In The

Court of Appeals

Of Virginia

Brian David Hill,

Appellant,

v.

Commonwealth of Virginia, City of Martinsville

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF MARTINSVILLE

OPENING BRIEF OF APPELLANT

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Court (Record-pages 454-455). See paragraph 15 of Statement of the Facts. The passage of that law made the evidence new on April 7, 2021 or on the date which the law became effective which was July 1, 2021 because it had become admissible as matter of law by new law of Virginia Code § 19.2-271.6. Virginia Code § 19.2-271.6 which nullifies the Supreme Court of Virginia's precedential ruling barring the admissibility of the evidence of Autism Spectrum Disorder and mental illnesses prior to the passage of this new law. Again see the General Assembly's nullification of Stamper v. Commonwealth, 228 Va. 707 (1985). That law on new admissibility of evidence came into effect on July 1, 2021. Citing: the enactment of this new law ("04/07/21 House: Enacted, Chapter 523 (effective 7/1/21)" and "House: Enacted, Chapter 540 (effective 7/1/21)"). The evidence (Paragraphs 3 and 9, Statement of the Facts) became admissible with the acts of assembly of Virginia Code § 19.2-271.6 and thus the evidence was considered new to the Court on the date that it became admissible. That date would be April 7, 2021 or when the law came into effect on July 1, 2021. Even if the new evidence (Paragraphs 3 and 9, Statement of the Facts) was then subject to the due diligence requirement, the criminal conviction had not became final until the final appellate ruling of the direct appeal affirming the conviction on September 2, 2021. Petition for Rehearing was denied on September 9, 2021. See the final Writ Panel decision rendered in CAV case no. 1295-20-3. Appellant does not have a copy of the record from the Trial Court receiving the CAV final appeal decision in CAV case no. 1295-20-3 because the Clerk never transmitted that in their incomplete record. Appellant refers to CAV case no. 1295-20-3 for the affirmation of the criminal conviction. Appellant blames the Clerk for not having that record, IT IS THE CLERK'S FAULT, not the Appellant, see COMPLAINT filing against the Clerk transmitted to the CAV. The direct appeal of that conviction. See CAV decision on 09-02-2021, and Rehearing denied on 09-09-2021, case no. 1295-20-3. The conviction became final at the final decision of the appellate level on September 2, 2021 (See Paragraph 11, Statement of the Facts). Petition for Rehearing was timely filed on September 6, 2021, and was denied on September 9, 2021. The motion for new trial (Record-pages 1880-2088) and new evidence (See Paragraphs 3 and 9, Statement of the Facts) was considered filed on February 14, 2022. In a total of 165 days from the final conviction (See Paragraph 11, Statement of the Facts) without including the Petition for Rehearing's denial, the new evidence (See Paragraph 9, Statement of the Facts) was filed with the Court from the final conviction at the appellate level (See Paragraph 11, Statement of the Facts) entered 5 months, 1 week, and 5 days ago. With the final date of denial of the Petition for Rehearing (See Paragraph 11, Statement of the Facts), the new evidence was filed with the Court from the final conviction at the appellate level (See Paragraph 11, Statement of the Facts) entered 5 months, and 5 days ago. Wouldn't the new evidence (See Paragraphs 3 and 9, Statement of the Facts) and the timing on the date of when the new evidence (See Paragraphs 3 and 9, Statement of the Facts) was filed invoke the Circuit Court's jurisdiction to

Brian D. Hill to that police officer before he was arrested for the charge of indecent exposure (Record page 3-3). See Paragraph 17, Statement of the Facts. Appellant filed true and correct copies of his multiple letters requesting the body-camera footage (Record 1928-1947; 1652-1658) and one letter was mailed by Certified Mail (Record page 1652-1658) by Brian's grandparents Kenneth Forinash and Stella Forinash. Appellant had even filed video evidence (Record page 1573-1574) regarding the issues in support of the Motion for New Trial or Judgment of Acquittal (Record-pages 1880-2088). Destruction of Brady evidence after multiple court orders and Appellant's multiple letters (Record 1928-1947, 1652-1657) asking for the very Brady evidence materials is CONTEMPT OF COURT (Record 1895-1896). See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). The Circuit Court should have found Glen Andrew Hall in contempt of Court (Record 1895-1896) as requested by Appellant (Record page 1921) in his Motion for New Trial (Record-pages 1880-2088). Violating multiple court orders, Glen Andrew Hall should have been charged with contempt or be found in contempt (Record 1895-1896, 1921), and be sanctioned (Record 1921) for destruction of evidence subject to protection from any spoliation in accordance with Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). It is unlawful to destroy evidence during a criminal case investigation or even during the pendency of a criminal charge in a Court of Law. It is spoliation of evidence (See Record-pages 1912, 1919, 1920, 1921) and proves that Glen Andrew Hall destroyed evidence out of fear that it may be favorable to Brian David Hill, the Appellant, indicating a weakness of Appellees' cause (Record-pages 1896, 1897). See 2 J. WIGMORE (John Henry Wigmore), EVIDENCES § 278, at 133 James Harmon Chadborn ed., Little, Brown 1979) (1940) (emphasis added). Doesn't matter what evidence he filed in Court falsely attempting to portray the Appellant as guilty, when evidence was destroyed after Circuit Court made orders (See Record-pages 1990, 1990-1906, 2039-2047) as well as the General District Court (See Record-pages 1989, 1990, 2036-2038) all made orders for discovery. Refusal to follow a Court Order in a case is contempt of court by any party and by any attorney. A sanction is necessary in cases of refusing to follow a Court Order for the proper functioning of a Court and its authority and guarantee to have respect for the judicial officers of a Court. When an attorney for the Commonwealth of Virginia and City of Martinsville is ordered to turn over evidence to the defendant, never does and then destroys the evidence, it is unlawful and blatant cover up of evidence. It is refusal to comply with a Court Order after being ordered to do so. It is unlawful and must be sanctioned to protect the constitutionality, credibility, and respect for the Court. The evidence was indeed destroyed during a pending criminal case litigation. None of that was objected or denied by the Commonwealth of Virginia and City of Martinsville on the record. No responses were ever made on the record by the Appellees' before that motion was erroneously denied. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the

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GLOSSARY

Appellant	Brian David Hill the Appellant of the case
CAV	Court of Appeals of Virginia
Trial Court	Circuit Court for the City of Martinsville The Tribunal being appealed from.
CA	Commonwealth Attorney for the City of Martinsville and the Commonwealth of VA

SUMMARY

Brian David Hill, ("Appellant") files this Opening Brief pursuant to Rule 5A:16(a) of this Court, and this is direct appeal of the Circuit Court's final judgment (Record-pages 2266-2266) denying Appellant's motion for New Trial or Judgment of Acquittal (Record-pages 1880-2088). That decision was made on February 22, 2022. This is a criminal appeal of right.

This case concerns the criminal defendant's due process right or entitlement to a New Trial De Novo or New Trial by Jury upon filing new evidence which could not have been filed or accepted previously at the time of the final criminal conviction which is the judgment of guilty (Record-pages 454-455). The Trial Court denied Appellant's motion for a new trial on the basis of not having jurisdiction to have considered the motion on its merits.

Specifically, it involves the statutory, evidential, and constitutional right to a new trial in a criminal case when a criminal defendant has new evidence and submits new evidence to the Trial Court to justify the necessary need for a New Trial or Judgment of Acquittal in the best interest of justice. For many reasons, that judgment should be reversed, ordered and remanded with instructions in regard to legal right of Appellant's request for a New Trial in his criminal case.

The Supreme Court of Virginia has emphasized a Trial Court's right and ability to order a New Trial at the sound discretion of the Court on the basis of new

evidence which could not have been previously considered as evidence at the time of criminal conviction. In this case, on the date of November 18, 2019 (Record-pages 454-455), the judgment of guilty aka the criminal conviction. This is based on the Odum standard and the Tweed standard.

See Commonwealth v. Tweed, 264 Va. 524, (Va. 2002) ("2. Motions for new trials based on after-discovered evidence are addressed to the sound discretion of the trial judge, are not looked upon with favor, are considered with special care and caution, and are awarded with great reluctance. 3. A party who seeks a new trial based upon after-discovered evidence bears the burden to establish that the evidence (1) appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative, or collateral; and (4) is material, and such as should produce opposite results on the merits at another trial. The litigant must establish each of these mandatory criteria. 4. In the exercise of its discretion, the circuit court must consider whether the party who seeks the new trial on the basis of after-discovered evidence has established the mandatory criteria. In this case, the circuit court did not abuse its discretion because defendant failed to establish that the shooter's testimony was such as would have produced opposite results on the merits at another trial.").

See Odum v. Commonwealth, 225 Va. 123, 124 (Va. 1983) ("1. Motions for new trials based on after-discovered evidence are within the discretion of the Trial

Judge, are not favored, are considered carefully and cautiously, and are reluctantly awarded. 2. The movant for a new trial for after-discovered evidence bears the burden to prove the evidence (a) was discovered after trial, (b) could not have been discovered earlier by reasonable diligence, (c) is not merely cumulative, corroborative or collateral, and (d) is material and should produce opposite results on new trial. 3. Here the evidence, being substantive information that another person was the criminal agent, was (a) available and not discovered after trial, (b) could have been obtained at trial by the exercise of due diligence and, (c) would not have produced a different result on retrial on the motion based on the Trial Court's assessment of the credibility of defendant's witnesses and the testimony by the victims. Consequently, the requirements for a new trial based on after-discovered evidence are not met.").

The Trial Court said in its reasoning for denying the motion for a new trial that: "UPON CONSIDERATION of the defendant's Motion for Judgment of Acquittal or New Trial, it is ORDERED that said motion is hereby DENIED on the ground of lack of jurisdiction." See the Order on Record 2266-2266.

The Trial Court improperly denied a motion properly filed under Rule 3A:15 - Motion to Strike or to Set Aside Verdict; Judgment of Acquittal or New Trial, Va. R. Sup. Ct. 3A:15 ("(c)Judgment of Acquittal or New Trial. The court must enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court must

grant a new trial if it sets aside the verdict for any other reason.").

The Court had not held that the new evidence was insufficient to grant the motion requesting a New Trial or Judgment of Acquittal. Instead it mainly relied on the ground that it lacked jurisdiction. Therefore the Court did not make a ruling or sound discretion on the merits of that motion.

Arguably the new evidence could have been discovered in 2019, however the Trial Court could not consider it as evidence under the law at the time of conviction, therefore the Supreme Court of Virginia had reasoned in its case law that the new evidence regarding "mental health" or mental illnesses at the time of the charged offense was not legally admissible as evidence as a matter of law. The evidence became admissible after the passage of Virginia Code § 19.2-271.6, on April 7, 2021, and the law went into effect on July 1, 2021.

The evidence would be considered new evidence after the final conviction because at the time of the conviction in the year of 2019, the Supreme Court of Virginia as well as Virginia law barred this evidence from being considered as evidence in any Court of the Commonwealth. See Stamper v. Commonwealth, 228 Va. 707 (1985).

In the year of 2021, the General Assembly nullified the ruling of Stamper v. Commonwealth, 228 Va. 707 (1985); by the passage of Virginia Code § 19.2-271.6. It was signed by the Governor and became codified into law on April 7, 2021, and that law went into effect on July 1, 2021. Almost 2-years after the final criminal

conviction in the Circuit Court. See https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HB2047. Note: Link provided by family. The evidence becomes new to the Trial Court since the date of the passage of Virginia Code § 19.2-271.6 which would be April 7, 2021 or the date of the law coming into effect on July 1, 2021.

Also the finality of the criminal conviction was not made final until the CAV had made its final judgment affirming the conviction on September 2, 2021. See the final Writ Panel decision rendered in CAV case no. 1295-20-3, and the direct appeal of the criminal conviction was considered timely due to the unopposed motion for delayed appeal.

The 'procedural' and 'substantial' due process clauses in U.S. Const. amend. XIV of the U.S. Constitution and the Virginia Constitution's Article I., Section 11 due process clause require that the Virginia Courts consider a motion attacking a conviction by requesting a new trial or judgment of acquittal based upon new evidence under the acceptable standards set by the highest Courts. In this case, that highest Court would be the Supreme Court of Virginia. Due process requires that a Court follow the acceptable and recognized standards as set by the Supreme Court or of a higher Court in published opinions as well as set precedents.

By denying that motion, the Trial Court had committed a grave miscarriage of justice, a fundamental miscarriage of justice by refusing to give Appellant a new trial as requested in his motion. All assignments of error concern the final judgment

(Record-pages 2266-2266) denying Appellant's motion for New Trial or Judgment of Acquittal.

All assignments of error concern the final judgment (Record-pages 2266-2266) denying Appellant's motion for Judgment of Acquittal.

This amended brief will use only the record instead of any Joint Appendix regarding what the Motion for New Trial or Judgment of Acquittal was challenging. That issue is preserved on appeal as the ultimate fact of what final judgment aka the criminal conviction which the Motion for Judgment of Acquittal was attempting to challenge.

Assignments of Error

Assignment of error 1. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by holding that it lacked jurisdiction to have considered the new evidence (Record-pages Evidence #1: 1555-1606; pages Evidence #2: 1609-1670; pages Evidence #3: 2089-2251, See paragraphs 3 and 9 of Statement of the Facts) in support of the motion and that very motion (Record-pages 1880-2088) on its merits without even an evidentiary hearing. See Record-pages 2266-2266 of the Order. The issue of new evidence (Record-pages Evidence #1: 1555-1606; pages Evidence #2: 1609-1670; pages Evidence #3: 2089-2251) was held in the Trial Court because it is new due to the passage of this new law cited in the motion (Record-pages 1880, 1555, 1609, 2089). Under the standards of Odum v. Commonwealth, 225 Va. 123, 124 (Va. 1983) and Commonwealth v. Tweed, 264

Va. 524, (Va. 2002); the Trial Court may consider a post-conviction motion for a New Trial at the sound discretion of the Court for new evidence. See paragraph 15 of Statement of the Facts. This judgment is an error of law. Sound discretion was not even used because the new evidence (See paragraphs 3 and 9 of Statement of the Facts) was not even considered due to the holding of lacking jurisdiction. They do have jurisdiction to consider motions with new evidence (See paragraphs 3 and 9 of Statement of the Facts) or even any proof of fraud on the court (See Record-pages 1911, 1702) or on any evidence of CONTEMPT OF COURT (pages 187-193, 524-545, 550, 552) by the Commonwealth Attorney to have considered the motion on the basis of new evidence (See paragraph 10 of Statement of the Facts). New evidence because it had become new evidence on April 7, 2021 or July 1, 2021 due to the passage of Virginia Code § 19.2-271.6. That statute was brought up on the record of the Trial Court, so that issue was preserved on appeal (See Record, pages 1893-1896, 1882-1883, 1891-1892; Paragraph 13 of Statement of the Facts). That law on new admissibility of evidence came into effect on July 1, 2021.[1] Citing: the enactment of this new law ("04/07/21 House: Enacted, Chapter 523 (effective 7/1/21)" and "House: Enacted, Chapter 540 (effective 7/1/21)"). At the time of the conviction, that evidence was inadmissible (See Record, pages 1886-1887), so it is

[1] See passage of new law (links given by family): https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SB1315 and https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HB2047 04/07/21 House: Enacted, Chapter 540 (effective 7/1/21); 04/07/21 House: Enacted, Chapter 523 (effective 7/1/21)

new after the change of the law. Prior to the passage of that law, the newly filed evidence would not legally be considered as evidence and could not have been used at Trial under the general rules of evidence. If the law does not allow evidence to be admissible in a case, it is treated as if it is not evidence at all. When the passage of a new law or Supreme Court decision rules previously inadmissible evidence as admissible, then the date of that admissibility is the date that the evidence becomes available as new evidence. The Court had not held that the new evidence (See paragraphs 3 and 9 of Statement of the Facts) was insufficient to grant the motion requesting a New Trial or Judgment of Acquittal. Instead it mainly relied on the ground that it lacked jurisdiction (Record-pages 2266-2266). Therefore the Court did not make a ruling or sound discretion on the merits of that motion. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 2. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by holding that it lacked jurisdiction to have granted or considered the motion for a new trial (Record-pages 1880-2088) without any evidentiary hearing (See the Table of Contents of the record, no transcript, no records of hearings) or order a response from the Commonwealth's Attorney (no record of any order asking for a response, it doesn't exist) based on newly admissible evidence

(See paragraphs 3 and 9 of Statement of the Facts) which was not made admissible (See Record, pages 1886-1887) at the verdict of guilty on November 18, 2019 in the Circuit Court (Record-pages 454-455). See paragraph 15 of Statement of the Facts. The passage of that law made the evidence new on April 7, 2021 or on the date which the law became effective which was July 1, 2021 because it had become admissible as matter of law by new law of Virginia Code § 19.2-271.6. Virginia Code § 19.2-271.6 which nullifies the Supreme Court of Virginia's precedential ruling barring the admissibility of the evidence of Autism Spectrum Disorder and mental illnesses prior to the passage of this new law. Again see the General Assembly's nullification of Stamper v. Commonwealth, 228 Va. 707 (1985). That law on new admissibility of evidence came into effect on July 1, 2021.[2] Citing: the enactment of this new law ("04/07/21 House: Enacted, Chapter 523 (effective 7/1/21)" and "House: Enacted, Chapter 540 (effective 7/1/21)"). The evidence (Paragraphs 3 and 9, Statement of the Facts) became admissible with the acts of assembly of Virginia Code § 19.2-271.6 and thus the evidence was considered new to the Court on the date that it became admissible. That date would be April 7, 2021 or when the law came into effect on July 1, 2021. Even if the new evidence (Paragraphs 3 and 9, Statement of the Facts) was then subject to the due diligence requirement, the criminal conviction

[2] See passage of new law (links given by family): https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SB1315 and https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HB2047 04/07/21 House: Enacted, Chapter 540 (effective 7/1/21); 04/07/21 House: Enacted, Chapter 523 (effective 7/1/21)

had not became final until the final appellate ruling of the direct appeal affirming the conviction on September 2, 2021. Petition for Rehearing was denied on September 9, 2021. See the final Writ Panel decision rendered in CAV case no. 1295-20-3. Appellant does not have a copy of the record from the Trial Court receiving the CAV final appeal decision in CAV case no. 1295-20-3 because the Clerk never transmitted that in their incomplete record. Appellant refers to CAV case no. 1295-20-3 for the affirmation of the criminal conviction. Appellant blames the Clerk for not having that record, IT IS THE CLERK'S FAULT, not the Appellant, see COMPLAINT filing against the Clerk transmitted to the CAV. The direct appeal of that conviction. See CAV decision on 09-02-2021, and Rehearing denied on 09-09-2021, case no. 1295-20-3. The conviction became final at the final decision of the appellate level on September 2, 2021 (See Paragraph 11, Statement of the Facts). Petition for Rehearing was timely filed on September 6, 2021, and was denied on September 9, 2021. The motion for new trial (Record-pages 1880-2088) and new evidence (See Paragraphs 3 and 9, Statement of the Facts) was considered filed on February 14, 2022. In a total of 165 days from the final conviction (See Paragraph 11, Statement of the Facts) without including the Petition for Rehearing's denial, the new evidence (See Paragraph 9, Statement of the Facts) was filed with the Court from the final conviction at the appellate level (See Paragraph 11, Statement of the Facts) entered 5 months, 1 week, and 5 days ago. With the final date of denial of the Petition for Rehearing (See Paragraph 11, Statement of the Facts), the new evidence was filed

with the Court from the final conviction at the appellate level (See Paragraph 11, Statement of the Facts) entered 5 months, and 5 days ago. Wouldn't the new evidence (See Paragraphs 3 and 9, Statement of the Facts) and the timing on the date of when the new evidence (See Paragraphs 3 and 9, Statement of the Facts) was filed invoke the Circuit Court's jurisdiction to have acted on the motion by considering its merits? For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 3. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by holding that it lacked jurisdiction because it created a fundamental "miscarriage of justice" (See Record page 1882) by permanently convicting an innocent man or woman in response to the Appellant's Motion for New Trial or Judgment of Acquittal (Record-pages 1880-2088). It is also considered cruel and unusual punishment (See Record-pages 2269, 2276) to convict an innocent person of a charged crime and demand legal fees out of a SSI disability dependent. In violation of substantial and procedural due process of Appellant, the criminal defendant (See Record-pages 1915, 2274, 2275, 2276). That would be unconstitutional under U.S. Const. amend. XIV and the Virginia Constitution's Article I., Section 11 due process clause. Also in violation of Article I. Bill of Rights,

Section 9. ("Prohibition of excessive bail and fines, cruel and unusual punishment, suspension of habeas corpus, bills of attainder, and ex post facto laws"). The conviction of a man who may be actually innocent of his criminal charge with the new evidence (See Paragraphs 3 and 9, Statement of the Facts) filed and presented to the Court. The issues of actual innocence in asking for a New Trial or Judgment of Acquittal was held in the Trial Court (See Record-pages 1559, 1569, 1570, 1608-1608, 1881) which allows the CAV to make a ruling similar to authoritative case law of *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, 24 Fla. L. Weekly Supp. 213 (2013); or Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (See Record page 1881). Therefore, the CAV or Supreme Court of Virginia should hold case law similar to precedential U.S. Supreme Court case law authority of *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, 24 Fla. L. Weekly Supp. 213 (2013) or Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (See Record page 1881). See McQuiggin v. Perkins, 569 U.S. 383, (2013) ("Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808, and House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1"). See McQuiggin v. Perkins, 569 U.S. 383, (2013) ("The Court has applied this "fundamental miscarriage of justice exception" to overcome various procedural defaults, including, as most relevant here, failure to observe state procedural rules, such as filing deadlines. See Coleman

v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640."). The Circuit Court erred because of permanently holding an innocent man convicted of a crime on a legal technicality of having no jurisdiction due to Rule 1:1 which the new evidence draws into question his guilt or his innocence. Rule 1:1 should not apply to somebody with new evidence proving innocence. The Trial Court did not mention Rule 1:1 when it claimed that it had no jurisdiction (Record-pages 2266-2266) but the judge does not cite the exact rule or statute. However, that issue (issue of invoking claim of not having jurisdiction) was held by the judge at the Trial Court since he made his ruling to be interpreted at the Appeals Court. It isn't Appellant's fault but that decision was the judge not specifying which exact and specific law or rule which it relied upon. However Appellant interprets from the final order/judgment that the Trial Court had used Rule 1:1. If Appellant can't do that to argue holding this issue, then the judge didn't properly invoke that rule or any rule which would make his order erroneous by not invoking any statute or rule to justify its decision. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 4. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by holding that it lacked jurisdiction because that

decision is unconstitutional under procedural due process and substantive due process under U.S. Const. amend. XIV and the Virginia Constitution's Article I., Section 11 due process clauses'. The issue of due process was brought up in the Trial Court record and was preserved in the Trial Court (See Record-pages 1915, 2274, 2275, 2276). It is unconstitutional because the Court had wrongfully ignored all of the new evidence (See Paragraphs 3 and 9, Statement of the Facts) in support of the Appellant's post-conviction motion for a new trial or judgment of acquittal (Record-pages 1880-2088). New evidence which may even infer "Actual Innocence" (See Paragraph 12, Statement of the Facts) with the passage of Virginia Code § 19.2-271.6 (See Paragraph 13, Statement of the Facts). That was the error to deny that motion without even an evidentiary hearing (No transcripts in the Trial Court record, even if the incomplete record transmitted from Trial Court was complete) because such a decision to ignore the new evidence (no evidence in Trial Court record that evidence was reviewed by the Trial Court) would violate the Virginia and United States Constitutions' Due Process Clauses (See Record-pages 1915, 2274, 2275, 2276). A criminal defendant litigant must be allowed to prove the newly admissible evidence (See Paragraphs 3 and 9, Statement of the Facts) which are the basis for such a constitutional or legal challenge to a final criminal conviction (Record-pages 454-455) when the new evidence (See Paragraphs 3 and 9, Statement of the Facts) shows that the conviction may be erroneous as a matter of law. It is unconstitutional for a judge to ignore new evidence in support of any motion or request for relief. For

the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 5. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by ignoring the new evidence (See Paragraphs 3 and 9, Statement of the Facts) in support of the Motion for a New Trial (Record-pages 1880-2088) or Judgment of Acquittal which was not admissible at the time of the criminal conviction on November 18, 2019, and then the final conviction from the appellate level ruling on September 2, 2021. See paragraph 11, Statement of the Facts. Petition for Rehearing was timely filed on September 6, 2021, and was denied on September 9, 2021. Again, See paragraph 11, Statement of the Facts. The evidence was not admissible until the new law was signed by the Governor on April 7, 2021 or on the date that the new law went into effect which would be July 1, 2021. That new law of Virginia Code § 19.2-271.6 was cited in Appellant's motion and supporting pleadings and therefore that issue was preserved in the Trial court. See paragraph 13, Statement of the Facts. A Court must at least determine if the new evidence (See Paragraphs 3 and 9, Statement of the Facts) was newly discovered, on the date which evidence became available at a later time, or could not have been admissible at the time of the finding of guilty of a crime, and hold the Motion for a New Trial at least under the standards set by Odum v. Commonwealth, 225 Va. 123,

124 (Va. 1983); and Commonwealth v. Tweed, 264 Va. 524 (Va. 2002). The very issue of new trial came from the Motion for "New Trial" itself and so that issue was preserved for appeal from the Trial Court (See Record, pages 1535, 1886, 1889, 1890). Ignoring of evidence. See paragraph 15 of Statement of the Facts. New evidence (See Paragraphs 3 and 9, Statement of the Facts) does warrant disturbing a final judgment or final order (Record-pages 454-455). Especially if that new evidence (See Paragraphs 3 and 9, Statement of the Facts) further proves "Actual Innocence" (See Paragraph 12, Statement of the Facts) where no reasonable juror can find the defendant guilty beyond a reasonable doubt upon reviewing over the new evidence. Rule 1:1 does not apply to new evidence. Rule 1:1 was interpreted from the judge's final order/judgment (Record-pages 2266-2266) claiming not having jurisdiction. That issue was preserved by the final order/judgment (Record-pages 2266-2266) because the order was given after the motion was filed after the 21-day period of the final conviction from the appellate level back to the Trial Court. See Paragraph 11, Statement of the Facts. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 6. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by ignoring the new evidence (See Paragraphs 3 and 9,

Statement of the Facts) in support of the Motion for a New Trial (Record-pages 1880-2088) when the new evidence pursuant to Code § 19.2-271.6 (See Paragraph 13, Statement of the Facts) proves as a matter of law that Appellant did not have the intent necessary to violate § 18.2-387 (See Record-pages 1883, 1887). Indecent exposure and Local Ordinance 13-17 (See Record-pages 1, 39, 46). The § 18.2-387 and/or Local Ordinance 13-17 statute clearly states in part: "Every person **who intentionally** makes an obscene display or exposure of his person, or the private parts thereof, in any public place…" (Citation reformatted, certain parts highlighted, emphasis added). Citation of Virginia Code § 19.2-271.6 law is in footnote[3]. Intent has to be proven by the Commonwealth of Virginia (See Record-pages 1883, 1887). The new evidence proves that Appellant did not have the intent necessary to violate § 18.2-387. Indecent exposure and did not have the intent necessary to violate Local Ordinance 13-17. Appellant did not have the intent (See Record-pages 1883, 1887) because of his Autism Spectrum Disorder (Record-pages 2051-2070), Psychosis

[3] Virginia Code § 19.2-271.6: "B. In any criminal case, evidence offered by the defendant concerning the defendant's mental condition at the time of the alleged offense, including expert testimony, is relevant, is not evidence concerning an ultimate issue of fact, and shall be admitted if such evidence (i) tends to show the defendant did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence. For purposes of this section, to establish the underlying mental condition the defendant must show that his condition existed at the time of the offense and that the condition satisfies the diagnostic criteria for (i) a mental illness, (ii) a developmental disability or intellectual disability, or (iii) autism spectrum disorder as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association." // PART 2: Record-pages 2115-2123, 1585, 1587, 2069, 2115-2124, 2200 has brittle diabetes

Disorder (Record-pages 2065-2070), Type 1 brittle diabetes (See footnote PART 2, **Record-pages 27-35, 214, 216, 489, 744-753, 829**), and Obsessive Compulsive Disorder (Record-pages 2208, 2068). The new evidence (See Paragraphs 3 and 9, Statement of the Facts) makes the entire criminal conviction (Record-pages 454-455) erroneous as a matter of law and is a fundamental "miscarriage of justice" (See Record page 1882). The new evidence (See Paragraphs 3 and 9, Statement of the Facts) and the arguments and merits of the Appellant's motion for a New Trial or Judgment of Acquittal (Record-pages 1880-2088) and arguments and merits of the supporting pleadings (See Paragraphs 3 and 9, Statement of the Facts) has demonstrated that if the trier of fact considered the new evidence as a whole with the evidence proffered by the Commonwealth of Virginia (See Record-pages 1-3), that Appellant had no intent (See Record-pages 1883, 1887) to commit any crime on September 21, 2018, when legally the evidence of intent is necessary to violate § 18.2-387. Indecent exposure and intent is necessary for Appellant to have violated Martinsville's Local Ordinance 13-17. Intent needs to be proven before a trier of fact can convict a criminal defendant of a crime. The passage of Code § 19.2-271.6 (See Paragraph 12, Statement of the Facts) now requires that the CAV and even the Supreme Court of Virginia make a new decision of law in regards to how a trier of fact determines whether a criminal defendant with autism (Record-pages 2051-2070), or a mental (Record-pages 2065-2070), or intellectual disorder had the intent to commit an actus reus without any justification, excuse, or other defense. While

Virginia does not appear to have established a clean definition of criminal intent, Black's Law Dictionary defines it as "[a]n intent to commit an actus reus without any justification, excuse, or other defense." (Record-pages 1888). For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 7. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by holding that it lacked jurisdiction because Rule 1:1 does not apply to a final conviction when the ground of new evidence (See Paragraphs 3 and 9, Statement of the Facts) is submitted to the Court in support of a Motion for a New Trial or Judgment of Acquittal (Record-pages 1880-2088). See Paragraph 14, Statement of the Facts, in regards to the issue "not" having jurisdiction preserved in the Trial Court is interpreted as to being of Rule 1:1. Even if technically the autism (Record-pages 2051-2070) and mental disorder (Record-pages 2065-2070)(Record-pages 2208, 2068) evidence could have been discovered in 2019 before the final conviction on November 18, 2019 (Record-pages 454-455), but that same filed evidence (See Paragraphs 3 and 9, Statement of the Facts) would have been inadmissible under Stamper v. Commonwealth, 228 Va. 707 (1985) (Record page 1886). It is the passage of this new law of Virginia Code § 19.2-271.6 on April 7, 2021 (See Paragraph 13, Statement of the Facts), but became effective on July 1,

2021 which made the evidence admissible in the year of 2021. That evidence was inadmissible from November 18, 2019, the date of the criminal conviction (Record-pages 454-455) until April 7, 2021 or when the law became effective on July 1, 2021. That would be 1 year, 4 months, 2 weeks, and 6 days after the criminal conviction. On the date when the law became effective; that would be 1 year, 7 months, 1 week, and 6 days after the criminal conviction of guilt. See Paragraph 11, Statement of the Facts. The CAV affirmed the conviction on September 2, 2021, and Petition for Rehearing was denied on September 9, 2021. Again, See Paragraph 11, Statement of the Facts. New evidence (See Paragraphs 3 and 9, Statement of the Facts) should outweigh the finality of a criminal conviction (Record-pages 454-455) or finality of a judgment of a Court (Record-pages 454-455) when the new evidence (See Paragraphs 3, 4 and 9, Statement of the Facts) shows that the conviction is based on errors of law, errors of fact, and is erroneous. See Paragraph 14, Statement of the Facts. Rule 1:1 does not apply to new evidence (See Paragraphs 3, 4 and 9, Statement of the Facts) which was inadmissible at the time of final judgment (Record-pages 454-455) prior to timely direct appeal. See Paragraph 11, Statement of the Facts. The date the 2021 law became effective or the date of the law's passage by acts of General Assembly may be when the evidence became new to the Circuit Courts or any Court of the Commonwealth of Virginia. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by

reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 8. The Appellant withdrawing his appeal by Motion to Withdraw Appeal (See Record-pages 442-453) which caused the criminal conviction of Appellant on November 18, 2019 (See Record-pages 454-455) did not waive his constitutional and/or legal right to overturn his conviction collaterally and on the ground of actual innocence (See Record page 442-453). New evidence ground is not waived by withdrawing appeal (See Record-pages 442-453) because no guilty plea was ever entered. See Paragraph 19, Statement of the Facts. New Trial or Judgment of Acquittal (Record-pages 1880-2088) is warranted on new evidence (See Paragraphs 3, 4, and 9, Statement of the Facts). Appellant explained why he had withdrawn his appeal in his Motion to Withdraw Appeal (See Record-pages 442-453). He did not waive all rights to overturn his conviction at a later time when evidence became available and when evidence previously inadmissible became admissible at a later time. This issue was preserved earlier in the Trial Court record which gave Appellant has preserved right to file a Motion for New Trial or Judgment of Acquittal. He didn't waive all rights when he withdrawn appeal in the Circuit Court due to the circumstances at that time which forced him into filing that motion. Part of it was corruption with the Public Defender and corruption of the Court ignoring his pro se motions. Read the circumstances in Record-pages 442-453. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE

FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 9. The Appellant had raised Virginia Code § 19.2-271.6. ("Evidence of defendant's mental condition admissible; notice to Commonwealth.") (See Paragraph 13, Statement of the Facts) in his Motion to justify that a New Trial or Judgment of Acquittal (Record-pages 1880-2088) is necessary for the ends of justice (Record page 1922). He had enough new evidence (See Paragraphs 3, 4 and 9, Statement of the Facts) to justify that the Circuit Court did have jurisdiction to consider that motion on its merits and consider holding an evidentiary hearing or order a response from the Commonwealth of Virginia. There is nothing in the record showing that any evidentiary hearing was ever ordered. The reasons why the Court should have held an evidentiary hearing or conducted any further proceedings was thanks to the passage of Virginia Code § 19.2-271.6 in April 7, 2021. Law became effective on July 1, 2021. Has the Appellant properly raised his defense or properly invoked Virginia Code § 19.2-271.6 in his post-conviction Motion to justify the relief sought (See Paragraph 13, Statement of the Facts)? Has new evidence (See Paragraphs 3, 4 and 9, Statement of the Facts) invoked the Circuit Court's jurisdiction? For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set**

forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.

Assignment of error 10. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by not holding accountable the violator of multiple Court Orders for discovery (Record-pages 2036-2046), the violator named attorney Glen Andrew Hall, Esquire who is the Commonwealth Attorney for the City of Martinsville and for the Commonwealth of Virginia. He violated those Court Orders (Record-pages 1895-1902) by unlawfully destroying evidence pursuant to Brady v. Maryland (Record page 1880, 1895-1902; Record-pages 325-330) and multiple Court Orders from both the Circuit Court for the City of Martinsville (Record-pages 2036-2046) and the General District Court for the City of Martinsville (Record-pages 2036-2046). Destroying biological evidence such as blood vials (Record-pages 1895-1990, 1914, 1670), destroying video evidence recorded by Martinsville Police Officer Robert Jones through usage of body-camera (Record-pages 1908-1913, 1652-1657). The video evidence concerning statements made by Brian D. Hill to that police officer before he was arrested for the charge of indecent exposure (Record page 3-3). See Paragraph 17, Statement of the Facts. Appellant filed true and correct copies of his multiple letters requesting the body-camera footage (Record 1928-1947; 1652-1658) and one letter was mailed by Certified Mail (Record page 1652-1658) by Brian's grandparents Kenneth Forinash and Stella Forinash. Appellant had even filed video evidence (Record page 1573-

1574) regarding the issues in support of the Motion for New Trial or Judgment of Acquittal (Record-pages 1880-2088). Destruction of Brady evidence after multiple court orders and Appellant's multiple letters (Record 1928-1947, 1652-1657) asking for the very Brady evidence materials is CONTEMPT OF COURT (Record 1895-1896). See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). The Circuit Court should have found Glen Andrew Hall in contempt of Court (Record 1895-1896) as requested by Appellant (Record page 1921) in his Motion for New Trial (Record-pages 1880-2088). Violating multiple court orders, Glen Andrew Hall should have been charged with contempt or be found in contempt (Record 1895-1896, 1921), and be sanctioned (Record 1921) for destruction of evidence subject to protection from any spoliation in accordance with Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). It is unlawful to destroy evidence during a criminal case investigation or even during the pendency of a criminal charge in a Court of Law. It is spoliation of evidence (See Record-pages 1912, 1919, 1920, 1921) and proves that Glen Andrew Hall destroyed evidence out of fear that it may be favorable to Brian David Hill, the Appellant, indicating a weakness of Appellees' cause (Record-pages 1896, 1897). See 2 J. WIGMORE (John Henry Wigmore), EVIDENCES § 278, at 133 James Harmon Chadborn ed., Little, Brown 1979) (1940) (emphasis added). Doesn't matter what evidence he filed in Court falsely attempting to portray the Appellant as guilty, when evidence was destroyed after Circuit Court made orders (See Record-pages 1990, 1990-1906, 2039-2047) as well as the General District Court (See Record-

pages 1989, 1990, 2036-2038) all made orders for discovery. Refusal to follow a Court Order in a case is contempt of court by any party and by any attorney. A sanction is necessary in cases of refusing to follow a Court Order for the proper functioning of a Court and its authority and guarantee to have respect for the judicial officers of a Court. When an attorney for the Commonwealth of Virginia and City of Martinsville is ordered to turn over evidence to the defendant, never does and then destroys the evidence, it is unlawful and blatant cover up of evidence. It is refusal to comply with a Court Order after being ordered to do so. It is unlawful and must be sanctioned to protect the constitutionality, credibility, and respect for the Court. The evidence was indeed destroyed during a pending criminal case litigation. None of that was objected or denied by the Commonwealth of Virginia and City of Martinsville on the record. No responses were ever made on the record by the Appellees' before that motion was erroneously denied. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

Assignment of error 11. The Circuit Court erred as a matter of law in its order (Record-pages 2266-2266) by not giving a New Trial or Judgment of Acquittal (Record-pages 1880-1924) in response as a sanction to the CONTEMPT OF COURT (See Paragraph 10, Statement of the Facts) by the Commonwealth's

Attorney Glen Andrew Hall, Esq. by unlawfully destroying evidence (Again, See Paragraph 10, Statement of the Facts). That issue was preserved for appeal, see the references in Paragraph 10 in the Statement of the Facts. He violated and defied (See Record-pages 1895-1896, 1912, 1919, 1920, 1921) the court orders (Circuit Court: See Record-pages 1990, 1990-1906, 2039-2047) (General District court: See Record-pages 1989, 1990, 2036-2038) by destroying evidence pursuant to Brady v. Maryland and multiple Court Orders from both the Circuit Court for the City of Martinsville (Circuit Court: See Record-pages 1990, 1990-1906, 2039-2047) and the General District Court for the City of Martinsville (General District court: See Record-pages 1989, 1990, 2036-2038). Destroying biological evidence such as blood vials (Record-pages 1895-1990, 1914, 1670), destroying video evidence recorded by Martinsville Police Officer Robert Jones through usage of body-camera (Record-pages 1910-1916, 1919-1920). The video evidence concerning statements made by Brian D. Hill to that police officer before he was arrested for the charge of indecent exposure. Destruction of Brady evidence after multiple court orders asking for the very evidence is CONTEMPT OF COURT. A court should have found Glen Andrew Hall in contempt of Court as requested by Appellant (Record page 1921). Violating multiple court orders (Circuit Court: See Record-pages 1990, 1990-1906, 2039-2047) (General District court: See Record-pages 1989, 1990, 2036-2038), Glen Andrew Hall should have been charged with contempt or be found in contempt as requested by Appellant (Record page 1921), and be sanctioned (Record page

1921) for destruction of evidence subject to protection from any spoliation in accordance with Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). It is unlawful to destroy evidence during a criminal case investigation or even during the pendency of a criminal charge in a Court of Law. It is spoliation of evidence and proves that Glen Andrew Hall destroyed evidence out of fear that it may be favorable to Brian David Hill, the Appellant, indicating a weakness of Appellees' cause (Record-pages 1896, 1897). See 2 J. WIGMORE (John Henry Wigmore), EVIDENCES § 278, at 133 James Harmon Chadborn ed., Little, Brown 1979) (1940) (emphasis added). Doesn't matter what evidence he filed in Court attempting to falsely portray the Appellant as guilty, when evidence was destroyed after Circuit Court made orders (See Record-pages 1990, 1990-1906, 2039-2047) as well as the General District Court (See Record-pages 1989, 1990, 2036-2038) all made orders for discovery. Refusal to follow a Court Order in a case is contempt of court. A sanction is necessary in cases of refusing to follow a Court Order for the proper functioning of a Court and its authority and guarantee to have respect for the judicial officers of a Court. When an attorney for the Commonwealth of Virginia and City of Martinsville is ordered to turn over evidence to the defendant, never does and then destroys the evidence, it is unlawful and blatant cover up of evidence. It is unlawful and must be sanctioned to protect the constitutionality, credibility, and respect for the Court. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening

Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Brian David Hill, the Appellant, filed a motion on or about February 14, 2022 entitled: "MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL…" (RECORD 1880-2088). This motion itself has fourteen (14) Exhibits of evidence.

In summary, the Appellant had filed a motion for a New Trial or Judgment of Acquittal in his criminal case with new evidence. That was in the Circuit Court for the City of Martinsville. Case number is CR19000009-00 (Record-pages 1-457). Appellant filed new evidence in four or five parts aka separate pleadings (RECORD 1880-2088, 718-880, 184-235, 238-299).

Appellant had filed evidence of being diagnosed with a "psychosis disorder" regarding his statements of the time of the offense so it is relevant ((Record-pages 2065-2070) by a forensic psychiatrist Dr. Conrad Daum who worked for Piedmont Community Services (**Record 2071-2076**). Appellant had filed evidence of being diagnosed with an "autism spectrum disorder" regarding his statements of the time of the offense so it is relevant (Record-pages 2051-2070). Appellant had filed evidence of being diagnosed with a Type 1 brittle Diabetes which is relevant to the time of the offense due to being a permanent health condition of severe health issues

(**Record-pages 27-35, 214, 216, 489, 744-753, 829**). Appellant had filed evidence of being diagnosed with an "obsessive compulsive disorder" regarding his statements or behavior at the time of the offense, so it is relevant (Record-pages 2208, 2068). Appellant had filed evidence of medical records from the Martinsville City Jail proving "further new evidence in support of Defendant's "MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL BASED UPON NEW EVIDENCE WHICH COULD NOT BE ADMISSIBLE AT THE TIME OF CONVICTION…" (Record 2089-2251). It proved that something was medically wrong with Brian David Hill around the time he was in jail after being arrested for indecent exposure.

On or about April 14, 2022, the Appellant had also filed a memorandum entitled: "NEW MEDICAL EVIDENCE IN SUPPORT OF DEFENDANT'S "MOTION…" (Record 2089-2251).

On or about April 14, 2022, the Appellant had also filed a memorandum entitled: "2ND WITNESS LETTER; AMENDED WITNESS LETTER; LEGAL ARGUMENTS AND AFFIDAVITS IN SUPPORT OF DEFENDANT'S "MOTION…" (Record 1555-1606).

On or about April 14, 2022, the Appellant had also filed a memorandum entitled: "LAST MINUTE EVIDENCE IN SUPPORT OF DEFENDANT'S "MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL…" (Record 1609-1670).

Originally Brian David Hill was charged in the General District Court for the City of Martinsville, under case number C18-3138, on September 21, 2018. The reason was over a CRIMINAL COMPLAINT (Record-pages 1-3) of Martinsville Police Department through its officer Robert Jones charging Brian David Hill with violation of "13-17/18.2-387". Referencing Virginia Code § 18.2-387 and/or Local Ordinance 13-17. Indecent exposure. Charged with "intentionally make an obscene display of the accused's person or private parts in a public place or in a place where others were present." (Record-pages 1-1).

Appellant had a bench trial on December 21, 2018, and was found guilty by a judge (Record-pages 46-46). Was given time served sentence (Record-pages 46-46, 4) but Appellant had appealed the case to the Circuit Court for the City of Martinsville by Trial De Novo (Record-pages 45, 47-52).

The disposition paper of conviction after being found guilty doesn't specify being convicted of the crime of Virginia Code § 18.2-387. Indecent exposure. Only specifies being found guilty of and convicted of the crime of Local Ordinance 13-17. In the original charge Appellant was charged with violation of "13-17/18.2-387" meaning Local Ordinance 13-17 and Virginia Code § 18.2-387. However the conviction only consists of being convicted of violating Local Ordinance 13-17 (Record-pages 46-46).

Appellant's appeal was successful, case was filed in the Circuit Court and the conviction was reset for a New Trial by Trial De Novo in the Virginia's

constitutional court of record (Record-pages 68-68).

Appellant had filed a Motion to Withdraw Appeal on November 12, 2019 (Record-pages 442-453).

Appellant had been convicted by the Circuit Court on November 18, 2019 (Record-pages 454-455). However, there was no guilty plea by Appellant. Record page 454 written this: "Other: DEF ~~CHANGED HIS PLEA TO GUILTY AND~~ AFFIRMED JUDG GDC, PAY COURT COSTS." Appellant is showing the true strikethrough, the Judge had stricken the words "CHANGED HIS PLEA TO GUILTY AND…" with what appeared to be a black marker pen. So, the Judge of the Trial Court did not consider that Appellant honestly decided that he was guilty because in his Motion to Withdraw Appeal he said that he did not waive his actual innocence or legal innocence, he did not plead guilty by any stretch of technicality (Record page 454).

There is no transcript as there were no hearings by the Circuit Court in regards to the Motion for New Trial or Judgment of Acquittal.

STATEMENT OF THE FACTS

1. The Commonwealth may have their own "Statement of the Facts" as is their right, but the Appellant will present his own Statement of the Facts based upon what was filed in the Motion for New Trial of Judgment of Acquittal.

2. For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE NATURE OF THE CASE AND MATERIAL

PROCEEDINGS BELOW" in this Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, as if fully set forth herein, all paragraphs in pages 31-35 of this brief.

3. Appellant had filed a "MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL BASED UPON NEW EVIDENCE…" (RECORD 1880-2088). This was pursuant to Virginia Rules of the Sup. Ct. 3A:15; Virginia Code § 19.2-271.6; and Schlup v. Delo, 513 U.S. at 327 — 28. Settles v. Brooks, Civil Action No. 07-812, 18 n.6 (W.D. Pa. Jun. 26, 2008). This motion itself has fourteen (14) Exhibits of evidence (Record-pages 1917-2088).

EXHIBIT 1. DISABLED PARKING PLACARDS OR LICENSE PLATES APPLICATION (Record 1925-1927)

EXHIBIT 2. Copy of pro se motion for discovery with proof that Police Chief G. E. Cassady was mailed letters requesting police body-camera footage (Record 1928-1951)

EXHIBIT 3. One page excerpt of Document #163, Filed 12/12/18, Page 4 of 6, one page of Federal Court Affidavit/Declaration or written filing, Document #163. Case #1:13-cr-435-1. (Record 1952-1953)

EXHIBIT 4. FEDERAL COURT TRANSCRIPT of Supervised Release Violating hearing regarding the criminal charge of September 21, 2018, in General District Court. Officer Robert

Jones of Martinsville Police Department had testified and thus is relevant to this MOTION. (Record 1954-2035)

EXHIBIT 5. COURT ORDER – GENERAL DISTRICT COURT (Record 2036-2038)

EXHIBIT 6. COURT ORDER – CIRCUIT COURT (Record 2039-2042)

EXHIBIT 7. COURT ORDER – CIRCUIT COURT (Record 2043-2046)

EXHIBIT 8. Article: Body Cameras Proving Useful for Martinsville Police; Wednesday, May 1st 2013; WSET/ABC13 NEWS (Record 2047-2050)

EXHIBIT 9. Interview and Interrogation of people with autism (including Asperger syndrome) By Dennis Debbaudt - EXPERT WITNESS (Record 2051-2054)

EXHIBIT 10. "DIVISION FOR TREATMENT AND EDUCATION OF AUTISTIC AND RELATED COMMUNICATION HANDICAPPED CHILDREN, Department of Psychiatry, University of North Carolina, DIAGNOSTIC EVALUATION" (Record 2055-2061)

EXHIBIT 11. Letter from "Dr. Shyam E. Balakrishnan, MD". (Record 2062-2063)

EXHIBIT 12. PSYCHIATRIC EVALUATION from Dr. Conrad Daum in October, 2018 (Record 2064-2070)

EXHIBIT 13. Information about Dr. Conrad Daum being a certified Forensic Psychiatrist (Record 2071-2076)

EXHIBIT 14. Case 1:13-cr-00435-TDS, Document #153, Filed 10/17/18, Pages 1 through 11;

DECLARATION/AFFIDAVIT OF BRIAN DAVID HILL regarding what happened on September 21, 2018 (Record 2077-2088)

ADDITIONAL EVIDENCE 1. NEW MEDICAL EVIDENCE IN SUPPORT OF DEFENDANT'S "MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL BASED UPON NEW EVIDENCE…" (Record 2089-2101)

ADDITIONAL EVIDENCE 2. EXHIBIT 1 of "NEW MEDICAL EVIDENCE IN SUPPORT OF DEFENDANT'S" MOTION. (Record 2102-2103)

ADDITIONAL EVIDENCE 3. EXHIBIT 2 of "NEW MEDICAL EVIDENCE IN SUPPORT OF DEFENDANT'S" MOTION. (Record 2104-2140)

ADDITIONAL EVIDENCE 4. EXHIBIT 3 of "NEW MEDICAL EVIDENCE IN SUPPORT OF

DEFENDANT'S" MOTION. (Record 2141-2165)

ADDITIONAL EVIDENCE 5. EXHIBIT 4 of "NEW MEDICAL EVIDENCE IN SUPPORT OF DEFENDANT'S" MOTION. (Record 2166-2194)

ADDITIONAL EVIDENCE 6. EXHIBIT 5 of "NEW MEDICAL EVIDENCE IN SUPPORT OF DEFENDANT'S" MOTION. (Record 2195-2251)

ADDITIONAL EVIDENCE 7. 2ND WITNESS LETTER; AMENDED WITNESS LETTER; LEGAL ARGUMENTS AND AFFIDAVITS IN SUPPORT OF DEFENDANT'S MOTION (Record 1555-1580)

ADDITIONAL EVIDENCE 8. AMENDED WITNESS LETTER #1 (Record 1581-1590)

ADDITIONAL EVIDENCE 9. UNSWORN DECLARATION FROM ROBERTA HILL IN SUPPORT (Record 1591-1594)

ADDITIONAL EVIDENCE 10. WITNESS LETTER #2 (Record 1595-1602)

ADDITIONAL EVIDENCE 11. WARRANT FOR ARREST OF SUPERVISED RELEASE VIOLATOR In December 22, 2018, PROVING CAPIAS WAS WRONGFUL (Record

1603-1603)

ADDITIONAL EVIDENCE 12. PHOTOCOPY OF SERVED FEDERAL ARREST DETAINER DATED NOVEMBER 15, 2018 (Record 1604-1604)

ADDITIONAL EVIDENCE 13. JUDGMENT AND COMMITMENT, Supervised Release Violation Hearing dated October 7, 2019 (Record 1605-1606)

ADDITIONAL EVIDENCE 14. DEFENDANT SUBMITS THE FOLLOWING VIDEO EVIDENCE: https://www.youtube.com/watch?v=5PMalR45MSo - Video Testimony of Brian David Hill on January 5, 2022 2nd Iteration Dated January 6, 2022 (Record 1574-1574)

ADDITIONAL EVIDENCE 15. DEFENDANT SUBMITS THE FOLLOWING AUDIO EVIDENCE: https://archive.org/details/e-3-20190924130648-i-2766344000 - Digital audio file of what is being filed in Federal Court in the new 2255 Motion. As part of Exhibit 3 in Brian's Federal 2255 Motion: An Audio CD disc (digital audio file located at the link given by Brian's family to present to the Court for quickly review by the Judge) containing a 21 Minute, 25 Seconds audio clip of a phone

call conference recording between Brian David Hill 276-790-3505 and Attorney Matthew Scott Thomas Clark 276-634-4000. Dated September 24, 2019. File reports time of 2:27PM. Attorney/client privilege for this audio waived. Audio for Exhibit 3 for usage in Federal 2255 Motion and for Martinsville Commonwealth case as well. (Record 1574-1574)

ADDITIONAL EVIDENCE 16. LAST MINUTE EVIDENCE IN SUPPORT OF DEFENDANT'S "MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL BASED UPON NEW EVIDENCE WHICH COULD NOT BE ADMISSIBLE AT THE TIME OF CONVICTION…" (Record 1609-1640)

ADDITIONAL EVIDENCE 17. EXHIBIT 1: Witness "Letter of Support from Brian Hill's Grandparents asking for an Investigation Into Brian's sex setup in Martinsville, VA in 2018…" (Record 1641-1651)

ADDITIONAL EVIDENCE 18. EXHIBIT 2: Photocopy of Letter to Martinsville Police Chief G. E. Cassady dated March 13, 2019; and copies of return receipt (front and back) and USPS receipt and Certified Mail receipt. (Record 1652-

1657)

ADDITIONAL EVIDENCE 19. EXHIBIT 3: Witness Letter from Stella Forinash of "photos of Brian with his black camera bag, black camera & baseball hat through the years on 1/26/2022." (Record 1658-1670)

ADDITIONAL EVIDENCE 20. Letter to Clerk and to Hon. Giles Carter Greer, presiding Judge of the Circuit Court (Record 2252-2265)

4. All of this proves Brian David Hill did not have the intent necessary to violate Virginia Code § 18.2-387. Indecent exposure, and Local Ordinance 13-17. That is because he has (1) Autism Spectrum Disorder at the time of the alleged offense, (2) Psychosis Disorder at the time of the alleged offense, (3) Type 1 Brittle Diabetes at the time of the alleged offense, and (4) Obsessive Compulsive Disorder at the time of the alleged offense. This is due to the new law under the passage of Virginia Code § 19.2-271.6. Evidence of defendant's mental condition admissible; notice to Commonwealth.

5. Appellant was pushing for a new trial with a lot of evidence exhibits and attachments prior to the Circuit Court denying that motion (See APPELLANT DESIGNATION // DESIGNATION OF Record-pages 3-14) because that new Virginia law opened up the admissibility of evidence being allowed to use all of the proof of mental illnesses diagnosed in his mental evaluation report in the

General District Court (Record-pages 58/SEALED:1-8) and by Dr. Conrad Daum the forensic psychiatrist (Record-pages 190-194). The report was only conducted for sanity and competency, because at the time this law had not been in effect nor did that law even exist at the time. The law referred to Virginia Code § 19.2-271.6. Evidence of defendant's mental condition admissible; notice to Commonwealth.

6. On September 21, 2018, Appellant was arrested and charged with "13-17/18.2-387, Code or Ordinances of this city, county or town: intentionally make an obscene display of the accused's person or private parts in a public place or in a place where others were present."

7. Appellant filed the new evidence for the purposes of a New Trial due to the Virginia Code § 19.2-271.6. Previously, none of Appellant's mental illnesses or any disorders could be used at the jury trial or bench trial concerning his criminal charge. The jury would not see it nor know about it. He could not legally admit it as evidence for any jury trial or bench trial. That law made such evidence admissible in 2021 when his criminal conviction had been adjudged on November 18, 2019. The new evidence at issue does justify the need for a New Trial.

8. With the word limit, Appellant will let the Commonwealth of Virginia argue their side of the Statement of the Facts in the case, their side of the story regarding Appellant's indecent exposure charge. Appellant will reply if he feels that anything the Commonwealth says is untruthful or not factual.

9. New Evidence which was on record and those issues of new evidence

held at the Trial Court: Record-pages Evidence #1: 1555-1606; pages Evidence #2: 1609-1670,2089-2251.

10. The preserved issues in the Trial Court record of Commonwealth Attorney Glen Andrew Hall being accused of fraud on the court (See Record-pages 1702, 1911) or on any evidence of CONTEMPT OF COURT (pages 1558-1564, 1895-1916, 1920, 1921) by the Commonwealth Attorney. Contempt pf court meaning refusing to obey a court order, defying a court order. Glen Andrew Hall believed he can defy court orders and permit destruction of evidence because he is the Commonwealth Attorney. He is in contempt three times and should receive three criminal charges of contempt of court (pages 1558-1564, 1895-1916, 1920, 1921)as asked in the record of the Trial Court. He violated and defied (See Record-pages 1895-1896, 1912, 1919, 1920, 1921) the court orders (Circuit Court: See Record-pages 1990, 1903-1906, 1830-1837) (General District court: See Record-pages 1899, 1903, 2036-2038) by destroying evidence pursuant to Brady v. Maryland and multiple Court Orders from both the Circuit Court for the City of Martinsville (Circuit Court: See Record-pages 1990, 1903-1906, 1830-1837) and the General District Court for the City of Martinsville (General District court: See Record-pages 1899, 1903, 2036-2038). Destroying biological evidence such as blood vials (Record-pages 1895-1990, 1914, 1670), destroying video evidence recorded by Martinsville Police Officer Robert Jones through usage of body-camera (Record-pages 1910-1916, 1919-1920). The video evidence concerning

statements made by Brian D. Hill to that police officer before he was arrested for the charge of indecent exposure. Destruction of Brady evidence after multiple court orders asking for the very evidence is CONTEMPT OF COURT.

11. See CAV decision on 09-02-2021, and Rehearing denied on 09-09-2021, case no. 1295-20-3. Those decisions affirm the criminal conviction in the Trial Court and the CAV has that record and can transmit those decisions to the foregoing appeal case as records for this appeal. Appellant refers to CAV case no. 1295-20-3 for the affirmation of the criminal conviction. The direct appeal of that conviction. See CAV decision on 09-02-2021, and Rehearing denied on 09-09-2021, case no. 1295-20-3.

12. The issues of actual innocence in asking for a New Trial or Judgment of Acquittal was held in the Trial Court (See Record-pages 1559, 1569, 1570, 1608-1608, 1881) which allows the CAV to make a ruling similar to authoritative case law of *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, 24 Fla. L. Weekly Supp. 213 (2013); or Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (See Record page 1881). Therefore, the CAV or Supreme Court of Virginia should hold case law similar to precedential U.S. Supreme Court case law authority of *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, 24 Fla. L. Weekly Supp. 213 (2013) or Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (See Record page 1881). See McQuiggin v. Perkins, 569 U.S. 383, (2013) ("Actual innocence, if proved, serves as a gateway

through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808, and House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1"). See McQuiggin v. Perkins, 569 U.S. 383, (2013) ("The Court has applied this "fundamental miscarriage of justice exception" to overcome various procedural defaults, including, as most relevant here, failure to observe state procedural rules, such as filing deadlines. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640.").

13. New evidence because it had become new evidence on April 7, 2021 or July 1, 2021 due to the passage of Virginia Code § 19.2-271.6. That statute was brought up on the record of the Trial Court, so that issue was preserved on appeal (See Record, pages 1893-1896, 1882-1883, 1891-1892).

14. The Trial Court did not mention Rule 1:1 when it claimed that it had no jurisdiction (Record-pages 2266-2266) but the judge does not cite the exact rule or statute. However, that issue (issue of invoking claim of not having jurisdiction) was held by the judge at the Trial Court since he made his ruling to be interpreted at the Appeals Court. It isn't Appellant's fault but that decision was the judge not specifying which exact and specific law or rule which it relied upon. However Appellant interprets from the final order/judgment that the Trial Court had used Rule 1:1. If Appellant can't do that to argue holding this issue, then the judge didn't properly invoke that rule or any rule which would make his order erroneous

by not invoking any statute or rule to justify its decision.

15. The Appellant withdrawing his appeal by Motion to Withdraw Appeal (See Record-pages 442-453) which caused the criminal conviction of Appellant on November 18, 2019 (See Record-pages 454-455) did not waive his constitutional and/or legal right to overturn his conviction collaterally and on the ground of actual innocence (See Record page 442-453). New evidence ground is not waived by withdrawing appeal because no guilty plea was ever entered. New Trial or Judgment of Acquittal is warranted on new evidence. Appellant explained why he had withdrawn his appeal in his Motion to Withdraw Appeal (See Record-pages 442-453). He did not waive all rights to overturn his conviction at a later time when evidence became available and when evidence previously inadmissible became admissible at a later time. See Assignment of Error 8.

16. Appellant had been convicted by the Circuit Court on November 18, 2019 (Record-pages 454-455). However, there was no guilty plea by Appellant. Record page 454 written this: "Other: DEF ~~CHANGED HIS PLEA TO GUILTY AND~~ AFFIRMED JUDG GDC, PAY COURT COSTS." Appellant is showing the true strikethrough, the Judge had stricken the words "CHANGED HIS PLEA TO GUILTY AND…" with what appeared to be a black marker pen. So, the Judge of the Trial Court did not consider that Appellant honestly decided that he was guilty because in his Motion to Withdraw Appeal he said that he did not waive his actual innocence or legal innocence, he did not plead guilty by any stretch of technicality

(Record page 454).

17. The Trial Court had not held accountable the violator of multiple Court Orders for discovery (Record-pages 2036-2046) who refused to comply with those Court Orders. The violator named attorney Glen Andrew Hall, Esquire who is the Commonwealth Attorney for the City of Martinsville and for the Commonwealth of Virginia. He violated those Court Orders (Record-pages 1895-1902) by unlawfully destroying evidence pursuant to Brady v. Maryland (Record page 1880, 1895-1902; Record-pages 325-331) and multiple Court Orders from both the Circuit Court for the City of Martinsville (Record-pages 2036-2046) and the General District Court for the City of Martinsville (Record-pages 2036-2046). Destroying biological evidence such as blood vials (Record page 1895-1990, 1914, 1670), destroying video evidence recorded by Martinsville Police Officer Robert Jones through usage of body-camera (Record-pages 1908-1913, 1652-1657). The video evidence concerning statements made by Brian D. Hill to that police officer before he was arrested for the charge of indecent exposure (Record page 3-3). Appellant filed true and correct copies of his multiple letters requesting the body-camera footage (Record 1719-1738; 1652-1658) and one letter was mailed by Certified Mail (Record page 1652-1657) by Brian's grandparents Kenneth Forinash and Stella Forinash.

18. The Appellant had requested a new trial in the motion requesting such (Record-pages 1880-2088). Appellant may have forgotten to ask for new trial at the

ending of his written motion (Record-pages 1712-1713) as was asked at the beginning of the motion (Record page 1880), he did ask that the "*Circuit Court consider providing any other relief or remedy that is just and proper, in the proper administration of justice and integrity for the Court*." (Record-pages 1880) that the Court may deem just and proper, and so that would include his above request for a new trial as entitled in the motion.

ARGUMENT

i. Standard of Review

All errors assigned on appeal are errors of law. All Assignments of error involve mixed questions of law and fact. All assignments of error 3 challenges the legal components of the decision appealed therefrom. This Court's review therefore is de novo and based on the facts of the case. E.g., Palace Laundry, Inc. v. Chesterfield County, 276 Va. 494, 498, 666 S.E.2d 371, 374 (2008). For all assignments of error, the Court must conduct an "independent examination of the entire record" to ensure that the judgment/order does not violate constitutional rights. The Gazette, Inc. v. Harris, 229 Va. 1, 19, 325 S.E.2d 713, 727-28 (1985); see also, e.g., United States v. Friday, 525 F.3d 938, 949-50 (10th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009), and cases cited therein (the independent review

standard applies to factual components of Free Exercise and Establishment Clause issues); New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940, 941 (1st Cir. 1989) (Breyer, J.), cert. denied, 494 U.S. 1066 (1990) (“‘First Amendment questions of “constitutional fact” compel… de novo review’”) (citations omitted).

ii. The Assignment of error 1. (Assignment of Error 1)

The assignment of error is using the case law precedent and case law standards of Odum v. Commonwealth, 225 Va. 123, 124 (Va. 1983) and Commonwealth v. Tweed, 264 Va. 524, (Va. 2002).

The standards involving a Circuit Court considering and possibly granting a motion for a new trial and/or judgment of acquittal based on the following factors/elements:

STANDARD 1. Motions for new trials based on after-discovered evidence are within the discretion of the Trial Judge, are not favored, are considered carefully and cautiously, and are reluctantly awarded.

STANDARD 2. The movant for a new trial for after-discovered evidence bears the burden to prove the evidence (a) was discovered after trial, (b) could not have been discovered earlier by reasonable diligence, (c) is not merely cumulative, corroborative or collateral, and (d) is material and should produce opposite results on new trial. 3. “Here the evidence, being substantive information that another person was the criminal

agent, was (a) available and not discovered after trial, (b) could have been obtained at trial by the exercise of due diligence and, (c) would not have produced a different result on retrial on the motion based on the Trial Court's assessment of the credibility of defendant's witnesses and the testimony by the victims." In that example presidential case, it said if the evidence was "available" at Trial. It wasn't available in Appellant's case due to Stamper v. Commonwealth.

Appellant's new evidence could have been discovered prior to the Trial, but it was inadmissible and therefore was not even legally considered as evidence for a Trial. So therefore unless it was legally considered evidence, it is not evidence if it was not admissible at the time. The discovery of evidence or that fact that it would be considered new evidence would have to be on the date of the enactment of the new statute of Virginia Code § 19.2-271.6 which had become law on the date of April 7, 2021 or on the date of when that law had become effective which was on the date of July 1, 2021

For the sake of brevity, Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, **as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.**

The standard of "(d) is material and should produce opposite results on new trial" is met. Appellant's new evidence in the Statement of the Facts prove that Appellant did not have the intent necessary to be convicted of violating the Virginia law. Because of Appellant's (1) Autism Spectrum Disorder at the time of the alleged offense, (2)

Psychosis Disorder at the time of the alleged offense, (3) Type 1 Brittle Diabetes at the time of the alleged offense, and (4) Obsessive Compulsive Disorder at the time of the alleged offense. Also there is evidence that the Appellees' Attorney Glen Andrew Hall for the Commonwealth of Virginia had violated three Court Orders for discovery materials including the police body-camera footage and the biological evidence of blood drawn from Brian Hill's arm on September 21, 2018. All of that was destroyed when it is the duty of the Law Enforcement and the Commonwealth of Virginia to preserve evidence concerning a criminal investigation and investigating evidence of a crime. It is the duty of the Law Enforcement and the Commonwealth of Virginia to preserve Brady materials ("Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963)") during a pending criminal litigation, especially when the Court orders turning over a copy of such material to the criminal defendant and his counsel. If the jury were to hear of the evidence destruction by the Commonwealth Attorney and the City of Martinsville; they would find the Appellant not-guilty of his charge. It is fairly obvious that he would be found not guilty due to evidence destruction by the prosecution of the criminal case.

iii. Assignment of Error 2 (For the sake of brevity, Appellant will not reproduce the entire "Assignment of Error 2" due to it surpassing the word limit. Therefore, Appellant hereby incorporates by reference, as if fully set forth herein, Read Assignment of Error 2 in the "Assignments of Error" section in this brief.

The Circuit Court erred as a matter of law by holding that it lacked jurisdiction to have granted or considered the motion for a new trial without any evidentiary hearing

or order a response from the Commonwealth's Attorney based on newly admissible evidence which was not made admissible at the verdict of guilty on November 18, 2019 in the Circuit Court. The evidence was new on April 7, 2021 or on the date that the law became effective which was July 1, 2021 because it had become admissible as matter of law by new law of Virginia Code § 19.2-271.6 which nullifies the Supreme Court of Virginia's precedential ruling barring the admissibility of the evidence of Autism Spectrum Disorder and mental illnesses prior to the passage of this new law. Again see the General Assembly's nullification of Stamper v. Commonwealth, 228 Va. 707 (1985).

iv. Assignment of Error 3 (For the sake of brevity, Appellant will not reproduce the entire "Assignment of Error 3" due to it surpassing the word limit. Therefore, Appellant hereby incorporates by reference, as if fully set forth herein, Read Assignment of Error 3 in the "Assignments of Error" section in this brief.

Assignment of error 3. The Circuit Court erred as a matter of law by holding that it lacked jurisdiction because it created a fundamental miscarriage of justice by permanently convicting an innocent man or woman in response to the Appellant's Motion for New Trial or Judgment of Acquittal. It is also considered cruel and unusual punishment to convict an innocent person of a charged crime. In violation of substantial and procedural due process of Appellant, the criminal defendant. That would be unconstitutional under U.S. Const. amend. XIV and the Virginia Constitution's Article I., Section 11 due process clause. Also in violation of Article I. Bill of Rights, Section 9. ("Prohibition of excessive bail and fines, cruel and unusual punishment, suspension

of habeas corpus, bills of attainder, and ex post facto laws"). The conviction of a man who may be actually innocent of his criminal charge with the new evidence filed and presented to the Court. The CAV or Supreme Court of Virginia should hold case law similar to presidential U.S. Supreme Court case law authority of McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, 24 Fla. L. Weekly Supp. 213 (2013). See McQuiggin v. Perkins, 569 U.S. 383, (2013) ("Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808, and House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1"). See McQuiggin v. Perkins, 569 U.S. 383, (2013) ("The Court has applied this "fundamental miscarriage of justice exception" to overcome various procedural defaults, including, as most relevant here, failure to observe state procedural rules, such as filing deadlines. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640.")

v. Assignment of Error 5 and Assignment of Error 6 (For the sake of brevity, Appellant will not reproduce the entire "Assignment of Error 5" and "Assignment of Error 6" due to it surpassing the word limit. Therefore, Appellant hereby incorporates by reference, as if fully set forth herein, Read Assignment of Error 5 and 6 in the "Assignments of Error" section in this brief.

The two Assignments of Error 5 and 6 both argue that the Circuit Court is ignoring the new evidence by simply claiming that the Court doesn't have jurisdiction. The new evidence can entitle a criminal defendant to a new trial at the sound discretion of the

Court. If a judge ignores the evidence, it is a due process violation.

Hunter v. United States, 548 A.2d 806, (D.C. 1988) ("Because the trial court improperly ignored evidence bearing on appellant's competence to enter a guilty plea, we reverse and remand to the trial court for further proceedings.")

Lafferty v. Cook, 949 F.2d 1546, 1555 n.10 (10th Cir. 1992) ("the inquiry on habeas is whether the state court denied the defendant his right to due process by ignoring evidence, including evidence at trial").

Raghav v. Wolf, 522 F. Supp. 3d 534, 538 (D. Ariz. 2021) ("Immigration Court violated his due process rights by ignoring evidence of his conditions in India and erroneously applying the law.").

James v. Bradley, 19-870-pr, 2 (2d Cir. Mar. 31, 2020) ("James brought this action alleging that Bradley violated his right to procedural due process by ignoring evidence at the hearing that purportedly showed that the tested urine was taken from someone other than James.").

vi. Assignment of error 9. ((Appellant will not reproduce the entire "STATEMENT OF THE FACTS" in this Assignment of Error in the Opening Appeal Brief. Therefore, Appellant hereby incorporates by reference, as if fully set forth herein, all paragraphs 1-18, "STATEMENT OF THE FACTS" in this brief.))

Here is the citation of the law in part.

Va. Code § 19.2-271.6. ("B. In any criminal case, evidence offered by the defendant concerning the defendant's mental condition at the time of the alleged offense,

including expert testimony, is relevant, is not evidence concerning an ultimate issue of fact, and shall be admitted if such evidence (i) tends to show the defendant did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence. For purposes of this section, to establish the underlying mental condition the defendant must show that his condition existed at the time of the offense and that the condition satisfies the diagnostic criteria for (i) a mental illness, (ii) a developmental disability or intellectual disability, or (iii) autism spectrum disorder as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.")

The mental evaluation by the General District Court did say that Appellant was competent and did not give him a defense of mental insanity at the time of the offense. Howveer, this new law allows all of his mental health issues be brought up as evidence in his defense of having lack of criminal intent due to his developmental disorders or disabilities like for E.G. Autism Spectrum Disorder and the "Psychosis".

vii. Assignment of Error 10 and Assignment of Error 11 (For the sake of brevity, Appellant will not reproduce the entire "Assignment of Error 10" and "Assignment of Error 11" due to it surpassing the word limit. Therefore, Appellant hereby incorporates by reference, as if fully set forth herein, Read Assignment of Error 10 and 11 in the "Assignments of Error" section in this brief.

The two Assignments of Error 10 and 11 both argue that the Circuit Court should have sanctioned, punished, and held accountable the City of Martinsville and Commonwealth of Virginia for destruction of evidence and violating three Court Orders.

This was argued in the Motion for New Trial or Judgment of Acquittal (Record-pages 1880-1916).

See 2 J. WIGMORE (John Henry Wigmore), EVIDENCES § 278, at 133 James Harmon Chadborn ed., Little, Brown 1979) (1940) (emphasis added). See Federal Rules of Evidence 401.; 32 C.J.S. Evidence § 535 (2008); Evidence—Admissibility of Attempts by a Party to Suppress Evidence, 9 TEX. L. REV. 79, 100 (1930) (stating that it has "long been recognized" that a party's misconduct in manipulating evidence is admissible as indicating a "consciousness of the weakness of his case,'" and citing cases from the 1800s that applied the inference to the fabrication, suppression, or destruction of evidence).

Bowman v. Commonwealth, 248 Va. 130, (Va. 1994) ("1. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, but whether evidence is material and exculpatory and, therefore, subject to disclosure under the Brady v. Maryland case is a decision left to the prosecution. 2. If the defendant does not receive such evidence or if he learns of the evidence at a point in the proceedings when he cannot effectively use it, his due process rights are violated. ").

All other Assignments of Error were documented in separate heading in pages 7-26 of this opening brief. Due to the word limit, Appellant cannot argue extensively in detail for each and every separate Assignment of Error without a separate motion requesting extending the word count. Those Assignments of Error

are long paragraphs because there are arguments already made in each one of them. For the sake of brevity, the arguments are in each Assignment of Error. The Appellant will see what objections or response is made by the Commonwealth of Virginia and will argue in the opposition reply brief on anything which may be an error of law or error of fact.

CONCLUSION

The judgment/order for the denial of Appellant's Motion for New Trial or Judgment of Acquittal should be reversed and judgment entered for a New Trial for the criminal case of Appellant, and the case should be remanded for further proceedings on the new evidence for New Trial if necessary, as well as the grounds raised for New Trial. Appellant requests relief accordingly and asks for any other relief that the Court of Appeals of Virginia may deem proper and just.

REQUEST FOR ORAL ARGUMENT

As this appeal raises important constitutional, evidential, and legal issues which were believed overlooked or ignored, the Appellant requests oral argument.

Originally Filed/Submitted on May 13, 2022,

Respectfully Filed/Submitted Amended version on August 17, 2022,

BRIAN DAVID HILL
Pro Se

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Signed
Brian D. Hill

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Rule 5A:19(a) since the Court on June 6, 2022 did grant the "MOTION FOR LEAVE OF COURT TO FILE OPENING BRIEF OF APPELLANT IN EXCESS OF 3,778 WORDS ABOVE WORD LIMIT OR EXTEND WORD LIMIT TO 16,078 WORDS TO CURE DEFICIENCIES" extending the word limit to 13,530, regarding the type-volume limits (word limit 12,300 or page limit at 50 pages) pursuant to Rule 5A:19(a), excluding the parts of the document exempted by Rule 5A:19(a) (appendices, the cover page, table of contents, table of authorities, signature blocks, or certificate):

   This brief contains [13,349] words.

2. This brief complies with the typeface and type style requirements because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2013*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Brian D. Hill
Signed
Brian D. Hill

Dated: August 17, 2022

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of August, 2022, I caused this Amended "OPENING BRIEF OF APPELLANT"; and corrected "APPELLANT DESIGNATION // DESIGNATION OF RECORD" to be delivered by email service by Assistant/Filing-Representative Roberta Hill using rbhill67@comcast.net or rbhill67@justiceforuswgo.nl to the Commonwealth of Virginia and City of Martinsville through the Commonwealth Attorney's Office of Martinsville City; as well as to the named counsel for the Office of the Attorney General; and the original was filed with the Clerk of the Supreme Court of Virginia by Virginia Court eFiling System (VACES) through Assistant/Filing-Representative Roberta Hill which shall satisfy proof of service as required by Rule 5:1B(c) stating that "*Service on Other Parties by Email. – An electronic version of any document filed in this Court pursuant to Rule 5:1B(b) must be served via email on all other parties on the date the document is filed with the Court or immediately thereafter, unless excused by this Court for good cause shown. An e-filed document must contain a certificate stating the date(s) of filing and of email service of the document.*" And the proof that such pleading was delivered will be filed together with this "Petition for Appeal" shall satisfy the proof of service was required by Rule 5:17(b):

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The reason why Brian David Hill must use such a representative/Assistant to serve such pleading with the Clerk on his behalf is because Brian is currently still under the conditions of Supervised Release for the U.S. District Court barring internet usage without permission. Brian's Probation Officer is aware of Roberta Hill using her email for conducting court business concerning Brian Hill or court business with the Probation Office in regards to Brian David Hill. Therefore, Roberta Hill is filing the pleading on Brian's behalf for official court business. Brian has authorized Roberta Hill to file the pleading.

If the Court wishes to contact the filer over any issues or concerns, please feel free to contact the filer Brian David Hill directly by telephone or by mailing. They can also contact Roberta Hill at rbhill67@comcast.net and request that she forward the message and any documents or attachments to Brian David Hill to view offline for his review.

Brian D. Hill
Signed
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