ALLEGHENY COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
Respondent-Plaintiff,	)	
v.	)	**No. 14333-2016**
KEVIN VIETMEIER,	)	
Petitioner-Defendant.	)	

Newly-Discovered Fact PCRA Petition

INTRODUCTION

In November 2016, 13-year-old D.V. accused her adoptive brother, Kevin Vietmeier, of touching her vagina with his bare hand on three different occasions. Mr. Vietmeier's parents – Theresa and Mark – were D.V.'s adoptive parents and legal guardians at the time. At the December 5, 2016 preliminary hearing, though, D.V. said she'd "exaggerated" her allegations and backtracked from her "bare hand to vagina" narrative. This time, she claimed Mr. Vietmeier had touched her "private parts" *over* her clothing, but not under it.

Based on certain pre-trial rulings from Judge Donna Jo McDaniel, who's no longer on the bench due to the Superior Court repeatedly questioning her judicial temperament and decision-making in sexual abuse and sexual assault cases, Mr.

Vietmeier pled guilty to harassment and corruption of a minor on June 20, 2017 and received five years of probation.

Eighteen months later, in January 2019, the Pennsylvania State Police ("PSP") was tasked with investigating D.V.'s claims that two family members had sexually abused her between 2006 and 2010 in Washington County. PSP detective Douglas ("Dan") Rush, consequently, interviewed D.V. on January 8, 2019 at the Washington County District Attorney's Office. Rush video-recorded D.V.'s interview. While Rush and others interviewed D.V. regarding the Washington County sexual abuse allegations, D.V. spontaneously mentioned her (Allegheny County) allegations against Mr. Vietmeier and admitted she'd fabricated the allegations with the hopes of being removed from Theresa and Mark's home and placed with her biological mother.

Deeply concerned that an innocent man had been forced to plead guilty due to D.V.'s false allegations, Rush contacted Allegheny County Detective Darren Gerlach – the detective who spearheaded the investigation surrounding D.V.'s November 2016 allegations. Rush told Gerlach about D.V.'s unprompted admission about falsely accusing Mr. Vietmeier. Gerlach then contacted the Allegheny County District Attorney's Office ("DAO") who subpoenaed Rush's report and D.V.'s video-recorded statement/admission. In March 2019, the DAO disclosed Rush's report to Mr. Vietmeier, but not D.V.'s video-recorded statement.

Based on the disclosure of D.V.'s January 8, 2019 statement/admission, Mr. Vietmeier is entitled to have his guilty plea withdrawn because his it represents a manifest injustice, *i.e.*, it's premised on false allegations, facts, and testimony.

STATEMENT OF FACTS

A. D.V.'s allegations against Mr. Vietmeier

On November 13, 2017, D.V., 13, alleged to her adoptive parents, Mark and Terri Vietmeier, that her (D.V.'s) stepbrother, Kevin Vietmeier, had touched her inappropriately between her legs the night before (November 12, 2017) when she'd spent the night at Kevin's house. The family contacted ChildLine and reported what D.V. had alleged.

On November 15, 2017, social worker Jennifer Ginsburg interviewed D.V. Ginsburg worked for the Pittsburgh Child Advocacy Center ("CAC") within Pittsburgh's Children's Hospital. Ginsburg drafted a report summarizing D.V.'s allegations:

SUMMARY OF CHILD INTERVIEW:
The interview with Dakota was completed by Forensic Interviewer, Jennifer Ginsburg, and observed by Allegheny County Police, Detective Gerlach, and Allegheny County Children Youth and Families Caseworker, Josette Pickens. The interview with Dakota was video/audio taped. The DVD of the interview was provided to Detective Gerlach. Please reference the video for information regarding the interview with Dakota.

Dakota did make a disclosure of sexual maltreatment during her interview. Dakota reported that Kevin touched her vagina with his hand over and under her clothing. Dakota reported Kevin rubbed her vagina with his hand and fingers on the outside. Dakota reported this has happened on three separate occasions.

Detective Darren Gerlach observed D.V.'s interview. He also drafted a report summarizing D.V.'s allegations.[2] Gerlach's report contained additional details regarding D.V.'s allegations:

> Dakota said that this past weekend, she went to her brother's, Kevin Vietmeier, home in Bridgeville. There, they were watching a movie. Dakota said that she was sitting on the couch with Kevin and his girlfriend, Brittany. About halfway through the movie, Brittany went to take a shower. Dakota said that Kevin then touched her "inappropriately." When asked to clarify what this meant, Dakota said that Kevin touched her vagina with his hand. The touching was both over and under the clothes. Dakota said that the touching was on top of her vagina, with Kevin's palm and fingers, and he rubbed back and forth.
>
> The touching stopped when the movie ended. When asked of Kevin said anything during or after the touching, Dakota stated that Kevin told her that he was sorry and asked of she was OK.
>
> Dakota then said that this was not the first time that Kevin had touched her. The first two times were at her adoptive parents home, located at 2378 Stewart Rd. in South Park. Dakota believed that she was 12 years old at the time and in the 6th grade. Dakota stated that Kevin touched her vagina while they sat on her parents couch.

On November 16, 2016, Gerlach filed a *Criminal Complaint* against Mr. Vietmeier. The *Criminal Complaint* summarized D.V.'s allegations:

> On 11/15/2016 Jane Doe was forensically interviewed at the Child Advocacy Center at Children's Hospital Pittsburgh. Doe disclosed that on 11/12/2016, a Saturday evening, the Defendant was sitting on the couch with Doe. While watching a movie the Defendant put his hand down the front of Doe's pants and touched her vagina both over her clothes and under her clothes. Does stated that they were both under an orange blanket on the couch. Doe stated that after the movie the Defendant told her that he was sorry and asked Doe if she was Okay.
>
> Doe further disclosed that the Defendant had touched her 2 separate times previously. Both of those incidents occurred at her parent's house at 2378 Stewart Rd. in South Park Twp. Doe explained that both incents were similar to the most recent, where-in the Defendant was watching television with Doe and he reached his hand into Doe's pants and touched her genitals. Doe stated at these two incidents occurred when she was 12 years-old.[3]

B. The preliminary hearing

On December 5, 2016, Mr. Vietmeier had his preliminary hearing – where D.V. testified. On direct-examination, in regards to the November 12, 2017 allegation, D.V.

[1] Rp. 2. Rp. = Reproduced Record.
[2] Rp. 3.
[3] Rp. 13.

said Mr. Vietmeier's hand only touched the outside of her "private parts."[4] At the end of the night, after she'd watched movies with Mr. Vietmeier, Brittnie Richards (Mr. Vietmeier's girlfriend), and her two younger sisters, Liberty, 12, and Bailey, 8, she claimed Mr. Vietmeier apologized for touching her inappropriately.[5]

On cross-examination, D.V. acknowledged she'd told Jennifer Ginsberg that Mr. Vietmeier had touched her vagina under her clothes, but she said this "wasn't true."[6] D.V. said Mr. Vietmeier never touched her vagina inside her pants on November 12, 2017 – or any time before this date.[7] D.V. said she "exaggerated the [November 12th] incident" to Ginsberg because, based on the substance of Ginsberg's questions and the way Ginsberg questioned her, she believed Ginsberg wanted her to say – or was "leading" her to say – that Mr. Vietmeier had touched her vagina under her clothes.[8]

During her interview, D.V. also told Ginsberg Mr. Vietmeier had touched her inappropriately in a similar fashion on two prior occasions – both of which allegedly occurred at her adoptive parents' ("The Vietmeier") house. At the preliminary hearing, though, D.V. said this was untrue. One incident allegedly occurred at the Vietmeier house, the other allegedly at her brother's house.[9]

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[4] PLTpp. 8, 14-15, 21-22. The preliminary hearing transcripts are part of the Reproduced Record. Rpp. 15-121.
[5] PLTpp. 26, 46-47.
[6] PLTpp. 39, 40.
[7] PLTpp. 41, 45.
[8] PLTpp. 41, 50.
[9] PLTpp. 32-33.

The first alleged incident, she said, occurred at the Vietmeier house, on the living room couch, while she and Mr. Vietmeier played video games on his phone. She couldn't recall the month or date of the alleged incident. She said ten family members and friends were in the kitchen at the time – and that all ten people could see into the living room from the kitchen. She said Mr. Vietmeier never touched her vagina inside her pants. He only touched the outside of her clothing near her private parts.[10]

The second incident allegedly occurred at her brother's house, on the living room couch, while she and Kevin watched T.V., and while "everyone" was outside. She couldn't recall the month or date of the alleged incident, but recalled there were "a lot" of people at the house, *e.g.*, the Vietmeiers, her sisters, etc. D.V. said Mr. Vietmeier touched her between her legs "over her clothes." He didn't touch her vagina inside her clothes.[11]

The Commonwealth moved forward with its prosecution by filing a five-count *Information* on January 13, 2017, charging Mr. Vietmeier with (1) indecent assault – person less than 13-years-old, (2) endangering the welfare of children, (3) corruption of a minor, (4) unlawful contact with a minor, and (5) indecent assault – person less than 16-years-old. The *Information* alleged these counts occurred between February 13, 2015 and November 13, 2016.

[10] PLTpp. 29-31.
[11] PLTpp. 33-37.

C. The plea agreement

On June 20, 2017, trial counsel and the Commonwealth brokered a plea deal where the Commonwealth agreed to drop the sex counts and not mention anything on the record regarding any alleged inappropriate sexual touching, if Mr. Vietmeier agreed to plead guilty to harassment (18 Pa. C.S. § 2709(a)(1)) and corruption of a minor (18 Pa. C.S. § 6301(a)(1)(i)). Mr. Vietmeier, therefore, pled guilty to harassment (third-degree misdemeanor) and corruption of a minor (first-degree misdemeanor) before Judge Donna Jo McDaniel the same day.

ADA Goldfarb said the following regarding the plea's factual basis:

> **MS. GOLDFARB: Thank you, Your Honor. Had the Commonwealth proceeded to trial in this case, we would have called the victim, Dakota Vietmeier, who has a date of birth of February 12th, 2003.**
>
> **The testimony would have been that on approximately three separate occasions, the defendant, identified as her brother, Kevin Vietmeier, with a date of birth of 12-15-87, had touched her in a way that was inappropriate and that she did not want him to touch her on or in.**
>
> **That these incidents occurred at the defendant's house, as well as other locations within Allegheny County.**

We would have introduced a forensic video, as well as the defendant's statement to the police.

With that, the Commonwealth would have rested.[12]

Judge McDaniel sentenced Mr. Vietmeier to five years probation.

Mr. Vietmeier didn't appeal, making his conviction final on July 20, 2017.

PCRA REQUIREMENTS

Mr. Vietmeier must meet the following conditions to be eligible for PCRA relief. 42 Pa. C.S. § 9543(a)(1)-(a)(4).

First, Mr. Vietmeier must show he's been convicted of a crime under the laws of this Commonwealth and is "currently serving a sentence of imprisonment, probation or parole for the crime." 42 Pa. C.S. § 9543(a)(1)(i). Mr. Vietmeier is currently serving a five-year probation sentence.

Second, Mr. Vietmeier must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2). Based on recently obtained newly-discovered facts, Mr. Vietmeier alleges that his conviction resulted from:

> A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> …

[12] PHpp. 5-6; Rpp. 129-130.

> The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

. 42 Pa. C.S. § 9543(a)(2)(i)&(vi).

Third, Mr. Vietmeier must show his claims aren't previously litigated or waived. 42 Pa. C.S. § 9543(a)(3). Mr. Vietmeier's claims are neither because his claims are premised on new facts – unknown to him before he pled guilty – that he's not yet presented to a court of law.

Fourth, because Mr. Vietmeier is filing his PCRA petition after the 1-year limitations period, he must prove his petition triggers one of the PCRA's three timeliness exceptions. The newly-discovered fact timeliness exception is applicable here. Mr. Vietmeier's claims are "predicated" on new facts "were unknown" to him and he couldn't have "ascertained" these new facts "by the exercise of due diligence." 42 Pa. C.S. § 9545(b)(1)(ii). *Infra*, pp. 8-14.

Fifth, by triggering § 9545(b)(1)(ii), Mr. Vietmeier must also prove he filed his PCRA petition within one year of the date his new claim could've been presented. 42 Pa. C.S. § 9545(b)(2). Mr. Vietmeier received the new facts giving rise to his new claim and current PCRA petition in March 2019. Thus, by filing his newly-discovered facts PCRA petition in September 2019, his petition is timely.

TIMELINESS

The PCRA statute has a 1-year limitations period. 42 Pa. C.S. § 9545(b)(1), meaning petitioners must generally file their PCRA petitions within one year of when their conviction(s) became final. The PCRA statute, however, lists three exceptions to the 1-year limitations period:

> (b) Time for filing petition.—
>
> > (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
> >
> > > (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> > >
> > > (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
> > >
> > > (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S. §§ 9545(b)(1)(i-iii).

Section 9545(b)(1)(ii) provides that "the facts upon which the claim is predicated were *unknown to petitioner* and could not have been ascertained by the exercise of due diligence." (emphasis added). Commonly referred to as the "after-discovered" or

"newly-discovered" fact exception, *Commonwealth v. Burton*, 158 A.3d 618, 628 (Pa. 2017), this exception "does not require a merits analysis of the claim in order for it to qualify as timely and warranting merits review." *Commonwealth v. Lambert*, 884 A.2d 848, 852 (Pa. 2005).

The newly-discovered facts exception in § 9545(b)(1)(ii) is distinct from the after-discovered evidence basis for relief delineated in 42 Pa. C.S. § 9543(a)(2). To trigger the *timeliness* exception, a petitioner need only prove that the *facts* giving rise to his claim(s) were unknown to him and couldn't have been ascertained by the exercise of due diligence. *Commonwealth v. Burton*, 158 A.3d at 629. If the "petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection." *Commonwealth v. Bennett*, 930 A.2d 1264, 1272 (Pa. 2007).

A. Receiving the "new facts"

On December 18, 2018, Washington County CYS received a report that D.V. had been "sexually assaulted" by previous family members between 2006-2010. On January 8, 2019, Detective Douglas ("Dan") Rush of the Pennsylvania State Police ("PSP") interviewed D.V. regarding the Washington County sexual abuse allegations at the Washington County District Attorney's Office's. Detective Bev Ashton and an "associate from the STARRS Program" also participated in the interview. Det. Rush video-recorded D.V.'s interview.

While D.V. discussed the Washington County sexual abuse allegations, she also mentioned, without prompting, the allegations she'd made against Mr. Vietmeier. She told Det. Rush she'd "lied about this incident" because "she didn't want to live" with the Vietmeiers anymore and "she wanted to see her biological mother." Here's how Det. Rush reported this portion of D.V.'s interview:

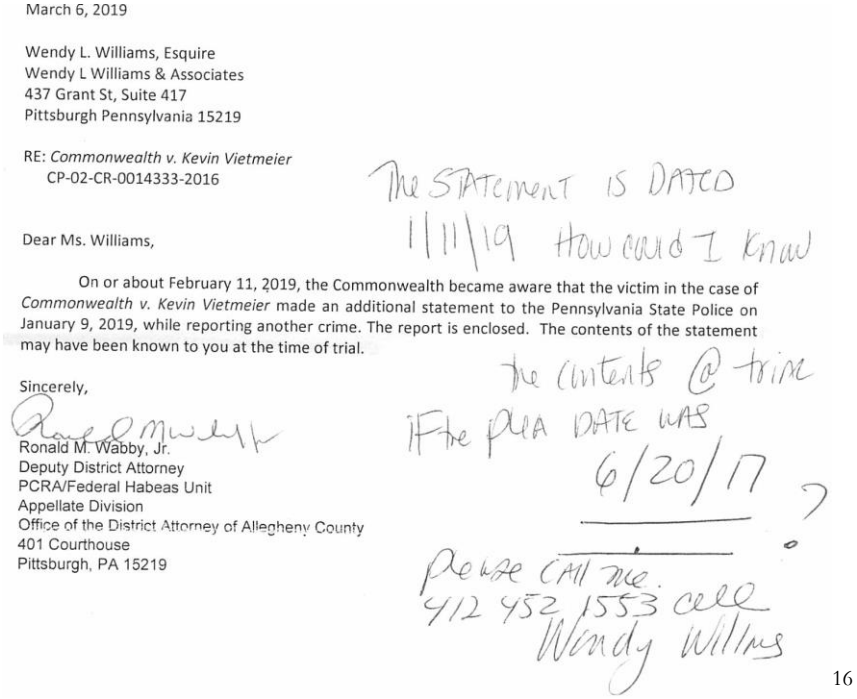
> **FORENSIC INTERVIEW (cont'd):**
> Dakota reported that she has also accused her adoptive brother, Kevin VIETMEIER, of sexually assaulting her after she was adopted. She said this was about two years ago and she reported it and it was investigated. She said VIETMEIER pled guilty to the charges. Dakota went on to say that she lied about this incident because she didn't want to live with VIETMEIER and wanted to see her biological mother. She said her adoptive mother (Theresa "Terry" VIETMEIER) told her that Kevin plead guilty because he wanted to protect Dakota. She couldn't elaborate any further on what that meant. Det. ASHTON asked her if they told anyone that she lied about this incident and she said, "we did but the attorney said that since he already plead guilty there was nothing they could do". We asked what attorney this was told to and she said she didn't know. [13]

Concerned by D.V.'s admission that she'd falsely accused Mr. Vietmeier of touching her inappropriately, Det. Rush called Det. Gerlach on January 10, 2019. Rush asked Gerlach if he knew D.V. had "lied about the incident." Gerlach, according to Rush, said he didn't know D.V. had lied about the allegations. Rush then explained D.V.'s statement/admission to Gerlach who said he'd contact and inform the Allegheny District Attorney's Office ("DAO") regarding D.V.'s statement/admission. Here's how Rush reported his conversation with Gerlach:

> **INVESTIGATIVE ACTIONS:**
> On 01/10/19 I located the above-mentioned case involving Kevin VIETMEIER (Docket # MJ05221-CR-0370-2016). This incident was reported to and investigated by Det. Darren GERLACH, Allegheny County Police Dept. On 01/10/19 I contacted Det. GERLACH and he related the following: Dakota accused VIETMEIER of touching her private area but VIETMEIER plead guilty to lesser charges to avoid being placed on Megans Law. He said when he interviewed VIETMEIER, VIETMEIER told him that he was over at his mother's house with his fiancé and they were watching movies with Dakota. VIETMEIER told him that he had been drinking and couldn't recall exactly what happened. I asked him if he knew Dakota lied about the incident and he said he did not. I explained to him what Dakota told us at the interview and he said he would let the Allegheny County DA know. [14]

[13] Rp. 139.
[14] Rp. 139.

On February 11, 2019, the DAO subpoenaed the PSP requesting the evidence from D.V.'s January 8, 2019 video-recorded statement.[15] On March 6, 2019, ADA Ron Wabby wrote the following letter to Wendy Williams, *i.e.*, trial counsel, and disclosed Det. Rush's report:



March 6, 2019

Wendy L. Williams, Esquire
Wendy L Williams & Associates
437 Grant St, Suite 417
Pittsburgh Pennsylvania 15219

RE: *Commonwealth v. Kevin Vietmeier*
CP-02-CR-0014333-2016

Dear Ms. Williams,

On or about February 11, 2019, the Commonwealth became aware that the victim in the case of *Commonwealth v. Kevin Vietmeier* made an additional statement to the Pennsylvania State Police on January 9, 2019, while reporting another crime. The report is enclosed. The contents of the statement may have been known to you at the time of trial.

Sincerely,

Ronald M. Wabby, Jr.
Deputy District Attorney
PCRA/Federal Habeas Unit
Appellate Division
Office of the District Attorney of Allegheny County
401 Courthouse
Pittsburgh, PA 15219

The STATEMENT IS DATED 1/11/19 How could I know the contents @ time IF the plea DATE WAS 6/20/17 ?

Please CALL me. 412 452 1553 cell Wendy Willms

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To date, the DAO hasn't disclosed the video-recording of D.V.'s statement/admission.

B. The "new facts"

Before Mr. Vietmeier's June 20, 2017 guilty plea, he'd never received a *law enforcement report* or *video-tape* summarizing and *capturing* a statement D.V. gave to multiple law enforcement officers ("LEOs") where she admitted she'd fabricated the allegations

[15] Rpp. 134, 142.
[16] Rp. 134.

against him for her own personal gain, *i.e.*, to increase the likelihood she'd be removed from the Vietmeier home and get to see her biological mother.

Additionally, before pleading guilty, Mr. Vietmeier had never received a law enforcement report where a LEO had contacted Gerlach, and told Gerlach that he'd (the LEO) interviewed D.V., that D.V. admitted to fabricating the allegations against him (Mr. Vietmeier), that he (the LEO) believed D.V.'s statement/admission, and that this was why he (the LEO) was calling Gerlach in the first place, *i.e.*, to report his concern that a presumably innocent person was prosecuted and forced to plead guilty based on D.V.'s false allegations.

Consequently, Rush's report and the video recording of D.V.'s January 8, 2019 statement/admission represents the first law enforcement report and video recording Mr. Vietmeier received that contained this type of exculpatory/impeachment evidence. Thus, the "new facts" – or the "facts" Mr. Vietmeier didn't know about before pleading guilty – are: (1) D.V. spoke to LEOs (2) and told these LEOs she'd fabricated the allegations against Mr. Vietmeier because (3) she didn't want to live with the Vietmeiers anymore and she wanted to see or be placed with her biological mother. That (4) said LEO video-recorded D.V.'s statement/admission and (5) believed D.V.'s statement/admission, and (5) based on his belief, contacted Gerlach to report D.V.'s false allegations against Mr. Vietmeier because (6) the LEO was concerned a presumably innocent person was prosecuted and forced to plead guilty based on D.V.'s false allegations.

C. Due diligence

"[D]ue diligence requires neither perfect vigilance nor punctilious care, but rather it requires reasonable efforts by a petitioner, based on the particular circumstances, to uncover facts that may support a claim for collateral relief." *Commonwealth v. Burton*, 121 A.3d 1063, 1071 (Pa. Super. 2015) (*en banc*), *aff'd Commonwealth v. Burton*, 158 A.3d 618 (Pa. 2017). Based on the nature of the "new facts," Mr. Vietmeier satisfies the diligence component.

The "new facts" come from a LEO report and video recording summarizing and capturing D.V.'s admissions to said LEOs. There's no way on God's green Earth Mr. Vietmeier could've uncovered such facts on his own before or after his guilty plea. The only way he could've obtained a LEO report and video recording containing such facts is through the discovery process. And that's what happened here. Gerlach obviously contacted the DAO after Rush had contacted him, the DAO subpoenaed Rush's report and D.V.'s videotaped statement/admission, and the DAO disclosed Rush's report – but not the video recording – to Mr. Vietmeier on March 6, 2019.

STATE AND FEDERAL CLAIM

I. Mr. Vietmeier's guilty plea must be vacated under state and federal due process principles because it's based on a manifest injustice, *i.e.*, false allegations, facts, and testimony, making it unknowing and unintelligent. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

"Society views the conviction of an innocent person as perhaps the most grievous mistake our judicial system can commit." *Satterfield v. Dist. Attorney Phila.*, 872 F.3d 152, 154 (3d Cir. 2017). Mr. Vietmeier is innocent of the five counts listed in the *Information* and the two counts he pled guilty to on June 20, 2017. All five counts are based on D.V.'s false allegations and testimony. The Federal and Pennsylvania Constitutions demand that this Court withdraw Mr. Vietmeier's guilty plea because it doesn't comport with the most commonsensical state and federal due process principle: it's fundamentally unfair to base a conviction on false allegations, facts, and testimony.

A guilty plea must have a factual basis. *Santobello v. New York*, 404 U.S. 257, 261 (1971); *Commonwealth v. Willis*, 369 A.2d 1189, 1190 (Pa. 1977). A factual basis premised on false allegations, facts, and testimony violates the defendant's state and federal due process rights because a guilty plea, like a conviction following a jury trial, can't be based on known or unknown false allegations, facts, and testimony. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Commonwealth v. Rega*, 70 A.3d 777 (Pa. 2013); *Commonwealth v. Gaddy*, 362 A.2d 217 (Pa. 1976); *Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009) (holding that the unknowing using of false testimony still constitutes a due process

violation after finding "no reason for subjecting the two types of errors [*i.e.*, the knowing and unknowing use of false testimony] to different standards of harm").

Moreover, if a guilty plea's factual basis is based on false allegations, facts, and testimony, the plea can't be knowing and intelligent, which is a fundamental state and federal due process requirement. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); Pa.R.Crim.P. 590(A)(3). A plea must also be voluntary, meaning "agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady v. United States*, 397 U.S. 742, 750 (1970).

After sentencing, a defendant can move to withdraw his guilty plea, but only if he presents evidence showing a "manifest injustice." *Commonwealth v. Yeomans*, 24 A.3d 1044, 1046 (Pa. Super. 2011). A petitioner can use after-discovered facts to prove and satisfy the "manifest injustice" standard. *Commonwealth v. Peoples*, 319 A.2d 679, 681 (Pa. 1974); *Commonwealth v. Heaster,* 171 A.3d 268, 273 n.6 (Pa. Super. 2017).

In *Commonwealth v. Peoples*, 319 A.2d 679 (Pa. 1974), the petitioner filed a Post-Conviction Hearing Act ("PCHA") petition, requesting the PCHA court to withdraw his guilty plea based on after-discovered evidence. The Commonwealth opposed the petition, arguing that "as a matter of law, the presence of such [after-discovered] evidence alone should not entitle [the petitioner] to withdraw his guilty plea[.]" Instead, the Commonwealth argued, the petitioner must meet the "manifest injustice" threshold for withdrawing a guilty plea. *Id.* at 680. The Supreme Court rejected the Commonwealth's argument and held:

> In numerous cases, most recently in *Commonwealth* v. *Starr*, 450 Pa. 485, 301 A.2d 592 (Pa. 1973), [the Supreme Court has] held that a court should allow the withdrawal of a guilty plea after sentencing to correct a manifest injustice to the defendant. The first issue thus presented by the case is whether a defendant has met the requirements of *Starr*… if he has produced after-discovered evidence which would have entitled him to a second trial if he had gone to trial originally rather than pleading guilty. We are of the opinion that any after-discovered evidence which would justify a new trial would also entitle a defendant to withdraw his guilty plea. *It would be incongruous to allow a defendant a new trial on the basis of after-discovered evidence when he has already had one trial, but to deny him a new trial on the basis of such evidence merely because he had originally decided not to go to trial, but plead guilty, perhaps because he did not have the additional evidence.*

Id. at 681 (emphasis added).

Thus, *Peoples* holds, where a petitioner seeks to withdraw his plea based on after-discovered evidence, the petitioner's ability to satisfy the after-discovered evidence standard means the petitioner is, *ipso facto*, able to satisfy the "manifest injustice" standard.

Consequently, to withdraw a guilty plea based on after-discovered evidence, the petitioner must plead and prove: (1) he discovered the new facts *after* he'd pled guilty and couldn't have obtained or developed the new facts before his (hypothetical) trial by the exercise of reasonable diligence; and (2) the new facts (a) aren't merely corroborative or cumulative of other evidence at the (hypothetical) trial, (b) aren't being used solely to impeach a witness's credibility, and (c) "must be such as would likely compel a different result." *Commonwealth v. Peoples*, 319 A.2d at 681; 42 Pa. C.S. § 9543(a)(2)(vi).

A. Applying *Peoples*[17]

Had Mr. Vietmeier obtained the new facts contained in Det. Rush's report and the video recording of D.V.'s statement/admission, he would've gone to trial, forced the DAO to put D.V. on the stand, and then used Rush's report and the video recording to *impeach* her allegations (assuming she even testified at trial) and present *substantive* evidence of his innocence.

B. Mr. Vietmeier can use Det. Rush's report and D.V.'s video-recorded statement/admission as impeachment and substantive evidence, meaning the new facts don't simply impeach D.V.'s credibility

If the DAO had Det. Rush's report and the video recording of D.V.'s statement/admission before the (hypothetical) trial, one must seriously question whether the DAO would've or could've moved forward with the prosecution. Long story short, there's no guarantee D.V. would've testified at (the hypothetical) trial after admitting to LEOs she'd fabricated her allegations against Mr. Vietmeier for the sole purposes to trying to "game the CYS system" in her favor so she could see her biological mother and obtain a new placement.

[17] That Mr. Vietmeier relies on *Peoples* – a state law case – to trigger the withdrawal of his guilty plea, doesn't mean his guilty plea claim is a pure state law claim. It's also federal claim, but *Peoples* represents the state law mechanism petitioners must first use to undo an invalid and unconstitutional guilty plea. The gist of *Peoples*, though, comports with straightforward federal due process principles, *i.e.*, it's fundamentally unfair to sustain a guilty plea that's based on false allegations, facts, and testimony. Thus, the DAO is on notice that Mr. Vietmeier's guilty plea claim is a hybrid claim involving both state and federal constitutional law.

If the DAO moved forward with the prosecution, however, it would have to subpoena D.V., put her on the stand, and have her stick to the initial allegations she presented to the CAC, Ginsberg, and Gerlach and at the preliminary hearing. If the DAO chose this (unfortunate) route, Mr. Vietmeier would not only *destroy* D.V.'s credibility on cross-examination based on Rush's report and the video recording, Mr. Vietmeier would also use the video recording as *substantive* evidence of his innocence.

Under this scenario, if D.V. stuck to her initial allegations at (the hypothetical) trial, her trial testimony would be *inconsistent* with her prior statement/admission to Dets. Rush and Alston. A prior inconsistent statement ("PIS") can obviously be used to impeach a testifying witnesses, but it can also be used as *substantive* evidence if the following circumstances are present: the witness who gave the PIS must testify at trial and be subject to cross-examination regarding the PIS; and the witness's PIS was either (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement. *Commonwealth v. Brown*, 52 A.3d 1139, 1171 n.52 (Pa. 2012); *Commonwealth v. Brady*, 507 A.2d 66, 71 (Pa. 1986).

Rush's report and the video recording are verbatim contemporaneous recordings of D.V.'s January 8, 2019 statement. Thus, Mr. Vietmeier can use the "new facts" in these items of evidence to *obliterate* D.V.'s credibility on cross-examination and present *substantive* evidence of his innocence. Consequently, the "new facts" do much more

than destroy D.V.'s credibility. They *substantively* prove he's innocent of the charges listed in the *Information*. Put differently, the "new facts" *substantively* prove the DAO can't meet its burden of proving any of the five counts listed in the *Information* beyond a reasonable doubt. Similarly, the "new facts" aren't cumulative or corroborative of other evidence. Again, the key "new fact" is that D.V. gave a *recorded statement to LEOs* admitting *she'd fabricated the allegations* against Mr. Vietmeier. The record is devoid of any similar "facts," meaning the "new facts" can't be cumulative.

And let's be honest, at (the hypothetical) trial, D.V.'s credibility would be suspect heading into trial based on her preliminary hearing testimony. At the prelim, she admitted to "exaggerating" the allegations against Mr. Vietmeier. She also admitted she'd lied during Ginsberg's interview when she said the two prior incidents both occurred at the Vietmeier house. At (the hypothetical) trial, Mr. Vietmeier will undoubtably use D.V.'s prelim testimony to further destroy her credibility – assuming she had any credibility remaining after being confronted with her PIS to Dets. Rush and Ashton.

D. The "new facts" in Det. Rush's report and D.V.'s video-recorded statement/admission undermine any claim by Det. Gerlach that Mr. Vietmeier confessed

At (the hypothetical) trial, Mr. Vietmeier will testify he never touched D.V. inappropriately on November 12, 2016 or any other time. He will then introduce D.V.'s video-recorded statement/admission and argue it supports his testimony – and *innocence* – because D.V. admitted to fabricating the allegations against him.

Mr. Vietmeier, more importantly, will also use Rush's report and D.V.'s video-recorded statement/admission to rebut Gerlach's report and preliminary hearing testimony. In his report summarizing Mr. Vietmeier's November 16, 2016 interrogation, Gerlach claimed Mr. Vietmeier confessed to D.V.'s allegations.[18] At the prelim, Gerlach mimicked this narrative on direct-examination.[19]

Gerlach's testimony/narrative is false. He video-recorded Mr. Vietmeier's interrogation and the video recording shows Mr. Vietmeier didn't confess. Mr. Vietmeier said he could neither confirm nor deny D.V.'s allegations because he'd fallen asleep when Brittnie Richards took her 5- to 10-minute shower, *i.e.*, the brief time frame D.V. alleged the inappropriate touching occurred on November 12, 2016. Mr. Vietmeier, though, never confessed to D.V.'s allegations – be it the November 12, 2016 allegation or the two prior alleged incidents.[20] During his prelim cross-examination, Gerlach admitted his direct-examination testimony wasn't true. He said Mr. Vietmeier didn't confess. Instead, Mr. Vietmeier told him he'd "agree with what [D.V.] said because he didn't remember much of the evening[.]"[21]

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[18] Rp. 4.
[19] PLTp. 57; Rp. 71.
[20] The DAO has a copy of Mr. Vietmeier's video-recorded interrogation. Notably, though, when ADA Goldfarb placed the guilty plea's factual basis on the record, she mentioned nothing about Mr. Vietmeier's *alleged* confessions. According to ADA Goldfarb, the only video recording the DAO would've introduced at trial would've been D.V.'s November 15, 2016 CAC interview with Ginsberg. PHpp. 4-5. If Mr. Vietmeier truly confessed to D.V.'s allegations, one has to wonder why ADA Goldfarb didn't make his confessions part of the factual basis. ADA Goldfarb didn't incorporate Mr. Vietmeier's interrogation video recording because he didn't confess, and his statements to Gerlach proved nothing regarding D.V.'s allegations, which, by the way, we now know were fabricated in an attempt to game the CYS system.
[21] PLTpp. 68, 69-70; Rpp. 82, 83-84.

With Rush's report and D.V.'s video-recorded statement, however, Mr. Vietmeier can convincingly argue: (a) he's innocent of D.V.'s allegations because D.V. admitted to two LEOs she'd fabricating the allegations; and (b) because he's innocent, he didn't and wouldn't confess to D.V.'s untrue allegations.[22]

E. Jurors can rely on the "new facts" to find Brittnie Richards's trial testimony truthful

Brittnie Richards was present for the alleged November 12, 2016 incident and she testified at the preliminary hearing. At the prelim, Richards said she was the one who'd encouraged Mr. Vietmeier to have D.V. and her sisters spend the night on November 12, 2016. She found a recipe on Facebook she thought D.V. and her sisters would enjoy making with her and Mr. Vietmeier that night. She said D.V. and her sisters arrived at Mr. Vietmeier's house at 9:30 p.m. that night.[23]

Richards said they watched the movie *Major Payne* that night. She, D.V. and Mr. Vietmeier sat on the same long black leather couch. D.V. was next to Mr. Vietmeier. Richards was on the other side of D.V. At no time during the movie did Richards see Mr. Vietmeier touch D.V. inappropriately. She said Mr. Vietmeier was falling asleep – because he was bobbing his head – when she got up and took a quick 5- to 10-minute shower. When she returned to the living room after her shower, Richards said Mr.

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[22] Even if Mr. Vietmeier falsely confessed, *which he didn't*, a false confession doesn't prevent inmates from obtaining PCRA relief or proving their innocence with after-discovered evidence. "Many of the nation's more than 360 wrongful convictions overturned by DNA evidence involved some form of a false confession." www.innocenceproject.org/false-confessions-recording-interrogations/.

[23] PLTpp. 90-91; Rpp. 104-105.

Vietmeier was asleep: "He was gone, done." His hands, she said, weren't anywhere near D.V. His right arm, she said, was on the couch.[24]

When she sat down on the couch after the shower, the couch made a noise which woke Mr. Vietmeier. Once up, he moved next to her (Richards) on the couch. She said they watched *Beetle Juice* after *Major Payne* and that Mr. Vietmeier sat next her during *Beetle Juice*. She said D.V. fell asleep on the couch during *Beetle Juice*. She said Mr. Vietmeier never apologized to D.V. or anyone that night. She said the only time Mr. Vietmeier was "alone" with "the kids" was during her 5- to 10-minute shower.[25]

Based on the "new facts" in Rush's report and D.V.'s video-recorded statement/admission, it's likely jurors would rely on these "new facts" to find Richards's testimony credible and truthful.

F. The cumulative impact of the "new facts" would likely compel a different result at (the hypothetical) trial

The "would likely compel a different result" standard is analogous to the "reasonable probability of a different outcome" standard with *Brady* and *Strickland* claims. Under *Brady*, for example, a new trial is required if it's reasonably probable the suppressed evidence would've altered at least one juror's assessment of the Commonwealth's case where this juror would've had reasonable doubts about the

[24] PLTpp. 92-94; Rpp. 106-107.
[25] PLTpp. 95-97; Rpp. 108-109.

Commonwealth's case. *Cone v. Bell*, 556 U.S. 449, 452, 470 (2009); *accord Buck v. Davis*, 137 S.Ct. 759, 776 (2017) (using the same standard for a *Strickland* claim).

When the "new facts" are viewed through this similar, yet differently worded, prism, Mr. Vietmeier has established a manifest injustice to withdraw his guilty plea. If jurors at Mr. Vietmeier's (hypothetical) trial learned of the "new facts" in Rush's report and D.V.'s video-recorded statement/admission, it's reasonably probable at least one juror – if not all of them – would have reasonable doubts regarding all five counts in the *Information*.

If D.V. testifies at the trial, the "new facts" destroy her credibility, and we're using the word "destroy" literally. Once jurors view D.V.'s video-recorded statement/admission, jurors will find she has no credibility whatsoever. Keep in mind, jurors will already be suspect of D.V.'s credibility because of her inconsistent prelim testimony. In the end, in cases where the DAO presents no physical or eyewitness evidence to corroborate a juvenile's inappropriate touching allegations, these cases turn on the accuser's credibility. D.V.'s credibility – at this point – isn't worth the paper this pleading is written on.

When the accuser voluntarily confesses – on camera – to multiple LEOs that she'd fabricated allegations against the defendant, while the LEOs were questioning her about an entirely separate allegation, the accuser's *credibility* regarding the initial allegations against the defendant disintegrates.

Mr. Vietmeier, therefore, is entitled to have his guilty plea withdrawn. His plea, put differently, represents a manifest injustice because it's based on false allegations and testimony rendering it unconstitutional under state and federal due process principles.

FACT-DEVELOPMENT REQUESTS

A. Right to discovery

The DAO subpoenaed the PSP regarding D.V.'s January 8, 2019 statement/admission.[26] The DAO disclosed Det. Rush's report to trial counsel on March 6, 2019.[27] The DAO, though, didn't disclose the video recording of D.V.'s statement/admission.

PCRA petitioners are entitled to discovery if the discovery "may arguably support one or more of [the petitioner's] PCRA theories." *Commonwealth v. Frey*, 41 A.3d 605, 613 (Pa. Super. 2012). D.V.'s video-recorded statement "may arguably" support Mr. Vietmeier's "PCRA theories." *Id.* Mr. Vietmeier, therefore, is entitled to a copy of D.V.'s video-recorded statement/admission.

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[26] Rp. 142.

[27] Once the DAO learned of D.V.'s statement/admission, it was constitutionally obligated to disclose this information. "*Brady* imposes an affirmative and continuing duty upon the government to disclose exculpatory information." *Commonwealth v. Williams*, 86 A.3d 771, 788 (Pa. 2014).

Likewise, the DAO has a "duty to correct" D.V.'s false preliminary hearing testimony – which formed the foundation of the guilty plea's factual basis. *Commonwealth v. Carpenter*, 372 A.2d 806, 810, 812 n.11 (Pa. 1977) ("It is, of course, an established constitutional principle that… a prosecuting attorney has an affirmative duty to correct the testimony of a witness which he knows to be false"; "It is, of course, the prosecutor's duty to take corrective measures when false testimony appears.").

While the DAO disclosed Rush's report, Mr. Vietmeier and counsel are unaware of any measures the DAO has taken to correct D.V.'s false preliminary hearing testimony, which, again, formed the foundation of the plea's factual basis.

According to Det. Rush's report, D.V. spontaneously divulged the fact she'd fabricated her allegations against Mr. Vietmeier while he (Rush) and others interviewed her regarding the Washington County sexual abuse allegations. Although Rush's report contained numerous facts regarding the Washington County sexual abuse allegations, Mr. Vietmeier understands the privacy issues/concerns regarding these allegations. Thus, all he's requesting is that the DAO disclose an edited copy of the video recording that contains only those portions where D.V. admitted to fabricating her allegations against him.

B. Right to an evidentiary hearing

If the Court finds the record insufficient to adjudicate Mr. Vietmeier's "new fact" claim, he's entitled to an evidentiary hearing to develop additional facts.

The PCRA court "shall order a hearing" when the PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2). A hearing can't be denied unless the Court is "certain" Mr. Vietmeier's PCRA petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); *accord Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-1036 (Pa. Super. 1979). Even in "borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing." *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983) (quoting *Commonwealth v. Strader*, 396 A.2d 697, 702 (Pa. Super. 1978)). Thus, an "evidentiary hearing should… be conducted where the record does not clearly refute the claim of an accused that his plea was unlawfully induced." *Id.*

The record doesn't clearly refute Mr. Vietmeier's claim that his guilty plea represents a manifest injustice and is unconstitutional under state and federal constitutional law because it's based on D.V.'s false allegations. To the contrary, the record, he believes, strongly supports his claim. However, if the Court believes it needs additional fact development to adequately review and adjudicate his claim, he's entitled to an evidentiary.

WITNESS CERTIFICATIONS

In accordance with Pa.R.Crim.P. 902(A)(15), if the Court grants an evidentiary hearing, Mr. Vietmeier intends to present the following witnesses:

1. Detective Douglas ("Dan") Rush: Det. Rush will testify and discuss D.V.'s video-recorded statement/admission from January 8, 2019. He'll also discuss why and how he contacted Detective Darren Gerlach and the DAO, his communications with Gerlach and the DAO, and how the DAO subpoenaed the information relating to D.V.'s video-recorded statement/admission.

2. Detective Beverly Ashton: Det. Ashton will testify and discuss D.V.'s video-recorded statement from January 8, 2019.

3. D.V.: D.V. will testify and discuss her video-recorded statement from January 8, 2019 and explain why she fabricated her allegations against Mr. Vietmeier.

4. Wendy Williams: Ms. Williams will testify and explain how, before Mr. Vietmeier pled guilty on June 20, 2017, the DAO had never disclosed a LEO report and/or video recording summarizing and capturing a LE statement from D.V. where

D.V. – on her own and without prompting – admitted she'd fabricated the allegations against Mr. Vietmeier. Ms. Williams will also testify that had this type of LEO report and video recording been disclosed to her and Mr. Vietmeier before his guilty plea, she would've advised him to plead not guilty and to go to trial.

5. Kevin Vietmeier: Mr. Vietmeier will testify and explain how, before he pled guilty on June 20, 2017, the DAO had never disclosed a LEO report and/or video recording summarizing and capturing a LE statement from D.V. where D.V. – on her own and without prompting – admitted she'd fabricated the allegations against him. Mr. Vietmeier will also testify that had this type of LEO report and/or video recording been disclosed to him before he pled guilty, he would've pled not guilty and gone to trial.

RIGHT TO AMEND

Mr. Vietmeier reserves the right to amend his PCRA petition if he uncovers or the DAO discloses additional facts relevant to his state and federal claim or that give rise to additional state and federal claims. Pa.R.Crim.P. 905(a)("Amendment shall be freely allowed to achieve substantial justice.").

CONCLUSION

WHEREFORE, Mr. Vietmeier requests the following relief:

1. An order withdrawing his guilty plea based on the manifest injustice standard; or in the alternative,

2. An order compelling the DAO to disclose an edited copy of D.V.'s video-recorded statement/admission that only contains the portions of D.V.'s statement where she admits to fabricating her allegations against him; and

3. An order scheduling an evidentiary hearing where the above-listed witnesses can testify.

Respectfully submitted this the 13th day of September, 2019.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On September 13, 2019, counsel emailed this pleading to ADA Ronald Wabby at RWabby@alleghenycountyda.us.