VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of February, 2024.

Present: All the Justices.

PATRICIA WEST, CHAIRMAN,
VIRGINIA PAROLE BOARD, APPELLANT,

against Record No. 220654
Circuit Court No. CL20005864

GILBERT MERRITT, III, APPELLEE.

UPON AN APPEAL FROM A JUDGMENT
RENDERED BY THE CIRCUIT COURT
OF THE CITY OF NORFOLK.

The Chairman of the Virginia Parole Board ("Respondent")[1] appeals a judgment of the Circuit Court of the City of Norfolk ("circuit court") granting the petition of Gilbert Merritt, III, for a writ of habeas corpus and vacating his convictions for murder and use of a firearm in the commission of a felony. Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that the circuit court's judgment should be affirmed.

Merritt filed his petition for a writ of habeas corpus on July 9, 2020, following the recantation of a key trial witness, Lisa Fuller. On appeal, Respondent raises limited issues of timeliness of the petition, waiver under the terms of Merritt's conditional pardon, and amendment of Merritt's petition to add a new claim for relief. Because the parties are fully conversant with the record in this case and this order carries no precedential value, the Court recites only those facts and incidents of the proceedings as are necessary to the parties' understanding of the disposition of this appeal.

[1] Due to changes in custody, there have been multiple party substitutions for the original respondent throughout these habeas proceedings. In the interest of clarity, and because the responding party has been represented at all relevant times by the Office of the Attorney General, all will be collectively referred to as Respondent.

I.

Respondent argues Merritt's petition was time-barred, even if the statute of limitations was tolled under Code § 8.01-229(D),[2] because Merritt was aware of the facts giving rise to his claims more than one year before filing his petition. A statute of limitations defense presents a mixed question of law and fact. *See Mackey v. McDannald*, 298 Va. 645, 654 (2020). While the Court reviews legal determinations de novo, the Court will uphold the circuit court's factual findings in accepting or rejecting the defense unless they are plainly wrong or without credible supporting evidence. *Id.*

The circuit court determined that the petition was timely, a conclusion premised on the finding that Merritt could not have known about the facts underlying his claims until Fuller admitted her role in his conviction. Merritt's petition stated that Fuller recanted in her interviews with the Innocence Project from the University of Virginia School of Law in October and November of 2019, "as reflected in her sworn affidavit," but the suppression of her false testimony and the scheme behind it did not end until Fuller executed the affidavit in January of 2020. Fuller testified that although she apologized to Merritt in 2014 or 2015, her apology was generalized and did not mention her testimony or that it was coerced by lead investigator Detective Robert Glen Ford. Merritt testified that he and Fuller never spoke about her testimony before she signed the affidavit. The circuit court found both Fuller's and Merritt's testimony to be credible. The circuit court's finding that Merritt did not know, and could not have known,

[2] The Court of Appeals recently recounted the requirements laid out by this Court's precedent for a plaintiff to be entitled to tolling under Code § 8.01-229(D). As summarized by the Court of Appeals, it has always been required that a

> plaintiff . . . establish that the defendant undertook an affirmative act designed or intended, directly or indirectly, to obstruct the plaintiff's right to file [the] action. Mere silence by the person liable is not concealment, but there must be some affirmative act or representation designed to prevent, and which does prevent, the discovery of the cause of action. And not just any act will do. The requisite obstruction must consist of some trick or artifice preventing inquiry, or calculated to hinder a discovery of the cause of action by the use of ordinary diligence.

Smith Dev., Inc. v. Conway, 79 Va. App. 360, 381 (2024) (internal quotation marks and citations omitted).

about the facts giving rise to his claims until Fuller signed her affidavit is therefore supported by the evidence. Moreover, given the inherently subversive nature of the scheme revealed by Fuller's recantation, the circuit court's finding was also not plainly wrong. Merritt's petition, filed within one year of Merritt learning of Fuller's recantation, was therefore timely.

II.

Respondent argues Merritt waived his right to pursue habeas relief under the terms of the conditional pardon he accepted while these habeas proceedings were pending.[3] Respondent relies on the release clause as an express waiver:

> [Merritt] releases all claims, demands, and causes of action, whether known or unknown, accrued or unaccrued, he has or may have against the Commonwealth of Virginia, as well as its political subdivisions, officials, employees, and agents that are in any way related to or arise out of Mr. Merritt's arrest or incarceration in the Virginia Department of Corrections. Mr. Merritt agrees that this release is binding on his heirs, assigns, agents, and estate unless exonerated, or otherwise has their conviction vacated, through a writ of habeas corpus or otherwise[.]

In opposition, Merritt contends the release clause was ambiguous at best. Merritt offered affidavits from himself, former Governor Ralph Northam, and former Secretary of the Commonwealth Kelly Thomasson to establish that the release clause was not intended to prevent his pursuit of habeas relief.

As determined by the circuit court, Merritt did not waive his right to pursue habeas relief. A conditional pardon "implies a contract" because it "always contains a condition which a prisoner may accept or reject at his pleasure." *Lee v. Murphy*, 63 Va. (22 Gratt.) 789, 791, 812 (1872). When terms of a contract "seemingly conflict, if, without discarding either, they can be harmonized so as to effectuate the intention of the parties as expressed in the contract considered as a whole, this should be done." *Plunkett v. Plunkett*, 271 Va. 162, 168 (2006). Though not a model of clarity, the language of the release clause, when taken as a whole, necessarily

[3] Merritt agreed to several terms under the conditional pardon, including that he be "supervised by Probation and Parole for three (3) years upon his release" from incarceration. Provided Merritt complies with the agreed terms, the conditions "shall be satisfied three (3) years from the date of [Merritt's] release." However, if any of the terms are violated, Merritt "shall forfeit all privileges provided under this grant of Clemency and . . . shall be subject to immediate arrest and incarceration to complete the term of his original sentences."

contemplates the possibility of exoneration. It is therefore reasonable to conclude that the release clause preserved only claims that could result in exoneration or vacation of convictions, such as a claim for writ of habeas corpus. Thus, Merritt's acceptance of the conditional pardon did not waive his right to pursue habeas relief, and the circuit court's reliance, if any, on the affidavits as parol evidence was harmless.

III.

Following the evidentiary hearing, Merritt sought and was granted leave to amend his petition to include new claims, specifically one under *Brady v. Maryland*, 373 U.S. 83 (1963), for suppression of canvass notes revealing witness reports of a different vehicle leaving the scene. Reviewing the grant or denial of a motion to amend is "limited to the question whether the trial judge abused his discretion." *Lucas v. Woody*, 287 Va. 354, 363 (2014). The circuit court recognized that the statute of limitations requires a petition be brought "within one year after the cause of action accrues," *see* Code § 8.01-654, but disagreed with Respondent that Merritt had knowledge of the facts giving rise to this new claim for more than one year. The evidence at issue was undisputedly revealed when the Norfolk Police Department turned over its investigative file as part of the discovery granted by the circuit court. Merritt sought to amend his petition "within several months of the provision of discovery" and "just weeks" after the evidentiary hearing. This timeline and, consequently, the circuit court's finding are supported by the record. As the statute of limitations had not expired on this new claim, the circuit court did not abuse its discretion by allowing Merritt to amend his petition. *See* Rule 1:8 ("Leave to amend should be liberally granted in furtherance of the ends of justice.").

IV.

Respondent further argues the canvass notes were not material under *Brady*. Whether a petitioner is entitled to habeas relief presents "a mixed question of law and fact." *Zemene v. Clarke*, 289 Va. 303, 306 (2015). The habeas court's factual findings "are entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them." *Hedrick v. Warden, Sussex I State Prison*, 264 Va. 486, 496 (2002). Materiality does not require that disclosure of suppressed evidence would have resulted in acquittal, and suppressed evidence must be considered collectively. *See Hicks v. Dir., Dep't of Corr.*, 289 Va. 288, 300 (2015) (citing *Workman v. Commonwealth*, 272 Va. 633, 645 (2006)). The ultimate question is whether, in the absence of the suppressed evidence, a defendant "received a fair trial,

understood as a trial resulting in a verdict worthy of confidence." *Workman*, 272 Va. at 645 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

Merritt's trial counsel testified that his defense strategy for the jury trial relied on attacking Fuller's credibility. Counsel stated that the canvass notes would have been "very important," if not "essential," in the aggregate. After already calling attention to a plea deal for Fuller's own impending sentencing, eyewitness testimony describing a vehicle different from the one described by Fuller would undoubtedly have been used to further undermine her credibility. Of broader import, such testimony also could have called into question the reliability of an investigation already weakened by blatant investigative failures and a lack of physical evidence connecting Merritt to the crime. *See, e.g.*, *Workman*, 272 Va. at 646-47. That Merritt could have used the canvass notes to meaningfully investigate and supplement his defense is a factual finding that is not plainly wrong or unsupported by the evidence. Under these circumstances, the canvass notes were material in the sense that their suppression "undermines confidence in the outcome" of Merritt's trial. *See United States v. Bagley*, 473 U.S. 667, 678 (1985). The circuit court, therefore, did not err in finding the evidence material.

For the foregoing reasons, the Court affirms the judgment of the circuit court.

This order shall be certified to the Circuit Court of the City of Norfolk.

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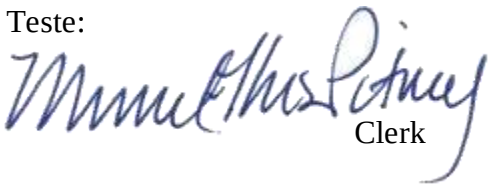

Clerk