STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Robert C. Shrout
Petitioner Below, Petitioner

vs) No. 11-0995 (Monongalia County 07-C-368)

Evelyn Seifert, Warden
Respondent Below, Respondent

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Robert C. Shrout, by counsel, Karen L. Hall, appeals the Monongalia County Circuit Court order dated March 31, 2011, denying him habeas corpus relief. The State, by counsel, C. Casey Forbes, has filed its response on behalf of Warden Seifert. Petitioner has filed a reply.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

"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 herein was convicted of felony murder in 1984. During his trial, petitioner attempted to place blame on the victim's boyfriend, but numerous witnesses gave the boyfriend an alibi. Further, witnesses placed petitioner at the victim's apartment building, and a man matching petitioner's description was seen in the apartment after screams were reported from that apartment. Additionally, petitioner's brother testified that just after the murder, petitioner told him that he wanted to hitchhike out of the state and that he thought he had killed a woman. Trooper Lynn Inman of the West Virginia State Police testified as to the serology evidence, which showed that the person in the victim's apartment on the night of the murder had a "secretor" blood type from the "Lewis categories," meaning that he secretes blood in other bodily fluids. Petitioner is a secretor, while the boyfriend is not. The jury found petitioner guilty of murder in the first degree.

Petitioner filed a motion requesting DNA testing pursuant to West Virginia Code § 15-2B-14. The motion was granted and testing was performed. This testing excluded petitioner as a possible contributor on either sample of fluid from the victim's sleeping bag. However, he could not be excluded from the specimen found in the vaginal swab of the victim and the saliva on the cigarette butts found in the victim's apartment, as his DNA was consistent with the same. The boyfriend was excluded as a donor of these samples. A *Zain III* hearing was held pursuant to *In the Matter of : Renewed Investigation of the State Police Crime Laboratory, Serology Division*, 219 W.Va. 408, 633 S.E.2d 762 (2006), and the testimony shows that Fred Zain potentially performed testing on four of the cigarette butts in the case, but that it could not fully be determined whether he performed the testing or simply reviewed the testing. Petitioner's request for habeas relief was denied by the circuit court in an extensive order finding that Trooper Inman's testimony was not misleading or false, and that there were sufficient grounds for petitioner's conviction. The circuit court concluded that there were no grounds for a new trial.

Petitioner asserts two assignments of error on appeal. First, he argues that the circuit court abused its discretion by failing to rule that Trooper Inman provided false or misleading testimony at his murder trial. Petitioner argues that Trooper Inman provided misleading testimony on different facts, such as omitting that there is a third type of Lewis blood type that can be a secretor or a non-secretor. Petitioner argues that this omission led the jury to believe that the only options for who was in the victim's apartment was the victim's boyfriend, a non-secretor, and petitioner, a secretor, when a third Lewis-type individual could have been there. Petitioner argues that Trooper Inman also testified falsely when she indicated that she was the one who tested all of the evidence, when it appears that Fred Zain may have conducted some of the testing; thus, the testing must be excluded. Petitioner argues that absent the excluded evidence, the evidence is insufficient to convict him. Petitioner argues that the circuit court failed to acknowledge that petitioner's fingerprints were not found in the apartment, and that samples from a sleeping bag showed that at some point a third unknown person had been in the apartment. Petitioner acknowledges that the victim's boyfriend had a good alibi but that petitioner produced several witnesses that felt that the boyfriend or petitioner's brother had committed the crime.

The State responds, arguing that Trooper Inman did not provide false or misleading testimony because she did, in fact, conduct all of the testing on the sleeping bag; cigarette butts; blood samples from the victim, petitioner, and the victim's boyfriend; and the vaginal swab. The State notes that Trooper Inman never stated that there was no one else conducting testing on some of the other cigarette butts. Moreover, the State argues that Fred Zain's initials on an informal raw data sheet for four of the cigarette butts does not prove that he was the tester for those items. As Trooper Myers explained in his testimony, the initals could mean that Zain simply read the results. The State also argues that Trooper Inman's testimony regarding the Lewis secretor categories was not misleading or false, as she was never asked how many Lewis secretor categories exist. Finally, the State argues that even without the serological evidence, the remaining evidence is sufficient to convict petitioner beyond a reasonable doubt.

The Court has carefully considered the merits of these arguments as set forth in his petition for appeal and in the State's response, and it has reviewed the appellate record. This assignment of error was fully examined below. The Court finds no error in the denial of habeas corpus relief and fully incorporates and adopts, herein, the circuit court's detailed order dated March 31, 2011. The Clerk of Court is directed to attach a copy of the same hereto.

Petitioner argues in his second assignment of error that the circuit court erred in ruling that he is not entitled to a new trial in accordance with the standards set forth in *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979). Petitioner argues that he has met all of the factors in *Frazier*, and all but the fourth factor have been basically conceded by the State. Petitioner argues that DNA evidence on the sleeping bag shows the presence of an unidentified third party which creates reasonable doubt, and that his conviction cannot be sustained.

The State responds that the circuit court did not abuse its discretion in concluding that petitioner is not entitled to a new trial as none of the *Frazier* factors are met. The State argues that the testimony of Trooper Inman was not false or misleading, and therefore there is no newly discovered evidence. The State further argues that as to the fourth *Frazier* factor specifically, even if this Court finds that this is newly discovered evidence, this case does not warrant a new trial because an opposite result would not be reached if a new trial were granted given the weight of the remaining evidence against petitioner.

> "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 the facts stated in his affidavit that plaintiff 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 Point 1, *State v. Frazier,* 162 W.Va. 935, 253 S.E.2d 534 (1979).

Syl. Pt. 1, *State v. William M.*, 225 W.Va. 256, 692 S.E.2d 299 (2010). In the present case, the circuit court detailed the evidence against petitioner, properly excluded the evidence that cannot be considered pursuant to *Zain III,* and found that evidence was sufficient to sustain petitioner's conviction. We find no error in the circuit court's conclusion that the evidence presented by petitioner does not constitute new evidence that would result in an acquittal.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

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

DISSENTING:

Chief Justice Menis E. Ketchum

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 2

ROBERT C. SHROUT,
Petitioner,

vs. CASE NO. 07-C-368

EVELYN SEIFERT, WARDEN
Respondent,

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

On June 8, 2007, the Petitioner, Robert C. Shrout, by his and through counsel, Jessica A. Haun, student attorney, and Susan McLaughlin, Supervising Licensed Attorney, of the WVU Clinical Law Program, filed a Petition for Writ of Habeas Corpus Ad Subjiciendum and for DNA testing pursuant to West Virginia Code §15-2B-14. The Petition sought a full habeas corpus hearing pursuant to Zain III, full style, In the Matter of: Renewed Investigation of the State Police Crime Laboratory, 219 W.Va. 408, 409-410, 633 S.E.2d 762, 763-764 (W.Va. 2006) alleging that during the Petitioner's trial in the underlying proceeding, false or misleading testimony was provided by a West Virginia State Police Crime Laboratory Serologist. In addition, the Petitioner sought DNA testing pursuant to W.Va. Code §15-2B-14. On August 9, 2007, a Scheduling Order was entered permitting the Petitioner to conduct discovery. By Agreed Order entered February 8, 2008, the Court directed DNA testing of evidence by the West Virginia State Police Crime Laboratory - Biochemistry Division pursuant to W.Va. Code §15-2B-14. On or about August 21, 2008, results of the DNA testing were made available to the Court and the parties. By Order of February 9, 2009, the Court scheduled a Zain III hearing for March 6, 2009.

By Order entered March 24, 2009, the Zain III hearing was rescheduled to May 11, 2009 and May 14, 2009. On May 8, 2009, the State filed its Answer to Petition for Writ of Habeas Corpus Ad Subjiciendum (Zain III) and for DNA testing pursuant to W.Va. Code §15-2B-14.

On May 11, 2009 and May 14, 2009, came the Petitioner, Robert C. Shrout, in person, and by Michael Malone, Student Attorney, Michael Safcsak, Student Attorney, and Michael Aloi, Supervising Licensed Attorney of the WVU Clinical Law Program and came the Respondent, Evelyn Seifert, not in person, but by her counsel, Marcia L. Ashdown, Prosecuting Attorney of Monongalia County for the Zain III evidentiary hearing. The Court heard testimony from witnesses and received exhibits into evidence and at the conclusion of the evidentiary hearing directed counsel for the parties to designate those portions of the record of the underlying criminal proceedings for consideration and review by the Court in ruling in this matter. On June 18, 2009, the State's Designation of Record In Opposition to Petitioner's "Zain III" Claim was filed and on July 10, 2009, Petitioner's Response to State's Designation of the Record and Designation of the Record pursuant to "Zain I" and "Zain III" was filed. The Court has reviewed the Petition, the Answer to the Petition, the evidence presented at the evidentiary hearings, the relevant portions of the record of the underlying criminal proceeding and relevant legal authorities and is prepared to rule.

FACTUAL HISTORY

On January 14, 1984, Lina Jan Spidle was found murdered in her apartment. She had been strangled with a braided leather belt and possibly sexually assaulted and robbed of money from her purse. The Petitioner, Robert C. Shrout, and the victim's boyfriend, Paul Strawser, were identified as possible suspects. Evidence was gathered at the crime scene and

from the victim and from the suspects and forwarded to the West Virginia State Police Crime Laboratory for examination and testing. After the investigation, the Petitioner, Robert C. Shrout, was arrested and charged with the murder and robbery of the victim. The style of the underlying case was State of West Virginia v. Robert Shrout, Felony No. 84-F-42 in the Circuit Court of Monongalia County, West Virginia. The underlying case went to trial and on December 1, 1984, the Petitioner, Robert C. Shrout, was found guilty of felony murder and later sentenced to life with mercy. The Petitioner, Robert C. Shrout, is currently serving his sentence at the Northern Regional Jail and Correctional Facility in Moundsville, West Virginia.

At the trial of the underlying case the Petitioner, Robert C. Shrout, contended that he did not murder the victim and that he was not present in the victim's apartment the night that the crime occurred. The defense further contended that the murderer was the victim's boyfriend, Paul Strawser. At the trial, the State offered testimony of Trooper Lynn Inman, a serologist from the West Virginia State Police Crime Laboratory. Trooper Inman testified that she was provided multiple items of evidence for examination and testing including known blood samples of the victim, the Petitioner, Robert C. Shrout, and the victim's boyfriend, Paul Strawser, as well as vaginal swabs from the victim, cigarette butts found in the living room, bathroom and bedroom of the victim's apartment, clothing worn by the victim and clothing retrieved from the Petitioner, Robert C. Shrout, and a sleeping bag taken from the bed in the victim's bedroom. Trooper Inman testified that the victim was type O blood and that the Petitioner, Robert C. Shrout, and the victim's boyfriend, Paul Strawser, were type A blood. Trooper Inman further testified that Lewis testing of the Petitioner, Robert C. Shrout, and the victim's boyfriend, Paul Strawser's, blood

indicated that the Petitioner, Robert C. Shrout, was a secretor, while the victim's boyfriend, Paul Strawser, was not a secretor.[1]

Trooper Inman also testified with regard to efforts by her to determine the blood type of saliva from the cigarette butts, bodily fluids in the vaginal swab, and other stains from the sleeping bag. Trooper Inman testified that she was able to discern blood type A on some of the cigarette butts found in the living room and bedroom, that the sperm fraction identified from the vaginal swab of the victim was blood type A and that semen stains on the sleeping bag were also blood type A. Based upon those test results, Trooper Inman was able to testify that the Petitioner, Robert C. Shrout, was a potential donor of the bodily fluids identified as blood group A because of his secretor status. Trooper Inman's conclusions were based in part on an inference that if a blood type was able to be detected from other bloodily fluids that those other bodily fluids were left by a secretor. Trooper Inman in her testimony excluded the victim's boyfriend, Paul Strawser, as the donor of the items in question because of his determined non-secretor status.

RESULTS OF DNA TESTING PURSUANT TO W.VA. CODE §15-2B-14

The Petitioner, Robert C. Shrout, in his Petition requested DNA testing on available serological evidence. By Order of February 8, 2008, upon agreement of the parties, the Court directed DNA testing of serological evidence by the West Virginia State Police Crime

---

[1] In serology terminology, a secretor is an individual who's blood type (A, B, or O) can also be found in other bodily fluids such as saliva, semen, etc. In non-secretors, the blood type cannot be found in those other bodily fluids or systems. Typically, eighty percent (80%) of the population are secretors and twenty percent (20%) are not. Robert Shrout was determined to have blood type A and to be a secretor. Paul Strawser, the victim's boyfriend, was determined to have blood type A, but to be a non-secreter. The victim, Lina Jan Spidle, was found to have blood type O. Ms. Spidle's blood sample was collected at her autopsy and the laboratory did not conduct the Lewis typings on autopsy blood due to its instability.

Laboratory - Biochemistry Division. DNA testing of various items of evidence recovered from the crime scene was accomplished and the results reported August 21, 2008. Simply stated, the DNA testing did not exonerate the Petitioner, Robert C. Shrout. The DNA testing did not exclude the Petitioner, Robert C. Shrout, as the donor of some of the items of evidence. The report indicated that a sufficient amount of human DNA was recovered from one (1) vaginal swab, sleeping bag areas 4 and 7, one (1) cigarette paper from the living room, three (3) cigarette papers from the bedroom, two (2) cigarette papers from the bathroom, the reference blood samples of the Petitioner, Robert C. Shrout, and the victim's boyfriend, Paul Strawser, and the known blood specimen of the victim, Lina Jan Spidle. The partial results identified from the vaginal swab (sperm and "e-cell fractions") were consistent with a mixture of DNA from at least two (2) individuals. All of the reportable results identified from the sperm fraction were consistent with a mixture of DNA from the Petitioner, Robert C. Shrout, and the victim, Lina Jan Spidle. As a result, the Petitioner, Robert C. Shrout, could not be excluded as the donor of the spermatozoa identified from the vaginal swab. Paul Strawser was excluded as a possible contributor to the mixture of DNA identified from the vaginal swab. Partial results identified from the cigarette butts collected from the living room were consistent with a mixture of DNA from at least two (2) individuals. The Petitioner, Robert C. Shrout, could not be excluded as a possible contributor to the mixture of DNA identified from the cigarette butts collected from the living room. The victim's boyfriend, Paul Strawser, was excluded as a possible contributor to the mixture of DNA in the cigarette butts. No conclusion could be reached concerning the victim, Lina Jan Spidle, as a possible contributor to that DNA. With respect to the cigarette butts collected from the bedroom, the DNA results were consistent with the victim, Lina Jan Spidle. No conclusions

could be reached with respect to the Petitioner, Robert C. Shrout. With respect to the sleeping bag, the Petitioner, Robert C. Shrout, the victim, Lina Jan Spidle, and her boyfriend, Paul Strawser, were all excluded as possible contributors to the mixture of DNA identified from the sleeping bag.

The Court concludes that the DNA testing on items considered to be crime related did not exonerate the Petitioner, Robert C. Shrout. The most noteworthy of the items retested was the vaginal swab from which the DNA testing determined that the Petitioner, Robert C. Shrout, could not be excluded as the donor of the spermatozoa on the vaginal swab, that the primary results from the vaginal swab e-cell fraction were consistent with Lina Jan Spidle, and that Robert Paul Strawser was excluded as a possible contributor to the mixture of DNA identified from the vaginal swab. That result is consistent with and confirms the serology testing that included the Petitioner, Robert C. Shrout, (a secretor) as a possible donor to the genetic markers found on the vaginal swab, and excluded Paul Strawser (a non-secretor) as a possible donor to the genetic material.

The DNA testing of some of the cigarette butt papers, partially taken from the filter portion of the cigarette and partially taken from the cigarette paper near the filter, was largely inconclusive. One of the Marlboro cigarette papers collected from the living room showed that Paul Strawser was excluded, and that the Petitioner, Robert C. Shrout, could not be excluded. It can be said that the inclusion of the Petitioner, Robert C. Shrout, as a possible donor to DNA on the cigarette paper is not conclusive as to the presence of the Petitioner, Robert C. Shrout, in the apartment. However, his being reported to be one in each 630,000 randomly selected

unrelated individuals who could have contributed the spermatozoa to the vaginal swab from Jan Spidle's body does carry significant evidentiary weight.

DNA testing on the stains from two areas from the sleeping bag that were submitted to DNA testing showed that neither the Petitioner, Robert C. Shrout, the victim's boyfriend, Robert Paul Strawser, nor the victim, Lina Jan Spidle were contributors to the DNA mixture in those stains. As Lt. Myers testified on May 14, 2009, those items were apparently not crime related. The trial record shows that the sleeping bag was found on the victim's bed and was not disturbed, (Tr. Trans. pp. 258, 264), while her body was found away from the bed and on the floor next to the closet doors. (Tr. Trans. p. 251)

The serology testing conducted by Cpl. Lynn Inman in 1984 at the State Police Laboratory was conducted in accordance with accepted standards of testing in use in laboratories at the time, and reflected the state of the science at that time. Cpl. Inman's report and testimony did not incorrectly or falsely include the petitioner as a potential donor to the genetic material according to the available testing techniques. Her inclusion of the petitioner as a member of 33% of the possible donating population was neither incorrect nor false. (Lt. Myers' testimony on May 14, 2009).

The transcript of Cpl. Inman's trial testimony was admitted as an exhibit at the "Zain III" hearing held on May 9 and 14, 2009; specifically, as a Exhibit No. 4 by the Respondent/State, and as Exhibit No. 5 by the Petitioner. Cpl. Inman testified regarding analyses that she conducted on the victim's known blood, vaginal swab and others items of potential evidentiary value collected from the apartment and submitted for serology examinations. Inman's report on those items is dated May 18, 1984. In that report there is no Lewis type listed under the

victim's systems, nor under the systems of any of the other tested items, including the vaginal swab, cigarette butts and swatches from the sleeping bag. Cpl. Inman did not falsely or incorrectly claim to have conducted Lewis testing on those items, because she did not include a Lewis factor on any item in that report.

As Lt. Brent Myers pointed out in his testimony on May 14, 2009, and as shown in Cpl. Inman's July 5, 1984 report, the known blood and saliva of the Petitioner, Robert C. Shrout, was not submitted to the laboratory until July 5, 1984. It was analyzed immediately. The July 5, 1984 report (which is part of State's Exhibit No. 1) shows that the only Lewis factor listed is for Shrout's *whole blood*, on which the laboratory did have the capacity to perform Lewis testiny in 1984. The known saliva specimen of the Petitioner, Robert C. Shrout, was reported only to have an ABO system factor and did not falsely report a Lewis factor. [2] His known saliva specimen contained his ABO genetic marker, indicating that Shrout was/is a secretor.

The known whole blood of the victim's boyfriend, Robert Paul Strawser, was submitted to the forensic laboratory on July 20, 1984, and his known saliva was received at the lab on September 5, 1984. The results of the examinations were set forth in a report dated October 11, 1984. Again, Cpl. Inman did not improperly report any Lewis factor in the saliva specimen of Paul Strawser. The report indicated that no ABO genetic marker was obtained from Strawser's saliva, meaning that Paul Strawser was a non-secretor.

Cpl. Inman correctly explained in her trial testimony that if one is a secretor, his/her ABO marker will appear in that person's saliva; and if one is a non-secretor, his/her ABO

---

[2] Lewis testing was not conducted on saliva or evidence stains until 1989 or 1990. (Lt. Myers' testimony, 5-14-09).

generic marker will not be present in other bodily fluids such as saliva or semen. Moreover, at trial Cpl. Inman testified only as to whether the tested items indicated that a potential donor was a secretor or non-secretor. She did not attribute a Lewis type (of a- b+ or a+ b-) to any of those tested items about which she was questioned. The only reference Cpl. Inman made to actual Lewis typing was in answer to a general (and perhaps inartful) question asked by the prosecutor on page 549 of the transcript. In answer to the question, Cpl. Inman referred to Lewis typing of a+ b- for non-secretors, and a- b+ for secretors, without including the possibility of an a- b- secretor. Although the answer was partially incorrect due to the omission of the a- b- secretor type, it remains true to say that Inman did not assign Lewis factors to tested items.

It is noteworthy to point out a portion of the Petitioner's hearing Exhibit No. 2 (page 107 of the Stolorow-Linhart December 2, 2004 report) in which appear the following statements:

> In cases in which an ABO type was obtained from analysis from a secretion sample, it was reasonable to conclude that the donor was a secretor. The problem was in misnaming this as a Lewis type, not the calculation of frequency. Secondly, Mr. Stolorow held the analysts responsible for potentially failing to exclude a falsely accused defendant who is a Lewis a- b- secretor, because they chose to use the Lewis nomenclature rather than the appropriate secretor nomenclature. The tests provided no data on which to base such an exclusion. It is instructive to note that few, if any, forensic laboratories in the country at that time would have been able to exclude such a falsely accused individual. While this practice is incorrect, it did not effect the meaningfulness of the results.

Moreover, based on the facts of the Shrout case and the theories of the prosecution and defense, the Petitioner, Robert C. Shrout's and the victim's boyfriend, Paul Strawser's Lewis types, of a- b+ and a+ b- respectively, are the only relevant Lewis factors. Testimony by Cpl. Inman regarding an a- b- secretor as a possible contributor to evidence stains would have been irrelevant in the context of this case. Therefore, omissions of reference to a- b- type in her testimony was harmless.

In her testimony Cpl. Inman did not misstate the frequency statistics of the numbers in the general and male populations who could be donors to the stains on the vaginal swab, the cigarette butts and sleeping bag. In particular, on cross-examination by the Petitioner's trial counsel, Cpl. Inman testified that one of three males could produce the findings in which the Petitioner, Robert C. Shrout, was included. (Tr. Trans. pp. 529, 569) Inman's testimony, in essence, was inclusion of the Petitioner, Robert C. Shrout, as the potential donor to certain evidence stains or secretions and exclusion of the victim's boyfriend, Paul Strawser, based upon Shrout's status as a secretor and Strawser's status as a non-secretor.

Moreover, in closing argument the prosecutor did not overstate or misstate the serological evidence, and correctly conceded that the combination of genetic markers on items that were linked to the Petitioner could also be linked to one-third of the population. (Tr. Trans. p. 809).

INVOLVEMENT OF FRED ZAIN IN LABORATORY TESTING

At the outset of this proceeding, the parties had been under the impression that Fred Zain was not involved in testing of any items submitted to the laboratory in the Petitioner's case. However, as pointed out by the State at the "Zain III" hearing, a close look at the raw data

sheets indicated that Zain may have tested, or reported results, on four cigarette butts from the victim's apartment. Pursuant to "Zain I," it is necessary for the Court to exclude the testimony of Cpl. Inman about those items. It also appears that Fred Zain may have conducted a pgm test of the victim's known blood along with eleven other items from separate cases on February 15, 1984, as shown on page 56 of the raw data sheets. Page 56 of the raw data sheets also shows that Cpl. Inman tested five other items relating to the victim on February 3 and February 7, 1984. These results were all reported in the May 18, 1984 report. Those results must also be excluded pursuant to "Zain I."

AFTER EXCLUSION OF THE FORENSIC EVIDENCE, THE REMAINING EVIDENCE WAS SUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTION

The Petitioner, Robert C. Shrout, was acquainted with the victim, Lina Jan Spidle, prior to her death and knew that she lived at Marjorie Garden apartment complex. According to the testimony of Joyce Shumiloff, bartender at Country Rock, Robert C. Shrout, Paul Strawser and Jan Spidle were all present at that bar on Friday afternoon, January 13, 1984. Ms. Shumiloff observed Paul Strawser hand more than $200.00 to Jan Spidle for safekeeping. (Tr. Trans. pp. 323-324).

Joyce Shumiloff invited the Petitioner, Robert C. Shrout, to come to her apartment that evening, also at Marjorie Garden, to play cards, offering the potential of a blind date for him. The Petitioner, Robert C. Shrout, arrived at approximately 9:00 p.m. and left not long after, because he was not needed as a fourth or sixth for the card game. As he left Joyce's apartment, the Petitioner, Robert C. Shrout, asked if Jan Spidle lived in the 2300 building to which Joyce answered 'no, the 2200 building.' (Tr. Trans. pp. 324-327).

While still at the Country Rock during the afternoon hours Joyce Shumiloff observed the Petitioner, Robert C. Shrout, and Jan Spidle engaged in small talk at the bar. She heard Jan tell the Petitioner, Robert C. Shrout, that he could come to stay with her and Paul at her apartment if his date didn't work out. (Tr. Trans. pp. 328-329).

Paul Strawser testified that his paycheck on January 13, 1984, had been for $266.48 and that when he cashed the check he received payment in crisp, new-appearing twenty dollar bills. When he returned to the Country Rock he handed Jan $220.00 or $240.00 in twenties, for her to hold for him. When he handed the money to Jan the Petitioner, Robert C. Shrout, was located immediately to his right at the bar. Paul Strawser also heard Jan tell the Petitioner, Robert C. Shrout, he could stay with them if his date didn't work out. (Tr. Trans. pp. 335-339).

Paul Strawser and Jan Spidle had planned to spend the entire weekend together. However, Strawser left Jan's apartment at approximately 7:00 p.m. to go downtown to play pool with some friends. Jan was upset with him, and after he left she went to another friend's apartment at Marjorie Garden where she remained from 8:00 pm. to 11:00 p.m. (Tr. Trans. p. 417). Strawser tried to telephone Jan at approximately 9:45 p.m. (Tr. Trans. p. 342) and when he did not reach her he called Jan's friend, Joan McDonald, at that time and perhaps again at 11:00 p.m. (Tr. Trans. p. 411).

After leaving Joyce Shumiloff's apartment the Petitioner, Robert C. Shrout, returned to downtown Morgantown, to the Country Rock Bar, where he was observed by bartender Florence "Cindy" Frymyer to have come back into the bar after 11:30 p.m. While the Petitioner, Robert C. Shrout, remained there Cindy handed the Petitioner, Robert C. Shrout, a

phone call from a male and heard the Petitioner, Robert C. Shrout, say, "I just walked back from there and I'm going to try to get money for a cab . . . or I will walk back out." Another patron of the bar gave the Petitioner, Robert C. Shrout, money for a cab. Cindy then called a taxi to drive the Petitioner, Robert C. Shrout, to Marjorie Garden. (Tr. Trans. pp.422-425, 429).

Cab driver Ronald Simpkins, who had known the Petitioner, Robert C. Shrout, since early teenage years, picked up the Petitioner, Robert C. Shrout, at midnight from the Country Rock Bar and drove him to Marjorie Garden, where he watched the Petitioner, Robert C. Shrout, enter the door to the 2200 building shortly after midnight. (Tr. Trans. pp. 435-436, 438).

Between 12:50 and 12:55 a.m. on January 14, 1984, Alma Yost who lived in the apartment directly beneath Jan Spidle, was awakened by banging noises in Jan Spidle's bedroom, which was directly above Ms. Yost's bedroom. She could hear Jan and a male arguing and she heard Jan scream twice. She then heard the sound of something being dragged across the floor and the noise of something banging into the metal close doors above her own. Because Alma Yost thought something was wrong with Jan, she went to the apartment of her son, Eddie Yost, across the hall from her apartment. Eddie Yost called the maintenance department to send someone to Jan's apartment. (Tr. Trans. pp. 387-391).

Maintenance man David Antonini received the call at approximately 1:00 a.m. He had been called to Jan's apartment once before because Jan, who was subject to violent seizures, had experienced a seizure. The maintenance department had master keys to allow entry into all of the apartments. Mr. Antonini received no answer when he knocked at Jan's door. His master keys allowed him to unlock the deadbolt and the doorknob lock. However, the chain lock was

in place and Antonini had to return to the maintenance office to obtain another key to unlock the chain. When Antonini returned, he was about to unlock the chain, he heard a man's voice ask, "Can I help you?" The man approached the doorway. Although the apartment's interior lights were off, a dusk-to-dawn light on the outside of the apartment building and the hallway lighting allowed Antonini to observe the man sufficiently to give a description of 5'9-10" 160-170 pounds, brown or dark curly hair with sideburns and mustache. Because Mr. Antonini assumed Jan had suffered a seizure and had recovered, he left the apartment. (Tr. Trans. pp. 453-459).

At trial, the Petitioner, Robert C. Shrout's, arrest photos were introduced as an exhibit to show his hair and facial hair at the time of the murder. (Tr. Trans. pp. 292). In closing argument the prosecutor drew a distinction between the Petitioner, Robert C. Shrout's, appearance in the photographs and that of Paul Strawser. (Tr. Trans. pp. 835-835).

Before the murder, the Petitioner, Robert C. Shrout, had been staying for several weeks with Arthur and Cara Rager, who lived at 851 Beechurst Avenue. They were aware that the Petitioner, Robert C. Shrout, would frequently sell plasma for $10.00 or $15.00 at Sera Tec because he had no consistent source of income. He went there on the morning of January 13. The Petitioner, Robert C. Shrout, returned to the Rager residence for dinner at 7:00 p.m., after which he left because he had a date on Dorsey Avenue (Marjorie Garden). (Tr. Trans. pp. 490-492).

The Petitioner, Robert C. Shrout, returned to the Rager's home at approximately 2:30 a.m. on January 14. Cara answered the door. The Petitioner, Robert C. Shrout, also got Art out of bed to show them money that he had allegedly won at cards. Art Rager noted that the money was over $200 in twenties (Tr. Trans. p. 494) and Cara Rager testified that the amount was $240.00 in crisp, new twenties (Tr. Trans. p. 512). As the Petitioner, Robert C. Shrout, talked,

he stated, "I might have been into something last night but I don't remember what." He also said something about seeing blood and an ambulance. (Tr. Trans. pp. 498 and 516). The Ragers described the Petitioner, Robert C. Shrout, was unusually quiet after he awakened the next morning, and he wanted to listen to the radio news to learn if there had been any trouble. (Tr. Trans. pp. 498 and 515). Art Rager even went out to buy a newspaper to see if there were any news available from that source. The Petitioner, Robert C. Shrout, left the Rager residence at about midday stating that he planned to go to the V.A. Hospital in Clarksburg because his back was bothering him. (Tr. Trans. p. 499).

Paul Strawser, who had not been able to reach Jan by telephone through the evening and night of January 13, took a cab from the Country Rock Bar (as confirmed by the bartender Cindy Frymyer, (Tr. Trans. p. 428), and by cab driver Robert Pinkney, (Tr. Trans. pp. 400-401). Robert Pinkney dropped Paul Strawser at Marjorie Garden at 4:14 a.m. Although Strawser asked Pinkney to wait, the taxi driver declined. (Tr. Trans. pp. 401-402). When Paul Strawser was unable to get any response from Jan in her apartment, he fell asleep by the door and awakened at 7:55 a.m. He then took a cab from the Dorsey Avenue Dairy Mart to his residence in Westover. (Tr. Trans. pp. 347-348 and pp. 403-404). Paul also called Jan's friend, Joan McDonald, again that morning, trying to locate Jan. (Tr. Trans. p. 411). At about mid-morning Paul called the maintenance department at Marjorie Garden asking for someone to check on Jan. (Tr. Trans. p. 348).

Jan Spidle's body was found in the bedroom of her apartment sometime before noon on January 14, 1984. She was strangled to death with a leather belt. He body was located next to the metal closet door. (Tr. Trans. p. 251). Her nightgown was ripped down the front and

at the right shoulder and collar (Tr. Trans. p. 581) and blood had run from her ears (Tr. Trans. p. 583). Jan's purse had been rifled and the $240 that had been given to her earlier by Paul Strawser was missing. (Tr. Trans. pp. 258, 296, 302-304).

The Petitioner, Robert C. Shrout, telephoned his brother, Gary Shrout, on January 14, 1982, asking if Gary still wanted to go to California. The plan was to hitchhike and to leave on January 15. (Tr. Trans. pp. 524-525). At a bar in Columbus, Ohio on Monday night (January 16, 1984) the Petitioner, Robert C. Shrout, made the statement, "I thought I killed a girl." (Tr. Trans. p. 526). In his own testimony, the Petitioner, Robert C. Shrout, attempted to change the content and context of that statement. (Tr. Trans. p. 711). However, his version was not supported by Gary in Gary's direct or cross-examination.

The Petitioner, Robert C. Shrout's, defense was to deny his own guilt and implicate Paul Strawser as the possible murderer. The jury heard witnesses called by the defense who heard parts of drunken statements made by Paul Strawser after the time of the murder to the effect that he didn't know whether the Petitioner, Robert Shrout, or he had killed Jan, or that Paul was present at the apartment and two other guys killed Jan, etc. (Tr. Trans. pp. 606-607 and 651-652).

However, the evidence of Paul Strawser's whereabouts during the late night hours of January 13 and early morning hours of January 14, were accounted for by Country Rock Bartender Cindy Frymyer (Tr. Trans. pp. 426-428), cab drivers Robert Pinkney and Keith Huffman (as indicated above) and Duane Janes (Tr. Trans. pp. 764-766).

Additionally, the State presented rebuttal evidence to contradict the Petitioner, Robert C. Shrout's, testimony that he had asked bartender Cindy Frymyer to place a phone call

to Jan Spidle for him before midnight on January 13. Ms. Frymyer stated that she made no such phone call to Jan Spidle's phone number on behalf of the Petitioner, Robert C. Shrout. (Tr. Trans. pp. 762-763).

Moreover, the Petitioner, Robert C. Shrout, testified that he had obtained the money that he had shown to the Ragers through transacting a marijuana sale at the Double Decker Bar on Walnut Street. In the State's rebuttal evidence, bartender Louis Audia testified that the Petitioner, Robert C. Shrout, had not been present at the Double Decker Bar at all on January 13-14. (Tr. Trans. pp. 757-758).

The trial evidence clearly supports the jury verdict in this case even when the forensic evidence is excluded. The forensic evidence merely corroborated the other evidence. That evidence is further corroborated by the DNA testing results.

THE PETITIONER IS NOT ENTITLED TO RELIEF UNDER ZAIN I, ZAIN II OR ZAIN III

The current proceeding has resulted in a review of the forensic and other evidence against the Petitioner, as contemplated by *Zain III*. Because the State agreed to the resubmission of evidence to DNA testing and the Court has proceeded with a *Zain III* hearing to review the serology evidence, no further review is necessary.

Zain II, 191 W.Va. 224, 445, S.E.2d, 165 (1994), held that serology reports prepared by employees of the Serology Division of the West Virginia State Police Crime Laboratory, other than Fred S. Zain, are not subject to the invalidation and other structures contained in *Zain I*, 190 W.Va. 321, 438 S.E.2d 501 (1993). *Zain II* also stated that, although the seriousness of any errors committed by the other serologists should not be understated, the

analysis of the underlying serological data in each of the cases examined showed that the results of the tests actually conducted in the reviewed cases, except where noted, appeared to be substantially correct. This language is consistent with the testing and testimony by Cpl. Lynn Inman in the Petitioner's case.

Zain I held that, once it was discerned that Fred Zain had offered any testimonial or documentary evidence in a criminal prosecution, his evidence should be deemed inadmissible and the remaining inquiry was to be whether the evidence presented at trial, independent of the forensic evidence presented to Tpr. Zain, would have been sufficient to support the verdict. Accordingly, even the involvement of Fred Zain in a case did not automatically invalidate a verdict, if the non-forensic evidence was found to be sufficient to support guilt. The Court concludes that there was sufficient evidence independent of the forensic evidence to support the jury verdict.

According to *Zain III*, a prisoner who is challenging conviction must prove that the serologist offered false evidence in the prosecution. The State has demonstrated that material false evidence was not presented. Moreover, the prisoner must satisfy the standards for granting a new trial as set forth in many cases, including *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979). The Court concludes that the Petitioner has not met the requirements of State v. Frazier. In fact, there is no new evidence to be presented at a new trial that would produce an acquittal, the DNA results on the vaginal swab obtained in 2008 would be more damaging to the Petitioner than the serological evidence in 1984.

ACCORDINGLY, the Court concludes based on all of the evidence presented, the record herein, the arguments of counsel and relevant legal authorities that the Petition is without

merit and as a result, it is ADJUDGED, ORDERED and DECREED that the Petition be and hereby is **DENIED** and the matter be and hereby is **DISMISSED** from the docket of this Court.

The Clerk is directed to forward a copy of this Order to all counsel of record.

ENTER: March 31, 2011

RUSSELL M. CLAWGES, JR., CHIEF JUDGE

FILED March 31, 2011
CIVIL ORDER BOOK 129 PAGE 388
JOAN FRIEND, CLERK