EXTENTION OF Mooney v. Holohan, 294 U.S. 103, 112, WHICH... NONDISCLOSURE VIOLATES DUE PROCESS)... SEE Pyle v. Kansas 317 U.S. 213 (DELIBERATE SUPPRESSION... EVIDENCE)...

government's behalf in this case including the police." Id at 437, 115 S. Ct. 1555, Kyles U.S. at 437. Also, in Workman (quoting Strickler, 527 U.S. at 281-82, 119 S. Ct. 1936)(citations and internal quotation marks omitted). We also "[t]he question is not whether the defendant would more likely than ~~not~~ have received a different verdict with the evidence, but whether in its absence he received a fair trial, ... resulting in a verdict worthy of confidence." Id. (quoting Kyles v..Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555 (1995)). "A reviewing court must determine whether the withheld favorable evidence "could ... to put the case in such a different light as to undermine confidence in the verdict," Strickler, 527 U.S. at 290, 119 S. Ct. 1336(citations and quotation marks omitted).

3. In Zemene v. Clark, 768 S.E.2d 684 (Va. 2015), "It is well settled that where, as here, the well pleaded allegations of the petition are not denied they must be accepted as true." Morris v. Smyth, 202 Va. 832, 833, 120 S.E.2d 485, 466 (1961)(per curiam).

4. In Hicks v. Director Dept. of Corr., 288 Va. 289 The Commonwealth correctly argues that in previous cases we have said that to invoke the tolling provision of IN MONROE V. ANGELONE 323 F.3d 286, (4th Cir. 2003)(FN5) (... INSTEAD, A BRADY VIOLATION USUALLY ENTILES A DEFENDANT TO A NEW TRIAL. SEE SPICER V. ROXBURY CORR. INST., 194 F.3d 547, 562 (4th Cir. 1999)).

Code §8.01-229(D), the obstruction by the defendant "must consist of affirmative acts of misrepresentation" and that "[t]he fraud ... relieve the bar of the statute.... which involves moral turpitude, ... effect of debarring or deterring the plaintiff from his action."Culpeper Nat'l Bank v. [289 Va. 298] Tidewater Improvement Co., 119 Va. 73, 84, 89 S.E. 118, 121 (1916).

v. **Did The Circuit Court Of Culpeper County Virginia Rule Erroneously When It Dismissed Petitioner's Motion For New Trial Based on Prosecutorial Misconduct, Police Misconduct Based On Rule 1:1 Of The Rules Of The Supreme Court Of Virginia. The Dismissal Merits This Courts Review.**

1. The Commonwealth's misconduct began and was continuous prior to trial and was continuous throughout the trial. Petitioner moves to the ~~AT~~ at 67. The Commonwealth speaks to the fact that **we dumped the misdemeanor court order violation**. The Commonwealth Attorney violated the Agreed Order For Discovery And Inspection. See app. Z~~9~~. The Commonwealth had knowledge of the whereabouts of petitioner on the night in question. They withheld **two items of exculpatory evidence**. The items a Video Tape from 7-11 and ~~2A~~
SEE APP. Z 6 FORTHTAT 67.

receipt from **Hertz** reflecting petitioner in **Charles** lottesville when the victim was already home. See appx. Q, page 7, (10). See also evidence appx. **Z6**. The Commonwealth proffered a **false direct indictment** before the grand jury and withheld the evidence from the defense. This despite an Agreed Order For Discovery And Inspection in place. See appx. **Z3**. The Rule 3A:11 was inapplicable in petitioner's cases.

~~See Appx. P.~~ **THERE WAS NO DENIAL OF THIS FACT AT APPX. P.**

2. On July 12, 2006 the Commonwealth's Motion For Joinder was heard in the Circuit Court. At the proceeding the Commonwealth made **false proffers in brief and in oral argument.** See appx. The Commonwealth Attorney did not deny this fact in its motion for dismissal of the motion for new trial. **SEE APPX. Z6, APPX. P.**
3. On July 7, 2006, the Commonwealth Attorney's Ms. Perez made a **false proffer in a letter of Stipulation** to trial counsel. See letter page 1, (4), (5.), appx. **Z6**. The said evidence reflects no chain of custody that reflects the proffer. See appx. Y, Z. The lead detective Daniel Art gave testimony that he checked **evidence out** **several times.** See Art TT392 ^{26.} ~~appx.~~ To this date **we do not know when the evidecne was checked out.** The other incidents of misconduct by the Commonwealth

are listed in the memorandum of law in support of new trial at appx. Q, pages 4 thru 7.

4. The Current Commonwealth Attorney the Honorable Paul Walther in a August 5, 2012 article in a local paper spoke to prosecutorial misconduct: Walther, asked about Turk's claim that methods used by local authorities in the Hash case "offend[ed] a sense of justice, said, "I haven't stood for that. I will not stand for it." See appx. ^{2011.} ~~A~~ Mr. Walther's opponent for Commonwealth Attorney Ms. frederick: "It is long past time for Mr. Walther to tell the truth, the whole truth and nothing but the truth to the people of Culpeper. Ms. Frederick won the election.in 2012. Petitioner has no knowledge if she ran in 2016. Mr. Walther was second chair in Hash and second chair in petitioner's cases. The Commonwealth's Mr. Walther may have changed his stance they did not deny any of the allegations in this claim. SEE APP. ~~2011~~ APP. 211.

A. **The Opinions Below Conflict With The Decision Of The Circuit Court Of Culpeper County, Court Of Appeals Of Virginia, This Court, Virginia Supreme Court, And The United States District Court 4th District.**

1. In Smith v. Com., 56 Va. 351 (Va. App. 2010), The holding in Jay could hardly be clearer, ... Jay IN BAILEY V. GLOVER, 21 WALL 342, 349-350 (1875) (... party CONCEALING THE FACTS...) ... FRAUDULENT CONCEALMENT... fails ... STATUTE OF LIMITATIONS... (AS CITED IN TAYLOR V. FREELAND + KRONZ 503 U.S. 638 (1992)).

commands we do not dismiss an appeal except on the grounds that this court lacks jurisdiction. It follows that a rule of court cannot convey or limit jurisdiction. (FN6) Also in Smith: The Supreme Court then observed that "[i]t is axiomatic that court-prescribed rules of practice and procedure, as opposed to statutory time limits, do not create or withdraw ... jurisdiction." Id. (emphasis added) Again in Bowles v. Russell, 551 U.S. 205, 210-212, 127 S. Ct. 2360, 2364-65 (2007)... Indeed those decisions ... the fact that a **time limitation** is set forth in a statute. at *769..

2. In Commonwealth v. Morris, Com., v. Chan, 281 Va. 70 (Va. 2011)(Rule 1:1 implements that policy, and we apply it ..., **unless a statute creates a clear exception to its operation.**) McEwen Lumber Co., v. Lipscomb Brothers Lumber Co., 234 Va. 243, 247, 360 S.E.2d 845, 848, 4 Va. Law Rep. 850 (1987)(citations omitted). See appx. T.
3. Hicks v. Dir. Dept., Corr., 288 Va. 289 (Va. 2015) (The Commonwealth correctly argues that in previous cases ... to invoke the tolling provisions of §8.01-229(D), the obstruction by the defendant "'must consist of affirmative acts of misrepresentation'" and DUE PROCESS VIOLATION UNDER 14TH AMEND. U.S. CONST.

that "[t]he fraud which will relieve the bar of the statute must be that character which involves moral turpitude, Culpeper Nat'l Bank v. [289 Va. 298] Tidewater Improvement Co., 119 Va. 73, 84, 89 S.E. 118, 121 (1916).

4. Prof'l Build., Maint., Corp. v. School Bd., 283 Va. 747 (Va. 2012) at 283 Va. 750: "Since accompanying exhibits referred to in the pleadings ... part of pleadings...." TC MidAtlantic Dev., v. Com., 280 Va. 204, 210, 695 S.E.2d 543, 547 (Va. 2010); see also Rule 1:4(i) mention in pleading of accompanying exhibit shall make exhibit part of pleading.
5. Zemene v. Clarke, 768 S.E.2d 684 (Va. 2015) "It is also well settled that where, as here, the well pleaded allegations of the petition not denied they must be accepted as true." Morris v. Smyth, 202 Va. 832, 833, 120 S.E.2d 485 (1961) (per curiam). See also appx. T.
6. Hash v. Johnson 845 F.Supp.2d 711 (W.D. Va. 2012) (FN24) (Respondent conceded this argument when he failed to challenge it in briefing before the Va. Sup. Ct. Hash, 686 S.E.2d at 212.

VI. Did The Circuit Court Of Culpeper County Rule Erroneously When It Dismissed Petitioner's Motion

For A New Trial On Newly Discovered Evidence That
The Conviction Was Principally Based On Perjury,
And The Commonwealth Failed To Correct Testimony
That It Knew Was False Based On Its Decision On
Rule 1:1 Of The Rules Of The Supreme Ct. Of Va.

1. On June 27, 2016, June 22, 2017, July 6, 2017, petitioner received newly discovered evidence of perjury at the preliminary hearing and the trial of petitioner. Constructive knowledge is **imputed to the Commonwealth**.
2. The newly discovered evidence impeaches the testimony of the three detectives that gave testimony at the trial from the police department. The **transparency of the new police department has revealed the corruption**. The new administration has freely mailed to petitioner previously unknown and evidence that was withheld. This is not the first incident of misdeeds by the previous administration. The letter of stipulation at appx. Z6, implicates Ronald Myers the former evidence technician in petitioner's cases. Mr. Myers was convicted of a moral turpitude crime post my trial in the Circuit Court. The former Chief Barlow spun the charges in the media and wrote to the Commonwealth a **letter discussing "Brady"**. See appx. Z11. The letter is indicative of the behavior IN FILE V. KANSAS, 317 U.S. 213, 215-16, (.. PETITIONER'S PAPERS ARE UNEXPECTEDLY DRAWN,.. IMPOSITION RESULTED FROM PERJURED TESTIMONY, KNOWINGLY USED BY THE STATE AUTHORITIES TO OBTAIN HIS CONVICTION,.. DELIBERATE SUPPRESSION... OF EVIDENCE FAVORABLE TO HIM... DEPRIVATION... FEDERAL CONST, MOONEY V. HOLMAN, 294 U.S. 103.

by the police prior to the arrest, after arrest, and prior to trial.

3. The evidence of perjury includes perjury at the trial, false affidavits for search warrents, false returns after the execution of search warrents, perjury at the preliminary hearing
4. In the Hash case a Culpeper County case opinions below the court in pert stated. "The court erred in failing to grant habeus relief ..., when the prosecution used the perjured testimony of Paul Carter. Hash a Circuit Court of Culpeper County murder case was overturned in the U.S. District Court Fourth District (W.D. Va. ... remanded to the Culpeper Court based on prosecutorial and police misconduct. The current Commonwealth Attorney the Honorable Paul Walther was second chair in Hash and petitioner's criminal trial.
5. The perjury was advanced by the Commonwealth. They withheld the evidence, failed to correct the false testimony of all police officers, and the victim. At times utilizing its own exhibits to advance the perjury. The Commonwealth did not **deny the perjury in its motion to dismiss**. See appx. P.

A. The Opinions Below Conflict With The Court of Appeals

Of Virginia, Virginia Supreme Court, U.S. District
Court (W.D. Va.) And This Court.

1. In Patrick v. Com., 25 Va. App. 538, 489 S.E.2d 720 (Va. App. 1992) (While error committed, ... once error is established it is presumed .. prejudicial; the burden shifts to the Commonwealth ... to show that it was non-prejudicial, ... case will be reversed.)
2. In Carter v. Com., 293 Va. 537 (Va. 2017) (FN3) Carter argues that the verdict should be set aside and a new trial granted when it was **uncontradicted that a material witness testified falsely at trial**. However, in Powell, the conflicting evidence was "after discovered evidence". SEE POWELL v. COM., 133 VA. 741 (VA. 1922).
3. In Com., v. Morris, Com., v. Chan, 281 Va. 70 (Va. 2011) (Rule 1:1 implements that policy, and we apply it rigorously, unless a **statute creates a clear exception to its operation.**) McEwen Lumber Co., v. Lipscomb Brothers Lumber Co., 234 Va. 243, 247, 360 S.E.2d 845, 848 (1987). (citations omitted). See appx.
4. In Hicks v. Dir., Dept., of Corr., 288 Va. 289 (Va. 2015) (The Commonwealth correctly argues that in previous cases ... to invoke the tolling provisions of §8.01-229(D), the obstruction ... "'must consist of affirmative acts of misrepresentation'" and that "'[t]he VIOLATIVE OF 6TH AMEND. (CONF. CLAUSE), 14TH AMEND.

fraud that will releive the bar of the statute ... character which involves moral turpitude, effect of debarring or deterring plaintiff from his action." Culpeper Nat'l Bank v. [289 Va. 298] Tidewater Imp., Co., 119 Va. 73, 84, (1916).

5. In Hash v. Johnson 845 F.Supp.2d 711 (W.D. Va. 2012) (Under Giglio, failure to disclose is material and thus prejudicial, if "'the **false testimony**, could ... in any reasonable likelihood have affected the judgement of the jury'" 405 U.S. at 154, 92 S. Ct. 763 (quoting Napue, 360 U.S. at 271, 79 S. Ct. 1173). Prejudice is said to exist "when the government's evidentiary **suppression undermines** confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, (1995). (FN30) In support of his argument Hash states a "conviction cannot be brought about by methods that offend 'a sense of justice.'" Rochin v. Calif., 342 U.S. 165, 173-74, 72 S. Ct. 205 (1952).
- VII. **Did The Circuit Court Of Culpeper County Rule Erroneously When It Based Its Decision To Dismiss Petitioner's Motion For New Trial On Rape And Sodomy, Wherein The Commonwealth Failed To Deny That There Were Four Incidents of Sexual Intercourse Not One**

**Incident Of Rape, The Reliance On Rule 1:1 Of The
Rule Of The Supreme Court Is Misplaced.**

1. Petitioner's Motion For A New Trial page 1, "Petitioner has been diligent in his efforts with the Va. State Police, Commonwealth Attorney's Office, Town of Culpeper Police Department." See appx. S.
2. Petitioner's Memorandum Of Law In Support of New Trial, page 1, "Petitioner has been diligent in his efforts to highlight the injustice of his cause. Petitioner invokes the ends of justice in this matter. Petitioner has involved the Virginia State Police, Town of Culpeper Police Department, Culpeper County Sheriff's Office, and the Commonwealth Attorney's Office for Culpeper County." Petitioner wrote the aforementioned agencies over a multi-year period. Petitioner went so far as to summon the Virginia St. Police to this prison. See appx. Q.
3. Petitioner submitted various exhibits to include several **affidavits** abouts the facts relating to the **four incidents of sexual intercourse**. The letters and supporting affidavits (**were not controverted**) by the Commonwealth in its motion to dismiss. see appx. P. The **three dozen (plus) documents** were written **as far back as 2014**. The Commonwealth cannot now change

its position. The State Attorney General cannot alter the narrative. The position of the Commonwealth cannot change. See the exhibits proffered to the Culpeper Court at appx. Z 12.

4. With no rape there could not have been a sodomy conviction. Petitioner has beyond any doubt put the rape and sodomy into the proper light several incidents of sexual intercourse not one rape.

A. The Opinions Below In The Virginia Supreme Court, United States District Court Fourth District, And This Court.

1. In Com., v. Morris, Com., v. Chan, 281 Va. 70 (Va. 2011) (Rule 1:1 implements that policy, and we apply it rigorously, unless a statute creates a clear exception to its operation.) McEwen Lumber Co., v. Lipscomb Brothers Lumber Co., 234 Va. 243, 247, 360 S.E.2d 845, 848 (1987). (citations omitted).
2. In Zemene v. Clarke, 768 S.E.2d 684 (Va. 2015), "it is well settled that where, as here, the well pleaded allegations of the petition are **not denied** they **must be accepted as true.**" Morris v. Smyth, 202 Va. 832, 833, 120 S.E.2d 485, 466 (1961) (per curiam).
3. In Hicks v. Director Dept. of Corr., 288 Va. 289 (Va. 2015) The Commonwealth correctly argues that VIOLATIVE OF AMEND. 14, U.S. CONST. PROFL BUILD, MAINT, CORP. V. SCHOOL BD. 283 VA. 747 (VA. 2012). ... RULE 1:4(i) mentioned in PLEADING... bexhibit... exhibit part of PLEADING... TC midAtlantic DEL V. COM, 280 VA. 204 (VA. 2010).

in previous cases we have said that to invoke the tolling provision of Code §8.01-229(D), the obstruction by the defendant "must consist of affirmative acts of misrepresentation" ... fraud ... relieve the bar of the statute ... which involves moral turpitude.... Culpeper Nat'l Bank v. [289 Va. 298] Tidewater Imprv., Co., 119 Va. 73, 84, 89 S.E. 118, 121 (1916).

4. In McQuiggin v. Perkins, 133, S. Ct. 1924 (U.S. 2013), at 1932: As just noted, see *supra*, at 1931-1932, we have held that the miscarriage of justice exception applies to state procedural rules, including filing deadlines. Coleman, 501, U.S., at 750, 111 S. Ct. 2546 (1991). Also in McQuiggin v. Perkins at 1936: The gateway should be open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error." 513 U.S. at 316, 115 S. Ct. 851; Schlup v. Delo (U.S. Mo. 1995).

CONCLUSION

The petition should be granted.

Respectfully Submitted,
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