No. 31676 – State ex rel. Clyde H. Richey v. Colonel Howard E. Hill, Jr. and Mike Clifford, Prosecuting Attorney of Kanawha County

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OF WEST VIRGINIA

Maynard, Chief Justice, concurring:

I write separately to concur with the majority in this case and to express particular concern with the tension between the need for fairness and the expenditure of limited judicial resources. I have always sought to make decisions which are fair, faithful to the precedents of this Court, and respectful to the views of other jurisdictions. Having read the very scholarly dissenting opinion, I believe that it is too motivated by what it perceives are legitimate concerns about the fairness, justness, and equity of the majority opinion. I believe the dissenting opinion is off the mark in its concern. Thus, I fully join the majority opinion but write separately to more fully explain why the opinion is fair, just, equitable, consistent with West Virginia law, and is consistent with the majority view of the law in numerous other jurisdictions.

A. General Rules of Criminal Finality

First, the dissent expresses substantial concern that "'[c]onventional notions of finality of litigation have no place where life or liberty is at stake . . . .' *Sanders v. United*

States, 373 U.S. 1, 8 (1963)." However, "[w]ithout finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions 'shows only that the "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have none.'" *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 1074-75, 103 L. Ed. 2d 334 (1989) (plurality opinion) (quoting Hon. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970)).[1] *Accord State v. Mata*, 916 P.2d 1035, 1053 (Ariz. 1996) (En Banc); *People v. Smith*, 794 N.E.2d 367, 377 (Ill. Ct. App. 2003); *State v. Whitfield*, 107 S.W.3d 253, 281 (Mo. 2003) (En Banc) (Limbaugh, C.J., dissenting) (rule applies at both "the state or federal level . . ."). In fact, the West Virginia Post-Conviction Habeas Corpus Act, W.Va. Code § 53-4A-1(a) (2000) provides for the application of res judicata in post-conviction proceedings, a point which this Court has recognized:

> A judgment denying relief in post-conviction habeas corpus is res judicata on questions of fact or law which have been fully and finally litigated and decided, and as to issues which with reasonable diligence should have been known but were not raised, and this occurs where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel or appeared pro se having knowingly and intelligently waived his right to counsel.

Syllabus Point 2, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). *See also State ex rel. Strogen v. Trent*, 196 W.Va. 148, 150 n.1, 469 S.E.2d 7, 9 n.1 (1996) (per curiam)

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[1]Judge Friendly's observation adopted in *Teague* was, of course, a retort to Justice Brennan's opinion in *Sanders*. *See* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Columbia L. Rev. 888, 936 n.342 (1998).

(refusing to apply W.Va. Code § 53-4A-1(a) to an original jurisdiction habeas petition based only because the State did not raise the issue of res judicata).

Of course, there are additional reasons compelling an adherence to finality in the post-conviction arena. "[C]ollateral litigation places a heavy burden on scarce . . . judicial resources, and threatens the capacity of the system to resolve primary disputes." *McClesky v. Zant*, 499 U.S. 467, 491, 111 S. Ct. 1454, 1469, 113 L. Ed. 2d 517 (1991). In other words, "[t]o the extent the . . . courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication." *Schneckloth v. Bustamonte*, 412 U.S. 218, 260-61, 93 S. Ct. 2041, 2065, 36 L. Ed. 2d 854 (1973) (footnote omitted) (Powell, J., concurring). "The reopening of closed cases . . . means attention to bygones at the expense of others in need of initial adjudication." *United States v. Keane*, 852 F.2d 199, 206 (7th Cir. 1988). Every petitioner who seeks successive post-conviction proceedings denies access to the courts of criminal defendants seeking speedy trials, civil plaintiffs seeking compensation for injuries, abused and neglected child seeking protection, and so on. The chronology in this case shows why the doctrine of res judicata bars, and should bar, Mr. Richey's claim. Mr. Richey has to date lost: 1) his *Zain* habeas in front of Judge MacQueen; 2) his motion for DNA testing in front of Judge Scott; 3) another motion for DNA testing in front of Judge Bloom that raised no new issues; and, 4) an original jurisdiction habeas for DNA testing which this Court

refused. He is now again asking for post-conviction DNA testing. Mr. Richey doesn't simply want another bite at the apple; he wants the whole orchard.[2] Which leads to my next point.

Even those who have been convicted have an interest in the finality of their convictions.

> "As Justice Harlan once observed, ' . . . the individual criminal defendant . . . ha[s] an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.'"

Coleman v. Thompson, 501 U.S. 722, 748, 111 S. Ct. 2546, 2564, 115 L. Ed. 640 (1991) (quoting *Engle v. Issac*, 456 U.S. 107, 127, 102, S. Ct. 1558, 1571, 71 L. Ed. 2d 783 (1982)

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[2]The dissent posits that if DNA testing on the underwear showed that the semen matched neither Mr. Richey nor his victim then it "might be shown to the satisfaction of a reviewing court that the wrong person was identified as a perpetrator and convicted." (emphasis deleted). Aside from noting that "might" is a long way from what the dissent agrees is the proper test, i.e., the test results must be "outcome determinative," it also points out another problem. The dissent claims that Mr. Richey's request for DNA testing "is even less a cause of concern because it does not involve the extraction of a DNA sample from anyone but the Petitioner . . . ." However, even if Mr. Richey's DNA did not match the semen on the underwear, this would not be outcome determinative because the victim testified that during the attack Mr. Richey masturbated him and caused him to ejaculate. Consequently, unless Mr. Richey can show that the semen on the underwear did not match *either* Mr. Richey or the victim, the testing is not outcome determinative since the test result would not be inconsistent with guilt. That of course means that the victim must also provide a DNA sample, which means that for the post-conviction DNA testing to be worthwhile the DNA testing would have to involve someone other than Mr. Richey–namely the victim of a crime that occurred nearly twenty-five years ago.

(quoting *Sanders v. United States*, 373 U.S. 1, 24-25, 83 S. Ct. 1068, 1082, 10 L. Ed.2d 148 (1963) (Harlan, J., dissenting)). That is to say,

> At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.

Schneckloth, 412 U.S. at 262, 93 S. Ct. at 2065, 36 L. Ed. 2d 854 (Powell, J., concurring). Consequently, I must agree that:

> "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility."

McClesky, 499 U.S. at 492, 111 S. Ct. at 1469 (citation omitted). *See also Miller v. Bordenkircher*, 764 F.2d 245, 249 (4th Cir. 1985) ("To speak thus firmly on the matter is not to speak harshly. At some point, the system must declare that justice has been done insofar as human capacity exists to dispense it, and attempt to focus the attention of those it has incarcerated upon rehabilitation rather than relitigation."). All of which is not to say that there are not some extremely limited instances where the rules of finality must imperatively yield. Therefore, I now turn to the dissent's next issue–that of making post-conviction DNA testing dependent upon a petitioner being incarcerated.

B. The Incarceration Requirement

The dissent states that "[t]here can be no sound reason for making a distinction on the basis of how a sentence is served or whether it has been fully served, since it hardly promotes the overriding aim of our criminal justice system: 'that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935)."[3] I believe that there are a number of good reasons to require current incarceration as a predicate to requesting post-conviction DNA relief.

The requirement that a post-conviction DNA petitioner be incarcerated is the standard applied to ordinary petitioners by the West Virginia Habeas Corpus Act; it is the standard applied by H.B. 4156; it is the standard that has been applied by numerous other jurisdictions; it is the standard enunciated in the pending Federal Innocence Protection Act; and it is the standard articulated by the seminal academic articles on the subject.[4] Aside from

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[3]I do want to point out that *Berger* dealt with the duty of a prosecutor to deal fairly with a criminal defendant during a criminal trial; *Berger* was not a post-conviction proceeding. Perhaps applying the broad language of *Berger* here, is, to take a line from the dissent itself, "forcing a round peg . . . into a square hole[.]" Indeed, since 1963 the Supreme Court has "taken care in [its] habeas corpus decisions to reconfirm the importance of finality." *McClesky*, 499 U.S. at 491, 111 S. Ct. at 1468.

[4]*See, e.g.*, Friendly, *Is Innocence Irrelevant*?, 38 U. Chi. L. Rev. at 150 (citation omitted) (emphasis added) ("'[t]he policy against *incarcerating* . . . an innocent man . . . should far outweigh the desired termination of litigation.'") *See also id*. (emphasis added) (agreeing that rules of finality should be relaxed "when there is some question of an innocent (continued...)

West Virginia law and my very strong and firm belief that this Court owes a healthy amount of respect to the actions of the Legislature in determining issues of public policy, the non-West Virginia authority alone would be a sufficiently compelling reason justifying a requirement that one be currently incarcerated before being allowed to seek post-conviction DNA testing. *Daily v. Board of Review*, 214 W.Va. 419, 433, 589 S.E.2d 789, 811 (2003) (Albright, J.) (Starcher, C.J., concurring) ("The majority opinion, in superb detail, sets forth the definitions of the two terms used by other states, and uses the law of those other states to craft definitions for use in West Virginia.")

Further, we have recognized that it is "often the case in our vocation . . . to craft a working rule that reflects a delicate balance between two competing interests." *State ex rel. Roark v. Casey*, 169 W.Va. 280, 284, 286 S.E.2d 702, 705 (1982). While released inmates who may be innocent have a personal interest in their "good names and reputations,"[5] those inmates who are innocent and still in prison have an even stronger

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[4](...continued)
man *languishing in prison*[.]").

[5]Although such interest does not itself rise to the level of constitutional right nor does it justify post-conviction relief for the reasons I set forth above. *Cf. Carey v. Dostert*, 185 W. Va. 247, 255, 406 S.E.2d 678, 686 (1991) ("[D]efamation does not constitute a deprivation of a 'liberty' or 'property' interest protected by the fourteenth amendment. *Paul v. Davis*, 424 U.S. 693, 712, 96 S. Ct. 1155, 1166, 47 L. Ed.2d 405 (1976)."); *United States v. Rankin*, 1 F. Supp. 2d 445, 455 (E.D. Pa. 1998) (citation omitted) ("Rankin's objection to being labeled a criminal as a result of his convictions in this case does not justify *coram nobis* relief. As the court of appeals observed, '[d]amage to reputation is not enough.'"), *aff'd*
(continued...)

interest–*gaining their freedom*. We must face the reality that the judicial system has limited resources. "[W]e live in a world of scarcity, one in which that most inflexible commodity, time itself, sets a limit on our ability to prevent and correct mistakes." *United States v. Keane*, 852 F.2d 199, 206 (7th Cir. 1988). We have a system that seeks to minimize mistakes through procedural mechanisms such as a trial by jury with all its attendant protections (right to effective counsel, proof beyond a reasonable doubt, disclosure of exculpatory evidence, rules based right to reciprocal discovery, etc.), a right to petition to this Court for appeal from any conviction, the right to file a petition for a writ certiorari with the Supreme Court of the United States from the decision of this Court, the right to file a post-conviction habeas corpus in state court under W. Va. Code § 53-4A-1, a right to appeal a state habeas denial to this Court with the right to file a petition for a writ certiorari with the Supreme Court of the United States from the decision of this Court, then a right to file for a habeas corpus in federal court under 28 U.S.C. § 2254 to vacate a state conviction violating the federal constitution, a right to appeal a denial of the federal habeas to a federal circuit court of appeal, and then the right to file a petition for certiorari to the Supreme Court of the United States from the decision of the federal appellate court.

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[5](...continued)
by unpublished opinion, 185 F.3d 862 (3d Cir. 1999) (Table); *United States v. Kerner*, 895 F.2d 1159, 1161 (7th Cir. 1990) (similar); *Blanton v. United States*, 896 F. Supp. 1451, 1457 (M.D. Tenn. 1995) (similar), *aff'd*, 94 F.3d 227 (6th Cir. 1996).

The resources that support these proceedings, however, are not infinite. Thus, we must prioritize and apply the justice system's finite resources to mitigating the greatest harms being caused from convicting a person who is actually innocent. Consequently, "'[w]here sentences have been served, the finality concept is of an overriding nature, more so than in other forms of collateral review such as habeas corpus, where a continuance of confinement could be manifestly unjust.'" *Fleming v. United States*, 146 F.3d 88, 91 n.3 (2d Cir. 1998) (quoting *United States v. Osser*, 864 F.2d 1056, 1059 (3d Cir. 1988)).

While I am "acutely conscious . . . that [Mr. Richey] must bear the emotional weight and public obloquy of conviction," *Keane*, 852 F.2d at 206,[6] the interest of those still incarcerated in being released from the "restrictive and even harsh" conditions of imprisonment that attend incarceration clearly must be our first priority.[7] "At some point the judicial system must close old files and turn to the future, regretfully accepting the risk of error lest the quest for perfect justice become the enemy of adequate justice." *Keane*, 852 F.2d at 206. All of these factors are "sound reason[s] for making a distinction on the basis of how a sentence is served or whether it has been fully served" in deciding whether to permit post-conviction DNA testing.

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[6] *But see* note 5, *supra* (observing that reputational injury alone is not a constitutional violation or a ground justifying post-conviction relief).

[7] *See Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59 (1981) ("To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

C. Post-Conviction DNA testing and Constitutional Jurisdiction

Finally, I want to defend the majority opinion from the claims that its directive that a petitioner must seek post-conviction testing from the court that entered the conviction, which is the same requirement imposed by H.B. 4156, is somehow an unconstitutional infringement on the original jurisdiction of this Court. I note that the dissent cites no specific authority for its conclusion that requiring a petitioner to seek post-conviction DNA testing from the court of conviction is an "inappropriate intrusion into the constitutional jurisdiction of this Court to grant extraordinary relief in any appropriate case where the remedy at law is inadequate and the common-law requirements are met by a petitioner."[8] Indeed, decisional law from this Court appears to refute the dissent's position for we have previously recognized that W. Va. Code § 53-4A-1's statutory limitation barring successive habeas petitioner's applied to this Court's original jurisdiction. *State ex rel. Strogen v. Trent*, 196

[8]I also want to point out that we have long held that mandamus does not lie if there exists and adequate remedy at law. *See, e.g., Smith v. State Road Comm'n*, 110 W.Va. 296, 299, 158 S.E. 163, 164 (1931) ("[Mandamus] is not available . . . where another specific and adequate remedy exists, since the office of mandamus is not to supersede, but rather to supply the want of a legal remedy.") Thus, "[a] remedy given by statute, which is as speedy and equally efficacious as mandamus, excludes the latter remedy." Syl. pt. 2, *Doran v. Whyte*, 75 W.Va. 368, 83 S.E. 1025 (1914). Consequently, the dissent's view that "[n]either the majority's decision nor Enrolled Committee Substitute for House Bill 4156 should be permitted to bar from this Court any meritorious application to it for relief by way of an extraordinary writ within our constitutional jurisdiction[,]" is a dramatic and drastic reinterpretation of our law related to mandamus.

W.Va. 148, 150 n.1, 469 S.E.2d 7, 9 n.1 (1996) (per curiam) (refusing to apply W.Va. Code § 53-4A-1(a) to an original jurisdiction habeas petition only because the State did not raise the issue of res judicata).

Moreover, requiring post-conviction DNA petitioners to seek relief from the court of conviction is eminently justifiable since the "[l]aw is practical and that is the practical approach." *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 258, 294 S.E.2d 51, 60 (1981) (Neely, J., concurring). The court of conviction is the court that has control over the circuit clerk who is responsible for the record in the case. Likewise, the circuit court presumably should have access to the record containing the material the petitioner wants tested. In point of fact, DNA testing is necessarily going to involve factual questions and we have observed that "[g]enerally, we decline to exercise original jurisdiction in cases involving merely factual disputes." *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 345, 480 S.E.2d 548, 554 (1996). In short, "'[t]he exercise of our original jurisdiction is discretionary and is governed by the practical circumstances of the case.'" *State ex rel. McGraw v. Telecheck* 213 W.Va. 438, 443 n.3, 582 S.E.2d 885, 890 n.3 (2003) (quoting *State ex rel. Doe v. Troisi*, 194 W.Va. 28, 32, 459 S.E.2d 139, 143 (1995)). In declining to exercise our original jurisdiction and directing petitioners "to a more appropriate court . . .we are exercising the discretion granted to us by the [state] Constitution." *Harvard v. Singletary*, 733 So.2d 1020, 1021 (Fla. 1999) (per curiam). *Cf.* W. Va. R. App. P. 14(c) ("If the

Supreme Court determines not to issue a rule to show cause, such determination shall be without prejudice to the right of the petitioner to present a petition to a lower court having proper jurisdiction, unless the Supreme Court specifically notes in the order denying a rule to show cause, that the denial is with prejudice.")

Finally, aside from everything else, however, I also do not understand the necessity for this Court to exercise its original jurisdiction in post-conviction DNA cases. Neither the majority opinion nor H.B. 4156 excludes this Court from participation in such cases. We can, of course, in appropriate cases, review the decisions of the circuit courts by way of a petition for appeal.[9] I have unbounded great confidence in the circuit court judges in this State. I believe that they can be trusted to apply either the majority opinion or H.B. 4156 as appropriate.

Having set forth why the majority and H.B. 4156 are fair, just, and equitable, I fully concur with the majority opinion.

[9]And, of course, we can always exercise our original jurisdiction to issue writs of mandamus or other appropriate writs if, for example, the court of conviction does not act reasonably promptly on the post-conviction DNA testing petition.