(Exhibit #1)

VIRGINIA: CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA)
) RECORD
v)
) CR10-3743
DEVINCHE JAVON ALBRITTON,)
Defendant.)

Before Hon. Patricia L. West, judge

Virginia Beach, Virginia

June 13, 2011

-----oOo-----

APPEARANCES: Commonwealth's Attorney's Office
(Mr. Thomas M. Murphy and
Ms. Sara R. Chandler), attorneys
for the Commonwealth.

Devinche Javon Albritton,
the defendant, pro se.

(Exhibit #1)

that she's using is different from the protocol. The protocol in the type of examination she's doing is, you know -- my guess -- to keep everything -- make sure that -- that the samples are kept sterile and separate. It doesn't have to do necessarily with the -- a DNA is a scientific determination. The SANE examination and the protocol that -- well, protocol it would follow would be, first, you would ask the patient this, then you do that, then you do this, then you do that, more so than the scientific protocol, I think, I'm assuming. They're trying to get that information for you anyway. It might -- again, it might --

MS. CHANDLER: Yes, Judge. You know, he referenced -- and I thought that he had made this request. Several months ago he did make a request, I think, directly to the hospital for the information. I think he wanted a lot of information, actually, about Ms. McDonald herself and what her -- basically her record was there at the hospital in doing these things. And if memory serves, he also requested her -- information about the SANE protocols, along those lines. Obviously, that's got nothing to do with us as far as, you know, our ability to respond on behalf of the hospital. So he needs to, I guess,

follow up on that.

THE COURT: But you're trying also --

MS. CHANDLER: Yes, ma'am. We've also been attempting to -- the issue, as you may know, is that Chesapeake Hospital did them several years ago and now, for the most part, they don't. And SANEs are done through other private corporations. So trying to backtrack it and get it, I think there are actually tangible documents showing what the procedure was at that time. You know, and, Judge, if we can get them we will turn them over to Mr. Albritton. If we can establish that they do not exist we will advise Mr. Albritton. But he did make an attempt several months ago directly through the hospital, if memory serves.

THE COURT: Okay.

MS. CHANDLER: And I don't know how they dealt with that.

THE COURT: I'm trying to read into what your written argument is about the constitutionality and about the -- I guess, the -- what you just argued verbally about the scientific procedure.

THE DEFENDANT: The basis -- the basis for it, it says, Theory technique, technical or specialized theory. That's basically what it says in

Satcher. It, you know, it --

THE COURT: Okay. They're going to try to get the documents to you as to what protocol they followed. And they will establish one way or the other whether they have them and go ahead and let you know. And I know that you've made that request directly to the hospital. And I assume you've not heard back from them?

THE DEFENDANT: Well, I never requested directly to the hospital. I think it was -- I forgot which judge it was, but the judge asked them to look into seeing about them getting it.

THE COURT: Well, they're trying to get -- first of all, the Commonwealth is shaking their head so I don't know if there's more to that that you're not -- but they are, in fact, voluntarily trying to get the documents and they will let you know one way or the other whether they exist or whether they cannot put their hands on them.

THE DEFENDANT: They said the presumption is on them to prove the admissibility of it. And that would --

THE COURT: They got the nurse coming again.

THE DEFENDANT: Okay.

THE COURT: All of this -- and you can talk to Ms. Smith about this, weight versus admissibility. The weight of evidence versus the admissibility of evidence is the concept, but if you're going to represent yourself you probably ought to figure it out. And I can't really help you there.

THE DEFENDANT: Yeah. I understand, Your Honor.

THE COURT: Anyway, so I'm going to deny the motion to suppress the -- first of all, the testimony of the SANE nurse. And then the SANE report itself, I suppose, will -- that would come up at trial. If you make the renewed motion, then it would be a basis at that point in time, but it's -- that's one of those that has to -- the facts have to come out.

THE DEFENDANT: Okay.

THE COURT: And, again, at trial, they've got to establish that she's an expert. So all of those issues would be decided at trial, her testimony and whether or not -- or whether or not she can testify.

So anything else? Y'all have to pick a date. Is that the last thing at this point, is a date?

MR. MURPHY: That's it, Judge.

MS. CHANDLER: Judge, in anticipation of today's DH, we had contacted our witnesses as well as reviewed our own trial schedules. And we actually only have two dates in August and then the rest of the dates we have available are in September. And he advised the court he had checked with his witness for July dates. We're not going to be able to do this trial in July. I don't know if we can select a date today or if he needs to contact his witness again and get -- check. We can provide him with our possible dates to check against theirs, but it's not -- we're not going to be available in July.

THE COURT: Do you have more dates for her? And what I'm putting --

THE DEFENDANT: I got August dates.

THE COURT: You have August dates? Let me just review the three motions first. The defendant's motion for a medical doctor is denied. You removed your motion for interlocutory appeal. And the motion for -- about the SANE report can be renewed at trial. So that will be the ruling that the court said now.

You got August dates? What are those?

THE DEFENDANT: I have August 10th, 11th, 12th.

THE COURT: Okay.

MS. CHANDLER: August 10th, Judge.

THE COURT: We'll set it for August 10.

THE DEFENDANT: Your Honor -- oh, yeah. This court order -- I'm not getting copies of the court order. I need -- how do I get a copy of the court order for the last time?

THE COURT: That's not their problem.

MR. MURPHY: Judge, standby counsel is not available.

MS. SMITH: Your Honor, Ms. Williams, who's been the investigator throughout this, is not available that week. She'll be off that entire week. She's been really helping.

MS. CHANDLER: Then, Judge, we'll pick a day in September.

MR. MURPHY: And we have September 7th.

THE DEFENDANT: Oh, my gosh.

THE COURT: Well, like I said, you don't have any place else to go, Mr. Albritton.

THE DEFENDANT: Well, and I -- I mean, I'm sorry, Your Honor. Well --

THE COURT: I mean, I'm not -- it's just -- you know, this is going to be a lengthy trial. And it's your standby counsel and her investigator,

VIRGINIA:

IN The CIRCUIT COURT for the City of VIRGINIA BEACH

Commonwealth of VIRGINIA, Plaintiff,
V.
DeVinche AlBritton, Defendant

(Exhibit #2)

Case No. CR10-3743

FILED
VA BEACH CIRCUIT COURT
2013 MAY 13 PM 3:47
THIS IS A TRUE COPY
ATTEST: [signature]

Motion for funds

Comes Now, DeVinche AlBritton, the defendant in the above cause of action, who respectfully moves this Honorable Court to appoint funds necessary for him to Obtain, purchase, and present a large Size scaled Map of the area depicting the Complaining Witness's point of origin the morning of September 6, 1999, Defendant AlBritton's legal residence at that time, and the purported walking Path of the Complaining Witness from her point of Origin to her place of Work, including the Surrounding Areas, in order to properly and adequately inform the Jury thereof in his Defense and States the following:

(1) Defendant AlBritton is charged with Several offenses alleged to have occurred more than a Decade ago, in the year 1999, in an Area of the City of Virginia Beach,

(2) AlBritton states that in his defense of the alleged offenses, he will have to present, explain, and elaborate on relevant areas, distance, and locations to a jury, in which a detailed large Scaled Map depicting street names, buildings, businesses, etc... relevant to the Case.

(3) Moreover, Due to the fact that overtime many Businesses, Street names, and landmarks relevant to the Case has changed or no longer exist, in accordance with AlBritton's fair trial and Due process rights, a specialized map of the requested area as it existed in 1999 would be needed to be prepared for his Jury Trial, which requires funds therefor.

(4) AlBritton States that there is no other means by which he may Obtain the required material needed for his defense, Save this Court.

Granted

Closing Statement

Wherefore, DeVinche AlBritton, pray's this Honorable Court to Grant this Motion for funds, in order for him to Obtain, purchase, and present the requested material to his Jury, pursuant to his fair trial and Dueprocess rights under the U.S. Constitution.

(Exhibit #2)

Respectfully Submitted

DeVinche AlBritton

Certificate of Service

I DeVinche AlBritton do swear that a true copy of the foregoing motion for funds has been mailed to: Thomas Murphy, Asst - Commonwealth's Attorney, 2425 Nimmo Pkwy, Va Beach, VA 23456 and to Stand by Counsel, Susan Smith, 2425 George Mason Dr, Va Beach, VA 23456 on this 11th day of May 2011.

DeVinche AlBritton

FILED
VA. BEACH CIRCUIT COURT
2011 MAY 12 AM 10:51
TINA E. SINNEN, CLERK
BY: _____

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: JUNE 1, 2011

JUDGE: HANSON

(Exhibit #2)

COMMONWEALTH OF VIRGINIA

vs

DEVINCHE JAVON ALBRITTON, DEFENDANT

INDICTMENT FOR:

ABDUCTION WITH THE INTENT TO DEFILE

RAPE

FORCIBLE SODOMY

ORDER—CASE NO.: CR10-3743

Court Reporter: Ronald Graham & Associates, Inc.

This day came T. Murphy and S. Chandler, attorneys for the Commonwealth, the defendant, in person, *pro se*, and S. Smith, stand-by attorney for the defendant.

After hearing arguments of counsel and the defendant, the Court ruled as follows:

On the defendant's motion to have Judge Hanson recuse himself from any further proceedings in this matter, the Court DENIED the motion;

On the defendant's motion for appointment of an expert witness in the area of Sexual Assault Examinations, the court GRANTED the motion as follows: Lisa K. Amick is appointed to assist the defendant and is allowed the sum of $400.00 to review the Commonwealth's discoverable evidence and to consult with the defendant for up to one hour. Leave is granted to the defendant to seek additional funds from the Court, upon written motion and with notice to the Commonwealth, for further assistance by Ms. Amick if needed. The Attorney for the Commonwealth shall provide to Ms. Amick photographs taken of the victim during the Sexual Assault Examination, which photographs Ms. Amick may provide to the defendant for his review during her one-hour consultation. The photographs shall not be copied and they shall be returned to the Attorney for the Commonwealth at the conclusion of Ms. Amick's one-hour consultation. The defendant shall not be permitted to keep the photographs or keep any copies thereof;

On the defendant's motion for additional funds for the appearance of an expert witness from LabCorp Laboratory Corporation of America, the Court GRANTED the defendant $500.00 for the appearance at trial of the expert witness;

(Exhibit #2)

On the defendant's motion for funds to obtain an aerial map of the location of the offense as it appeared in 1999, it was agreed by the parties that S. Smith, stand-by counsel, will determine whether the City of Virginia Beach has a map of the area in 1999 and that the Attorney for the Commonwealth will determine whether such a map includes the victim's "point of origin" as she began her trip on the date of offense. If such a map exists and contains the requested locations, the Court GRANTS the defendant's motion to have such map produced for his use at trial and awards him the processing fees associated with its production. Such fees will be paid only upon presentation of an invoice or other accounting from the city department producing the map;

On the defendant's motion for sequestration of the jury, the Court DENIED the motion;

On the defendant's motion to dismiss the indictments due to a violation of his speedy trial rights, the Court found no violation of his rights and no purposeful or intentional delay by the Commonwealth in investigating the case or bringing the charges, and so the Court DENIED the motion;

The objections of the defendant and of the Commonwealth to the various rulings of the court were noted on the record.

This matter is set for trial by jury, commencing on June 13, 2011.

ENTER: 1/5/12

Honorable Edward W. Hanson, Jr.
Judge, Circuit Court

SEEN:

Thomas M. Murphy
Deputy Commonwealth's Attorney

Sara R. Chandler
Associate Commonwealth's Attorney

Susan Smith
Office of the Public Defender, Stand-By Counsel

Devinche Javon Albritton
Defendant

(Exhibit #2)

SUPREME COURT OF VIRGINIA

DOUGLAS B. ROBELEN, CLERK

SUPREME COURT BUILDING

100 NORTH 9TH STREET, 5TH FLOOR

RICHMOND, VIRGINIA 23219

(804) 786-2251 V / TDD

FAX: (804) 786-6249

MURIEL-THERESA PITNEY

CHIEF DEPUTY CLERK

February 8, 2021

DeVinche J. AlBritton, No. 1016653
Sussex II State Prison
24427 Musselwhite Drive
Waverly, VA 23891

Re: *Devinche J. Albritton v. Commonwealth of Virginia*
Record No. 210005

Dear Mr. AlBritton:

You previously wrote the Court inquiring whether Defense Exhibit 3 was included in the circuit court record that was transmitted to this Court. You also called Mr. Robelen, Clerk, making the same inquiry. The Court of Appeals did transmit the circuit court record to this Court; however, the circuit court retained Defense Exhibit 3, presumably because of its size. Please note that because your petition specifically references the exhibit, if the Court determines it needs the exhibit, it has the authority to request it.

Sincerely,

Muriel-Theresa Pitney
Chief Deputy Clerk

MTP/ep

This is the Address where the alleged Victim lived and began her walk to work

(Exhibit #2)

Walking directions are in beta.
Use caution – This route may be missing sidewalks or pedestrian paths.

Walking directions to Aragona Village Shopping Center

4748 Deerfield Ln
Virginia Beach, VA 23455 ← The alleged Victim's point of origin 9-6-99

1. Head **southwest** on **Deerfield Ln** toward **Huntinghill Ln**	226 ft
2. Turn left onto **Huntinghill Ln**	0.1 mi
3. Turn right onto **Honeygrove Rd**	0.3 mi
4. Turn left onto **Aragona Blvd**	1.0 mi
5. Turn left onto **S Kellam Rd**	0.4 mi
6. Turn right onto **Jeanne St**	141 ft
7. Turn left onto **Horace Ave** Destination will be on the right	0.2 mi

Aragona Village Shopping Center
Virginia Beach, VA 23462

These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

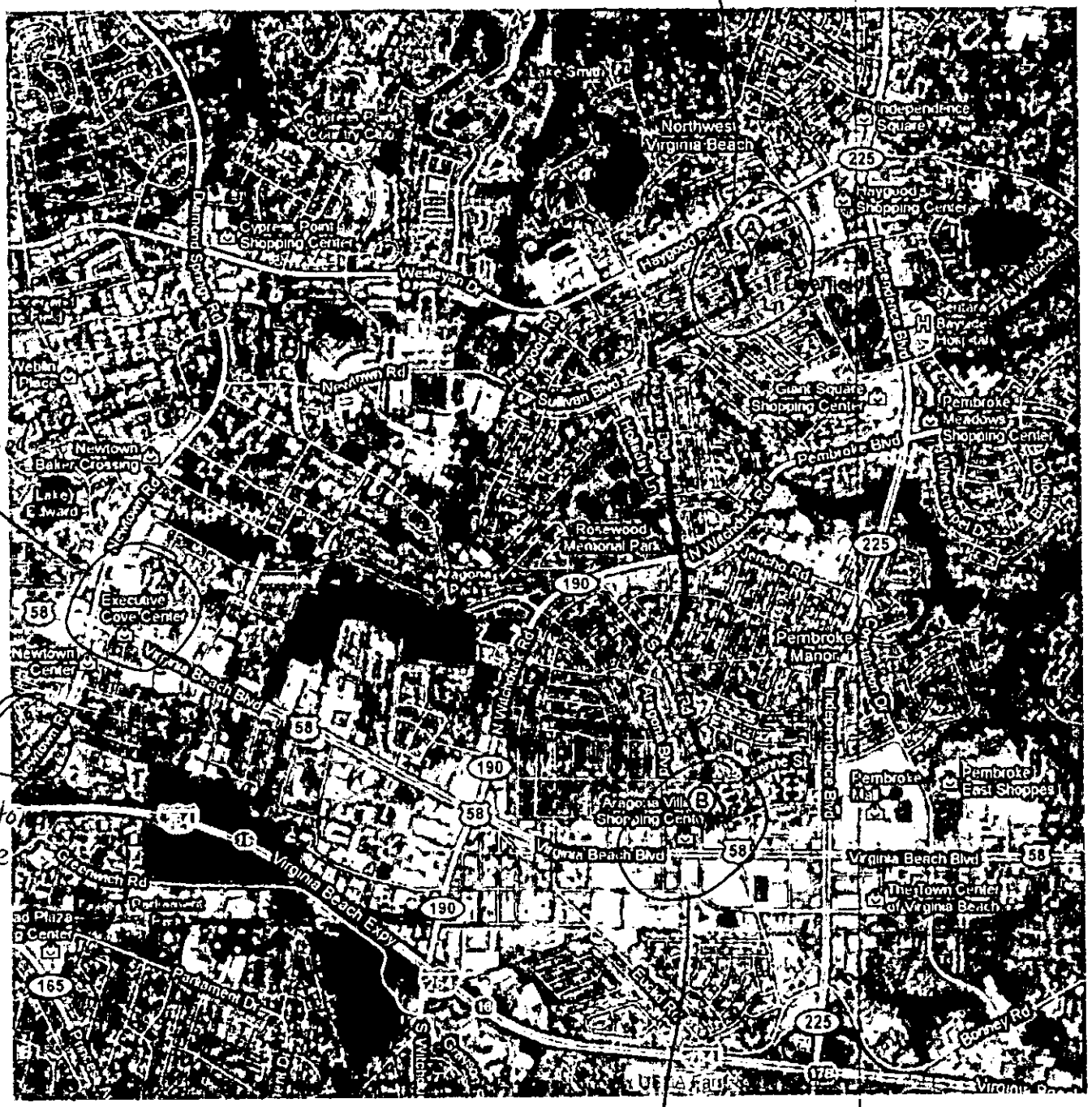
Report a problem

(Exhibit #2)

Google maps

To see all the details that are visible on the screen, use the "Print" link next to the map.

The Alleged Victim's Residence and Point of Origin walking



The alleged crime scene

Pet Albritton Residence 9-6-99

"This is a small replica of Defense Exhibit #3" That is in the Custody of the Virginia Beach Circuit Court!!

The Alleged Victim's Place of Work that She was walking to The morning of 9-6-99

(Exhibit #2)

Driving directions to Aragona Village Shopping Center

4748 Deerfield Ln
Virginia Beach, VA 23455 ← The address of the alleged Victim on 9-6-99

1. Head **southwest** on **Deerfield Ln** toward **Huntinghill Ln**	226 ft
2. Turn left onto **Huntinghill Ln**	0.1 mi
3. Take the 2nd left onto **Honeygrove Rd**	0.4 mi
4. Take the 2nd right onto **Independence Blvd**	2.0 mi
5. Turn right onto **Virginia Beach Blvd** Destination will be on the right	0.4 mi

Aragona Village Shopping Center
Virginia Beach, VA 23462

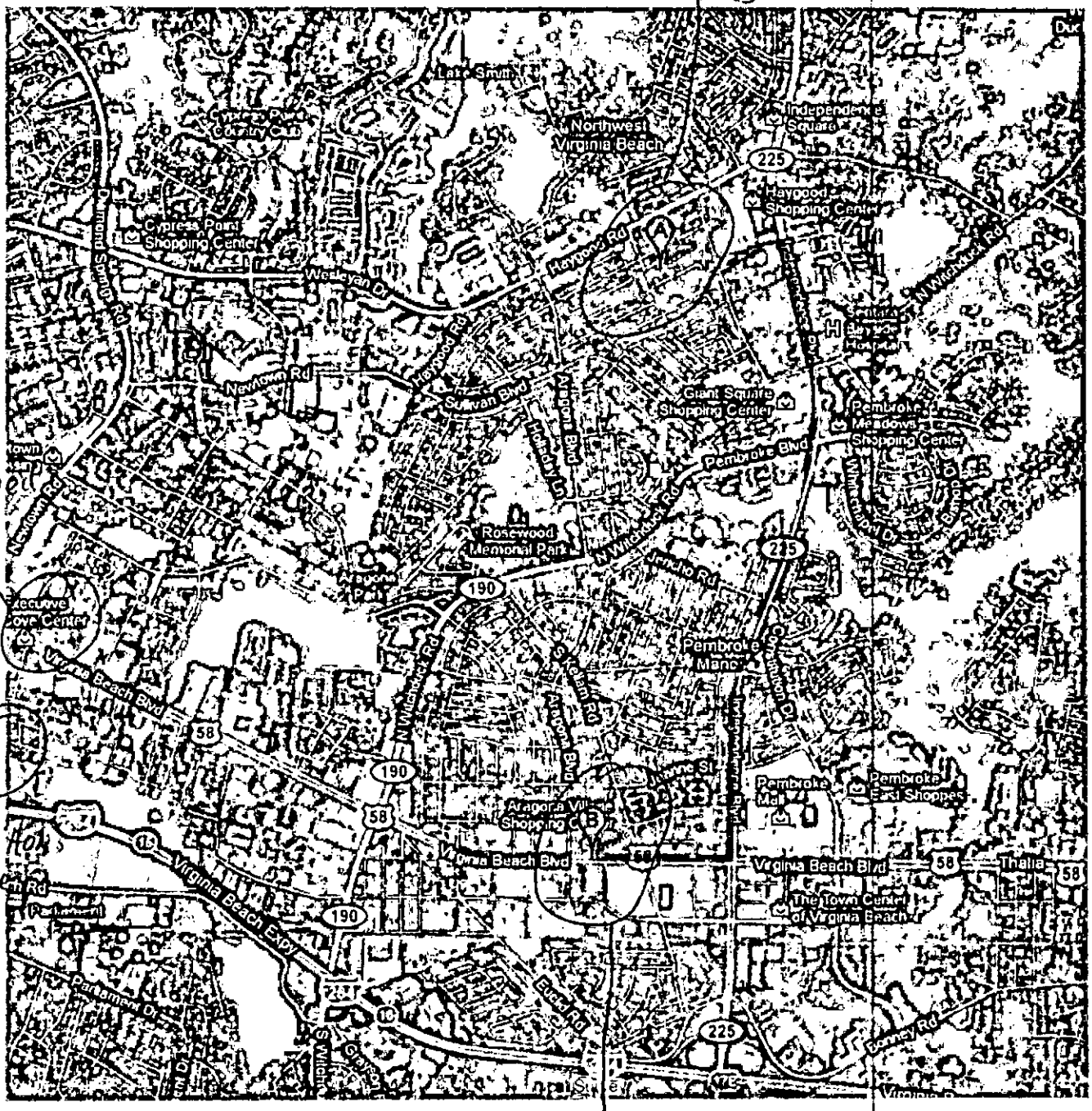
These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

Report a problem

Google maps (Exhibit #2)

To see all the details that are visible on the screen, use the "Print" link next to the map.

The alleged Victim's residence and Point of Origin 9-6-99



The Alleged Crime scene

Pet Albright Residence 9-6-99

This is a small replica of "Defense Exhibit #3" entered into the Record, produced by the Court's order, and in the custody currently in the Virginia Beach Circuit Court Clerk's Office

The alleged Victim's place of Work that she walked To on the morning of 9-6-99

(Exhibit #3)

EAST COAST INVESTIGATIONS, INC.
2420 Virginia Beach Blvd. Ste. 116
Virginia Beach, VA 23454

RE: DeVinche Albritton # 1016653

To Whom It May Concern:

East Coast Investigations,Inc., was hired on 10/13/2015 to conduct a research investigation with regards to obtaining a copy of the NCJRS SANE Hospital Protocol for Virginia. This investigation was to determine how difficult it was to uncover the documents and the level of accessibility for such.

An investigation online entering NCJRS into Google provided such documents and with no problem uncovering an 80 page hospital protocol for treatment of sexual assault victims. On the second page of the protocol it lists numerous names of the task force members for additional expansion if necessary or needed..

We also uncovered the SANE program 8 pages for review.

Respectfully,

Nick Fortunato
Senior Investigations
East Coast Investigations, Inc.
Dept of Criminal Justices Services 11-1155

See (Exhibit #1, June 23, 2022 Transcript)

* This proves that the prosecutors lied To me and the Court on the Record! They Never produced the Hospital SANE Protocol as They promised as I sat in Jail awaiting Trial in Isolation!!

(Exhibit #3)

Hospital Protocol
Development Task Force

Mr. Greg Auditore
Investigator
Henrico County Division of Police

Ms. Nancy Bowman
Registered Nurse
Medical College of Virginia

Mr. Robert Colvin
Executive Director
Virginia State Crime Commission

Ms. Gayle Crutchfield
Senior Social Worker
Henrico County Dept. of Social Services

Ms. Linda Curtis
Deputy Commonwealth's Attorney
Hampton Commonwealth's Attorney's Office

Ms. Deanne Dabbs
Forensic Section Chief, Serology/DNA
Division of Forensic Science

Ms. Barbara Dill
Registered Nurse

Ms. Fran Ecker
Children's Justice Act Coordinator
Dept. of Criminal Justice Services

Mr. Timothy Gladis
Victims Services Program Analyst
Dept. of Criminal Justice Services

Ms. Tammy Knight
Registered Nurse
Medical College of Virginia

Mr. John Mahoney
Chair, Hospital Protocol Development Task Force
Victims Services Program Analyst
Dept. of Criminal Justice Services

Ms. Kathryn Malbon
Victims Services Program Analyst
Dept. of Criminal Justice Services

Ms. Mandie Patterson
Victims Services Section Chief
Dept. of Criminal Justice Services

Ms. Phyllis Sale
Nurse Practitioner
Medical College of Virginia

Ms. Cindy Swanson
Rape Crisis Center Services Coordinator
YWCA Rape Crisis Center

Ms. Katharine Webb
Senior Vice President
Virginia Hospital Association

Virginia's
HOSPITAL PROTOCOL
For the Treatment of Sexual Assault Victims

Prepared by
Hospital Protocol Development Task Force

In Coordination with
- Virginia State Crime Commission
- Department of Criminal Justice Services
- Department of General Services, Division of Forensic Science
- Virginia Hospital Association

Adopted December 11, 1990

(Exhibit #3)

■ Purpose

This summary provides a general overview of the more detailed information presented in the body of the protocol. The summary also serves as an index; page references at the end of each section refer to pertinent information contained elsewhere in the protocol.

Medical personnel are encouraged to read the entire protocol and to refer to topic-specific literature for more detailed information.

■ General Information

Reports of sexual assaults against adults and children have continued to increase throughout the past decade.

Traditionally, the successful prosecution of both adult and child sexual assault/abuse cases has been difficult. Since the victim is often the only witness to the crime, the collection of physical evidence as well as the documentation of medical trauma may be necessary either to substantiate an allegation or to help strengthen a case for court.

When immediate medical attention is received, the chances increase that some type of physical evidence will be found. The role of medical personnel in this process often can be the key to successful prosecution and can help to promote early victim recovery.

The primary purpose of this document is to assist hospitals to:

- Minimize the physical and psychological trauma to the victim of a sex crime, and
- Maximize the probability of collecting and preserving physical evidence for potential use in the legal system.

Recommendations were based upon the physical and emotional needs of the sexual assault/abuse victim reasonably balanced with the basic requirements of Virginia's legal system. The resulting protocol provides useful legal, medical and forensic guidance and can serve as a basis for serious discussion of the evidentiary, medical and emotional needs of sexual assault/abuse victims.

For purposes of this protocol, the term "sexual assault" will be used to refer to all sex crimes perpetrated against adults and the term "sexual abuse" will refer to all sex crimes perpetrated against children, both terms being defined in a broad context as follows:

> Any act of sexual contact or intimacy performed upon one person by another, and without mutual consent, or with an inability of the victim to give consent due to age, mental or physical incapacity. (SEE PREFACE)

* Compare this Document with Exhibit # 7, the April 23, 2023, Transcript Perjured S.A.N.E Expert Witness Testimony, See page 349.!! (Exhibit #3)

forms, anatomical drawings and patient consent forms should be provided by the individual hospital.
(SEE PAGES 26-27)
NOTE: Step-by-step instructions for the PERK are listed in this protocol on pages 27-34.

■ Medical Examination

Body Diagrams/Photographs
Photographs of sexual assault victims should not be taken on a routine basis. Instead written descriptions and diagrams of the human figure should be used to show the location and size of the injury.

Any photographs which are taken should be limited to those instances where there is an opportunity to produce clear pictorial evidence of injury, such as bruises or lacerations. Photographs should only be taken with the specific consent of the victim.

All photographs should be taken by a competent photographer, preferably of the same sex as the victim, and a ruler and color chart should be used to indicate the size and nature of each injury.
(SEE PAGES 34-35)

Documentation/Terminology
Physical examination findings should be documented as completely as possible on the medical record. Sexual assault prosecutions may not always require the presence or testimony of the attending clinician or nurse; however, there will be times when it is necessary. If testimony is needed, a thoroughly completed and legible medical record and accompanying body diagram will assist medical staff in recalling the incident.

The attending clinician must be careful not to include any subjective opinions or conclusions as to whether or not the crime occurred. Hospital personnel should not be expected to expand their role and act as "investigators" for law enforcement. They should not ask for details beyond those necessary to perform the medical and evidence collection tasks; it is the responsibility of the follow-up investigator to ask the more detailed questions.
(SEE PAGE 35)

Date of Last Voluntary Coitus
It is recommended that attending clinicians ask victims if they engaged in voluntary sexual intercourse within 48 hours prior to the assault. If so, victims should also be asked the date of the contact and the partner's relationship to the victim. This information should be noted on the Sexual Assault Information Form.
(SEE PAGE 35)

Toxicology Blood/Urine Screen
Blood/urine screens for determining toxicology should only be done in the following situations:

- If the victim or accompanying person (such as a family member, friend or police officer) states that the victim was drugged by the assailant(s), *and/or*
- If, in the opinion of the attending clinician, the victim's medical condition appears to warrant toxicology screening for optimal patient care.

(SEE PAGE 35)

Medical Report Form for Sexual Assault Examinations
Throughout the medical examination, the attending clinician should explain to the victim why questions are being asked, why certain medical and evidentiary tests may be needed, and what treatment may be necessary. Pertinent information to be included on the Medical Report Form may be found in the Adult Protocol.
(SEE PAGE 36)

Analysis of Specimens
All medical and forensic specimens collected during the sexual assault examination must be kept and processed separately.
(SEE PAGE 36)

■ Procedures for Release of Evidence

Transportation/Release of Evidence
Under no circumstances should victims be allowed to handle evidence after it has been collected. Only a law enforcement officer or duly authorized agent may transfer evidence from hospitals to the Division of Forensic Science for analysis.

Evidence collection items should not be released from a hospital without the written authorization and consent of the informed adult victim, or an authorized third party acting on the victim's behalf if the victim is unable to understand or execute the release.
(SEE PAGE 37)

Non-Authorization to Release Evidence
Although the vast majority of sexual assault victims consent to having evidence specimens released to law enforcement subsequent to the medical examination and evidence collection process, there may be instances when a victim will not authorize such a release. Hospital and/or law enforcement personnel should not react negatively to the victim's initial decision not to release evidence. They should inform the victim that the release of evidence

(Exhibit #3)

STATE OF VIRGINIA COUNTY OF VIRGINIA BEACH COMMONWEALTH OF VIRGINIA Plaintiff, Versus DEVINCHE ALBRITTON Defendant.	IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT CASE NO: CR10-3743 **AFFIDAVIT OF ELIZABETH LYNNE GIBBS, MD**

COMES NOW, Elizabeth Lynne Gibbs, M.D. duly sworn states as follows;

1. For purposes of identification, I, Elizabeth (Betsy) Baker Gibbs, M.D., am a forensic pediatrician. I received my Doctorate of Medicine in 1986 and completed my pediatric residency in 1989. I have been board certified in pediatrics and forensic medicine. I continue to be board-certified in forensic medicine. I am trained as a parenting coordinator and am a certified forensic medical investigator. I have practiced forensic medicine for twenty years. I worked with over ten thousand (10,000) children, families and adults with allegations of child sexual and physical abuse, domestic violence, or sexual assault to include rape-homicides and testified as an expert witness in hundreds of cases. I have been qualified as an expert witness in South Carolina, Virginia, Pennsylvania, New Jersey, Georgia, and Florida.
2. I have been asked to render an opinion regarding the possible etiologies of the physical findings seen on Jamie Lewis on September 6, 1999 by Kathryn McDonald, RN, SANE.
3. I reviewed the medical records and photographs from the Chesapeake General Hospital Sane Program from September 6, 1999.

(Exhibit #3)

4. Many factors contribute to the extent of injury to the genital area during forced, coerced or consensual intercourse. One of these factors includes multiple sexual contacts, particularly with multiple partners, within a short period of time. According to the history I have been given and the records reviewed, Ms. Lewis did have sexual intercourse with two partners, one being her husband, within a short period of time.
5. I agree with Ms. McDonald's assessment in that the findings are abnormal. These findings support a history of blunt-force trauma to the genitalia. They can be seen in instances of nonconsensual and consensual intercourse, albeit more often in nonconsensual intercourse. Multiple sexual partners and multiple sexual acts are among the factors that increase the likelihood of traumatic findings in multiple sites, regardless of the nature of consent.
6. In my medical opinion, no judgment can be made, to a reasonable degree of medical certainty, regarding the nature of consent to the sexual act. The blunt-force trauma could have been made with the consent or without the consent of Ms. Lewis.
7. As to the non-genital findings, the scratch on the left forearm is non-specific and gives no information regarding the nature of the consent to the sexual act.

FURTHER AFFIANT SAYETH NAUGHT!

Elizabeth Gibbs MD
Elizabeth Lynne Gibbs, M.D.

SWORN to and subscribed this 21st
Day of February, 2012.

Notary Public for South Carolina
My Commission Expires: June 23rd 2021

(Exhibit 4)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DEVINCHE JAVON ALBRITTON,

Petitioner,

v.

HAROLD CLARKE,

Respondent.

Criminal No. 2:16cv737

ORDER

Before the Court are the following Motions brought by *pro se* Petitioner DeVinche Javon Albritton: a Motion for Relief from Judgment, a Motion to Amend and Supplement, a Motion for an Evidentiary Hearing, a Motion for Summary Judgment, a Motion to Admit a Trial Transcript, and a Motion to Compel and for Injunction. These Motions follow the Court's Order adopting the Magistrate Judge's Order denying Mr. Albritton's Motion to Vacate Under 28 U.S.C. § 2254. For the reasons stated herein, the Motion for Relief from Judgment (ECF No. 24) is **DENIED**; the Motion to Amend and Supplement (ECF No. 28) is **GRANTED**; the Motion for an Evidentiary Hearing (ECF No. 29) is **DENIED**; the Motion for Summary Judgment (ECF No. 30) is **DENIED** for lack of jurisdiction; the Motion to Admit a Trial Transcript (ECF No. 34) is **GRANTED** with leave to supplement; the Motion to Compel and for Injunction (ECF No. 38) is **DEFERRED** pending response from the Government.

(Exhibit 4)

I. BACKGROUND

Following trial in Virginia Beach Circuit Court in April 2013, Petitioner was convicted of Rape and Abduction with Intent to Defile. On May 1, 2013, he was sentenced to a total term of life imprisonment plus thirty years in the Virginia penal system. *See* ECF No. 10 at 1–2. Mr. Albritton filed a § 2254 Petition presenting nine claims alleging violations of federal rights regarding Petitioner's trial, as well as the denial of his appeal by the Virginia Court of Appeals and the denial of his petition for a writ of habeas corpus by the Virginia Supreme Court. *See* ECF No. 1.

On April 20, 2017, the Attorney General of Virginia filed a Motion to Dismiss on behalf of the Respondent. *See* ECF No. 8. The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C), Federal Rule of Civil Procedure 72(b), and Local Rule 72 for a report and recommendation. In the Report and Recommendation (ECF No. 20) filed on February 1, 2018, the Magistrate Judge recommended granting Respondent's Motion to Dismiss, dismissing the Petition with prejudice. On March 6, 2018, this Court adopted the Magistrate Judge's findings and recommendations. ECF No. 22. The instant Motions followed. The Court ordered the State to respond to four of these Motions.

II. Motion for Relief from Judgment

A. Motion to Amend and Supplement

On April 19, 2018, Mr. Albritton filed a Motion (ECF No. 28) to supplement his Motion for Relief from Judgment under Rule 60(b). Mr. Albritton included an attachment as Exhibit #1 "to establish that [he] is entitled to federal habeas relief upon his *Brady* violation claim." ECF No. 28 at 2 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). The Exhibit is an excerpt from *Bell v. Bell*, 512 F.3d. 223 (6th Cir. 2008). *Id.* at 3–4. *Id.*

In his Motion, Mr. Albritton claims that he "had not yet received the relevant documentation from the Sussex II" prison library when he filed the Motion for Relief from Judgment. ECF No. 28 at 1. Out of deference to this *pro se* Petitioner, the Court **GRANTS** Mr. Albritton's Motion to Supplement. Accordingly, Exhibit #1 will be considered along with the Motion for Relief from Judgment.

B. Standard

Federal Rule of Civil Procedure 60(b) "authorizes a district court to grant relief from a final judgment for five enumerated reasons or for 'any other reason that justifies relief'" under Rule 60(b)(6). *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011) (quoting Fed. R. Civ. P. 60(b)(6)). "The remedy provided by the Rule, however, is extraordinary and is only to be invoked upon a showing of exceptional circumstances." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979). The party seeking such relief "must clearly establish the grounds therefore to the satisfaction of the district court . . . and such grounds must be clearly substantiated by adequate proof." *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992).

A motion under Rule 60(b) is not a substitute for appeal. *See Ackermann v. United States*, 340 U.S. 193, 198 (1950). Neither does a motion for reconsideration allow a district court to reconsider its prior ruling with respect to issues addressed in its original order. *See United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982) ("To the extent that the post-judgment motion sought to have the district court reconsider its ruling with respect to the [issues addressed in the district court's original order], it [is] clearly improper, because Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue."). "Where the motion is nothing more than a request that the district court change its mind . . . it is not authorized by Rule 60(b)." *Id.* at 313.

Under Rule 60(b)(1), a petitioner may seek relief from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." Mr. Albritton first disputes this Court's treatment of his objections to the Magistrate Judge's Report and Recommendations (ECF No. 21). In its Order, the Court characterized Mr. Albritton's objections in passing as "untimely." *Id.* Mr. Albritton argues that the Court was mistaken to do so. ECF No. 24 at 2–3.

C. Analysis

Movants typically are given fourteen days to file objections after being served with a Magistrate Judge's Reports and Recommendations. Fed. R. Civ. P. 72(b)(2). Mr. Albritton's objections were filed with the Court on February 20, 2018. The Magistrate Judge's Report had been filed and mailed on February 1, 2018, but the Report was not marked "received" by the prison until February 5, 2018. ECF No. 24 at 7. Under the "prison mailbox rule," courts deem *pro se* inmates' objections to be filed upon mailing. *See Houston v. Lack*, 487 U.S. 266 (1988); *see also Brown v. Cherry*, 2:11-cv-83, 2012 WL27422, at *1 n.1 (E.D. Va. Jan. 4, 2012) (recognizing prison mailbox rule for Rule 72 objections to Magistrate Judge Report). Mr. Albritton caused his objections to be served on February 15, 2018, fourteen days after the Magistrate Judge's Report was filed. ECF No. 21 at 22. Therefore, the objections were timely.

Nevertheless, Mr. Albritton is afforded no relief therefrom. The Court exercised its discretion properly to "review[] the record and examine[] the objections filed by Petitioner to the Report and Recommendation," making "de novo findings with respect to the portions objected to." ECF No. 22 at 1–2. Regardless of whether Mr. Albritton's objections were deemed untimely, they were considered fully, and further review based upon an "exceptional circumstance" as contemplated by Rule 60(b) is unwarranted.

Moreover, as the Fourth Circuit has explained, "[t]o the extent that [a] post-judgment motion [seeks] to have the district court reconsider its ruling with respect to [a specific] issue, it [is] clearly improper, because Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue." *Williams*, 674 F.2d at 312; *see also Adkins v. N.C. Att'y Gen.*, 217 F.3d 837 (4th Cir. 2000) (unpublished table disposition) (upholding summary denial of a Rule 60(b) motion that merely restated argument from underlying § 2254 petition); *Robinson v. McKellar*, 872 F.2d 419 (4th Cir. 1989) (unpublished table disposition) ("In the motion for reconsideration, [petitioner] raised the same issues he raised in his habeas petition.").

Mr. Albritton's Motion reiterates bases for relief that have already been presented—and previously rejected—in his Motion to Vacate. *Compare* Motion for Relief from Judgment (ECF No. 24), *with* Motion to Vacate Under § 2254 (ECF No. 1). These bases include discovery disputes (ECF No. 24 at 3–4) brought under *Brady* and expert opinion testimony (ECF No. 24 at 5). Both were already resolved. *See* ECF No. 20 at 16–17 *and* ECF No. 20 at 15, *respectively*. As a result, Mr. Albritton's Motion lacks merit and "is nothing more than a request that the district court change its mind," which "is not authorized by Rule 60(b)." *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982); *see also Evans v. Smith*, 220 F.3d 306, 323–23 (4th Cir. 2000).

III. Motion for Evidentiary Hearing

Mr. Albritton argues that he is entitled to an evidentiary hearing to address a *Brady* violation for the State's alleged failure to provide him with a "SANE protocol." A district court may hold an evidentiary hearing if the petitioner alleges facts that would entitle him or her to relief and one of the *Townsend* factors is met.[1] *See Robinson v. Polk*, 438 F.3d 350, 368 (4th Cir. 2006).

[1] "[A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material

"Where a state procedural rule is both adequate and independent, it will bar consideration of the merits of claims on habeas review unless the petitioner demonstrates cause for the default and prejudice resulting therefrom or that a failure to consider the claims will result in a fundamental miscarriage of justice." *McNeil v. Polk*, 476 F.3d 206, 211 (4th Cir. 2007). "[A] rule is adequate if it is regularly or consistently applied by the state court and is independent if it does not depend on a federal constitutional ruling." *Burket v. Angelone*, 208 F.3d 172, 183 (4th Cir. 2000) (internal citation omitted). Mr. Albritton presented his *Brady* claim to the Supreme Court of Virginia, which dismissed the claim based on the procedural default rule articulated under *Slayton v. Parrigan*, 215 Va. 27 (1974); s*ee also Porter v. Warden of Sussex I*, 283 Va. 326 (2012). The rule in *Slayton* constitutes an adequate and independent state procedural rule. *See Wright v. Angelone*, 151 F.3d 151, 159–60 (4th Cir. 1998); *Mu'Min v. Pruett*, 125 F.3d 192, 196–97 (4th Cir. 1997); *Boozer v. Ray*, Civil Action No. 3:08cv489, 2009 WL 1975032, at *5 (E.D. Va. July 8, 2009). Therefore, Mr. Albritton must demonstrate cause and prejudice or a miscarriage of justice to allege facts that would entitle him to relief. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

"For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim." *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). Mr. Albritton alleges that the Government interfered with his right to discover exculpatory material under *Brady*. When he asked the Government for disclosure of the sexual assault nurse examiner's protocol, the Government allegedly responded that it was unavailable. ECF No. 20 at 16. Mr. Albritton claims

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facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Townsend v. Sain*, 372 U.S. 293, 313 (1963). Absent one of these factors, the Court has "ample discretionary authority to tailor the proceedings to dispose quickly, efficiently, and fairly of first habeas petitions that lack substantial merit, while preserving more extensive proceedings for those petitions raising serious questions." *Lonchar v. Thomas*, 517 U.S. 314, 325 (1996).

that he learned after his trial that the protocol *had* been available.[2] Therefore, the Government's response prevented Mr. Albritton from reviewing the protocol, and Mr. Albritton has established that the Government caused an interference. *See also Royal v. Taylor*, 188 F.3d 239, 245–46 (4th Cir. 1999).

To prove actual prejudice, Mr. Albritton must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Strickler v. Pruett*, 149 F.3d 1170 (4th Cir. 1998) (unpublished table decision). "[E]vidence is material only where there exists a reasonable probability that had the evidence been disclosed the result of the trial would have been different." *United States v. Ellis*, 121 F.3d 908, 914 (4th Cir. 1997). Mr. Albritton argues that the Government's failure to reveal the sexual assault nurse examiner's protocol for examining and collecting DNA samples from the victim constitutes prejudice. However, he has failed to show reasonable probability that the trial's outcome would have been different had the nurse's procedure been disclosed. That the information was not disclosed is insufficient to demonstrate prejudice. A hearing cannot serve as a "fishing expedition." *Lenz v. Washington*, 444 F.3d 295, 304 (4th Cir. 2006).

However, potential for a miscarriage of justice could avail Mr. Albritton of relief under the procedural default doctrine. *See Gilbert v. Moore*, 134 F.3d 642, 656 (4th Cir. 1998). For this, Mr. Albritton "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *O'Dell v. Netherland*, 95 F.3d 1214, 1246–47 (4th Cir. 1996). The Court notes that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the

[2] The Government can violate *Brady* even when the materials are available from another source. "[T]here is no general 'public records' exception to the *Brady* rule." *Anderson v. State of S. Carolina*, 709 F.2d 887, 888 (4th Cir. 1983).

absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). However, no miscarriage results when "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Smith v. Murray*, 477 U.S. 527, 538 (1986).

Mr. Albritton asserts unpersuasively that disclosure of the publicly available protocol for sexual assault nurse examiners would have resulted in a different outcome at trial. ECF No 29 at 1. He has not demonstrated how the development of any facts was precluded by the Government's alleged failure to disclose. *See Lenz*, 444 F.3d at 304 ("Where, as here, a petitioner has not alleged additional facts that, if true, would entitle him to relief, a hearing is unwarranted.") (internal quotation marks omitted); *cf. Walker v. True*, 399 F.3d 315, 321 (4th Cir. 2005) (finding that denial of an evidentiary hearing was error where an inmate presented extensive evidence that would satisfy the elements of Virginia's definition of mental incapacity and preclude execution). The Court finds no miscarriage of justice occurred. *See also Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006).

Mr. Albritton has established cause but has insufficiently alleged prejudice or a miscarriage of justice. Therefore, his claim is procedurally defaulted. Accordingly, he has failed to allege facts that would entitle him to relief,[3] and Mr. Albritton's Motion for a hearing is **DENIED** without prejudice.

IV. Motion for Summary Judgment

Mr. Albritton seeks summary judgment as to Claims Three and Four of his habeas petition. ECF No. 30. Rule 56 motions for summary judgment "appl[y] to habeas proceedings." *Brandt v. Gooding*, 636 F.3d 124, 132 (4th Cir. 2011). Summary judgment is granted "if the movant shows

[3] The Court need not address the *Townsend* factors when facts are not alleged that would entitle a petitioner to relief. *See Robinson v. Polk*, 438 F.3d 350, 368 (4th Cir. 2006).

that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Mr. Albritton contends that his habeas claims for *Brady* violations and improper expert testimony are beyond genuine dispute. ECF No. 30. The Court disagrees. Moreover, this Motion is construed as a successive petition because these claims were dismissed previously. *See* ECF No. 22.

This Court has jurisdiction to consider a successive motion brought under § 2254 only after a petitioner receives permission to file such a motion from the United States Court of Appeals for the Fourth Circuit. *See In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997). Because this Court has not received certification from the Fourth Circuit that a second or successive habeas petition is warranted, Petitioner's § 2254 Motion must be **DENIED** for lack of jurisdiction.

V. Motion to Admit a Trial Transcript

Mr. Albritton seeks to admit the transcript from state court documenting his Motion to Suppress hearing. The Court liberally construes this Motion as an additional Motion to Supplement the Motion for Relief from Judgment (ECF No. 24). As noted above, the Court may "permit a party to serve a supplemental pleading" under Rule 15(d). *See, e.g., United States v. Maddicks*, Criminal No. 4:16cr70, 2017 WL 1788665 (E.D. Va. May 4, 2017). Although Mr. Albritton failed to attach any transcript as an exhibit to this Motion, this Motion is **GRANTED**, and leave to supplement is allowed.

VI. Motion to Compel and for Injunction

Mr. Albritton seeks an order requiring officials at his state prison to allow his family to send him a hearing transcript. ECF No. 38. He alleges that the prison limits parcel weight to one ounce unless deemed "legal mail." ECF No 38 at 1. "Legal mail" must be mailed by "verified attorneys, officers of state, federal, local courts and the Virginia State Bar." ECF No. 38 at 3.

Because of this weight restriction and Mr. Albritton's status as a *pro se* petitioner, he allegedly cannot receive a parcel containing legal materials from his family.

"The determination of whether particular kinds of correspondence qualify for the constitutional protection accorded a prisoner's 'legal mail' is a question of law properly decided by the court." *Sallier v. Brooks*, 343 F.3d 868, 873 (6th Cir. 2003); *see also Whitehouse v. Corner*, No. 1:10cv1020(CMH/TRJ), 2012 WL 508628, at *2 (E.D. Va. Feb. 14, 2012) (mail marked confidential did "not qualify as legal mail because it was not 'sent to or received from verified attorneys, officers of state, federal, and local courts, the Virginia State Bar'") (quoting Virginia Department of Corrections Operating Procedure 803.1).

"A court must consider: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the rights that remain open to the inmates; (3) the impact that accommodation of the asserted constitutional right would have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether any 'ready alternatives' exist to the prison regulation." *Griffin v. Lombardi*, 946 F.2d 604, 607 (8th Cir. 1991) (citing *Turner v. Safley*, 482 U.S. 78 (1987)); *see also Oliver v. Powell*, 250 F. Supp. 593, 608 (E.D. Va. 2002) ("plaintiff's objection to the limitation of the size and weight of incoming and outgoing correspondence fails because the provision is justified by a legitimate governmental interest"). Before the Court is whether Virginia's narrow definition of "legal mail" denies a *pro se* petitioner access to the Court.[4] The Court **DIRECTS** the Government to file a formal response to this argument within thirty days of the date of this Order.

[4] A claim for denial of access to courts requires a specific showing of actual injury, that a "nonfrivolous, post-conviction or civil rights legal claim has been frustrated or impeded." *Miller v. Kruse*, No. 1:13cv1083 (TSE/TRJ), 2014 WL 296398, at *2 (E.D. Va. Jan. 24, 2014) (applying *Lewis v. Casey*, 518 U.S. 343, 356 (1996)); *see also United States v. Stotts*, 925 F.2d 83 (4th Cir. 1991); *White v. White*, 886 F.2d 721, 723 (4th Cir. 1989) (a *pro se* "prisoner

VII. CONCLUSION

For the reasons stated herein, Mr. Albritton's Rule 60(b)(1) Motion (ECF No. 24) is **DENIED**. Mr. Albritton's Motion to Amend and Supplement (ECF No. 28) is **DENIED as MOOT**. Mr. Albritton's Motion for Evidentiary Hearing (ECF No. 29) is **DENIED**. Mr. Albritton's Motion for Summary Judgment (ECF No. 30) is **DENIED** for lack of jurisdiction. Mr. Albritton's Motion to Admit a Transcript (ECF No. 34) is **GRANTED** with leave to supplement. Mr. Albritton's Motion to Compel and for Injunction (ECF No. 38) is **DEFERRED** pending the Government's Response, due within thirty days of the date of this Order.

To the extent necessitated by this holding, the Court also **DENIES** the certificate of appealability required by Rule 22(b) of the Federal Rules of Appellate Procedure because Mr. Albritton has failed to demonstrate a "substantial showing of the denial of a constitutional right." *See Reid v. Angelone*, 369 F.3d 363, 369 (4th Cir. 2004) (requiring certificate of appealability for merits denials of Rule 60(b) motions to alter or amend judgment), *partial abrogation recognized by United States v. McRae*, 793 F.3d 392, 399–400 & n.7 (4th Cir. 2015).

Mr. Albritton is **ADVISED** that if he intends to appeal this Order and seek a certificate of appealability from the United States Court of Appeals for the Fourth Circuit, he must forward a written Notice of Appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia, 23510 within thirty days from the date of this Order.

The Clerk is **REQUESTED** to mail a copy of this Order to Petitioner DeVinche Javon Albritton.

IT IS SO ORDERED.

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must provide some basis for his allegation that the delay or failure in delivering his legal mail deprived him of meaningful access to the courts"); *Hayes v. Stanley*, 204 F. App'x 304, 305 (4th Cir. 2006) (inability to perfect an appeal is insufficient to establish actual injury); *accord Cochran v. Morris*, 73 F.3d 1310, 1317 (4th Cir. 1996).

(Exhibit# 4)

Arenda L. Wright Allen
United States District Judge

3/12, 2019
Norfolk, Virginia

(Exhibit-A)

(Exhibit # 5)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6350

DEVINCHE JAVON ALBRITTON,

Petitioner - Appellant,

v.

HAROLD CLARKE, Director of the Virginia Department of Corrections,

Respondent - Appellee.

No. 19-6464

DEVINCHE JAVON ALBRITTON,

Petitioner - Appellant,

v.

HAROLD CLARKE, Director of the Virginia Department of Corrections,

Respondent - Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:16-cv-00737-AWA-LRL)

Submitted: August 22, 2019 Decided: August 26, 2019

(Exhibit # 5)

PER CURIAM:

DeVinche Javon Albritton, a Virginia inmate, seeks to appeal the district court's order* denying various postjudgment motions filed in Albritton's 28 U.S.C. § 2254 (2012) proceeding. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Albritton has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

* Because Albritton filed numerous postjudgment motions in his federal habeas proceeding, which the district court resolved in various orders, we note that the subject order was entered on April 24, 2019.

(Exhibit #5)

Before KING and RICHARDSON, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

DeVinche Albritton, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

(Exhibit #6)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6674

DEVINCHE JAVON ALBRITTON,

Petitioner - Appellant,

v.

HAROLD CLARKE, Director of the Virginia Department of Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:16-cv-00737-AWA-LRL)

Submitted: October 17, 2019 Decided: October 21, 2019

Before MOTZ and QUATTLEBAUM, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

DeVinche Albritton, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

VIRGINIA: CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA)
)
v)
)
DEVINCHE JAVON ALBRITTON,)
Defendant.)

RECORD

CR10-3743

COPY

Before Hon. Edward H. Hanson, Jr., judge; and jury

Virginia Beach, Virginia

April 23, 2013

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APPEARANCES: Commonwealth's Attorney's Office (Mr. Thomas M. Murphy and Ms. Sara R. Chandler), attorneys for the Commonwealth.

Mr. Devinche Javon Albritton, the defendant, pro se.

Mr. Stephen P. Givando, standby counsel for the defendant.

BY MR. MURPHY:

Q Nurse McDonald, in going over your form, your SANE report, in all of the questions you ask, is that -- is this following protocol? I mean, do you do this on every exam?

A Yes, sir.

Q And back in 1999 this was the form you were limited to and the questions you were limited to?

A Yes, sir.

Q And the examination you were limited to?

A Correct.

Q So you followed protocol as it was in 1999; is that correct?

A Yes, sir.

Q Okay. Now, Ms. McDonald, I'm going to ask you -- having observed the injuries to the victim's vagina -- vaginal area, genitalia area, describe for the jury, do you have an opinion based on your training and experience as to whether those injuries are consistent with consensual sex?

A I found them to be inconsistent with consensual sexual intercourse.

Q Okay.

MR. MURPHY: Judge, I'm going to offer a -- I'm going to count the pages out loud. One,

Q -- of the study.

A Okay. Based on the recommendations by Gaffney, in 2001, following the Virginia court case, Johnston versus Commonwealth of Virginia, in 2000 challenging the scientific merit of expert testimony in a court of law, the SANE must remember that associations, correlations, or casual explanations cannot be made without the scientific evidence that established these relationships. Gaffney. Currently, many experts and laypersons alike believe that if women do not consent to intercourse, they are more than likely to have injuries to their genital area. Based on the findings of this study and several other studies, there is evidence to suggest that injuries can be identified on examination after both nonconsensual and consensual intercourse. Therefore, scientific research in the field of forensic science should include further studies using standard protocols with trained investigators to establishing interrater reliability for examinations. Addressing potential cofounding variables such as prior sexual history, condom and lubrication usage, rough intercourse, and marital rape.

Before the knowledge base of forensic experts, including SANES, can be established, rigorous

scientific examining the numerous potential variables following both consensual and nonconsensual intercourse must be conducted. Applying the scientific knowledge of evidence, findings, and sexual assault cases will set precedent for SANE testimony, allowing the judges and allowing them to make decisions based on facts rather than myths or opinions.

Q Do you agree with that conclusion?

A Yes, sir, I do.

Q All right. Would you agree that that article identifies a relevant factor that should be required in considering the formulation of a SANE expert opinion concerning alleged victim's injuries?

A Sir, this article was written in what? 2006? I did my practice in 1999.

Q Okay.

A I'm glad to see that there has been further evidence collecting based on different studies. But in 1999 we didn't have those studies, so I had to base my opinions based on my background and my education in 1999.

Q I understand. But you were looking at some facts and you were filling in gaps?

A I didn't fill in any gaps, sir.

Q So you --

A I had -- the information that I had in 1999 is based on what my opinion was.

Q So would you agree that you assume when you examined the victim and didn't know -- did you know her prior -- her sexual history? Did you know her prior sexual history during your exam?

A No, sir, because that was not required of me to ask that information prior -- in 1999.

Q Did you know -- did you know that she -- okay. I'm sorry. Okay. So if you didn't know her prior sexual history before -- during your exam, you just assume -- would you agree, you assume that those injuries resulted from one sole person, her having sex with one person?

A Sir, it's not up to me to determine whether or it was one person or more than one person.

Q Okay.

A I'm basing my information on the injuries that I saw based on my knowledge and education in 1999.

Q I understand that, but -- I understand that. But you formulated an opinion --

A Yes, sir.

Q -- saying that she received some injuries.

Did you formulate -- when you formed your opinion, did you see -- did you assume that this woman had sex with one person and that was it?

A Sir, the number of people she had sexual intercourse with is not in my purview to investigate. That's up to the detective. Mine is to solely look at the injuries, make sure that her injuries are not life threatening, and if they are to transfer her to the emergency department. That's why the exam was done outside, just in the area of the emergency department at Chesapeake General Hospital.

Q But you are --

A And you the other -- excuse me. May I finish?

Q Yes, ma'am. I'm sorry.

A Thank you. And the detectives are the ones that determine how -- what the background is as far as the incident is concerned.

Q So --

A My job was to look at her injuries, to collect the evidence --

Q Right.

A -- and to determine if this was to be due to consensual intercourse.

Q So you didn't consider maybe it could have

happened somewhere else because you just didn't know?

A Sir, I don't determine where it happens. I just determine that there have been injuries.

Q There have been injuries.

A And that --

Q But those injuries -- what I'm saying is --

THE COURT: Let her finish.

BY THE DEFENDANT:

Q Okay.

A I'm sorry, sir. I lost my train of thought with that.

Q I keep losing mine too. The injuries that you're saying resulted -- that apparently resulted, isn't it true, in fact, that you may have assumed or did you speculate that this woman only had sex with one person at that time to receive those injuries?

A Sir, I don't assume or speculate anything. It's not my job to determine who she had intercourse with prior to or during the alleged incident. My job is to look to see if there are injuries and to collect the evidence. I do not investigate.

Q So you just --

A I am part of a big team of investigators.

The investigator or the detective is the one that asked the questions about the incidence prior to or where the place it happened.

Q So your investigation is tailored to whatever information they wanted to give you basically?

A My investigation is basically to take the physical evidence request -- physical evidence recovery kit, to collect the evidence, to determine if there are injuries, to document the injuries, and to give the information to the police department, the physical evidence recovery kit.

Q But would you agree that your SANE exam was incomplete, that you did not know anything -- any facts prior to her that day -- her sexual history prior to your examination?

A No, sir. My SANE exam, based on the guidelines in 1999, was complete.

Q They were complete?

A Yes, sir, they were.

Q So you just -- so basically somebody come in, they could -- but isn't it true that you said that -- I'm sorry. You failed to consider the variable of the prior sexual history?

A Sir, I don't have to know the variable of

any prior sexual history to be able to collect evidence to document injuries.

Q But shouldn't all of the variables be considered?

A In 1999 we were given guidelines. The guidelines specifically stated this was my job. These were my protocols. Nothing beyond that. The investigation was to be taken on by the police department to determine what they found and if this was indeed something that should be further investigated.

Q Oh. So, again, your opinion was based on what the detectives told you and what the victims told --

A My opinion was based on my exam.

Q But your exam was not looking for the truth apparently?

MR. MURPHY: Judge, objection.

THE COURT: Sustained.

BY THE DEFENDANT:

Q Are you biased in favor of the Commonwealth?

A No, sir. Part of my training was with the defense attorney, and I learned a lot from the defense

attorney.

Q Sure you have. And why do you say -- and why do you say you're not biased? Do you recall saying that you base your opinion of the examination on what the detectives tell you?

A No, I don't recall saying that. I get my information from the detectives so that I know where --

Q And you go no further.

A -- to look for the physical evidence. Then I talk to the victim or the alleged patient and ask her where it happened based on the fact that the crime lab was backed up and we were asked to just get evidence and to ask the questions on the form so that they would know where to investigate or to test the evidence first.

** Q Okay. How is it, then, that you can give this jury an expert opinion stating that based upon a reasonable degree of medical probability when, in fact, you were clearly ignorant of facts and circumstances and both incompetent, incomplete in gathering and considering relevant factors which had a direct bearing on the issues of the case?

** A Sir, the guidelines in 1999 indicated that I was to collect evidence.

Q I understand.
A To -- okay.
Q I understand. But do you agree that --
A No, sir, I do not agree.
Q You don't agree?
A No, sir, I do not.
Q Do you recall your testimony on March 25th -- I mean, March 27th, 2012?
A No, sir.
Q You don't recall your testimony? This is at 253, 11 through 14. I asked you if you failed to consider variables that had a direct effect on the injuries. And your answer was yes.
A I was under a lot of stress and I must have misunderstood your question.
Q Ma'am, you was under a lot of stress. I repeated this question a few times. And you're coming in here saying that they're not variables now but when, in fact, you considered them variables then. Are you trying to alter your testimony to maybe prevent or obscure the jury from finding the truth of your incomplete exam?
MR. MURPHY: Judge, I'm going to object. He's testifying again.
THE COURT: Sustained.

BY THE DEFENDANT:

Q Your answers are quite different.

MR. MURPHY: Judge, I'm going to object to the comments.

THE DEFENDANT: All right.

THE COURT: Sustained.

MR. MURPHY: No questions.

THE DEFENDANT: I'll move on.

BY THE DEFENDANT:

Q Do you recall your testimony when I asked you whether -- do you recall me asking you whether you failed to receive any of those answers concerning details of the victim's sexual intercourse with her husband that morning prior of the alleged injur -- I'm sorry. Do you recall me asking you if by failing to ask and receive any of those answers concerning details of the victim's sexual intercourse with her husband the morning prior of the alleged incident you failed to consider such relevant and material variables which clearly could have had a direct bearing on the issue of the victim's alleged injuries that you observed? Do you recall that question?

A No. Can I see that question?

Q Yes.

THE DEFENDANT: Your Honor?

BY THE DEFENDANT:

Q This is at 251.

A I don't recall it, but it's there. So you must have asked it.

**** Q And your answer was -- to that was, And you're right. I could have. I don't know. I mean, I asked you about a variable, again, and you acknowledged that it was a variable. But you could have, but you just didn't want to consider it. What do you say about that?

**** A I couldn't consider anything other than what my guidelines were in 1999.

Q Again, I asked you how did you -- how would you conduct your exam and you said you were basing your examinations on what the detective tells you. Am I correct? You base your examinations on what the detective tells you. Am I correct?

MR. MURPHY: And, Judge. I'm going to object. He's asked and answered this about ten different ways.

THE DEFENDANT: I didn't ask and answer the question. I asked her does she --

THE COURT: I think the witness can answer

that question.

THE WITNESS: I based my exam on what the detective told me?

BY THE DEFENDANT:

Q Yes.

A Is that your question?

Q Yes. Do you base your examination --

A The detective comes in and he tells me that he feels there's been an alleged sexual assault.

Q And you base your examination --

THE COURT: Let her finish.

THE WITNESS: And when I speak to the -- my patient, I ask her why she's there. And if she indicates that she's there because of an alleged sexual assault, then I must conclude that I need to do an exam and I need to collect evidence at the request of the police department.

BY THE DEFENDANT:

Q So if a detective doesn't tell you something, what do you do with that missing information? Do you fill in the gaps or do you assume or speculate? What do you do?

A I don't fill in any gaps, I don't assume,

(Exhibit #8)

MOTION UNDER 28 U.S.C. § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §§ 2254 OR 2255

United States Court of Appeals for the Fourth Circuit

Name of Movant	Prisoner Number	Case Number (leave blank)
DeVinche Javon AlBritton	1016653	22-141

Place of Confinement: RiverNorth Correctional Center, 329 Dellbrook Lane, Independence, Virginia 24348

IN RE: DeVinche Javon AlBritton, MOVANT

1. Name and location of court which entered the judgment of conviction from which relief is sought:
The Virginia Beach Circuit Court, 2425 Nimmo Pkwy, Virginia Beach, Virginia 23456

2. Parties' Names: Commonwealth of Virginia vs. DeVinche AlBritton

3. Docket Number: CR10-3743 4. Date Filed: November 17, 2010

5. Date of judgment of conviction: April 24, 2013 6. Length of sentence: Life plus 30 years

7. Nature of offense(s) involved (all counts):
Rape, Abduction w/intent to defile

8. What was your plea? (Check one) ☑ Not Guilty ☐ Guilty ☐ Nolo Contendere

9. If you pleaded not guilty, what kind of trial did you have? (Check one) ☑ Jury ☐ Judge only

10. Did you testify at your trial? (Check one) ☐ Yes ☑ No

11. Did you appeal from the judgment of conviction? (Check one) ☑ Yes ☐ No

12. If you did appeal, what was the

Name of court appealed to: The Virginia Appeals Court

Parties' names on appeal: DeVinche J. AlBritton vs. Commonwealth of Virginia

Docket number of appeal: 0925-13-1 Date of decision: January 14, 2015

Result of appeal: Denied and Refused, Dismissed

13. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court? ☑ Yes ☐ No

(Exhibit #8)

14. If you answered "Yes" to question 13, answer the following questions: A. FIRST PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? United States District Court, ED of Virginia, Norfolk, Virginia 23510

(2) What were the parties' names? DeVinche Javon Albritton vs. Harold Clarke, Director of VA Dept of Corrections

(3) What was the docket number of the case? 2:16 cv 737

(4) What relief did you seek? To Vacate Convictions and Sentences, order a New Jury Trial

(5) What grounds for relief did you state in your petition, application, or motion?

See (Attachment(s) #1 and #2)

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☑ Yes ☐ No

(7) What was the result?

☐ Relief granted ☐ Relief denied on the merits

☐ Relief denied for failure to exhaust ☑ Relief denied for procedural default

(8) Date of court's decision: March 6, 2018

B. SECOND PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? United States District Court, ED of Virginia, Norfolk, Virginia 23510

(2) What were the parties' names? DeVinche Javon Albritton vs. Harold Clarke, Director of VA Dept of Corrections

(3) What was the docket number of the case? 2:16cv737

(4) What relief did you seek? Relief from March 6, 2018, Judgment under Rule 60(B)

(5) What grounds for relief did you state in your petition, application, or motion?

NA

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☑ No

(7) What was the result?

☐ Relief granted ☐ Relief denied on the merits

☐ Relief denied for failure to exhaust ☑ Relief denied for procedural default

(8) Date of court's decision: March 12, 2019

(Exhibit #8)

C. THIRD AND SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS

For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) through (8) above for first and second petitions, applications, or motions.

D. PRIOR APPELLATE REVIEW (S)

Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction over your case? If so, list the docket numbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion	☑ Yes	Appeal No.	19-6350	☐ No
Second petition, application, or motion	☑ Yes	Appeal No.	19-6464	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No

If you did not appeal from the denial of relief on **any** of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.

NA

15. Did you present any of the claims in this application in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255? (Check one) ☐ Yes ☑ No

16. If your answer to question 15 is "Yes," give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied.

NA

17. If your answer to question 15 is "No," why not? This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous § 2254 or § 2255 application because . . .

A. (For § 2255 motions only) the claims involve "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [you] guilty"; or,

B. (For § 2254 petitions only) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [you] guilty of the offense"; or,

C. (For both § 2254 and § 2255 applicants) the claims involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

(Exhibit #8)

I did not present the following claims in any previous petition, application, or motion for relief under 28 U.S.C. § 2254:

See (Attachment-A)

I did not present the claims listed above in any previous petition, application, or motion because

See (Attachment(s) B-D)

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct. Executed on March 11, 2022 [date]

Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§ 2255 cases).

I certify that on March 11, 2022 [date] I mailed a copy of this motion and all attachments to Attorney General Jason Miyares, 202 North 9th Street, Richmond, Virginia VA 23219 at the following address:

Movant's Signature

State of Virginia
County of Goochland
On this 11th day of March 2022
before me personally appeared Dewnice M Britton
to me known to be the person who executed the foregoing instrument, and acknowledged that the execution was of his/her free act and deed.

SEAL (signed) Erica Creger Suits
NOTARY PUBLIC

I certify that the above notary is not a party to this action.

Signed:

ERICA JO CREGER NOTARY PUBLIC REG. #7788119 MY COMMISSION EXPIRES 8/31/2022 COMMONWEALTH OF VIRGINIA

NO STAPLES, TAPE, OR BINDING PLEASE

I was commissioned a notary public as Erica Jo Creger

Print to PDF for Filing

(Attachment # 1)

(Exhibit #8)

Petitioner's Habeas Corpus Claim(s)

Claim #1: Petitioner AlBritton states that the Trial Court denied and violated his Constitutional Rights under the 6th and 14th Amendments to call for and present Evidence and Witnesses in his favor to the Jury, to a fair Trial, and Due Process, by Refusing to Allow him the use of relevant "Refreshment Material" for his Witness.

Claim #2: Petitioner AlBritton states that his 6th and 14th Amendment Rights to Effective Assistance of Appellate Counsel was denied and Violated, by Counsel's failure to properly raise, argue, and exhaust his Constitutional Claim that the Trial Court abused its discretion and Violated his Rights to call for and present witnesses and Evidence in his favor by refusing to allow him the use of "Refreshment material" during his Jury Trial.

Claim #3: Petitioner AlBritton States that his 5th, 6th, and 14th Amendment Rights were violated by the admission and use of unreliable and inadmissible Expert Opinion Testimony given by the Commonwealth's S.A.N.E nurse Expert witness, Kathryn McDonald.

Claim #4: Petitioner AlBritton states that the Commonwealth of Virginia violated his 1st, 6th, and 14th Amendment Rights pursuant to ~~the~~ principles established by > Brady V. Maryland, 373 U.S. 83 (1963) rendering his Trial, Convictions, and Sentences UnConstitutional by failing to reasonably Search for, Obtain, and provide to him for his Defense at trial, a relevant Copy of Virginia's S.A.N.E Protocol, which was material Evidence Exculpatory and Directly Impeached the Commonwealth's S.A.N.E Expert Witness Testimony and Evidence Vital to their Charge of Rape against him.

(Attachment #2)

(Exhibit #8)

Petitioner's Habeas Corpus Claim(s)

Claim #5: Petitioner Albritton states that he was denied his 6th and 14th Amendment Rights to Effective Assistance of Appellate Counsel, by Counsel's failure to raise, argue, and Exhaust his Claim Concerning the Violation of Petitioner's Constitutional Rights under Brady V. Maryland, supra...

Claim #6: Petitioner Albritton states that the Commonwealth of Virginia Called for, used, and upheld the admission of inadmissible Hearsay Witness Testimony against him at his Jury Trial in Violation of his 5th, 6th, and 14th Amendment Rights U.S. Constitution.

Claim #7: Petitioner Albritton states that the Trial Court denied and Violated his Constitutional Rights to Due Process, a fair Trial, and a Complete defense, by refusing to admit his proffered jury instructions which supported his Theory of Defense.

Claim #8: Petitioner Albritton states that his 6th and 14th Amendment Rights to Due Process and Effective Assistance of Appellate Counsel were denied and Violated by his Appellate Counsel's failure to raise, argue, and Exhaust the Trial Court's error and Constitutional Violation of Refusing his Two (2) proffered Jury Instruction(s) Concerning the Deficiencies in the Commonwealth's investigative and Evidence gathering practices as such was a Theory of Defense argued.

Claim #9: Petitioner Albritton states that the Cumulative effect of the Claimed Violations Committed by the Commonwealth of Virginia in his Case, Clearly deprived, prejudiced and Violated his applicable Constitutional Rights to Due Process and a Fair Trial.

(Attachment - A)

(Exhibit #8)

I did not present the following claims in any petition, application, or motion for relief under 28 U.S.C. § 2254:

Petitioner Albritton states that the Commonwealth of Virginia unreasonably impeded, Violated, and Deprived him of his applicable and Substantive Constitutional Rights and any Opportunity to have effectively requested and/or received Federal Funding under 18 U.S.C. § 3599(a)(2) for Investigative Services that were reasonably necessary for the development of his Constitutional Claims and Newly Discovered Evidence relevant to the Brady Prosecutorial Misconduct Committed by the Commonwealth against him at Trial for his initial Federal Habeas review there of, which would have provided and entitled him to Federal relief for his Current Abduction w/intent to defile and Rape Convictions obtained by the Commonwealth's Discriminatory Violation of his 1st, 5th, 6th, 8th, and 14th Amendment Rights as an Indigent, pro se, prisoner, and the State's use of False and Fraudulent S.A.N.E Expert Evidence and Testimony against him at Trial.

(Attachment - B) (Exhibit #8)

I did not present the claim listed above in any previous petition, application, or motion because:
The foregoing Federal Habeas claim currently presented by Petitioner Albritton involves and relies upon "a New rule of Constitutional Law, made retroactive to cases on Collateral review by the Supreme Court of the United States which was previously unavailable to him, where Petitioner Albritton cites the relevant "new rule of Constitutional Law as determined by the United States Supreme Court" in > Ayestas V. Davis, (No. 16--6795), 584 U.S. ____ (2018) decided more than Two (2) years after the initial filing of his First Federal Habeas Petition, whereupon the U.S. Supreme Court ruled in > Ayestas that a State's application of a procedural default Rule Bar does not preclude a State prisoner upon a §2254 petition from receiving Federal Funding under 18 U.S.C. -§3599(f) for investigative services that are reasonably necessary to assist them in the development of their Federal Habeas claims and for the search for evidence supporting their petition, upon which Petitioner Albritton claims entitlement under the 1st and 14th Amendments thereto.

Moreover, Pursuant to 28 U.S.C. §2244(B)(i)+(ii) the factual predicate for petitioner Albritton's current claim could not have been discovered previously through the exercise of due diligence, Based upon the fact that the U.S. District Court after its final Order dismissing Petitioner Albritton's initial §2254 Petition

(Attachment - C) (Exhibit #8)

On March 6th, 2018, with prejudice, in a subsequent review of Petitioner ALBritton's Rule 60(B) motion, contrary to its previous rulings, found that the Commonwealth had in fact caused an interference with Petitioner ALBritton's access to and Discovery of the relevant 1999 S.A.N.E protocol during his State Criminal Trial proceedings, and also admitted additional Transcript of his June 13, 2012, suppression hearing, thereby expanding the available record to be considered by the Court entered in on its Orders for March 12, 2019 and April 24, 2019 (Exhibits A and - Exhibit B). It was not until the United States District Court acted in allowing the Transcript to be filed when Petitioner ALBritton was finally able to gain access to the documents which the Commonwealth had been impeading and denying on account of Petitioner's Indigency and his prisoner, pro se status, which The Commonwealth used VDOC prison officials to challenge and Obstruct him from being given a Copy without a Lawyer on the guise of Drug smuggling allegation seemingly being the reason to deny him access. see (Exhibit C - Copy of Affidavit of Marie Vargo). Had the Transcript not been Obstructed by the Commonwealth during ALBritton's Initial Federal Habeas, then the U.S. Magistrate Judge would have allowed an Evidentiary Hearing and Investigative services to develope and contact the Witnesses Named in The relevant 1999 Protocol for S.A.N.E's.

(Attachment-D) (Exhibit #8)

The provisions of §2244 must be applied in Petitioner AlBritton's Cause of action as to allow and give the U.S. District Court the authorization to review and grant him Federal relief now, where the Commonwealth of Virginia's Miscarriage of Justice and intentional Violations of his Constitutional Rights to a Jury + Fair Trial are clearly shown on the record that Federal Laws were Violated by holding AlBritton in Jail Isolation pending his Jury Trial, and upon his pro se, Brady discovery requests falsely representing to him and the Trial Court that the Commonwealth would search for and provide AlBritton with the relevant 1999 S.A.N.E Protocol for his defense at Trial, which was purposely withheld and never provided, in order for the Commonwealth to use its false and perjurious Expert S.A.N.E evidence and Testimony to Obtain AlBritton's Convictions and Life Sentences, See (-- Exhibit D, copy of Bell V. Bell, 512 F.3d 223 (C.A.6. Tenn.) 2008), Exerpt explaining Federal Law of Brady Prosecutorial Misconduct as determined by the U.S. Supreme Court in the Cases of > Strickler V.- Greene, 527 U.S. 263 (1999) and Banks V. Dretke, 540 U.S. 668 (2004)). Here, The Commonwealth of Virginia Should not be allowed to maintain its Unlawful and Un Constitutional Convictions, Sentences, and Custody of Petitioner AlBritton and preclude Federal Habeas review and all relief regarding its intentional Violations, merely by asserting and applying the State's procedural default Rule in Porter V. Warden, -- 283 Va. 326 (2092) Barring Federal Review, where the Rule is impractable and Impossible for AlBritton to have complied with as he was an Indigent, pro se, prisoner held in Isolation by the Commonwealth with absolutely No access to any Computer or Internet or a phone to call!!

(Exhibit #8)

(Exhibit-B)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DEVINCHE JAVON ALBRITTON,

Petitioner,

v.

HAROLD CLARKE,

Respondent.

Criminal No. 2:16cv737

ORDER

Before the Court are a Motion to Compel and for Injunction, a "Renewed Motion to Admit a Trial Transcript," a Motion to Alter or Amend the Court's Judgment denying a Motion for Relief from Judgment denying a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, a Motion to Supplement, and a Motion for Evidentiary Hearing filed *pro se* by Petitioner DeVinche Javon Albritton. For the following reasons, the Motion to Compel and for Injunction (ECF No. 38) is **DENIED**; the Renewed Motion to Admit a Transcript (ECF No. 41) is **GRANTED**; the Motion to Supplement (ECF No. 47) is **GRANTED**; the Motion for Evidentiary Hearing (ECF No. 49) is **DENIED**; and the Motion to Alter or Amend Judgment (ECF No. 42) is **DENIED**.

I. Background

Petitioner was convicted in April 2013 of Rape and Abduction with Intent to Defile and was sentenced to a term of life imprisonment plus thirty years. *See* ECF No. 10 at 1–2. Mr. Albritton filed a § 2254 petition presenting nine claims alleging violations of federal rights regarding his trial, as well as regarding the denial of his appeal by the Virginia Court of Appeals

and the denial of his petition for a writ of habeas corpus by the Virginia Supreme Court. *See* ECF No. 1.

On April 20, 2017, the Attorney General of Virginia filed a Motion to Dismiss on behalf of the state. *See* ECF No. 8. The matter was referred to a United States Magistrate Judge who recommended granting Respondent's Motion to Dismiss and dismissing the petition with prejudice. After this Court adopted the Magistrate Judge's findings and recommendations, Mr. Albritton filed a Motion for Relief from Judgment (ECF No. 24), a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit (ECF No. 25), a Motion for Evidentiary Hearing (ECF No. 29), a Motion for Summary Judgment (ECF No. 30), a Motion to Admit Transcripts (ECF No. 34), and a Motion to Compel and for Injunction (ECF No. 38). The Court denied the Motions for Relief from Judgment, Evidentiary Hearing, and Summary Judgment. The Court deferred ruling on the Motion to Compel and for Injunction pending a response from the Government. That Response (ECF No. 46) was filed on April 11, 2019.

II. Motion to Compel and for Injunction

Mr. Albritton seeks an order requiring officials at his state prison to allow his family to send him a hearing transcript. ECF No. 38. A *pro se* "prisoner must provide some basis for his allegation that the delay or failure in delivering his legal mail deprived him of meaningful access to the courts." *White v. White*, 886 F.2d 721, 723 (4th Cir. 1989). Claims for denial of access to courts requires a specific showing of actual injury, that a "nonfrivolous, post-conviction or civil rights legal claim has been frustrated or impeded."[1] *Miller v. Kruse*, No. 1:13cv1083 (TSE/TRJ),

[1] "A court must consider: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the rights that remain open to the inmates; (3) the impact that accommodation of the asserted constitutional right would have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether any 'ready alternatives' exist to the prison regulation." *Griffin v. Lombardi*, 946 F.2d 604, 607 (8th Cir. 1991) (citing *Turner v. Safley*, 482 U.S. 78 (1987)).

2014 WL 296398, at *2 (E.D. Va. Jan. 24, 2014) (applying *Lewis v. Casey*, 518 U.S. 343, 356 (1996)); *see also United States v. Stotts*, 925 F.2d 83 (4th Cir. 1991). Inability to perfect an appeal is insufficient to establish actual injury. *See Hayes v. Stanley*, 204 F. App'x 304, 305 (4th Cir. 2006); *accord Cochran v. Morris*, 73 F.3d 1310, 1317 (4th Cir. 1996).

Mr. Albritton alleges that the prison limits parcel weight to one ounce unless deemed "legal mail." ECF No 38 at 1. "Legal mail" must be mailed by "verified attorneys, officers of state, federal, local courts and the Virginia State Bar." ECF No. 38 at 3. As explained by the Government, prison officials instituted these rules to combat drug smuggling via prisoner mail. ECF No. 46 at 7–8. Mr. Albritton's "objection to the limitation of the size and weight of incoming and outgoing correspondence fails because the provision is justified by a legitimate governmental interest." *Oliver v. Powell*, 250 F. Supp. 593, 608 (E.D. Va. 2002). Moreover, the transcript has been admitted. Accordingly, the Motion is **DENIED**.

III. Renewed Motion to Admit a Transcript

Mr. Albritton filed the Motion to Admit Transcripts without a transcript attached thereto. Soon after filing the motion and prior to receiving leave to supplement, Mr. Albritton filed the transcript with the Court. ECF No. 35. On March 12, 2019, the Court granted Mr. Albritton's motion. Because the instant Renewed Motion to Admit Transcripts includes transcripts for the Court's consideration different from that admitted on March 12, the Court construes the Motion as a separate, additional Motion to Admit Transcripts. The Motion (ECF No. 41) is **GRANTED**.

IV. Motion to Alter or Amend Judgment

Mr. Albritton's Motion must be decided by this Court before the Fourth Circuit can assert jurisdiction over the appeal of this Court's denial of habeas relief. "A notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect. A new notice of appeal must be filed

within the prescribed time measured from the entry of the order disposing of the motion." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 60 (1982); *see also United States v. Johnson*, 95 F. App'x 497, 497 (4th Cir. 2004) (holding that a "notice of appeal will not be effective until the district court disposes of the motion to reconsider"). Upon issuance of this Order, the Notice of Appeal will take effect.

A. Motion to Supplement

On April 15, 2019, Mr. Albritton filed a Motion to Supplement (ECF No. 47) his pending Motion to Alter or Amend Judgment. For good cause shown, the Motion is **GRANTED**.

B. Motion for Evidentiary Hearing

On April 18, 2019, Mr. Albritton filed a Motion for Evidentiary Hearing (ECF No. 49). "[A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief . . . . [I[f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 477 (2007). On this record, an evidentiary hearing would not enable Mr. Albritton to prove factual allegations that would entitle him to habeas relief. Rather, the facts in the record preclude habeas relief. Accordingly, the Motion is **DENIED**.

C. Legal Standard

A Motion to Alter or Amend Judgment "may only be granted in three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012). "Rule 59(e)

(Exhibit-B)

motions may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

D. Analysis

Mr. Albritton's Motion addresses no "intervening change in controlling law" and does not "account for new evidence." The Court construes the Motion liberally as an effort to "correct a clear error of law or prevent manifest injustice," the third situation under which relief may be sought under Rule 59(e).

The Motion must be denied because the Court made no "clear error of law" in its Order denying relief from denial of Mr. Albritton's petition. Rather than allege mistakes in the Court's Order, Mr. Albritton reverts to advancing the alleged merits of his denied petition and Motion for Relief from Judgment. ECF No. 42. This Court has considered and dismissed identical arguments. *See* ECF Nos. 22 and 39. Repeating previous, failed arguments is insufficient to demonstrate a clear error or manifest injustice in the Court's Order denying relief.

V. CONCLUSION

For the reasons stated herein, Mr. Albritton's Motion to Compel and for Injunction (ECF No. 38) is **DENIED**; the Renewed Motion to Admit a Transcript (ECF No. 41) is **GRANTED**; the Motion to Supplement (ECF No. 47) is **GRANTED**; the Motion for Evidentiary Hearing (ECF No. 49) is **DENIED**; and the Motion to Alter or Amend Judgment (ECF No. 42) is **DENIED**.

To the extent necessary, the Court also **DENIES** the certificate of appealability required by Rule 22(b) of the Federal Rules of Appellate Procedure because Mr. Albritton has failed to demonstrate a "substantial showing of the denial of a constitutional right." *See Reid v. Angelone*, 369 F.3d 363, 369 (4th Cir. 2004) (requiring certificate of appealability for merits denials of similar Rule 60(b) motions to alter or amend judgment), *abrogated in part by United States v. McRae*, 793

F.3d 392, 399–400 & n.7 (4th Cir. 2015). The Court acknowledges that Mr. Albritton filed a Notice of Appeal before entry of this Order. That Notice now takes effect.

The Clerk is **REQUESTED** to mail a copy of this Order to Petitioner DeVinche Javon Albritton, the Virginia Attorney General's Office, and the Clerk of Court for the United States Court of Appeals for the Fourth Circuit.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

April 23rd, 2019
Norfolk, Virginia

(Exhibit #8) (Exhibit-C)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

DEVINCHE JAVON ALBRITTON,

Petitioner,

v. Criminal No. 2:16cv737

HAROLD CLARKE,

Respondent.

AFFIDAVIT

State of Virginia, City of Richmond, to-wit:

MARIE VARGO, first being duly sworn, states as follows:

1. I am the Virginia Department of Corrections (VDOC) Corrections Operations Administrator. My duties include oversight of Offender Management Services, Offender Drug Testing and Support, the Visitation Unit and the Statewide VDOC PREA/ADA Coordinator.
2. The information contained in this affidavit is based on personal knowledge and records maintained in the regular and ordinary course of business.
3. I am generally aware of this petition filed by offender DeVinche J. Albritton (#1016653) which includes a complaint that mailroom staff at Sussex II Correctional Center denied his receipt of a package marked as "legal mail" and sent by his family. According to offender Albritton, the package contained his suppression hearing transcript.
4. Although offenders retain certain First Amendment rights to correspondence and visitation with non-offenders and family members, correctional administrators also have

responsibilities under the Code of Virginia to maintain security, discipline, and good order in their facilities. These responsibilities include the control of contraband entering the prisons, control over disruptive or illegal activities, and concern for the safety and well-being of offenders and institutional staff.

5. In an effort to reduce and eliminate the quantity of drugs and substances that were entering the prisons, VDOC officials revised visitation and correspondence policies effective April 22, 2017.

6. I recently re-examined overdose and drug statistics for time periods both before and after the amended correspondence policy went into effect. Based on statistical information available to me, there has been a marked decrease in the number of confirmed and suspected drug overdose incidents in VDOC facilities. There likewise has been a noticeable decline in the number of confirmed drug overdose deaths in VDOC facilities. Finally, there has been a drastic decrease in the number of confirmed and suspected drug possession incidents in VDOC facilities.

7. VDOC's mission is to improve public safety. The presence of drugs in the facilities undermines this goal, and the correspondence policy was amended in order to improve public safety in the Commonwealth of Virginia.

8. VDOC has become aware of an increased rate of opioids that are being smuggled in through the mail. As the nation and the general public has faced an increasing epidemic of opioid abuse and overdoses, so, too, has VDOC.

9. The mailing of Suboxone strips, in particular, has been increasing and contributing to inmate opioid overdoses.

(Exhibit #8)

10. Suboxone strips are medicated strips that are prescribed to treat opioid addiction. When properly used, they are to be placed below the tongue and dissolved. The purpose of the strips is to treat opiate-based addictions. The strips can also be abused in an attempt to achieve a "high."

11. Suboxone strips are small, generally between the size of a dime and a quarter, though they can be cut into smaller sizes. They are fairly translucent and can be easily concealed inside of a letter, card, or envelope.

12. Despite VDOC officers opening and inspecting all incoming offender mail for contraband, these small strips were being concealed inside of greeting cards and along the seams of envelopes, sometimes by tape or other adhesive. Mailroom officers were unable to detect all of the suboxone strips entering facilities through the mail, and strips were frequently discovered in the possession of offenders. All of this played a significant role in VDOC officials revising its correspondence policies in April 2017.

13. Other drugs, like LSD ("lysergic acid diethyamide") or "acid" are also produced in a strip form that can be easily concealed on or in paper and correspondence similar to the methods used for the Suboxone strips.

14. In order to rectify this problem, VDOC took steps to significantly reduce the amount of paper items that an offender may receive in the mail.

15. Previously, VDOC policy permitted offenders to receive incoming general correspondence via the mail as long as the correspondence was processed by the United States Postal Service as equal to or less than the contents of a one-ounce (1 oz.) domestic first class letter. In practice, this rule amounted to permitting mailed envelopes containing approximately five sheets of typical-weight copy paper or one sheet of paper and six

photographs. The mail could be opened and inspected, and if it passed inspection, all of the mail items would be passed along to the offender. These page-limit and weight restrictions did not apply to legal mail, special purpose mail, educational correspondence, packages from a vendor, or mail from a federal, state, or local government agency.

16. VDOC recognized that almost all of the contraband that was entering prisons through the mail came from family members and friends of offenders and not from legal mail. Typically, vendors, government agencies, attorneys, and educational organizations are not the parties sending in unauthorized items or drugs via the mail.

17. A. David Robinson circulated a memorandum in March of 2017 announcing a change in mail procedures. As the memorandum noted, all offender general correspondence (including the envelope) will be photocopied in the institutional mailroom. A maximum of three black and white photocopied pages (front and back) will be provided to the offender. Each item in the envelope – such as the envelope itself, a photograph, or a newspaper clipping – will be photocopied onto a single page. Once the items have been photocopied, the original items are destroyed. Enclosure A, A. David Robinson Memorandum.

18. If the incoming correspondence exceeds the page limit restriction or cannot be copied onto an 8.5" x 11" sheet of paper, the entire correspondence and all enclosed items will be returned to the sender along with a *Notice of Unauthorized Correspondence* form advising the sender of the reason for the return. Offenders are no longer permitted to possess original pieces of paper mail, including original letters, cards, or photographs.

19. This new policy does not apply to legal mail, special purpose mail, educational correspondence, packages from a vendor, or mail from a federal, state, or local

government agency. Legal correspondence is defined as: Correspondence sent to or received from verified attorneys, officers of state, federal, and local courts, the Virginia State Bar, and tort claims filed with the Division of Risk Management; the sender must clearly identify outer envelopes and contents as legal correspondence.

20. The mailroom officers in charge of photocopying and distributing incoming offender correspondence are not instructed to read every piece of mail, or to restrict the mail offenders may receive based on the content of the communication. The updated incoming correspondence policy applies to all incoming paper mail from the public, no matter what the item says, depicts, or shows.

21. Prior to this change, VDOC issued memoranda advising offenders of the upcoming policy change. On or about March 13, 2017, offenders were provided a letter from the warden at the facility explaining the upcoming policy change. The incoming correspondence policy became effective April 17, 2017.

22. In addition to alerting offenders, VDOC posted the new policy on its public website at https://vadoc.virginia.gov/ in order to inform the public about the policy change before it went into effect. The policy change was also covered in local newspapers.

23. While the new correspondence policy does require an increase in costs in the form of photocopying and staff time spent in the mailroom, VDOC decided that this increase was warranted, given the number of recent and known inmate deaths that resulted from drug overdoses. Additionally, the risk to the safety and health of offenders posed by drug

(Exhibit #8)

overdoses that do not result in death, but often require medical treatment, makes such a change in procedure a rational choice.

MARIE VARGO

Sworn and subscribed to before me, a Notary Public, in and for the State of Virginia, City of Richmond, on this 5th day of April 2019.

Barbara B Reyes
Notary Public

My commission expires: 04/30/21

BARBARA B REYES NOTARY PUBLIC REG. # 7564727 COMMONWEALTH OF VIRGINIA

(Exhibit #8) (Exhibit - D)

FED-CS-17 - 512 F.3d 223, Bell v. Bell, (C.A.6 (Tenn.) 2008)

---------- Excerpt from page 512 F.3d 241 follows ----------
Two Supreme Court cases establish that a prosecutor's false or misleading statement disclaiming the existence of Brady material obviates the need for a petitioner to conduct an independent investigation. Such material, if in the prosecution's possession, and if not disclosed, is therefore suppressed under Brady, even if it is available through another source. In Strickler, the issue before the Court was whether the petitioner had "cause" for failing to raise his Brady claim before the state trial court, > 527 U.S. at 283, 119 S.Ct. 1936, which, as the Supreme Court has explained, tracks Brady's "suppression" element. > Banks v. Dretke, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The warden argued that because facts suggesting the basis for the petitioner's Brady claim were publicly available, through trial testimony and a newspaper article, the prosecution's maintenance of an open-file policy that did not include the evidence in question was irrelevant. > Strickler, 527 U.S. at 284, 119 S.Ct. 1936. The Supreme Court rejected this argument. Though the Court disagreed with the warden's contention that the factual basis for the petitioner's claim was publicly available, it did not rely on this fact in crafting the applicable legal standard. > (FN4) > Id. at 285, 119 S.Ct. 1936. Instead, the Court held that the petitioner established cause because (1) "the prosecution withheld exculpatory evidence," (2) "petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence," and (3) the state asserted that petitioner had received "everything known to the government." > Id. at 289, 119 S.Ct. 1936.

In Banks, the Supreme Court reaffirmed and extended Strickler, and reversed the Fifth Circuit's holding that the petitioner could not demonstrate cause because he was not diligent in investigating his Brady claim. > 540 U.S. at 695, 124 S.Ct. 1256. The Banks Court did not take a position on whether further investigation would have led to the suppressed material; instead, the Court found cause because the prosecution (1) "knew of, but kept back"

---------- Excerpt from page 512 F.3d 242 follows ----------
the Brady material; (2) "asserted ... that it would disclose all Brady material;" and (3) confirmed the petitioner's reliance on that representation by denying contrary allegations in state habeas proceedings. > Id. at 693, > 124 S.Ct. 1256. In rejecting the warden's argument, Banks clearly indicated that a contrary rule "declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." > Id. at 696, 124 S.Ct. 1256 (framing the state's argument that the petitioner was not diligent as an argument that "the prosecution can lie and conceal and the prisoner still has the burden to discover the evidence" and rejecting this argument (alternation and internal citation removed)); see also > id. at 695, 124 S.Ct. 1256 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed."). The rule emerging from Strickler and Banks is clear: Where the prosecution makes an affirmative representation that no Brady material exists, but it in fact has Brady material in its possession, the petitioner will not be penalized for failing to discover that material.

The majority's attempt to distinguish this case from Strickler and Banks on the basis of "absence of reasonable reliance" is utterly unpersuasive. Majority Op. at 236. Petitioner specifically requested that the prosecution provide impeaching evidence concerning its witnesses, which would have included Davenport's sentencing documents. Accordingly, when the prosecution did not provide any of those sentencing documents and informed Petitioner that it had provided "all discoverable information in [its] file," J.A. at 499, Petitioner was entitled to "presume that [these] public officials [had] properly discharged their official duties" and that no relevant documents existed. > Banks, 540 U.S. at 696, 124 S.Ct. 1256 (quoting > Bracy v. Gramley, 520 U.S. 899, 909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997)). Under Strickler and Banks, Petitioner's ability to uncover the disposition of Davenport's criminal charges by searching public records did not relieve the prosecution of its duty to respond honestly and completely to Petitioner's discovery request.

The majority's mischaracterization of Strickler and Banks is even more egregious in light of the courts of appeals' consistent interpretation of these cases. Several of our sister circuits have recognized that prosecutors cannot knowingly misrepresent that Brady material does not exist without running afoul of Banks and Strickler, see > Jennings v. McDonough, 490 F.3d 1230, 1239 & n. 8 (11 th Cir.2007) (denying Brady claim where the petitioner had equal access to the evidence and "there is no allegation that the prosecution actively misled [the petitioner] about the existence of the [Brady evidence]"); > Johnson v. Dretke, 394 F.3d 332, 337 (5th Cir.2004) ("[I]f the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial."); > Gantt v. Roe, 389 F.3d 908, 912-13 (9th Cir.2004) ("While the defense could have been more diligent ... this does not absolve the prosecution of its Brady responsibilities.... Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation."), as have several separate opinions of this Court. See > United States v. Graham, 484 F.3d 413, 422 (6th Cir.2007) (Batchelder, J. dissenting) ("[T]he defense is entitled to rely on the prosecution's representations regarding its compliance with its Brady obligations."); > Bell, 460 F.3d at 767 (panel opinion) (Gibbons, J. dissenting) ("Miller ... did not disclose ...

"Proposed Petition" (Exhibit #9)

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Eastern Virginia
Name (under which you were convicted): DeVinche Javon Albritton	Docket or Case No.:
Place of Confinement: RiverNorth Correctional Center 329 Dellbrook Lane, Independence, Virginia 24348	Prisoner No.: 1016653
Petitioner (include the name under which you were convicted): DeVinche Javon Albritton	Respondent (authorized person having custody of petitioner): v. Harold Clarke, The Director of The VA Dept of Corrections
The Attorney General of the State of: Virginia	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
The Virginia Beach Circuit Court, 2425 Nimmo PKwy, Virginia Beach, Virginia 23456

(b) Criminal docket or case number (if you know): CR10-3743

2. (a) Date of the judgment of conviction (if you know): April 24, 2013

(b) Date of sentencing: April 24, 2013

3. Length of sentence: Life Plus 30 years

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case: Rape and Abduction w/intent to defile

Claims stated in "Attatchments #1-24"

6. (a) What was your plea? (Check one)

☑ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

(Exhibit #9)

AO 241
(Rev. 01/15)

Therefore, petitioner asks that the Court grant the following relief: see (Attachment #25)

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on March 11, 2022 (month, date, year).

I certify that the above notary is not a party to this action.

Signed:

Executed (signed) on March 11, 2022 (date).

I was commissioned a notary public as Erica Jo Creger

State of Virginia
County of Grayson
On this 11th day of March 2022
before me personally appeared
DeVonche Albritton
to me known to be the person who executed the foregoing instrument, and acknowledged that the execution was of his/her free act and deed.

SEAL (signed) Erica Creger Smith
NOTARY PUBLIC

ERICA JO CREGER
NOTARY PUBLIC
REG. #7788119
MY COMMISSION EXPIRES
8/31/2024
COMMONWEALTH OF VIRGINIA

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

(Attatchment #1)

(Exhibit #9)

Petitioner's Ground for Federal Habeas Relief

Petitioner DeVinche Javon Al Britton states that the Commonwealth of Virginia Fraudulently and Unreasonably impeded, precluded, and Deprived him of his applicable and Substantive Constitutional Rights and any Opportunity to have effectively requested and/or received Federal Funding under 18 U.S.C. § 3599 (a)(2) for Investigative services that were reasonably necessary for the development of his Constitutional Claims and Newly Discovered Evidence relevant to the Brady Prosecutorial Misconduct Committed by the prosecuting Commonwealth of Virginia against him at Trial, for his initial Federal Habeas review thereof, which would have provided and entitled him to Federal relief for his current Abduction W/intent to defile and Rape Convictions obtained by the Commonwealth's Discriminatory Violations of his 1st, 5th, 6th, 8th, and 14th Amendment Rights as an Indigent, pro se, prisoner, and the Commonwealth's use of False and Fraudulent S.A.N.E Expert Evidence and Witness Testimony against him at Trial

(Attachment #2) (Exhibit #9)

Supporting Facts

Petitioner DeVinche Javon AlBritton (hereafter "Petitioner AlBritton") at all times relevant is Indigent and a Virginia Dept of Corrections (VDOC) prisoner, whereon November 1, 2010, was indicted by a Grand Jury and Charged with one count of Abduction W/intent to defile, one count of Rape, and one Count of Forcible Sodomy, upon which an arrest warrant was issued and Executed on November 17, 2010, while Petitioner AlBritton was serving a prison term at VDOC. Lawrenceville Correctional Center on unrelated Criminal Charges.

Petitioner AlBritton was alleged to have committed the crimes charged in the indictments on September 6, 1999, where the alleged Victim, Jamie Lewis (hereafter "J.L.") had reported to her Coworkers, that she had been Forced into a nearby wooded area and Raped at Knifepoint by a stranger that she had never seen on her way to work that morning, prompting her Coworkers to Call the police to investigate.

Upon the Police arrival, J.L. when questioned as to why had she not reported her Rape immediately after emerging from the wooded area to the nearby Police officers parked at the shopping center instead of walking to work, explained that she was too scared that if Petitioner AlBritton was watching her and knew where she lived, so she wanted to be somewhere safe. See (Exhibit #1,

(Attachment #3) (Exhibit #9)

Nevertheless, J.L. was taken by police to the Chesapeake General Hospital to be given a Sexual Assault Nurse-Examination (S.A.N.E), by S.A.N.E nurse Kathryn McDonald (hereafter "Nurse McDonald") where she examined and Documented any injuries J.L. had and collected Biological samples to be Submitted to the Virginia State laboratory to be tested and screened for a possible DNA match in the DNA database, However, No DNA match was attempted per policy at that time which required there to be a known Suspect for a Match to be made, and the case went "Cold" until January 2010, when policy changed to test all backlogged DNA case samples.

On December 8, 2010, after being Transported from VDOC Lawrenceville Correctional Center to the Virginia Beach City Jail and placed on Administrative Segregation/Isolation Status pending Trial, Petitioner Albritton was arraigned in the Virginia Beach Circuit Court, where he entered pleas of Not Guilty on all charges and invoked his Right to Self-Representation.

Petitioner Albritton immediately moved for Discovery (Exhibit #2) and was granted his request (Exhibit #3). Petitioner Albritton also moved for relief from paying the $5.00 a day Jail fee as a VDOC prisoner which was denied, and moved for funds to hire a private Investigator to assist him for his defense Based on his inability to gather needed information and evidence as a prisoner in Isolation, whereupon the Court deferred and later denied his motion. (Exhibit #4).

(Attachment # 4) (Exhibit # 9)

On May 12, 2021, Petitioner Albritton then moved for Funds to Obtain Evidence which establishes his claim of Innocence of never abducting and Raping J.L. on her way walking to work, but that she had in fact been driven and dropped of by someone at his residence on Newtown Road, the morning of the alleged crimes, and that they had Consensual Sex, whereupon his motion for Funds to produce the relevant Large scaled Map (Exhibit # 5), the Trial Court granted Petitioner Albritton's Motion for Funds and Ordered the production of the Large scaled map of the area as it was in 1999 to include and show J.L.'s point of Origin on September 6, 1999, her place of work, the Location of the alleged Crime scene, and Petitioner Albritton's residence (Exhibit # 6, Copy of Trial Court Order for production of the relevant Large scaled map). The relevant Large scaled map which was produced as directed by the Trial Court was ultimately entered into evidence at Both Trials without Objection as "Defense Exhibit # 3". See (Exhibit # 7, Small replica of Petitioner's "Defense Exhibit # 3", google map). Petitioner Albritton was also given some Discovery material from the Commonwealth which included the medical S.A.N.E Report prepared by Nurse McDonald the morning of September 6, - 1999 and their Notice of intent to use both McDonald's S.A.N.E report and Expert Opinion Testimony against him at Trial.

(Attachment #5) (Exhibit #9)

However, Petitioner ALBritton upon review of the Discovery material provided by the Commonwealth found that such did not contain or include any relevant S.A.N.E rules, Guidelines, or such protocol from 1999, thereby causing him to file a motion to Suppress Nurse McDonald's S.A.N.E report and Expert Opinion Testimony, arguing that the Commonwealth's failure to provide him with a copy of the relevant 1999 S.A.N.E protocol for his defense violated his 6th and 14th Amendment Rights. see (Exhibit #8, copy of Petitioner's Motion to Suppress). On June 13, 2011, the Court held a hearing on Petitioner's motion to Suppress, where he argued that his 6th and 14th Amendment rights were being violated by the fact that the Commonwealth failed to provide him with the relevant S.A.N.E protocol from 1999 necessary for his defense to challenge Nurse McDonald's report and Expert Opinion, However, The Commonwealth in response argued that Petitioner ALBritton's Motion to Suppress was not proper and premature, because of the fact that their office was diligently searching for the relevant S.A.N.E protocol from 1999 in order to provide it to him for Trial, Stating on the record: "You Know and Judge, if we can get them we will turn them over to Mr ALBritton. If we can establish that they do not exist we will advise MR ALBritton." see (Exhibit #9, copy of Tr 6-23-11, pgs 25-27). However,

(Attachment #6) (Exhibit #9)

The Court upon the Commonwealth's sworn representation that their Office was diligently Searching and would provide Petitioner Albritton with a copy of the relevant S.A.N.E. Protocol from 1999 for his defense at Trial denied his motion as premature, but could be renewed at Trial. see (Exhibit #10, Copy of June 13, 2011, Order)

Petitioner Albritton had also been given copies of the photographs taken of the alleged Crime Scene, wooded area on the morning of September 6, 1999, where upon his review, clearly showed that the area was wet from rain on the previous day and was also saturated with Both poison Ivy and poison Oak, with ground Bee hives therein, totally Contradicting V.L.'s account of being Raped in that wooded area from the Condition of her Skin and the Clothes she wore the morning of the alleged incident, the facts of which were also later presented to the Jury and proven by the Evidence and witness Testimony at both of his Jury Trials. see (Exhibit #11, Copies of the alleged Crime Scene photographs of the Wooded area, Exhibit #12, Copy of a Six (6) page Centers for Disease Control and Prevention Report on Poisonous Plants entered into evidence at Trial as Defense Exhibit-#4; T+ 4-23-13 pgs 421-432).

Thereafter, waiting a few Months nearing his upcoming Trial date, and with no response from either the Court or The

(Attachment #7) (Exhibit #9)

Attorney(s) for the Commonwealth in regards to their Oath of Searching to provide him with a Copy of the relevant S.A.N.E protocol from 1999 for his defense, Petitioner AlBritton filed a motion with the Trial Court in an attempt to obtain records from the Chesapeake General Hospital in regards to material that he could use in defense and Cross-examination of Nurse McDonald's S.A.N.E report and Expert Opinion at Trial, but was refused and denied his effort by the Trial Court. see (Exhibit #13)

On March 26, 2012, the 1st day of his 1st Jury Trial, Petitioner AlBritton on another attempt raised the issue and Violation of not being provided a Copy of the relevant 1999 S.A.N.E protocol for his defense, where he filed a motion in Limine that morning, Calling for at least a partial Suppression of the Commonwealth's S.A.N.E evidence Citing Brady V. Maryland, -- 373 U.S. 83 (1963) and Washington V. Texas, 388 U.S. 14, 19 (1967) as his legal authorities therein for relief. see (Exhibit #14, Copy of Petitioner AlBritton's motion in Limine filed March 26, 2012)

The Trial Court upon hearing Petitioner AlBritton's renewed request for Suppression for the Commonwealth's failure to produce and give him a Copy of the relevant 1999 S.A.N.E protocol for his defense at Trial, again refused to grant him any relief and simply deferred any Consideration of the matter until later in the Trial, which never happened. see (Tr 3-26-12 pg 11-13)

(Attachment #8) (Exhibit #9)

Nevertheless, The Commonwealth presented the Jury with Nurse McDonald's S.A.N.E report and Expert Opinion Testimony, where McDonald testified that in her Expert opinion, the Injuries Observed during J.L.'s S.A.N.E exam were inconsistent with Consentual Sexual intercourse.

However, upon Cross-examination by Petitioner Albritton, acting prose, Nurse McDonald admitted and Testified that she as an Expert in Conducting J.L.'s S.A.N.E exam on September 6, 1999, had failed to Consider variables that had a direct bearing and effect on J.L.'s alleged injuries. See (Exhibit #15, copy of Tr 3-26-12 pgs 250-254).

Thereafter, on March 28, 2012, during the Jury deliberation of the Case, the Jury requested to that they be allowed to examine the Clothing worn by J.L. the morning that she was allegedly abducted and Raped in that Wooded area, upon which the Commonwealth Objected and asked the Trial Court to refuse the Jury's request to examine J.L.'s Clothes she wore on Septembes 6, 1999. See (Exhibit #16, Copy of Tr 3-28-12 pgs #548-551, Refusal Jury Question asking to examine the alleged Victim's clothing worn on 96-99)

Immediately after the Trial Court refused the Jury's request to examine J.L.'s Clothing, the Jury foreman informed that they were Deadlocked and a Mistrial was declared.

(Attachment #9) (Exhibit #9)

More than 1 year later, on April 22, 2013, Petitioner Al Britton, still a prisoner held in ~~Ad~~ Administrative Segregation/Isolation and acting pro se pending his retrial, was brought before a New Jury of 11 women and 1 man to be tried on the two remaining charges of Abduction w/intent to defile and Rape, where the Commonwealth still never provided him with a copy of the relevant 1999 S.A.N.E protocol for his defense as they had promised under Oath on the record on June 23, 2011. See (Exhibit #9, copy of Tr 6-23-11 pgs-#25-27).

On April 23, 2013, the 2nd day of Petitioner Al Britton's retrial, The Commonwealth for a second time presented the Jury with Nurse McDonald's S.A.N.E report from September 6, 1999 and her Expert Opinion Testimony, that in her Expert Opinion she found that J.L.'s injuries observed were inconsistent with Consensual sexual intercourse. However, the Commonwealth further directed Nurse McDonald to testify that she had Completely followed the S.A.N.E protocol as it was in 1999 where she was limited by the 1999 as to the questions asked during a S.A.N.E exam, the facts of which Al Britton was unable to challenge without ever being given a copy of the relevant 1999 S.A.N.E protocol as promised by the Commonwealth. See (Exhibit #11, Tr 4-23-13 pg #333)

(Attachment# 10) (Exhibit# 9)

Immediately thereafter, Petitioner AlBritton, for a second time acting pro se, attempted, However, in vain to conduct an effective Cross-examination of Nurse McDonald, without ever being provided with the relevant 1999 S.A.N.E protocol she just had made reference to completely following, where he again Questioned Nurse McDonald as to her admitted failures as an Expert in Conducting a Complete and Reliable S.A.N.E exam of J.L. the morning of September 6, 1999, However, Nurse McDonald in response to Petitioner AlBritton's Cross-examination, contrary to her previous Trial testimony, and as directed by the Commonwealth, she reasserted ~~and~~ testified Falsely that she had completely followed and stayed within the guidelines of ~~only~~ what the S.A.N.E protocol had required her to do in 1999, and that the relevant S.A.N.E protocol as it was in 1999 did not require her as a S.A.N.E nurse to Know or even consider facts such as a Victim's most recent prior sexual History prior to their alleged sexual assault during a S.A.N.E examination, See (Exhibit# 18, copy of Tr 4-23-13 pgs 349-358, the False Testimony by S.A.N.E nurse McDonald regarding the relevant 1999 S.A.N.E protocol the Commonwealth failed to provide to petitioner AlBritton's defense as promised under Oath on the record 6-13-11 (Exhibit# 9, pgs 25-27)).

(Attatchment #11) (Exhibit #9)

Petitioner AlBritton in a diligent and final attempt to fairly Challenge The Commonwealth's False S.A.N.E and Expert Witness Evidence and without ever being provided a copy of the relevant 1999 S.A.N.E protocol as promised (Exhibit #9, pgs #25-27), Called Witness Dr Elizabeth Gibbs as his defense S.A.N.E expert to explain and also Contradict Nurse McDonald's S.A.N.E evidence and False expert testimony, where Dr Gibbs executed a sworn Affidavit (Exhibit #19, copy of Dr Gibb's sworn Affidavit) and testified to the Jury at both Trials as to the Unreliability of the Commonwealth's Medical S.A.N.E expert evidence upon a reasonable determination of the issue of Consent. However, when Questioned about whether Virginia's S.A.N.E protocol in 1999, would include and require S.A.N.E nurses to inquire or ask a victim's ~~most~~ recent Sexual History prior to their alleged assault during a S.A.N.E exam, in response to McDonald's False Testimony that she had Completely followed Virginia's 1999 S.A.N.E protocol, and that the relevant Protocol as it was in 1999 did not Contain or require her as a S.A.N.E nurse to Question a Victim about their most recent prior Sexual History (Exhibits #17, #18 pgs - #349-358), Dr Gibbs testified that she did not Know whether or not if Virginia's S.A.N.E protocol in 1999 actually required such an inquiry of a Victim's most recent prior sexual History during a S.A.N.E examination, see (Exhibit #20, Copy of Tr 4-24-13 pgs - #513-514)

Nevertheless, less than two hours later, the Jury return a Verdict of Guilty on both Charges, and Recommeded sentences of Life for Rape and 30 years with a $25,000.00 fine for the Abduction w/ - intent to defile, upon which the Trial Court Sentenced Petitioner AlBritton.

(Attachment #12) (Exhibit #9)

Petitioner AlBritton, because he was informed by the Virginia beach Jail deputies prior to his formal sentencing upon the Jury's recommedation of a Life sentenced, that he would be placed on indefinite Suicide/-Strip cell watch, upon requesting the Trial Court for a Direct Appeal he also asked for appointment of Appellate Counsel due to his inability on Suicide/Strip cell watch status and not knowing when he would be ever released and transferred back to VDOC for his Direct Appeal.

However, Soon thereafter, Petitioner AlBritton was transported back to VDOC Lawrenceville Correctional Center and when he attempted to remove his Appellate Counsel, MR Gregory Pugh, and proceed pro se for his pending Appeal, the Virginia Court of Appeals denied his request. see (Exhibit #21)

Thereafter, a few months later in 2014, Petitioner AlBritton due to his New Life plus 30 year sentences for Abduction and Rape, was Transferred from Security Level-3 Lawrenceville Correctional Center to Level-5 maximum Security Sussex I State Prison, where his Late Aunt, Vera Diaz who was terminally ill and dying of Lung Cancer at that time, Sought him out and as her final act of Love towards Petitioner, called on the rest of his family who had disowned and shunned him for Publicly shaming them and the family name in the News and in Virginia Beach, to forgive and help Petitioner in any way they possibly could, where some family members gave portions of financial assistance to find and hire a private Investigator to search for any potential Evidence or witnesses which could be used to prove Innocence, including the missing 1999 S.A.N.E protocol the Commonwealth failed to produce as promised. see (Exhibit #9, pgs #25-27

(Attatchment# 13) (Exhibit#9)

In October of 2014, while Petitioner AlBritton's Direct Appeal was in its last Stage of review by the Virginia Supreme Court, the private Investigator hired by his family was able to easily locate a copy of the MISSing relevant 1999 Virginia S.A.N.E protocol where the investigator provided him with a copy of the 1999 S.A.N.E protocol (Exhibit#22, copy of the 1999 S.A.N.E protocol found and provided by the private investigator), and a year later provided an additional statement attesting to the search efforts used to find the missing protocol and that further investigative services to find witnesses named in the S.A.N.E protocol was available. See (Exhibit#23)

Petitioner AlBritton upon receiving a copy of his newly obtained 1999 S.A.N.E protocol as Evidence, immediately contacted MR Pugh asking for help and assistance in presenting it to the Supreme Court for his Appeal, but was ignored and refused, prompting Petitioner to file his own Motion to Supplement the record with a copy of the relevant 1999 S.A.N.E protocol to be Considered by the Virginia Supreme Court, However, the Court denied his motion to Supplement. See (Exhibit#24

Petitioner AlBritton immediately filed motions to Reconsider and a Petition for a Rehearing and wrote a letter to Appellate Counsel MR Pugh asking him to at least help him obtain a Copy of his Motion to Suppress Transcript in order to show the Supreme Court what happened, but MR Pugh never responded, not until he informed Petitioner AlBritton that his Motion to Reconsider and Petition for a Rehearing were denied. see (Exhibit#25).

(Attachment# 14) (Exhibit# 9)

Thereafter, Petitioner AlBritton filed his Habeas petition to the Virginia Supreme Court where he argued among other claims That the Commonwealth's S.A.N.E Expert Witness Nurse McDonald lied and Gave False Evidence which was unreliable causing him to become convicted of Rape and argued that the Commonwealth Violated his Constitutional Rights to have been provided with a Copy of the relevant 1999 S.A.N.E protocol for his defense which also caused him to be convicted of a Rape he did not commit and asked the Court for an Evidentiary hearing to be Scheduled on his Constitutional Claims. See (Exhibit# 26, copy of State Habeas. Attachments #20-#33, and Exhibit# 27, copy of motion for an Evidentiary Hearing filed to the Virginia Supreme Court).

Nevertheless, on November 28, 2016, the Virginia Supreme Court upon Consideration of the Commonwealth's Motion to Dismiss, disregarded the facts, Newly Obtained 1999 S.A.N.E protocol, and U.S. Supreme Court Law presented by Petitioner AlBritton in support of his Claims, and dismissed his Habeas as procedurally defaulted and barred from review and relief under Virginia's rule in > Porter V. Warden, - - 283 Va. 326, 330, 722 S.E.2d 534 (2012)

Thereafter, On December 23, 2016, the U.S. District Court received and Filed Petitioner AlBritton's Federal Petition for a Writ of Habeas Corpus W.th Exhibits and a Supporting Affidavit to be Considered by the Court. See (Exhibit# 28, Copy of the Civil Docket Case No. - -# 2:16CV00737, Petitioner AlBritton's Initial Federal Habeas Petition; - Exhibit# 29, copy of relevant Attachments #20-34 from AlBritton's Initial Federal Habeas; and Exhibit# 30, Copy of AlBritton's Affidavit).

(Attatchment #15) (Exhibit #9)

During the pendency of his Federal Habeas review proceedings, Petitioner AlBritton on multiple occasions diligently tried to produce and develope Evidence and the relevant Record, where he filed motions to Compel, the production of a Trial Court Transcript, and for an Evidentiary Hearing. see (Exhibit #31, and Exhibit #-32, copy of Petitioner AlBritton's Renewed Motion for Production of Record and for an Evidentiary Hearing). However, On August 15, 2017, both filed motions were denied by the U.S. Magistrate judge assigned to his case. see (Exhibit #33, copy of U.S. Magistrate judges 8-15-2017 Order).

Thereafter, on February 1, 2018, upon consideration of the Commonwealth's motion to Dismiss, the U.S. Magistrate judge issued his Report and Recommendation That Petitioner AlBritton's Federal Habeas petition be dismissed with prejudice, finding that AlBritton's Brady prosecutorial misconduct claim among other claims raised, were procedurally defaulted and Barred Federal review under Virginia's Rule in > Porter V. Warden, -283 Va. 326 (2012), upon which the U.S. District Court Judge on March 6, -2018, in a Final Order, adopted and approved the U.S. Magistrate judge's Report and Recommendation, dismissing AlBritton's Federal Habeas Petition with prejudice and denied him a COA. see (Exhibit #34, - Copy of the U.S. District Court's March 6, 2018, Final Order).

Petitioner AlBritton after the Dismissal of his Initial Federal Habeas Petition, filed for Relief from the Judgment under Rule 60(B) and other Auxillary Motions, and on September 21, 2018, the U.S. District Court Judge Issued an order directing the Commonwealth to file a response thereto. see (Exhibit #35, Copy of the U.S. District Court's September 21, 2018 Order)

(Attachment #16) (Exhibit #9)

Six (6) months later, on March 12, 2019, upon Consideration of filings by both Petitioner AlBritton and the Commonwealth of Virginia, the U.S. District Court Judge denied his motions for relief from Judgment, for an Evidentiary hearing, and for Summary Judgment, However, the Court did Grant AlBritton's motions to Supplement and to admit the Trial Transcript, with leave to Supplement his June 13, 2011, of the Suppression hearing Transcript, where upon further Consideration of AlBritton's arguments and Evidence, found and acknowledged that the Commonwealth of Virginia did in fact interfere with his Brady Disclosure Rights to have Timely discovered the relevant 1999 S.A.N.E protocol during his Jury Trial proceedings, but still held that his Claim in regards thereto, was procedurally defaulted. see (Exhibit - #36, copy of the U.S. District Court's March 12, 2019, Order at pgs 6-8).

The U.S. District Court also deferred its ruling upon AlBritton's motion to Compel and for injunction filed against the Commonwealth for refusing and denying him access to receive a copy of his June 13, 2011, Suppression hearing Transcript for his initial federal Habeas proceeding from his family as a VDOC prisoner, where the Commonwealth submitted an Affidavit from VDOC officals in support of its denial of AlBritton's rights thereto. see (Exhibit #37, copy of Affidavit of VDOC official, Marie Vargo).

On April 24, 2019, the U.S. District Court entered an order denying Petitioner AlBritton's motions to Compel and for Injunction, for an Evidentiary Hearing, and to Alter and Amend judgment. However, the U.S. District Court Granted AlBritton's Renewed motion to Admit his June 13, 2011 Suppression Hearing Transcript. see - (Exhibit #38, copy of U.S. District Court's April 24, 2019, Order).

(Attachment #17) (Exhibit #9)

Thereafter On August 26, 2019, the U.S. Court of Appeals for the Fourth Circuit dismissed Petitioner AlBritton's Appeal filed in regards to the District Court's dismissal of his initial Federal Habeas petition with prejudice and denial of a COA. see (Exhibit #39)

On September 4, 2019, Petitioner AlBritton filed a motion for funding of Investigative Services, which was later denied by the U.S. Court of Appeals on October 7, 2019. see (Exhibit #40, and Exhibit-#41, copy of U.S. Court of Appeals, 4th Circuit, October 7, 2019, Order).

Thereafter, on October 21, 2019, The U.S. Court of Appeals, for the Fourth Circuit dismissed Petitioner AlBritton's Appeal filed in regards to the U.S. District Court's dismissal Orders entered upon his post-judgment motions filed after the Court's March 6, 2018, Final Order denying his initial Federal Habeas petition. see (Exhibit #42)

Petitioner AlBritton then prepared and filed a petition for a Writ of Certiorari to the United States Supreme Court requesting review and relief from his unlawful State Convictions and Sentences. However, The Supreme Court on April 27, 2020, entered an Order denying AlBritton's Certiorari Petition. see (Exhibit #43, copy of the U.S. Supreme Court's Denial of petition for a Writ of Certiorari on April 27, 2020).

(Attachment #18) (Exhibit #9)

Petitioner's Argument

Petitioner Albritton argues that the Commonwealth of Virginia (hereinafter "Commonwealth") discriminatorily and intentionally Violated his Constitutional Rights as an Indigent, prose, prisoner under the 1st, 5th, 6th, 8th, and 14th Amendments for access to Federal Funding under 18 U.S.C. §3599(a)(2) and to have thereby received meaningful initial §2254 Federal Habeas review and relief for his current Un Constitutional Abduction w/intent to defile and Rape Convictions which were obtained by the Virginia Commonwealth's Violations of his 1st, 6th, 8th, and 14th Amendments and the use of False Expert Witness Evidence, upon the Virginia Commonwealth's intentional and Fraudulent creation and unfair application of an impracticable procedural default rule Violation against him in deprivation of his Rights, precluding him from Funding.

Petitioner Albritton assets that his Trial record and Evidence presented establishes that the Commonwealth in total disregard and discrimination of the facts and his Constitutional Rights as an Indigent, prose, State prisoner, who was being held in the Custody of their Jail on Administrative Segregation/Isolation status pending Trial, and having no material ability or Social means of access to search for or Obtain a Copy of the relevant 1999 S.A.N.E protocol on his own, intentionally committed the Brady prosecutorial Misconduct against him in direct Violation of The United States Supreme Court's Rulings in > Strickler V. Greene, --527 U.S. 263 (1999) and Banks V. Dretke, 540 U.S. 668 (2004), where the Commonwealth in response to Petitioner Albritton's pro se/prisoner

(Attachment #19) (Exhibit #9)

Discovery motions and motion to Suppress the Commonwealth's S.A.N.E evidence, lied and falsely represented to the Trial Court and Petitioner AlBritton that the Commonwealth was searching to find the 1999 S.A.N.E protocol and would ultimately provide it to AlBritton for his defense at trial once it was found. see (Exhibit #9, Jt 6-23-11 pgs 25-27, also Exhibits #2, 3, and 8)

However, Petitioner AlBritton reasonably believes and argues that the Commonwealth intentionally never provided him with a copy of the relevant 1999 S.A.N.E protocol for his trial defense as they had promised, due to the fact that after finding the 1999 S.A.N.E protocol on the internet, where AlBritton being their prisoner in their City Jail had absolutely No access or means to search himself, upon reviewing the S.A.N.E protocol, the Commonwealth determined and found that Petitioner AlBritton would be able to use the 1999 Virginia S.A.N.E protocol to Challenge and effectively move the Trial Court to exclude or Suppress the Commonwealth's S.A.N.E Evidence and Expert Opinion Testimony as unreliable and inadmissable or at the very least present the S.A.N.E protocol as Evidence of Reasonable doubt to the Jury in regards to the Commonwealth's medical evidence resulting in a Not Guilty Verdict for his Rape charge. as He could have Subpoened witnesses named in the Protocol. Nevertheless, after his Trial and Conviction upon Nurse McDonald's unchallengable False S.A.N.E Evidence and perjurous Expert Witness Testimony, where she cited full and Complete Compliance with the missing 1999 S.A.N.E protocol to Validate and bolster her testimony and Evidence in regards to the S.A.N.E examination she

(Attachment #20) (Exhibit #9)

had Conducted on the morning of September 6, 1999, to the Jury (Exhibit #17), When the relevant 1999 S.A.N.E protocol was finally Discovered and Found to be located in Public Record on the internet, the Commonwealth upon Petitioner Al Britton's claim of their Brady Prosecutorial Misconduct of Falsely representing that they would Search and Failed to provide him a copy as promised on June 13, 2012 (Exhibit # 9), applied its State procedural default Rule Violation against him pursuant to the Virginia Supreme Court's decision in > Porter V. Warden, -- 283 Va. 326, 330, 722 S.E.2d 534, 542 (2012) (holding Brady claim procedurally barred because the allegedly withheld evidence was available to the petitioner in public records.), in total disregard of the Facts and U.S. Supreme Court Law in > Strickler and Banks regarding Brady Prosecutorial Misconduct against defendants. see (Exhibit #44) Copy of an Excerpt page from > Bell V. Bell, 512 -- F.3d 223 (C.A.6 (Tenn.) 2008)).

Petitioner Al Britton argues that the Commonwealth's fraudulent assertion of its procedural default Rule in > Porter against him in his case as an Indigent, pro se, prisoner in Jail Isolation during Trial proceedings was clearly unreasonable, impracticable, and effectively deprived him of his Constitutional Rights to have had a meaningful initial Federal Habeas Review and relief upon his Claim that the Commonwealth committed Brady Prosecutorial Misconduct against him at Trial regarding the relevant 1999 S.A.N.E protocol never being provided for his defense as promised, which further allowed the

(Attachment #21) (Exhibit #9)

Commonwealth to use False and perjurous Expert Evidence and Testimony to Obtain Petitioner ALBritton's current Abduction with intent to defile and Rape Convictions, where the relevant U.S. Magistrate and U.S. District Judge upon review of his initial Federal Habeas petition simply deferred to and then relied on the Commonwealth's Fraudulent application of its procedural default Rule in > Porter as grounds to dismiss his Brady claim against the Commonwealth as barred from Federal Habeas review, in total disregard of the relevant facts and contrary to U.S. Supreme Court's Rule of Law on prosecutorial Brady Violations. see > - -(Exhibit #9, T 6-13-11 pgs #25-27, and Exhibit #44, - -Copy of Excerpt from > Bell v. Bell, supra, explaining Strickler and- -Banks decisions).

Petitioner ALBritton argues that the Commonwealth of Virginia Clearly Conspired to and intentionally Violated his Constitutional Rights to have received Federal habeas review and relief by its Brady prosecutorial misconduct, because of the fact that the Commonwealth Knew that (1) Petitioner was an Indigent, prose, prisoner being held in Jail Isolation pending his Jury Trial, with no material means or social access to search on any Computer or Internet himself for the relevant 1999 S.A.N.E Protocol, (2) that by the time Commonwealth's fraudulent action of Lying to Petitioner and the Court on June 13, 2011, about searching for the relevant 1999 S.A.N.E Protocol to provide it to

(Attachment #22) (Exhibit #9)

his defense for trial could be discovered, after a conviction and sentence was obtained, the Commonwealth would be shielded from any claim of Violation committed and Petitioner AlBritton would also be foreclosed from any and all federal Review and relief, based upon the Commonwealth's newly imposed State procedural default Rule in > Porter V. Warden, supra, as such a Rule in AlBritton's case was not only unreasonable, but also impossible for him as an Indigent, pro se, prisoner, being held in the Virginia Beach City Jail's Isolation, C-3 F, with absolutely no access to a Computer or internet material to meet. see (Exhibit #45, copy of relevant pages #12 and #14 from the Virginia Beach City Jail Handbook (2012)).

Petitioner AlBritton argues that the Prejudicial Result and proof that he was effectively precluded from receiving Federal Funding for Investigative Services reasonably necessary for the developement of his Claims and Brady evidence (1999 S.A.N.E Protocol for Missing Witnesses) and that he was also deprived of his Constitutional Right to a Meaningful initial Federal Habeas Review and Relief, by the Commonwealth's fraudulent and impractical application of its procedural default Rule in > Porter V. Warden, supra... against him in response to his Brady Prosecutorial Misconduct Claim, is clearly shown by the facts and Record where initially the District Court Judge on March 6, 2018, upon dismissing Petitioner AlBritton's Federal Habeas Petition, simply adopted and approved the U.S. Magistrate Judge's February 1, 2018, Report and Recommendation deferring to the Commonwealth's finding and application of Its procedural default Rule under Porter, thereby Barring AlBritton from receiving any and all Federal Review or Relief, Whereas, The Same District Court Judge, on March 12, 2019, in a later Ruling on AlBritton's Case upon a review of his Rule 60 (B) Motion, Considered

(Attatchment # 23) (Exhibit # 9)

argument, Facts, and the Record, which the U.S. Magistrate Judge in deferring to the Commonwealth's procedural default ruling, refused to Consider or acknowledge in recommending that his Federal Habeas petition be denied and dismissed with Prejudice, finally recognized and found that the Commonwealth had in fact Interferred with AlBritton's Brady rights to have discovered the relevant 1999 S.A.N.E Protocol for his Jury Trial, However, Still held that his Brady Claim was procedurally defaulted for failure to show prejudice. see (Exhibit # 36, Copy of the U.S. District Court's - March 12, 2019, Order pages # 6-8).

Petitioner AlBritton argues that his current Convictions and Sentences for Abduction W/intent to defile and Rape for which he is being held in State Custody are both Un lawful and Un Constitutional, because the Commonwealth of Virginia Obtained his Convictions in direct Violation and discrimination of his 1st, 5th, 6th, 8th, and 14th Amendment Rights as an Indigent, pro se, State prisoner pending a Criminal Jury Trial, by intentionally denying and interfering with his access to the relevant 1999 S.A.N.E Protocol, which was Brady Material Evidence for his Trial while holding him prisoner in Isolation, so as to prevent its Discovery or use in Subpoenaing Favorable Expert Witnesses named in the S.A.N.E Protocol for his Trial, and thereby using False and perjurious Expert Witness Evidence and Testimony which the Commonwealth Knew would have been proven unreliable and irrelevant by the relevant 1999 S.A.N.E protocol, which the Commonwealth intentionally denied and also interfered AlBritton from gaining access there to during his

(Attachment #24) (Exhibit #9)

Jury Trial out of discrimination of his Constitutional Rights as an Indigent, pro se, prisoner being held in Jail Isolation. See - (Exhibit #36, copy of the U.S. District Court's March 12, 2019, Order: - page #6-8).

Moreover, Petitioner Allbritton argues that the Commonwealth should not be permitted in direct Violation of the U.S. Constitution to Maintain his current Convictions, sentences, and custody for Abduction and Rape, obtained by the Violation and discrimination of his applicable Constitutional Rights, where he has also been deprived of his Constitutional Rights to a meaningful Initial Federal Habeas review of the Commonwealth's intentional Brady Prosecutorial misconduct which was an underlying cause of multiple Violations, and that he was precluded from any opportunity of having received Federal Funding for Investigative Services for the developement of his Brady Evidence which would have proven his entitlement to Federal Relief, by the Commonwealth's further injustice of asserting and applying its procedural default Rule in > Porter - V. Warden to effectively Bar Federal Habeas Review and Relief, Whereas, it was unreasonable and impossible for Petitioner Allbritton to have been expected to search and have found the relevant 1999 S.A.N.E Protocol on the Internet in Public Records, where he was being held pro se, prisoner, in Jail Isolation Status, with No Phone, Computer, or Public Access to media, and then when he asked the Commonwealth for help and to perform its duty under Brady for the Material, the Commonwealth

(Attachment #25) (Exhibit #9)

lied and Falsely represented that the Commonwealth would search for the 1999 Protocol and Provide it to him for Trial. see (Exhibit #9, pages #25-27). Therefore, The Rule in > Porter should have never Barred Federal Review.

Closing Statement and Request for Relief

Wherefore, Petitioner DeVinche Javon ALBritton prays this Honorable Court upon Consideration of the foregoing Claim, Supporting Facts, Argument, and Exhibits presented in Support thereof, to Find that Petitioner's Constitutional Rights has been Violated, that his current Convictions, Sentences, and Custody for Abduction w/-Intent to defile and Rape were obtained in Violation of the Constitution of the United States and therefore must be Vacated, and that Petitioner ALBritton is entitled to be granted a New Jury Trial in full compliance with the U.S. Constitution or to be forever discharged

Respectfully Submitted

DeVinche J. ALBritton #1016653

(Exhibit #10)

FILED: April 5, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-141

(Exhibit #10)

In re: DEVINCHE ALBRITTON

Movant

ORDER

Movant has filed a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2254.

The court denies the motion.

Entered at the direction of Judge Motz with the concurrence of Judge King and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk