No. 19-8806

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

David Lawrence Dixon — PETITIONER

VS.

State of West Virginia — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

West Virginia Supreme Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Lawrence Dixon, #3570828
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia
25185

QUESTION(S) PRESENTED

Question #1: Was Appellant denied his Fourteenth Amendment right to due process when the biological evidence used in his trial was destroyed before Appellant could have it re-tested?

Question #2: Was Appellant denied his Fourteenth Amendment right to due process when the State refused to allow Appellant the right to have the biological evidence re-tested under a "state-created" right, when said biological evidence identified another individual as the suspect, creating a conflict with the identity of the perpetrator?

Question #3: Was Appellant denied his Fourteenth Amendment rights to due process and equal protection of law under ***Brady*** and ***Agurs*** by the State, when, the exculpatory value of the evidence as known by the State *prior to arrest,* identified Appellant as a Caucasian male, when Appellant is a Black/African-American male, and said biological evidence was destroyed before it could have been re-tested?

*

LIST OF PARTIES

[X] All parties appears in the caption of the case on the cover page.

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TABLE OF AUTHORITIES CITED

IN THE
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Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

STATE COURTS

The opinion of the highest state court to review the merits appears at **Appendix A** to the petition, and is unpublished.

The opinion of the Eighth Judicial Circuit Court of McDowell County, Welch, West Virginia appears at **Appendix B** to the petition, and is unpublished.

The date on which the highest state court decided my case was **December 20th, 2019**. A copy of that decision appears at **Appendix A**.

A timely petition for rehearing was thereafter denied on the following date: **March 19th, 2020**, and a copy of the order denying rehearing appears at **Appendix C**.

STATUTES AND RULES

Fed. R. Civ. P. 59(e) 28 U.S.C. §2254(b)(1)(B)

OTHER

Dixon v. Howard H. Painter, Warden, C.A. No. 1:99-0964, Judgement Order, U.S.D.J. David A. Faber, page 7

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The standards announced in the cases of Brady v. Maryland and United States v. Agurs regarding exculpatory evidence and its significance in the truth seeking process with regards to establishing reasonable doubt, respectfully.

STATEMENT OF THE CASE

On December 1st, 1995, Petitioner was arrested on charges of murder, sexual assault and abduction of a person, based on a preliminary assessment of DNA evidence tested by a Trooper from the West Virginia State Police Crime Laboratory — Serology Division, as telephoned to the lead investigating Trooper on November 29th and 30th, 1995, indicating that the suspect [he] identified in this case was a Caucasian male.

On December 11th, 1995, at Petitioner's bond hearing, the Prosecutor inquired into Petitioner's lineage by asking, *"did Timothy and David have different fathers"*.

Since this inquiry did [not] fair well with Petitioner's *mother*, Petitioner was bounded over to the Grand Jury, and, in February 1996, Petitioner was indicted for the aforesaid crimes.

On ***April 29th, 1996***, the Forensic Trooper from the West Virginia State Police Crime Laboratory — Serology Division, *concluded* his DNA testing of the evidence gathered from the victim, in August 1995.

At Petitioner's April 1st, 1997 trial, the DNA Evidence from the West Virginia State Police Crime Laboratory — Serology Division, was labeled by the trial judge as being *circumstantial*, and, on April 7th, 1997, Petitioner was found guilty of the aforesaid charges.

All appellant counsels appointed refused to assist Petitioner in addressing the State's *Evidence-In-Chief* as being unconstitutional for trial.

Because all appeals (including Petitioner's *pro se* appeal) to the West Virginia Supreme Court were denied with no comments, prompted Petitioner to proceed as a [pro se] §2254 Petitioner.

Petitioner's first §2254 (Dixon v. Howard H. Painter, Warden, C.A. No. 1:99-

30964) was dismissed *with* prejudice due to the State alleging that Petitioner still had a remedy available to him, that *remedy* was: *Petitioner never had an omnibus habeas corpus [hearing] in any of his habeas petition*.

In adhering to the Fourth Circuit's Order, which reversed in part and affirmed in part, (dismissal to reflect *without* prejudice. 4CCA No. 01-7710, January 28th, 2002, *rehearing denied*) Petitioner on May 16th, 2002, filed a habeas corpus petition in the Circuit Court of McDowell County under the West Virginia's Habeas Corpus Statute that proved to be futile, — the habeas judge dismissed that petition on the grounds of *res judicata*, with the *West Virginia Supreme Court* denying the appeal — and Petitioner attempted to return back to the United States District Court.

In filing that §2254 Petition for a Writ of Habeas Corpus (1:03-0376), the Respondent argued that Petitioner's §2254 Petition should be dismissed for procedural grounds and therefore is procedurally barred.

The current petition for *Certiorari* is derived from the salient fact that your Petitioner is an African-American male, and has been since December 10th, 1965.

Petitioner attempted to obtain general habeas corpus relief of the conviction and sentence from the *April 1997 Trial*, based on the grounds (inter alia), *that the State's DNA Evidence indicating that the suspect in this case was identified* **forensically** *as a Caucasian male*, has been futile in all West Virginia State Court *habeas corpus* proceedings, and to the West Virginia Supreme Court of Appeals' original jurisdiction proceedings.

Petitioner does aver that there are *other* constitutional grounds he had attempted to raised in the course of these proceedings as a pro-se petitioner, however, Petitioner believes he should only advance issues that was before the West Virginia Supreme Court of Appeals on both the habeas corpus appeal and the rehearing

petition, regarding the DNA Evidence used by the State in his case that identified Petitioner as a Caucasian male.

Furthermore, Petitioner also desires to know whether the refusal to grant a DNA Testing under the ***rights*** created by West Virginia Supreme Court of Appeals ruling and adoption into State Law, violated Petitioner's due process rights under clearly established federal law based on the Fourteenth Amendment of the United States Constitution, See, District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52, 174 L. Ed.2d 38, 129 S. Ct. 2308 (2009) and the destruction of that evidence before Petitioner could test it, violates his Fourteenth Amendment rights.

REASONS FOR GRANTING THE PETITION

In Wainwright v. Skyes, *post*, This Court posed the question: "To what extent must a petitioner who seeks federal habeas relief, exhaust state remedies before resorting to the federal courts?" 433 U.S. 72, 78, 97 S.Ct. 249, 252, 53 L.Ed.2d 594 (1977)

In Russell v. Rolf, 893 F.2d 1033 (9th Cir. 1990) the Court there stated: "having persuaded the district court to deny the Petitioner federal review on the ground that he had an *'adequate and available'* state remedy, the state cannot now be permitted to oppose Petitioner's petition for relief on the theory he was procedurally barred in state court." 28 U.S.C. §2254(b)(1)(B), Grandberry v. Greer, 481 U.S. 129, 134, 95 L.Ed.2d 119, 107 S.Ct. 1671 (1987)("the duty of the state in advising district courts as to whether state remedies have been exhausted is best met with candor, not misdirection. A state under these circumstances misleads a district court by mentioning [only] that portion of its views that favors the immediate result it seeks, and the upshot is to whipsaw the petitioner back and forth between the court systems." *Ibid, Russell v. Rolf, 893 F.2d at 1038*, see also, e.g., James v. Jacobson, 6 F.3d 233, 242 (4th Cir. 1993) on practices and procedures "judicially recognized")

In *Pope v. Netherland*, 113 F.3d 1364 (4th Cir.) *cert.denied*, 521 U.S. 1140 (1997), the Fourth Circuit stated that "any challenges to the sufficiency of the evidence to convict in a state court prosecution is necessarily a due process challenge to the conviction [under] ***Jackson v. Virginia, 443 U.S. 307 (1979)***." Ibid, 113 F.3d at 1368. (Emphasis added)

Because exhaustion is a matter of Federal law, federal courts are not bound by a state court's determination that a petitioner did, or failed to, present the claim to the

state courts in a manner prescribed by state law.

Furthermore, as a matter of Federal law, state courts may not thwart the exhaustion requirements by refusing to rule or by ruling inconclusively, and "may not avoid deciding federal questions/issues by invoking procedural rules they do not apply evenhandedly to all similar claims." see, Hathorn v. Lovorn, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982), Harris v. Reed, 489 U.S. 255, 278, 109 S.Ct. 1038, 1051, 103 L.Ed.2d 308 (1989)

The exhaustion requirement focuses on whether a petitioner actually afforded the state court the opportunity to rule on the claim *and not on whether the state court actually availed themselves of that opportunity.* See, Castille v. Peoples, 489 U.S. 346, 349-51, 103 L.Ed.2d 380, 385-86, 109 S.Ct. 1056 (1989)("exhaustion occurs if claim presented in proceeding in which petitioner deserves ruling on merits as a matter of right.")

Petitioner's *Original Jurisdiction Habeas Corpus Petition* filed to the West Virginia Supreme Court of Appeals, **See, Exhibit 'A'** alerted the State's *Highest Court* to the insufficiency of the DNA Evidence used in his trial. (see, Schlup v. Delo, 513 U.S. 298, 330, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)("The Jackson standard looks to whether there is sufficient evidence which, if credit, could support the conviction.")

The West Virginia Supreme Court of Appeals has created remedies for convicted individuals such as Petitioner seeking to have testing done on *any* biological evidence remaining, under a number of established factors. See, State of West Virginia ex rel. Clyde H. Richey v. Colonel Howard E. Hill, Jr. et al.,216 W.Va. 155, 603 S.E.2d 117 (2004)

In Leftwich v. Coiner, *post,* the Fourth Circuit Court of Appeals noted that the

State of West Virginia has only two (2) procedures for attacking a conviction and *"exhaustion of one of the alternatives is all that 28 U.S.C. §2254 requires."* 424 F.2d 157, 160 (4th Cir. 1970)

These remedies extend ***only*** to the [sufficiency of the evidence], be it direct or circumstantial, and applying for relief through these remedies are not necessary. see, Humphrey v. Cady, 405 U.S. 504, 516 and n.18, 31 L.Ed.2d 394,407 and n.18, 92 S.Ct. 1048 (1972)(state prisoners only required to exhaust "those remedies still open to the prisoner at the time he files his application in the federal court.")

The availability of other state remedies does not preclude a finding of exhaustion if the petitioner pursued a claim through one complete round of state trial-appellate [or] post-conviction proceedings. (Emphasis added)

As to Petitioner's Original Jurisdiction Habeas Corpus Petition, This Court in O'Sullivan v. Boerckel, post, distinguished opportunities for judicial review that are *"established part[s] of the State's appellate process"*, and from [extraordinary remedies], explaining: "we have held that state prisoners do not have to invoke remedies when these remedies are alternatives to the standard review process and where the state-courts have not provided relief through those remedies in the past. 526 U.S. 838, 844-45, 144 L.Ed.2d 1, 8-9, 119 S.Ct. 1728 (1999)(*citing Wilwording v. Swenson, 404 U.S. 249, 249-50 (1971*)

Based on Federal law as determined by This Court, did Petitioner's original writ of habeas corpus to the West Virginia Supreme Court of Appeals alerted said Court to the insufficiency of the evidence as outlined in Jackson v. Virginia?

Petitioner believes it did, in that it gave them an *"opportunity to apply controlling legal principles to the facts bearing upon the constitutional claim."* Picard v. Connor, 404 U.S. 270, 275-77, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971); Accord.

Baldwin v. Reese, 541 U.S. 27, 29, 158 L.Ed.2d 64, 69, 124 S.Ct. 1347 (2004)(exhaustion doctrine requires that prisoners "fairly present" his claim in each appropriate state court -*including a state supreme court with powers of discretionary review* - thereby alerting that court to the federal nature of the claim.), citing, Duncan v. Henry, 513 U.S. 364, 365 (1995)(per curiam); see also, Dixon v. Howard H. Painter, Warden, C.A. No. 1:99-0964, Judgement Order, U.S.D.J. David A. Faber, page 7)

Furthermore, §2254(b) does not require Petitioner to spell out every syllabus of every claim before the state court in order to satisfy exhaustion, "so long as a substantial equivalent of the federal claim has been argued in the state proceedings." *Ibid,* Pope v. Netherland, *supra, at 1368* (*"It is not necessary to cite 'book and verse of the federal constitution' so long as the constitutional substance of the claim is evident."),* see also **Sanders v. United States**, 373 U.S. 1, 16 (1963)*("identical grounds [for exhaustion purposes] may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, or be couched in different language, or vary immaterial respects."*)

Petitioner had also relied on language that a claim may be [fairly presented] to the state court if there is:

(a): reliance on pertinent federal cases *employing* constitutional analysis;

(b): reliance on [state cases] employing constitutional analysis *in factually similar situations*;

(c): assertions of the claim in terms so particular as to call to mind a *specific right protected by the Constitution*, (see, Pope v. Netherland, supra, at 1368; see also Evans v. Court of Common Pleas, 959 F.2d 1227, 1231-33 (3rd Cir. 1992), *cert.denied*, 506 U.S. 1089 (1993)('insufficiency of evidence claim,

even if framed in state law rather than federal constitutional terms, "necessarily implicates federal due process rights."'), West v. Wright, 931 F.2d 262, 266 (4th Cir.) *rev'd on other grounds*, 505 U.S. 277 (1992), and,

(d): allegations of a *pattern of facts* that is well within the mainstream of constitutional litigation. See, e.g., Henry v. Estelle, 993 F.2d 1423, 1426 (9th Cir. 1993)(fair presentation requirement was satisfied because petitioner's state court argument that evidentiary error resulted in "miscarriage of justice" under state constitution was "essentially the same" as federal due process claim.)

These caveats - and the ineffectiveness of trial counsel - necessitated the need for Petitioner to utilize the West Virginia Supreme Court of Appeals *Original Jurisdiction* Petition procedure, due to their leading cases of In The Matter of An Investigation of The West Virginia State Police Crime Laboratory, Serology Division, **190 W.Va. 321**, 438 S.E.2d 501 (1993)(***Zain 1***) and In The Matter of An Investigation of The West Virginia State Police Crime Laboratory, Serology Division, **191 W.Va. 224**, 445 S.E.2d 165 (1994)(***Zain 2***)

Invested in the principles of comity and federalism is *etiquette*. See, e.g., O'Neal v. McAninch, 513 U.S. 432, 443 (1995)(in a highly technical area such as this one, consistency of [rules] brings with it simplicity, a body of existing law available for consultation.)

These two leading cases alone constitutes as "bodies of existing law available [for] consultation" and therefore are the controlling legal principles to which the West Virginia Supreme Court of Appeals were bound to follow . . . as did Petitioner.

The core issue throughout this endeavor *is* the State's reliance on D.N.A. evidence prepared by the West Virginia State Police Crime Laboratory – Serology

Division, that was wrong and failed to meet the threshold of admissibility for trial based on application of Federal law, as determined by This Court.

The ***Richey*** case requires a preponderance of evidence to demonstrate the need for seeking a DNA Test, and before Petitioner demonstrate that the requirement was met below, he first must avail himself of a trial issue that was never corrected by either the Circuit Court of McDowell County or the West Virginia Supreme Court of Appeals, an issue of constitutional dimension.

Petitioner believes that invalidation of the DNA Evidence (State's Evidence In Chief) came form the Prosecutor, (Mr. Bell) during his closing argument, in that Mr. Bell, *inter alia*, commented on Petitioner remaining silent during the trial and not presenting any evidence.

Mr. Bell, the Prosecutor, stated the following with regards to the DNA Evidence **used** in Petitioner's case:

". . . when they examine evidence like this, they're required by law to maintain half of it. Why?, *so there can be an independent test.* If someone really believes that Frances, the Forensic Chemist, was wrong or was mistaken or didn't do his job, they can send that evidence to Cellmark in Maryland or to Roche Lab in North Carolina, if they really believe that the DNA doesn't match David Dixon.

"Why would you **[not]** *want to do that? Why would you* **[not]** *want an independent test? Could it be that the person who knows better than anybody--"*

Mr. Hassan: "Objection, your Honor. We move--"

Mr. Bell: ". . . who's sperm was in her--"

The Court: "The objections sustained, Mr. Bell. *Move on to another line.*"

Mr. Bell: "Ladies and Gentlemen, there's one person in this room who knows better than anybody whose sperm was inside Mrs. Hodge's anus and how it got there.

"And I suggest to you that the evidence proves beyond any reasonable doubt, *based on the DNA evidence that we put on that has not been contradicted,* that David Dixon, *right here*, is the person who raped Mrs. Hodge." See, Exhibit "C" — Trial Transcripts, Volume 5, pages 98-99

This was a ***non-invited*** summation. There is no *overwhelming evidence* in this case, Defense raised an objection to the comment, the Prosecutor simply repeated the remark, and there was no curative action taken by the trial judge. See, United States v. Blevins, 1991 U.S. App. LEXIS 23023, 1991 LEXIS at 7-9,("when a defendant is the only witness who could contradict the evidence, reference to the evidence as uncontradicted may raise constitutional questions.")

Petitioner was under no obligation to testify at trial concerning evidence that identified him as a Caucasian male, a fact that was known *prior to arrest; prior to Indictment, and prior to trial.*

Nevertheless, the Fifth Amendment – ***Griffin v. California, 380 U.S. 609 (1965)*** – prohibits the prosecutor, and/or judge, from making any *direct/indirect* adverse comment on a defendant's refusal to take the stand. See, United States v. Lorick, 753 F.2d 1295, 1298 (4th Cir.), *cert.denied*, 471 U.S. 1107 (1985)

The State failed to present 'credible' - *Jackson v. Virginia* - evidence in this case under its own State Law, as was demonstrated by the Defense through presentation of contrary evidence and vigorous cross-examination of the State's Leading Witness, Trooper Darren R. Francis, Forensic Chemist for the West Virginia State Police Crime Laboratory – Serology Division. See, Daubert v. Merrell Dow Pharmaceuticals, Inc., 59 U.S. 579, 596, 125 L.Ed.2d 496, 484, 113 S.Ct. 2786 (1993); citing Rock v. Arkansas, 483 U.S. 44, 61, 97 L.Ed.2d 37, 107 S.Ct. 2704 (1987)('perfect testimony' during initial testifying for the State verses faulty testimony

during cross-examination.)

Petitioner's reason for submitting his *Richey Petition*, See, Exhibit "B" requesting a DNA Test was based on (and still is) the exculpatory value of the evidence that was [present] *prior to and during* Petitioner's arrest, indictment and trial, and as was testified to [*by the*] State's Leading Witness, Trooper Darren R. Francis.

There are several noted factors the Trooper did to the testing procedures that discredited the results obtained. As was testified to, Trooper Darren R. Francis did the following to the testing procedures that were not *authorized* by either of the DNA Manuals within the State Police Laboratory – Serology Division:

(a): added the substances known as [BSA] to the mixture, in contrast to the Manual; see, T.T. Vol.3, pages 264-266

(b): detected a third allele gene that did not come from Petitioner, his brother or the victim, see, T.T. Vol.3, pages 272-276

(c): manually moved a permanently affixed strand of DNA off the membrane to his (sic) autorads, based on *the* assessment that his *computer identified those 'images' as banding patterns*, but [because] he did not detect a band, he had to go in there and *manually* remove those bands, see, T.T. Vol.3, page 281

(d): used the results of an "*uncompleted*" test to generate frequencies based on data from the F.B.I.'s population database, using only one (1) race, see, T.T. Vol.4, page 55 (the database population bin of the FBI was ruled inconclusive by the scientific community, but is not an issue. The *exaggerated frequencies* that was generated by Trooper Francis was due to him ascertaining the *re-occurrence* of the banding pattern *of a white*

male in the black/African-American population. See, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595, 125 L.Ed.2d 469, 484, 113 S.Ct. 2786 (1993)(one must focus solely on the principles and methodology of the test, *and not on the conclusions they generate*.)

(e): could have excluded Petitioner as a suspect had he used the *fourth probe stipulated by the R.F.L.P. Manual*, see, T.T. Vol.4, pages 17-19 (the RFLP Manual ***MANDATES*** the usage of the "fourth" probe [D1S7] in the analysis of DNA fragments. *It matters not* what probes was available in the lab, D1S7 *was in the lab* and was *mandatory* that it be used in the process/procedure, just like it was used in Petitioner's brother's procedure. As recalled, when it *wasn't used*, (probe D1S7) Petitioner's brother *was* identified as the source.)

(f): terminated R.F.L.P. testing because he ran out of biological evidence samples, see, T.T. Vol.4, pages 17-19, (The transcripts referenced appears to have this fact *omitted* from the pages stated above. However, the Prosecutor, during his initial closing argument, made references to this fact. See, T.T. Vol.5, pages 98-99)

As the *Richey* case requires, only a preponderance of the evidence is needed in justifying a request for a DNA Test, and based on the above *minium* factors that invalidates the DNA test results, Petitioner believes he had met the requirement for a secondary DNA Test. Furthermore, in State v. Hood, **155 W.Va. 337, 342,** 184 S.E.2d 334, 337 (1971), the West Virginia Supreme Court stated beyond the initial issue of the *accuracy and reliability of the scientific test* is the question of whether accepted test procedures were [followed] by qualified personnel in making the test; the Court

of Appeals made the following assessment about the necessary foundation for the admissibility of test results: "It further appears that the necessary foundation before the admission of the results of any test are: **(1)** that the testing device or equipment was in proper working order; **(2)** that the person giving and interpreting the test was properly qualified; **(3)** that the test was properly conducted; and **(4)** that there was compliance with any statutory requirements." **See, State v. Clawson,** 165 W.Va. 588, **270 S.E.2d 659,** 677 -678 and n.15 (1980), ***adopting*** People v. Kelly, 17 Cal.3d 24, 30, 549 P.2d 1240, 1244, 130 Cal.Rptr. 144, 148 (1976)

Because the *Richey* Petition not only served to alert the Circuit Court as to the sufficiency of the evidence under state-law, it also announced that Petitioner was also raising a federal constitutional issues, (Jackson v. Virginia) but, because the State Courts of West Virginia simply enjoys *unquestionable discretion* in their judicial system, (which makes the State's remedies inadequate in protecting Petitioner's rights) has caused an extreme inordinate delay of eighteen years (18) in which both the lower court and the West Virginia Supreme Court of Appeals refused to take action, denying Petitioner basic due process of law.

In *Evitts v. Lucey*, post, This Court held that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Federal Constitution and, in accord with the Due Process Clause." 469 U.S. 387, 401- 405, 105 S.Ct. 830, 839, 83 L.Ed.2d 821 (1985)

"The State must afford the petitioner a full and fair hearing on his federal claims, so must the petitioner afford the State a full and fair *opportunity* to address and resolve the claims on the merits". Picard v. Connor, supra, 404 U.S. at 275

Petitioner was *not* seeking to be released from prison or have his time reduced, he simply wanted a DNA test done on the remaining evidence used in his case.

But due to the destruction of that evidence before Petitioner could have it re-tested, has denied Petitioner his due process rights to equal protection of the law, under West Virginia's "higher standard of protection" than that of the Federal Constitution. **See, West Virginia v. Osakalumi, 194 W.Va. 758, 461 S.E.2d 504, 512 (1995)**(*adopting Brady and Agurs*)

To begin, Petitioner believes that the Prosecutor has not complied with the requirements of ***Brady*** and ***Agurs,*** in that the Forensic Report of Trooper Francis that was turned over to the Defense, See, FORENSIC LABORATORY Report, *Lab. No. S9500404 'SUPPLEMENTAL'*, Exhibit "D" was not allow to be discussed or used by Defense during the course of trial.

This Report was used to have Petitioner arrested; held in custody without bond; *Indicted*; and subsequently subjected to a trial in a hostile community.

Petitioner has been attempting to have his claims/grounds heard in the State Courts of West Virginia through five (5) different procedures, beginning with questioning whether the State of West Virginia had probable cause to make an arrest and extend Petitioner's incarceration, see, Pugh v. Gerstein, 420 U.S. 103, 114-119 and n.19, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975), United States v. Van Metre, 150 F.3d 339, 348 (4th Cir. 1998) once the Investigating Trooper was informed that the suspect identified by forensic science, was a Caucasian male.

This Report of Trooper Francis *clearly* demonstrates that he *did not* perform an authorized DNA Test as mandated by his Agency Policies and Procedures outlined by their *adoptive* DNA Manuals.

As the Trooper's Report indicated, the biological evidence tested ***could have*** come from the Petitioner. This is not scientific conclusion under *Daubert v. Merrell Dow Pharmaceutical, Inc.*.

As the Fourth Circuit Court of Appeals recognized, "[a] reliable expert opinion must be based on scientific, technical or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." Oglesby v. General Motors Corp., 190 F.3d 244, 250 (4th Cir. 1999)(*citing Daubert*)

Two rectal swabs were taken from the victim, so, based on this fact, how can you have "sufficient" amount of [extracted] DNA from the [rectal] swab but [insufficient] amount extracted from the rectal swab [female fraction], when both swabs are the same **and** you are using the same RFLP and PCR *Amplification technique* on all of the extracted DNA. see, Exhibit "D", page 1

Your Petitioner believes that the refusal of the West Virginia Supreme Court of Appeals to take action on Petitioner's rehearing petition based on their *own* precedent case-laws, once they have been made aware (alerted) to the nature and scope of the Petitioner's habeas corpus grievances, Richey v. Hill, supra, 603 S.E.2d at 189 and *n.9, Maynard, Chief Justice concurring*, but compare Justice Albright dissenting, supra is manifest injustice. *Fed. R. Civ. P. 59(e): A "manifest injustice" is synonymous with a "clear error". It occurs where a court has 'patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." South Carolina v. United States, **232 F.Supp.3d 785 , 785 n.5**, 2017 U.S. Dist. LEXIS 16990, **2017 U.S. Dist. LEXIS 11 n.5** No. 1:16-cv-00391-JMC (D.S.C. February 7th, 2017)*

These following facts remain undisputed and have yet to be adjudicated:

1. the destruction of the remaining evidence that was in custody of the McDowell County Circuit Courthouse before Petitioner had a chance to re-test it;

2. the Prosecutor's closing argument regarding that evidence;[1] as a means of distracting the jury *from* that evidence; (see, Estes v. Texas, 381 U.S. 532, 540, 14 L.Ed.2d 543, 85 S.Ct. 1628 (1965)

3. the evidence under *Trombetta's* (California v, 467 U.S. 479, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984)) standard of constitutionality (where the evidence possesses *"an exculpatory value that was apparent before the evidence was destroyed,"* and [was] of such a nature that the defendant would be unable to obtain comparable evidence by any other reasonably available means. Id, 467 U.S. at 489, 81 L.Ed.2d at 422, 104 S.Ct. at 2534; *adopted by*, West Virginia v. Osakalumi, supra, 461 S.E.2d at 510)

4. the DNA Evidence that was previously tested in the calendar year of April 1996, is *now* an antiquated procedure/process, (As of the April 1st, 1997 Trial of Petitioner, the West Virginia State Police Crime Laboratory — Serology Division, no longer does RFLP DNA Analysis. See, Exhibit "C", T.T. Vol. 4, page 74))

Based on this partial assessment of the facts in this case, Appellant prays that his *Petition for Certiorari* should be granted.

Respectfully submitted.

David Lawrence Dixon, *pro se* Appellant

N:1 In *United States v. Jorn*, This Court stated that when a defendant moves for a mistrial, when the basis for the motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, re-prosecution is barred. *Id.*, 400 U.S. 470, 485 n.12, 27 L.Ed.2d 543, 556 n.12, 91 S.Ct. 547 (1971)