STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

William Mark Johnson,
Petitioner Below, Petitioner

vs) No. 11-0209 (Preston County No. 02-C-42 & 07-C-256)

David Ballard, Warden
Mount Olive Correctional Complex,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner William Mark Johnson, by counsel Melissa Giggenbach, appeals the Circuit Court of Preston County's order entered January 7, 2011, which denied his third and fourth petitions for writ of habeas corpus. Respondent David Ballard, Warden of Mount Olive Correctional Complex, is represented by counsel Barbara H. Allen.

This Court has considered the parties' briefs and the record on appeal. Upon consideration of the standard of review, the briefs, and the record presented, we find that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In 1988, petitioner was found guilty of six felony counts, including kidnapping and various sexual crimes arising from the rape of a thirteen-year-old girl. Petitioner received a life sentence, with a recommendation of mercy, plus an additional term of 61 to 105 years in prison. In 1992, petitioner filed a petition for writ of habeas corpus alleging twenty-three assignments of error. Petitioner was represented in those proceedings by attorney Howard Higgins. Following this Court's decision in *In the Matter of an Investigation of West Virginia State Police Crime Laboratory, Serology Division* (*Zain I*), 190 W.Va. 321, 438 S.E.2d 501 (1993), petitioner filed a second petition for a writ of habeas corpus concerning police serologist Fred Zain's involvement and testimony in petitioner's criminal trial. The circuit court denied relief in both habeas cases. In 1998, this Court refused petitions for appeal from both cases.

In 2002 and 2007, petitioner filed his third and fourth petitions for writ of habeas corpus, which were subsequently consolidated by the circuit court. Ultimately, following an evidentiary hearing, the circuit court denied the third and fourth habeas petitions by order entered on December 10, 2010, and reissued on January 7, 2011, for purposes of appeal. This order is the subject of the present appeal. We consider this appeal using the following standard of review:

> In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the

> underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Petitioner raises six assignments of error, four of which allege the circuit court erred in finding that issues previously addressed in earlier habeas petitions were barred by the doctrine of res judicata or have been waived. The Court finds no merit to petitioner's contention in this regard and adopts and incorporates the circuit court's well-reasoned findings and conclusions contained in the circuit court's "Order Denying Petition For Habeas Corpus" as to these four assignments of error. The Clerk is directed to attach a copy of the circuit court's January 7, 2011, order to this memorandum decision.

In a fifth assignment of error, petitioner contends that it was error for the circuit court to rule that testimony from Dr. William Fremouw in a prior habeas case was not persuasive. However, Dr. Fremouw's testimony was limited in scope and duration and mostly addressed matters that are no longer at issue because they were previously decided. Petitioner also contends that it was error for the circuit court to refuse to take judicial notice of prior testimony of George Castelle, Kanawha County Chief Public Defender. Mr. Castelle's testimony addressed claims of ineffective assistance of a different former counsel, rather than the issues raised in the present petitions. Moreover, as noted by the circuit court, petitioner had the opportunity to call Mr. Castelle as a witness in these proceedings but chose not to do so. Accordingly, we find no error in the circuit court's rulings regarding this evidence.

Petitioner's final assignment of error is that the circuit court erred in failing to make findings of fact and conclusions of law addressing his allegations of ineffective assistance of his first habeas counsel Mr. Higgins. Notwithstanding the circuit court's extensive analysis of the other assignments of error, petitioner is correct that the order does not contain findings in this regard. This appears to have been a mere oversight by the circuit court. This Court remands the case to the circuit court for findings and conclusions in accordance with Rule 9(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings on the claim of ineffective assistance of first habeas counsel. With regard to all other assignments of error, the circuit court is affirmed.

Affirmed in part,
Remanded with directions.

ISSUED: November 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.
WILLIAM MARK JOHNSON,
PETITIONER,

v. **//Civil Action Nos. 07-C-256 and 02-C-42**
Honorable Lawrance S. Miller Jr.

DAVID BALLARD, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
RESPONDENT.

ORDER DENYING PETITION FOR HABEAS CORPUS

I. Procedural Review

The June 1988 Term of the Preston County Grand Jury indicted William Mark Johnson ("Petitioner") in Felony No. 88-F-32. The Indictment charged the Petitioner with one count of Kidnapping, one count of First Degree Sexual Abuse, four counts of First Degree Sexual Assault, four counts of Second Degree Sexual Assault, and four counts of Third Degree Sexual Assault.

The Petitioner was arraigned on or about June 17, 1988, and the trial of his case was set for August 8, 1988. The Court appointed Attorney David P. Brown to represent the Petitioner. Following several Motions hearings conducted from April through November 1988, Petitioner Johnson's jury trial on the fourteen counts indicted in Felony No. 88-F-32 commenced on November 15, 1988, and ended on November 17, 1988.

The jury found Petitioner Johnson guilty on November 17, 1988, of six felony counts – guilty of Kidnapping, with mercy, guilty as an aider and abettor to one count of First Degree Sexual Abuse, guilty as an aider and abettor to three counts of First Degree Sexual Assault, and guilty to one count of First Degree Sexual Assault. The Petitioner was found not guilty of the remaining eight counts of the indictment.

Trial Judge Robert C. Halbritter sentenced Petitioner Johnson on November 28, 1988, as follows:

a. Remainder of his life with mercy upon his conviction of Kidnapping as charged in count one of the indictment;
b. One to five years imprisonment upon his conviction of aider and abettor to First Degree Sexual Abuse as charged in count two of the indictment and to run consecutive with the sentence imposed in count one;
c. Fifteen to twenty-five years upon each of his convictions as aider and abettor to First Degree Sexual Assault as charged in counts three and six of the indictment and to run consecutive with the sentence imposed in count two and each other;
d. Fifteen to twenty-five years upon his conviction of First Degree Sexual Assault as charged in count nine of the indictment and to run consecutive with the sentence imposed in count six;
e. Fifteen to twenty-five years upon his conviction as aider and abettor to First Degree Sexual Assault as charged in count twelve of the indictment and to run consecutive with the sentence imposed in count nine.

The Petitioner, *pro se*, filed a Motion for Reduction of Sentence in January 1989 that was denied by Order entered January 20, 1989.

On or about May 23, 1989, the Court substituted Attorney Hugh Rogers Jr. for Attorney David P. Brown as counsel for the Petitioner. On November 22, 1989, Petitioner Johnson, through counsel Rogers, filed a Petition for Appeal to the West Virginia Supreme Court of Appeals alleging only one ground for appeal. The appeal concerned a plea offered by Prosecutor Virginia J. Hopkins conditioned on not interviewing the complaining witness, which was later withdrawn. While his Appeal was pending, Petitioner Johnson, *pro se*, filed two Motions for Bond that were also denied. The Supreme Court declined to hear the Petition for Appeal (No. 891542) by Order dated January 9, 1990.

On November 21, 1990, Petitioner Johnson filed a Motion for Appointment of Counsel to assist in filing a Petition for Post Conviction Habeas Corpus. The Court appointed

attorney Howard G. Higgins Jr. (hereinafter referred to as "habeas counsel Higgins"), and a Petition for a Writ of Habeas Corpus Ad Subjiciendum was filed on April 10, 1992, under Civil Action No. 90-C-361 (the "**First Habeas**"). The First Habeas Petition listed twenty-three arguments advocating for relief. Petitioner's First Habeas was denied by Order entered February 26, 1997.

While the First Habeas was pending, the West Virginia Supreme Court of Appeals issued an opinion in *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division ("Zain I")*, 190 W. Va. 321, 438 S.E.2d 501 (1993). The Court held that any evidence offered in a trial by former West Virginia State Police serologist Fred S. Zain will be presumed to be tainted.

Fred Zain testified at the Petitioner's trial as a witness for the prosecution, presenting test results and conclusions regarding a variety of items of physical evidence submitted for analysis in connection with Petitioner's case.

On December 15, 1993, Petitioner filed, *pro se*, his Second Petition for Writ of Habeas Corpus under Civil Action No. 93-C-405 (the "**Zain Habeas**"). This *pro se* Petition centered its argument on State Police Serologist Fred Zain's involvement and testimony in Petitioner Johnson's prosecution. The Court on December 30, 1993, appointed Attorney James F. Sigwart II (hereinafter referred to as "Zain counsel Sigwart"), as Petitioner Johnson's counsel for the Zain Habeas. No subsequent Petition for Writ of Habeas Corpus or Motions were filed by Zain counsel Sigwart after the appointment.

A hearing on the Zain Habeas was conducted on April 11, 1994, where Zain counsel Sigwart and habeas prosecutor Virginia J. Hopkins presented oral arguments to the Court.

On August 24, 1995, Judge Halbritter issued an Opinion in the Zain Habeas. An Order Denying Writ in the Zain Habeas was entered November 29, 1995. The Order was incorrectly sent to habeas counsel Higgins instead of Zain counsel Sigwart. Because Petitioner Johnson did not receive a copy of the Order, he continued to file *pro se* Motions under the Zain Habeas.

On May 19, 1997, the Court appointed Attorney Lawrence E. Fraley III (hereinafter referred to as "habeas appellate counsel Fraley"), to appeal the First Habeas and Zain Habeas decisions to the West Virginia Supreme Court of Appeals. On June 23, 1997, the Petitioner moved for DNA testing and for an expert to review serology test results and filed a memorandum in support thereof in the Zain Habeas. The appeals in the First Habeas and the Zain Habeas were filed with the West Virginia Supreme Court of Appeals on January 7, 1998, under docket numbers 980003 and 980004 respectively. The Court refused to hear the First Habeas Appeal by Order dated June 4, 1998, and refused to hear the Zain Habeas Appeal by Order dated July 15, 1998.

Petitioner Johnson filed his third Petition for Writ of Habeas Corpus Ad Subjiciendum on March 20, 2002, under Civil Action No. 02-C-42 (the "**Third Habeas**"). On the same date Petitioner also filed Motions for Expert Services to Review Serology Test Results, for DNA Testing of Evidence, for Production of Documents, and a Motion for Appointment of Counsel. The Court appointed the Preston County Public Defender Corporation as counsel for the Petitioner for his Third Habeas on June 10, 2002. The Petitioner filed his Supplemental Petition for Writ of Habeas Corpus on August 4, 2003. On February 21, 2006, the Petitioner, by court-appointed attorney Sally C. Collins (hereinafter referred to as "Attorney Collins"), filed an Amended Petition for a Writ of Habeas Corpus with a *Losh v.*

McKenzie[1] *Checklist* and an Amended Motion for Order for Expert Services to Review Serology Test Results, for DNA Testing of Evidence, and for Production of Documents.[2] The Respondent, by counsel, filed its final Response to Petition and Motion to Dismiss on March 24, 2006. The Third Habeas was summarily dismissed by Opinion Letter filed July 20, 2006, pursuant to West Virginia Code § 53-4A-3(a) and Rule 4(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia and *Losh*, with the exception of Petitioner's ground of ineffective assistance of prior habeas counsel as it was the only ground that met the *Losh* requirements. With regard to Petitioner's Amended Motions for Order of Expert Services to review Serology Test Results, for DNA Testing of Evidence, and for Production of Documents, the Opinion Letter filed July 20, 2006, found:

> This Court finds that the Court has previously and finally adjudicated the issue of serology and other forensic evidence in its prior ruling on the Petitioner's Zain Petition by Opinion filed August 24, 1995. Just like the procedural history in *State ex rel. Richey v. Hill*, this Court, too, has heard and denied the Petitioner's Zain Petition. Furthermore, on June 4, 1998, the West Virginia Supreme Court of Appeals refused the Petitioner's appeal of the denial of his Zain Petition, as the Supreme Court had also done in *State ex rel. Richey v. Hill*.
>
> Accordingly, pursuant to *State ex rel. Richey v. Hill*, this Court **DENIES** the Petitioner's Amended Motion for Order for Expert Services to Review Serology Test Results, for DNA Testing of Evidence, and For Production of Documents, as the Court finds and concludes that the issue of Zain serology test results and DNA testing is *res judicata*. The Court further notes that even if the issue were not found to be *res judicata*, the Petitioner has not proven by a preponderance of the evidence element no. 5 (identity) and element no. 6 (DNA outcome determinative) of the test for post-conviction DNA testing as set forth in *State ex rel. Richey v. Hill*[.]

(Opinion Letter filed July 20, 2006, in Preston County Civil Action No. 02-C-42 at 7; internal citations omitted.) Following numerous status conferences and a motion hearing, an Omnibus Evidentiary Hearing for the Third Habeas began on May 11, 2007. Habeas appellate counsel

[1] 166 W. Va. 762, 277 S.E.2d 606 (1981).
[2] This Motion in its original form was filed by the Petitioner on March 20, 2002.

Fraley and Petitioner William Johnson testified. This hearing concluded on May 31, 2007, with the testimony of Petitioner's expert witness, Attorney George Castelle (hereinafter referred to as "Attorney Castelle").

Following the completion of evidence in the Omnibus Hearing, the Court took the matter under advisement and ordered that both the Petitioner and Respondent submit to the Court their Proposed Findings of Fact and Conclusions of Law. The Court received the Petitioner's Proposed Findings of Fact and Conclusions of Law on July 27, 2007. The Respondent submitted its Findings of Fact and Conclusions of Law on or about August 9, 2007.

The Court on August 21, 2007, found by a preponderance of the evidence that Zain counsel Sigwart was deficient under the *Strickland* standard in failing to review raw data from the crime lab, failing to submit the data for independent review, and failing to request DNA testing. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.E.2d 674 (1984). The Court concluded that Petitioner was entitled to the raw data from the crime lab, independent review of that data, and the previously requested DNA testing. In all other aspects, pending the results of data and DNA testing and a new Zain hearing, the Court denied Petitioner's request for release from custody. Attorney Collins was continued as Petitioner's counsel with regard to the Third Habeas. All parties were saved their exceptions to the Order of the Court.

On December 17, 2007, Attorney Collins filed a Notice of Intent to Appeal and Designation of Record and Request for all Hearing Transcripts to be Made Part of Court File. Pursuant to the Court's Opinion Letter filed August 21, 2007, Attorney Collins on February 12, 2008, filed a Motion for Expert Services to Review Serology Test Results and for DNA Testing of Preserved Evidence. There is no record that an appeal was filed in the Third Habeas.

On November 5, 2007, Petitioner Johnson filed his fourth Petition for Writ of Habeas Corpus Ad Subjiciendum under Civil Action No. 07-C-256 (the "**Fourth Habeas**"). In the Fourth Habeas, Petitioner alleges the following arguments as grounds for which he claims he is held unlawfully:

1. Petitioner[']s due process rights and equal protection rights under the 8th and 14th Amendments to the United States Constitution, as well as Article III Sections 5 and 10 to the WV Constitution were violated pursuant to the State's unlawful presentation of perjured and unreliable evidence before the Preston County Grand Jury, and Trial Jury.
    A. The conviction was secured through the use of perjured testimony and fabricated evidence in disregard for Petitioner's due process and equal protection rights under the 8th and 14th Amendments of the United States Constitution.
    B. The Court erred in allowing testimony and evidence of hair.
    C. Zain material was used at the Grand Jury in order to obtain an indictment.
    D. Officer Stiles mislead the Grand Jury and committed perjury.
    E. Grand Jury errors render indictment void.
    F. The entire body of the Grand Jury did not vote on the indictment.
    G. The Petitioner's Unite[d] State[']s constitutional due process rights under the 8th and 14th Amendments [were] violated through the State[']s willful suppression of evidence favorable to the Petitioner.

In addition, Petitioner also alleges:

H. Zain material was used to violate the Petitioner[']s U.S. constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), *Doyle v. Ohio*, 426 U.S. 610 (1976), and Petitioner's WV constitutional rights under *State v. Walker*, 533 S.E.2d 48 (W. Va. 2000), and *State v. Boyd*, 233 S.E.2d 710 (W. Va. 1977)[.]

I. Actual innocence[.]

On November 9, 2007, the Court found that consolidation of Civil Action No. 02-C-42 and No. 07-C-56 was proper as both cases were habeas cases involving Zain issues.

On August 20, 2010, Attorney Collins filed the Petitioner's Proposed Witness and Exhibit List. Dr. William Fremouw and Attorney Castelle were included on this list. Dr. Fremouw prepared a memorandum and developed an opinion as to whether Zain's testimony

had a material effect on the jury under *Zain I*. *See Zain I*, 190 W. Va. 321, 438 S.E.2d 501.

The memorandum prepared by Dr. Fremouw states that he reviewed the following documents:

1. West Virginia Supreme Court case ruling November 10, 1993
2. Letter by Attorney Castelle, dated May 29, 2007[,] of a legal analysis of the case
3. Review of grand jury transcript, June 7, 1988, in Case Number 88-F-32
4. Review of Petitions, Exhibit 11, Preston County Circuit Court trial date 1988, pages 814 through 817
5. Review of trial transcript over motion by Petitioner's attorney, Mr. David Brown, to dismiss five counts
6. Review of trial transcript of testimony of Fred Zain, November 15 through November 18, 1988, pages 304 through 330
7. Review of proceedings before Judge Fox on pretrial motions in the trial of Elwood Johnson as argued by Thomas Rodd and Virginia Jackson Hopkins, May 1, 1989

(Pet'r's Ex. 3 filed October 15, 2010, at 1.) Dr. Fremouw concluded by stating:

> In my opinion, the jurors would have been minimally influenced by the misstatement of Fred Zain's educational credentials. However, they would have been substantially prejudiced and influenced by the misleading and false testimony of Fred Zain and summaries made of it by Detective Stiles and Attorney Hopkins.
>
> This analysis does not evaluate the credibility and impact of the alleged victim's testimony in this case but does raise a serious concern about the additive effect of the questionable "scientific" testimony provided by Fred Zain and its influence on the jury.
>
> Based on the totality of the circumstances, and the above problems with the testimony and evidence by Fred Zain, it is my conclusion that his testimony was highly prejudicial and material to the outcome of the trial of the defendant William Johnson.
>
> (*This opinion is based on the analysis of just the transcript sections cited on Page 1 of this memo and not an overall reading of the complete trial transcript or the grand jury transcript which may contain other relevant information.*)

(Pet'r's Ex. 3 filed October 15, 2010, at 5; second emphasis added.)

Prosecutor Melvin C. Snyder III (hereinafter referred to as "Prosecutor Snyder") filed Respondent's Motion to Exclude Expert Opinion Evidence in regard to Attorney Castelle

and Dr. William Fremouw based on his opinion that their testimony is not expert opinion evidence under Rule 702 of the West Virginia Rules of Evidence on September 3, 2010. At the Omnibus Hearing on October 15, 2010, Attorney Collins offered Dr. Fremouw's testimony and memorandum into evidence subject to Prosecutor Snyder's continuing objection. Attorney Collins also expressed her desire for the Court to take judicial notice of Attorney Castelle's testimony from Preston County Civil Action No. 02-C-42. The Court found that judicial notice of his testimony for purposes of the Fourth Habeas was improper as the issues in the Fourth Habeas were different than those explored by the Court in finding that Zain counsel Sigwart provided ineffective assistance of counsel in Preston County Civil Action No. 02-C-42. The Court then gave an opportunity to Attorney Collins to call Attorney Castelle to testify, but she did not.

Following the completion of evidence in the Omnibus Hearing, the Court took the matter under advisement and ordered both the Petitioner and Respondent to submit to the Court their Proposed Findings of Fact and Conclusions of Law. The Court received the Petitioner's Proposed Findings of Fact and Conclusions of Law on November 8, 2010. The Respondent did not timely submit proposed Findings of Fact or Conclusions of Law.

II. Legal Standard

West Virginia Code § 53-4A-1(a)-(b) (2008) provide, in part, that:

> (a) Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the constitution of this State, or both, . . . or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may . . . file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or

other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence. . . .

(b) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

West Virginia Code § 53-4A-7(a) (2008) states:

If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceedings or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought. If it appears to the court from said petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or any such record or records referred to above, that there is probable cause to believe that the petitioner may be entitled to some relief and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced, and the court shall pass upon all issues of fact without a jury. The court may also provide for one or more hearings to be held and/or evidence to be taken in any other county or counties in the State.

The West Virginia Supreme Court of Appeals has held that:

An omnibus habeas corpus hearing as contemplated in W. Va. Code, 53-4A-1 et seq. (1967) occurs when: (1) an applicant for habeas corpus is represented by

counsel or appears pro se having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently waived his right to counsel; and, (4) the trial court drafts a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding.

Syl. Pt. 1, *Losh*, 166 W. Va. 762, 277 S.E.2d 606.

The West Virginia Supreme Court identified the following syllabus points as guidance in a *Zain I* case:

1. " ' "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that [defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus, *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979), *quoting*, Syl. pt. 1, *Halstead v. Horton*, 38 W. Va. 727, 18 S.E. 953 (1894).' Syl. pt. 1, *State v. King*, 173 W. Va. 164, 313 S.E.2d 440 (1984)." Syllabus Point 1, *State v. O'Donnell*, 189 W. Va. 628, 433 S.E.2d 566 (1993).

2. Although it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict.

3. "Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is

> sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury." Syllabus Point 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 100 S. Ct. 1081, 63 L.Ed.2d 320 (1980).

Zain I, 190 W. Va. 321, 438 S.E.2d 501.

To prevail in post-conviction habeas corpus proceedings, the "petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." Syl. Pt. 1, *State ex rel. Scott v. Boles*, 150 W. Va. 453, 147 S.E.2d 486 (1966).

Rule 702 of the West Virginia Rules of Evidence states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In addition, the West Virginia Supreme Court has addressed habeas corpus hearings and stated:

> 2. 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.
>
> 3. A waiver of a constitutional right must be knowing and intelligent, that is a voluntary relinquishment of a known right, and if the waiver is conclusively demonstrated on the record at trial or at a subsequent omnibus habeas corpus hearing, the waiver makes any issue concerning the right waived res judicata in succeeding actions in habeas corpus.
>
> 4. A prior omnibus habeas corpus hearing is res judicata as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Syl. Pts. 2-4, *Losh*, 166 W. Va. 762, 277 S.E.2d 606.

III. Findings of Fact and Conclusions of Law

On October 15, 2010, the Court held an Omnibus Evidentiary Hearing for the Fourth Habeas. Dr. William Fremouw and Petitioner Johnson testified. Dr. Fremouw testified regarding his opinion as to whether testimony by Fred Zain or summation testimony of the testimony of Fred Zain had a material effect on the jury. Considering the sections of the transcript reviewed and the testimony therein altogether, Dr. Fremouw concluded in his report and testimony before the Court that the reviewed testimony was prejudicial and had a material effect on the Petitioner's trial. Petitioner Johnson testified regarding statements made by the prosecution involving Zain's testimony and his belief that those statements could not be substantiated scientifically.

In the Court's Opinion Letter in the Third Habeas regarding Zain counsel Sigwart's ineffective assistance of counsel, the Court stated:

> *The Court concludes that Petitioner is entitled to the raw data from the crime lab, independent review of that data, and the previously requested DNA testing.* Otherwise pending these results and a new Zain Hearing, the Court denies Petitioner's request for his release from custody.

(Emphasis added). The Court emphasized Petitioner's right to conduct the requested DNA testing and have the results reviewed in its finding that Zain counsel Sigwart provided ineffective assistance of counsel. Attorney Collins then made a Motion for Expert Services to Review Serology Test Results and for DNA Testing of Preserved Evidence on February 12, 2008, which the Court granted but an order was never prepared. Subsequently on May 11, 2009, Attorney Collins filed a Motion to Continue Hearing in regard to the Zain Evidentiary Hearing set for May 13, 2009, as Petitioner had thus far been unable to secure both the evidence

and experts for the hearing and requested an additional sixty days to prepare. An Order following the Status Conference on September 11, 2009, set another Status Conference for October 23, 2009, to allow more time for the Petitioner to set up and prepare for a forensic evaluation of the evidence. Nothing further had come of the analysis of the data and DNA testing specifically provided for in the last Opinion Letter as of Petitioner's Habeas Hearing on October 15, 2010. During that hearing, Attorney Collins stated that the case had been repeatedly continued to allow her to find a laboratory to conduct the requisite serology testing, but determined that she was no longer interested in pursuing DNA testing. Attorney Collins also made the Court aware that Petitioner's Zain data and reports had been reviewed in *Zain I*. *See* 190 W. Va. 321, 438 S.E.2d 501. After consulting with her client during the Omnibus Hearing on October 15, 2010, Attorney Collins then withdrew the Motion for Expert Services to Review DNA Evidence. Therefore, at this point the Petitioner no longer wishes to pursue the testing for which the Habeas hearing has been continued since 2008.

To the extent that this Fourth Habeas is a petition for habeas corpus relief under *Zain I*, the Court **DENIES** the requested relief as the matter has been previously and finally adjudicated in the Zain Habeas. West Virginia Code § 53-4A-1 (2008) states that a person convicted of a crime may file a petition for a writ of habeas corpus "only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article[.]" This Court concurs with the findings of Judge Halbritter, who heard the evidence and testimony presented at trial and subsequently considered the Zain Habeas under *Zain I* and found:

The Court first of all has to remove the evidence of Fred Zain from the State's case and decide whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt.

In the jury trial in November of 1988 the following witnesses testified for the State: Deputy Sheriff Joseph Stiles, who was the investigating officer; Linda Shillingburg, who was the mother of the victim, Virginia Runner; Fred Zain, whose testimony the Court has to strike and disregard; Dr. Bernice Schwarzenberg, who examined the victim within a short period of time after the occurrence of the alleged criminal acts by William Mark Johnson and a co-defendant, Elwood Johnson; Mark W. Neal, who is a CIB latent finger and foot print examiner; Clarence Ralph Lane, who is a CIB firearms and tool markings examiner; Mary Jane Fleming, social worker with what was then known as the Department of Human Services; Jerry Shillingburg, stepfather of Virginia Runner; and Virginia Runner, the victim. Testifying for the defendant were Tom Rodd who initially had been the attorney for the defendant and was the attorney for the co-defendant; Emma Steelman, a counsellor [sic] at Valley Community Mental Health; Mary Jane Fleming; Ada Marie Johnson, wife of the defendant; Elwood Johnson, co-defendant; and William Mark Johnson, the defendant. The State called in rebuttal Deputy Sheriff Joseph Stiles, Melissa Sypolt, a sister of the victim, and Jerry Shillingburg.

Considerable evidence was offered by both the State and the defendant in the trial. Deputy Sheriff Joseph Stiles testified as to the investigation that he had made. He testified to the pictures he took and the physical evidence that he gathered. Generally speaking, the chronology of what the State contended occurred was as follows: Elwood Johnson was married to Diane Johnson, a sister of Virginia Runner, the victim. Virginia Runner who was 12 years old at the time of the alleged crimes, testified that in the early morning hours at about 3:00 o'clock a.m. on or about January 11, 1988, that Elwood Johnson came in to her bedroom in the home of her mother and stepfather, woke her up, said that he wanted her to wash some jeans of his wife, Diane. He had her go outside with him where a pick-up truck was parked. He then forced her into the pick-up truck. There was also a knife that she contended was brandished by William Johnson and that when she was threatened by the defendant with that knife she quit fighting. She had been fighting and resisting Elwood Johnson to that point. She was then driven from the home of her mother and stepfather, which was in Preston County, to another remote place in Preston County. Along the way she testified to certain sexual abuse and sexual assaults that occurred. She testified to the sexual assault by the defendant, and to the aiding and abetting by the defendant of crimes committed against her by the co-defendant. The defendant and co-defendant then returned her to her residence. They told her not to tell anything.

She testified that the first thing she did was go in the house and inform her stepfather that she had been sexually assaulted and identified and told him who

were the perpetrators of these crimes upon her. The stepfather telephoned the police, and then telephoned the mother who was at work and told her that he was taking the daughter to the hospital. He went immediately to the hospital.

At the home of the victim at the time of the alleged offenses there was snow on the ground and Deputy Stiles went out and took numerous pictures of various places where the crimes occurred and gathered certain physical evidence. At the place where they stopped, Deputy Stiles found urine in the snow, and he, of course, seized it as physical evidence. Numerous exhibits came in through the testimony of Deputy Stiles.

The stepfather took the victim to the hospital where the victim was examined by Dr. Schwarzenberg. Dr. Schwarzenberg observed that Virginia Runner was dirty, that she had many fresh bruises and lacerations which were consistent with the history of kidnapping and sexual assault that she had taken from the victim, that the victim was having a menstrual period, and that her menstrual flow was minimal and it was pooling in the vagina. The examination of the vagina showed excessive redness outside and some swelling inside, and hymen tears in three places. The hymen was quite red and the tears were quite recent. She described the tears as being with reference to a clock at 3:00 o'clock, 6:00 o'clock and 12:00 o'clock.

Dr. Schwarzenberg further testified that an excess amount of force had been used to cause the injuries she saw on the victim. She examined the anus and found an excessive amount of redness and tenderness which indicated force had been used. There were red blood cells present inside which suggested trauma where an object had been inserted. There was no evidence of semen or sperm found by her. She was also questioned by defense counsel concerning genital herpes and there was an assertion by the defendant that he had herpes and that if [he] had sex with the victim she should have had herpes.

The investigation results of Deputy Stiles revealed evidence of tire prints in the snow that were consistent with the particular tires of the vehicle in question. Also a shoe track found in the snow was consistent with the shoe of the defendant. The dirt found on the victim and her clothing was consistent with her being in the truck. The truck seat was very dirty. The defendant admitted and his co-defendant admitted that they had driven to the victim's home and taken her in their vehicle with them the morning in question. The defendant and the co-defendant said they were there but they denied that they committed any criminal acts on Virginia Runner. Yet, the evidence of the history and the results of the physical examination by Dr. Schwarzenberg were consistent with the victim's testimony that she had been sexually assaulted. The physical evidence was also consistent with her testimony.

The Court concludes that the remaining evidence after disregarding the evidence of Zain was sufficient to support the conviction. The State's evidence in this case was very, very strong.

The Court next must decide whether or not the error of admitting Zain's evidence had a prejudicial effect on the jury. Zain did not testify concerning any transfer evidence, that is, he did not testify that he examined any semen that was found on the victim because no semen was found. Likewise, he did not testify concerning any blood of the defendant or the co-defendant being found on the victim. He did testify that he examined the yellow snow that was submitted and found it to be urine. There was independent evidence, of course, of Deputy Stiles as to the yellow on the snow being consistent with urine and an explanation by the victim of what had occurred. Zain examined the clothing of Virginia Runner and found her blood was on the clothing. He examined the defendant's clothing and found no evidence on it. He did examine Elwood Johnson's (the co-defendant['s]) underwear, and found semen on it which was consistent with being that of Elwood Johnson, but Zain also conceded on cross-examination that he didn't know when that semen had gotten there and could have been ten to fourteen days previous to the time in question. There was a hair that he testified to that Officer Stiles found at the scene as being consistent with the hair of Virginia Runner, but also he conceded it was consistent with other family members, and there was some evidence of a hairbrush being in the truck.

The testimony of Zain clearly was not critical to the State's case. The State asserts that it called Zain to show that the investigation was completely done. As a matter of fact, the defendant used Zain considerably to support his defense. Numerous exhibits were introduced on cross-examination of him.

Identify of the defendant was not an issue in this case. The victim knew them (the defendant and the co-defendant), recognized them and identified them during the trial, and they did not dispute that they were not there. They disputed that they had committed any sexual assault or sexual abuse and that they had forcibly taken or kidnapped her.

The evidence of the force and the sexual contact were not any evidence that was shown by Zain. Those facts were shown by the victim, her family (describing the immediate reporting), and the doctor.

The Court concludes that Zain's testimony did not have a prejudicial effect on the jury. The State's case was extremely strong. The jury would have reached the same result without the Zain evidence. The Court, therefore, denies the relief requested by the petitioner in this case.

(Opinion Letter filed August 24, 1995, in Preston County Civil Action No. 93-C-405.)

Therefore, this Court has previously and finally adjudicated the issues raised by Petitioner

Johnson in denying his writ for habeas corpus relief. The Petition for Writ of Habeas Corpus is **DENIED** to the extent that it raises *Zain I* issues as the issues have been previously and finally adjudicated in Preston County Civil Action No. 93-C-405.

This Court further incorporates the findings of the Opinion Letter filed July 20, 2006, in the Third Habeas with regard to its analysis of the remaining grounds brought before the Court. The Opinion Letter states:

> Based upon this Court's review of the Instant Petition and both of the Petitioner's prior habeas corpus petitions, this Court finds that the following grounds in the Petitioner's Instant Petition have been previously raised and adjudicated or waived, or are at least matters known or which with reasonable diligence could have been known at a prior omnibus habeas corpus hearing:
>
> | | |
> |---|---|
> | a: trial court lacked jurisdiction (indictment void) | Previously raised, *see* Ground XI, First Petition |
> | b: prejudicial pretrial publicity | Previously raised, *see* Ground II, First Petition |
> | c: suppression of helpful evidence by prosecutor | Prosecutorial Misconduct previously raised, *see* Ground XII, First Petition |
> | d: state's knowing use of perjured testimony | Prosecutorial Misconduct previously raised, *see* Ground XII, First Petition |
> | e: unfulfilled plea bargains | Waived, *see* Order entered November 21, 1990, First Petition |
> | f: information in pre-sentence report erroneous | Waived, *see* Order entered November 21, 1990, First Petition |
> | g: ineffective assistance of trial counsel | Previously raised, *see* Grounds VII-X, First Petition |
> | h: challenges to the composition of grand jury or its procedures | Previously raised, *see* Ground XI, First Petition |
> | i: defects in the indictment | Previously raised, *see* Grounds XI and XV, First Petition |
> | j: refusal of continuance | Previously raised, *see* Ground XXI, First Petition |
> | k: refusal to turn over witness notes after | |

witness has testified	Waived, *see* Order entered November 21, 1990, First Petition
l: constitution errors in evidentiary rulings	Previously raised, see Grounds I, III-VI, XVIII-XIX, First Petition
m: instructions to the jury	Previously raised, *see* Grounds XII and XX, First Petition
n: claims of prejudicial statements by prosecutor	Prosecutorial Misconduct previously raised, *see* Ground XII, First Petition
o: sufficiency of evidence	Previously raised, *see* Ground XVI and XXIII, First Petition
p: acquittal of co-defendant on same charge	Previously raised, *see* Ground XIV, First Petition
q: severer sentence than expected	Sentencing previously raised, *see* Ground XIV, First Petition
r: excessive sentence	Sentencing previously raised, *see* Ground XIV, First Petition
s: other: cruel and unusual punishment	Sentencing previously raised, *see* Ground XIV, First Petition

The Court further finds that the following grounds in the Petitioner's Instant Petition, while such grounds were not previously raised and adjudicated or waived in the Petitioner's First Petition, nonetheless do not fit into the three narrow exceptions pertaining to second or subsequent habeas corpus petitions as set forth in Syllabus Point 4 of *Losh v. McKenzie*, *supra*,

g: ineffective assistance of appellate counsel
s: other: No fair and full Zain habeas hearing
s: other: Court findings in Zain habeas hearing in error
s: other: Court's denial of DNA testing

In addition, the Court further notes that none of these grounds were raised in an amended version of the First Petition, which amendments could have been requested, as the Court's final ruling on the Zain Petition, by Opinion filed August 24, 1995, and Order entered November 29, 1995, occurred approximately one year and three months *prior* to the Court's ruling on the First Petition, by Opinion filed February 20, 1997, and Order entered February 26, 1997. These grounds were matters that became known or which with reasonable diligence could have been known at a prior omnibus habeas corpus hearing.

(Opinion Letter filed July 20, 2006, in Preston County Civil Action No. 02-C-42 at 10-12.)

The Fourth Habeas alleges the following grounds, summarized without the Petitioner's additional discussion:

Ground 1:	Other: Zain evidence
Ground 2:	Other: Zain evidence
Ground 3:	Other: Zain evidence; defects in indictment
Ground 4:	Other: Zain evidence; defects in indictment
Ground 5:	Other: Zain evidence; defects in indictment
Ground 6:	Defects in indictment
Ground 7:	Suppression of helpful evidence by prosecutor
Ground 8:	Other: Zain evidence
Ground 9:	Acquittal of co-defendant on same charge; sufficiency of evidence

Upon consideration of the grounds raised in Petitioner's Fourth Habeas, the Court **FINDS** that these grounds in the Fourth Habeas have been previously raised and adjudicated or waived, or are at least matters known or which with reasonable diligence could have been known at a prior omnibus habeas corpus hearing. *See* W. Va. Code § 53-4A-1(a); *Losh*, 166 W. Va. 762, 277 S.E.2d 606.

Rule 702 Expert Testimony Objection

A. George Castelle

As Attorney Castelle did not present any testimony or evidence before the Court, the Court need not rule on Prosecutor Snyder's objection to Attorney Castelle's testimony. At the Omnibus Hearing, the Court found that judicial notice of Attorney Castelle's testimony in Preston County Civil Action No. 02-C-42 was improper because Attorney Castelle's testimony went to the issue of ineffective assistance of Zain counsel Sigwart, rather than issues addressed in the Fourth Habeas. The Court did rule that Attorney Collins could call Attorney Castelle as a witness, but Attorney Collins declined to do so and did not ask for a continuance to call him as a witness.

B. Dr. William Fremouw

Prosecutor Snyder's Objection to Exclude Expert Opinion Evidence is overruled as it pertains to Dr. William Fremouw. After considering Dr. Fremouw's qualifications, the Court considers Dr. Fremouw's experience in his work as a psychologist as establishing his specialized knowledge to determine the effect that testimony may have on a jury. Through Dr. Fremouw's well established expertise as a forensic psychologist in his field, Mr. Fremouw has assisted many courts in giving opinion testimony to assist in understanding and determining facts at issue under Rule 702 of the West Virginia Rules of Evidence. Therefore, the Court **FINDS** that Dr. Fremouw's testimony on the effect of the testimony and court proceedings in Petitioner Johnson's trial proceedings is admissible under Rule 702 of the West Virginia Rules of Evidence. However, the weight and credibility to be given to Dr. Fremouw's testimony is an issue for the Court to decide. *Gentry v. Magnum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).

Consideration of Dr. Fremouw's Findings and Testimony

Although Petitioner's grounds for his Petition for Writ of Habeas Corpus have all been previously and finally adjudicated or are matters known or which with reasonable diligence could have been known, this Court also considered Dr. Fremouw's analysis and findings in conjunction with its findings. *See* Syl. Pt.4, *Losh*, 166 W. Va. 762, 277 S.E.2d 606. On Dr. Fremouw's own admission, he reviewed only those documents listed in his memorandum, which include:

1. West Virginia Supreme Court case ruling November 10, 1993 [*Zain I*, 190 W. Va. 321, 438 S.E.2d 501.]
2. Letter by Attorney Castelle, dated May 29, 2007[,] of a legal analysis of the case
3. Review of grand jury transcript, June 7, 1988, in Case Number 88-F-32
4. Review of Petitions, Exhibit 11, Preston County Circuit Court trial date 1988, pages 814 through 817

5. Review of trial transcript over motion by Petitioner's attorney, Mr. David Brown, to dismiss five counts
6. Review of trial transcript of testimony of Fred Zain, November 15 through November 18, 1988, pages 304 through 330
7. Review of proceedings before Judge Fox on pretrial motions in the trial of Elwood Johnson as argued by Thomas Rodd and Virginia Jackson Hopkins, May 1, 1989

Dr. Fremouw concluded his memorandum by stating:

> In my opinion, the jurors would have been minimally influenced by the misstatement of Fred Zain's educational credentials. However, they would have been substantially prejudiced and influenced by the misleading and false testimony of Fred Zain and summaries made of it by Detective Stiles and Attorney Hopkins. . . .
>
> Based on the totality of the circumstances, and the above problems with the testimony and evidence by Fred Zain, it is my conclusion that his testimony was highly prejudicial and material to the outcome of the trial of the defendant William Johnson.
>
> (*This opinion is based on the analysis of just the transcript sections cited on Page 1 of this memo and not an overall reading of the complete trial transcript or the grand jury transcript which may contain other relevant information.*)

(Second emphasis added).

In his report, Dr. Fremouw analyzed areas of testimony and presented his opinion as to the impact had on the jurors. The areas that Dr. Fremouw identified and offered an opinion on include:

1. Fred Zain presented false testimony as to his educational background.
2. Testimony regarding the finding of semen in the underpants in both grand jury and trial testimony while discussing evidence gathered from the victim.
3. Testimony regarding hair samples of the alleged victim and the defendant was confusing and unsupported.
4. Fred Zain's style of testimony
5. Fred Zain provided calculations of accuracy with no scientific foundation.
6. Fred Zain's testimony minimized the absence of physical findings.
7. Fred Zain's testimony was unduly summarized and emphasized in the closings by Attorney Hopkins.

(Pet'r's Ex. 3 filed October 15, 2010, at 1-5.)

The Court **FINDS** that trial Judge Halbritter heard all the evidence before the Court in the trial of the Petitioner and gave extensive analysis of the effect of Zain's testimony in the Zain Habeas. The Court **FINDS** Dr. Fremouw's analysis unpersuasive as his review of the proceedings consisted only of the transcript sections and the documents identified above rather than a review of the complete proceedings in context of the entire evidence presented before the Court. In addition, Dr. Fremouw repeatedly made qualifying statements in his testimony. Excerpts of those statements are as follows:

Direct Examination by Attorney Collins:

Dr: Fremouw: "I'm also familiar with social psychology, which is a subfield about persuasion and how people can be misled by false information which is what Madison Avenue tries to do all the time.

So, I'm familiar with that, but *I wouldn't say I'm an expert in social psychology*, but I'm familiar with it." (October 15, 2010, Hearing Transcript at 25, ¶ 1-2.) (Emphasis added).

"Q. Okay. And what were the contents of the documents that were provided to you?

A. What were the documents?

Q. I mean, what were the contents of the documents? I mean, what was it concerning?

A. Several of them were court rulings. Number one was the Supreme Court case ruling.

Second one was a letter by Attorney Castelle of his legal analysis of the case; but then, more specifically, Grand Jury transcript.

Petitioner's Exhibit 11, pages 814 to 817.

Trial transcript over motion by Petitioner's Attorney, Mr. Brown, to dismiss five counts.

Review of trial transcript of Fred Zain, Pages 304 to 330 of November 15th through November 18th, 1988, testimony.

A review of proceedings before Judge Fox argued by Thomas Rodd and Virginia Jackson May 1, 1989.

Q. Okay. Is it possible that you also later received a copy of opening or closing statements from the trial?

A. Not that I remember. I received proceedings from November 28, 1988, which I thought was a sentencing phase." (*Id.* at 27.)

"Q. What conclusion did you draw that these I guess interminglings of testimony of evidence affected the jury or could have affected the jury?

A. *Could have affected the jury.* My opinion was that it was very - - *potentially* very central because it sounded like the semen from the co-defendant was found in the victim's clothing. That there is an exchange of bodily fluids. And reading the testimony carefully and reading the review, there is no foundation for that. They were commingled as they were presented." (*Id.* at 31, ¶ 5; *Id.* at 32, ¶ 1.) (Emphasis added).

"Q. Now, number 6. You also explored Trooper Zain's minimization of testimony.

A. Yes.

Q. Or absence of physical findings.

A. Yes. Trooper Zain during the trial said often tests fail to show transfer evidence of blood or semen which did not prove the alleged event didn't occur. We already talked about that.

In my opinion he falsely testified that vinyl seats were more porous than cloth seats and the absence of blood on the cloth truck seat meant little in spite of its porous nature.

That would just be my common sense, not experience, purchasing cars and furniture that vinyl is less porous and cloth is porous. And that's why myself and others buy - - purchase vinyl is to be stain resistant. They are advertised as stain resistant, not stain attractive. *That's not a psychologist's opinion. That's just a common sense opinion.* That that is misleading. To say that vinyl seats are more porous doesn't make sense. *I do not have a degree in materials science so I realize that's a lay opinion.*" (*Id.* at 38-39, ¶ 2-7.) (Emphasis added).

"Q. Okay. And is that, in fact, an opinion that you have listed under the summary there on your last page?

A. Yes. Next to the last paragraph, his testimony was highly prejudicial and material to the outcome of the trial of the defendant, William Johnson. Then I qualify it in the next paragraph saying the opinion is based solely on the analysis described, and I do not have knowledge of the overall trial or other evidence, but based on what I read I felt that was highly prejudicial

Q. Okay. Did you see any need to get any - - the entire transcripts from the trial?

A. I asked about that, but I was only asked to look at Mr. Zain's opinion. I was not retrying the case. I was not - - I'm not - - it is not my role or right, so, no, I didn't." (*Id.* at 43, ¶ 4-5; *Id.* at 44, ¶ 1-2.)

Cross-Examination by Prosecutor Snyder:

"Q. I think that you have mentioned that the only trial transcript that you reviewed was Fred Zain's testimony and I think you list the pages here. Dates of November 15th and November 18th and Pages 304 through 330, is that correct?

A. Yes.

Q. So you didn't review the entire trial transcript?

A. I did not.

Q. You really don't know what other evidence that was presented at trial that might have incriminated the defendant?

A. Correct. I do not, Mr. Snyder." (*Id.* at 45, ¶ 7-12.)

Furthermore, the Court **FINDS** that Dr. Fremouw's analysis focuses on the testimony of Mr. Zain or summaries made of it by Detective Stiles and Attorney Hopkins. The Court **FINDS** that the alleged prejudicial impact had by this testimony has already been considered by this Court in Preston County Civil Action No. 93-C-405. In that action, the Court reviewed what was previously referred to as the Zain Habeas and applied the harmless error test as provided by the

West Virginia Supreme Court of Appeals for this type of Zain evidence. In applying the test, the Court first removed the inadmissible evidence from the State's case and then considered whether the remaining evidence was sufficient to convict the defendant. *See* Syl. Pt. 3, *Zain I*, 190 W. Va. 321, 438 S.E.2d 501. Then, after applying the third prong of the test, the Court found that "Zain's testimony did not have a prejudicial effect on the jury. The State's case was extremely strong. The jury would have reached the same result without the Zain evidence. The Court, therefore, denies the relief requested by the petitioner in this case." (*See* Opinion Letter filed August 24, 1995, in Preston County Civil Action No. 93-C-405 at 8.) Therefore, the incomplete analysis by Dr. Fremouw has already been considered by the Court and the Court found that there was sufficient evidence to support the conviction and the Zain evidence did not have a prejudicial effect on the jury. As a result, the Court **FINDS** that the grounds addressed by Dr. Fremouw's memorandum and testimony have been previously and finally adjudicated or waived pursuant to West Virginia Code § 53-4A-1(a) or are matters which with reasonable diligence could have been known under *Losh*. *See* Syl. Pt. 4, 166. W. Va. 762, 277 S.E.2d 606. Furthermore, the Court **FINDS** that the grounds before the Court on this Fourth Habeas do not include any of the grounds allowed for further petitions in *Losh* that include "ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively." *Id.* Therefore, the Court **DENIES** the Petitioner's grounds as they have been previously and finally adjudicated or could have been known with reasonable diligence under West Virginia Code section 53-4A-7(a) and *Losh v. McKenzie*. 166 W. Va. 762, 277 S.E.2d 606.

IV. Conclusion

Based upon a review of the entire record and the evidence presented at the Omnibus Hearing, the Court finds that Petitioner Johnson's petition for habeas corpus relief has been previously and finally adjudicated or includes matter known or which with reasonable diligence could have been known. The Court **FINDS** that Dr. Fremouw's findings, while admissible, do not create any cognizable ground on which Petitioner has not already asserted a prior Petition for Writ of Habeas Corpus or have been previously and finally adjudicated or waived. Furthermore, the Court **FINDS** that a driving fact in continuing the Petitioner's request for habeas relief for this length of time was Petitioner's desire to conduct the testing for which Zain counsel Sigwart was found ineffective in not acquiring, but then withdrawn on October 15, 2010. The Court **CONCLUDES** that Petitioner has not stated any ground for release and the Court **DENIES** Petitioner's request for his release from custody.

The Court by Order entered November 21, 1990, informed the Petitioner that grounds not raised in the habeas corpus action would be deemed waived. In fact, this Order was subheaded "Notice to Petitioner and Counsel Concerning Waiver of Grounds Not Raised in Post-Conviction Habeas Corpus Proceeding, and Pleading Timetable." The Court by the same Order also directed the Petitioner to file an amended petition or a certificate certifying that no additional grounds of relief are known within 60 days. Attached to the Order was a sample *Losh v. McKenzie* Checklist and Certificate. However, a completed *Losh v. McKenzie* Checklist and Certificate was not filed by the Petitioner until February 21, 2006, in the Petitioner's Third Habeas in Preston County Civil Action No. 02-C-42.

In the present case, the Court **FINDS** that the Petitioner has filed three previous habeas corpus petitions that have been heard and denied by this Court. The Court further

FINDS that the appeals of the prior habeas corpus petitions were refused by the West Virginia Supreme Court of Appeals. Although the First Petition did not include a completed *Losh v. McKenzie* Checklist, the Petitioner was informed by Order entered November 21, 1990, that any grounds not raised by him would be considered waived. Therefore, the Court will not now consider any grounds raised by the Petitioner in the Fourth Habeas that have either been previously raised and adjudicated or waived, nor will the Court consider any "matters known or which with reasonable diligence could have been known." Syl. Pt. 4, *Losh*, 166 W. Va. 762, 277 S.E.2d 606.

Based upon this Court's review of the Fourth Habeas and the Petitioner's prior habeas corpus petitions, this Court **FINDS** that the grounds raised by the Petitioner have been previously and finally adjudicated or waived, or are at least matters known or which with reasonable diligence could have been known at a prior omnibus habeas corpus hearing. The Court therefore **DENIES** the Petitioner's grounds in the Fourth Habeas.

To the ruling of the Court the Petitioner is saved his objections and exceptions.

It is further **ORDERED** that the Clerk of this Court shall personally deliver or deliver by first-class mail a certified copy of this Order to the Prosecuting Attorney, Melvin C. Snyder III and Sally C. Collins, attorney for the Defendant.

2 copies
S/D 12/10/10

ENTER this 10 day of December, 2010.

Lawrance S. Miller Jr., JUDGE

ENTERED this 10th day of December, 2010.

Betsy Castle, CLERK
by: Shawntel Kamsler, Deputy

A TRUE COPY:
ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT
By Shawntel Kamsler Deputy

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,
WILLIAM MARK JOHNSON,
Petitioner,

vs.

//Case Nos. 07-C-256
02-C-42
JUDGE LAWRANCE S. MILLER, JR.

DAVID BALLARD, WARDEN,
MT OLIVE CORRECTIONAL COMPLEX,
Respondent.

ORDER GRANTING REQUEST FOR REISSUANCE OF DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

On January 7, 2011, counsel for Petitioner requested a reissuance of the Denial of the Petition for a Writ of Habeas Corpus to allow for additional time to file the Notice of Intent to Appeal with the W.Va. Supreme Court of Appeals. It appearing that the original Denial of the Writ of Habeas Corpus was signed December 10, 2010; it appearing that present counsel was appointed on December 29, 2010; it appearing that this is an appeal from a combined third and fourth Habeas, including a Zain Habeas, and the record is voluminous; it appearing that the Appeal falls under the Revised Rules of Appellate Procedure and must be filed 30 days from the Denial of the Order appealed from; and it further appearing that an extension of time will not be granted by the W.Va. State Supreme Court of Appeals; accordingly, this Court ORDERS that the Denial of the Petition for a Writ of Habeas Corpus be reissued to allow for a timely and complete filing of a Notice of Intent to Appeal with the W.Va. Supreme Court of Appeals. It is further ORDERED that the Clerk of this Court shall personally deliver or deliver by first-class mail, a certified copy of this Order to Melissa Giggenbach, P.O. Box 4206, Morgantown, WV 26505; Petitioner William M. Johnson, Mt. Olive Correctional Complex; and to Melvin Snyder, Prosecuting Attorney of Preston County. 3 copies S/D 1/7/11

ENTER this 7 day of January, 2011

Lawrance S. Miller, Jr., JUDGE

ENTERED this 7th day of January, 2011.

Betsy Castle
Betsy Castle, CLERK

By: Shawntel Lambka Deputy Clerk

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT
By Shawntel Lambka Deputy