

COPY

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA ex rel.
ALEX FARMER,

Appellant/Petitioner below,

v.

Docket No.: 34157
(Jefferson Cty. Circuit Court No.: 05-C-102)

THOMAS MCBRIDE, Warden,

Appellee/Respondent below.

BRIEF OF APPELLEE

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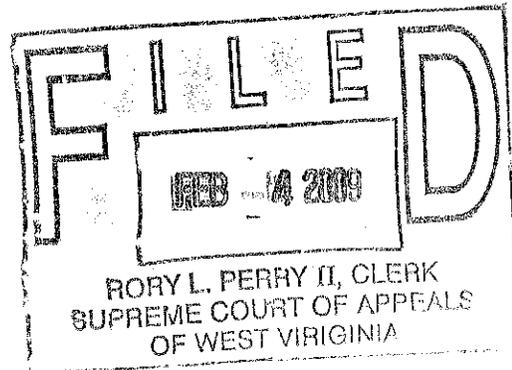


Table of Contents

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.....1.

II. STATEMENT OF THE FACTS.....2.

III. RESPONSE TO THE APPEAL.....15.

IV. AUTHORITIES RELIED UPON.....16.

V. ARGUMENT.....20.

A. STANDARD OF REVIEW.....20.

**B. THE CIRCUIT COURT PROPERLY DENIED THE APPELLANT’S
 ZAIN III CLAIM.....20.**

**C. THE CIRCUIT COURT PROPERLY RULED THAT THE MOTIONS FOR
 ACQUITTAL WERE PROPERLY DENIED BY THE TRIAL COURT.....25.**

**D. THE CIRCUIT COURT PROPERLY RULED THAT THE SEROLOGY
 EVIDENCE FROM THE T-SHIRT WAS PROPERLY ADMITTED BY THE
 TRIAL COURT.....27.**

**E. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL COURT
 PROPERLY ADMITTED THE APPELLANT’S STATEMENT.....32.**

**F. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL
 COURT PROPERLY DENIED THE APPELLANT’S MOTION TO
 DISQUALIFY JUROR COOK.....38.**

**G. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL COURT
 PROPERLY ALLOWED THE JURY TO HAVE A MAGNIFYING GLASS.....40.**

**H. THE CIRCUIT COURT PROPERLY RULED THAT THE APPELLANT
 PRESENTED NO EVIDENCE OF FALSE TESTIMONY BY WITNESSES.....42.**

**I. THE CIRCUIT COURT PROPERLY RULED THAT THE SENTENCES
 WERE PROPERLY IMPOSED.....43.**

VI. CONCLUSION.....44.

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This proceeding is an appeal from an omnibus habeas corpus proceeding. The Respondent respectfully requests that this Court deny the Petition for Appeal and affirm the rulings of the circuit court below.

Marjorie Bouldin, an elderly woman living alone, was found dead in her home the morning of April 15, 1988. There was evidence of a burglary. Ms. Bouldin had been raped vaginally and anally. The cause of death was determined as asphyxia from manual strangulation. The Appellant, who had been hired to paint Ms. Bouldin's home the day before, was identified as a suspect.

At jury trial in the summer of 1990 the Appellant was convicted of the indicted offenses of: First Degree Murder; two counts of First Degree Sexual Assault; and Burglary. For these convictions, the Appellant was sentenced, respectively, to the statutory sentences of: Life without mercy; two 15-25 year sentences; and one 1-15 year sentence, each sentence to run consecutively to the others. [State v. Alexander E. Farmer, Jefferson County Criminal Action Number 89-F-21.]

The Appellant's direct appeal was denied by this Court. [Order, 1/29/92.]

The Appellant then filed a *Zain* habeas, challenging the forensic evidence against him, which was denied by Order entered January 30, 1996. [SER Farmer v. Trent, Jefferson County Case No.: 94-P-13.]

The Appellant's direct appeal from that *Zain* habeas was refused by this Court. [Order, 8/23/96.]

The Appellant's case was one of ten cases in which the serological evidence was recently reviewed by this Court, resulting in findings revealing no probative error in the Appellant's case.

In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division (“*Zain III*”), 219 W.Va. 408, 633 S.E.2d 762 (2006).

The Appellant’s current appeal is from the circuit court’s denial of his omnibus habeas corpus petition, wherein he primarily alleged trial court error in the 1990 murder trial. [Order Denying Petition for Habeas Corpus, 8/15/07.] The Respondent respectfully requests this Court refuse the appeal.

II. STATEMENT OF THE FACTS

1. Marjorie Bouldin, an elderly woman living alone, was found dead in her home by a neighbor the morning of April 15, 1988. There was evidence of a burglary. Ms. Bouldin had been raped vaginally and anally. The cause of death was determined as asphyxia from manual strangulation. The Appellant, who had been hired to paint Ms. Bouldin’s home the day before, was identified as a suspect. [*State v. Alexander E. Farmer*, Jefferson County Criminal Action Number 89-F-21, R. *passim*.]

The Trial Conviction.

2. The Appellant was subsequently indicted for these offenses on the felonies of First Degree Murder, two counts of First Degree Sexual Assault, and Burglary. [Indictment, 9/19/89.]

3. At the pre-trial suppression hearing on January 26, 1990, State Police Corporal Jeffries testified that, as part of his investigation of Ms. Bouldin’s murder, on April 16, 1988, he and Jefferson County Sheriff’s Deputy Shirley spoke with the Appellant, the Appellant signed a *Miranda* waiver, the Appellant was not under arrest, and the Appellant gave a statement until he said that he wanted to speak with a lawyer. Corporal Jeffries further testified that on April 16, 1988, he and Shirley went to the trailer where the Appellant was living, obtained consent from

the Appellant and his brother to search the home. The Appellant identified the clothing that he was wearing on the date that Ms. Bouldin was killed. That clothing was seized, including a blue Breeder's Cup t-shirt. Corporal Jeffries also testified that on June 8, 1989, he and Shirley interviewed the Appellant at New Jersey's Bayside Prison, that the Appellant was not under arrest [for any charges concerning Ms. Bouldin], that the Appellant signed a *Miranda* waiver, and that the Appellant gave a statement. [Tr., 1/26/90 (Vol. 1), 12-65; Exhs. 1-8.]

4. Deputy Shirley, who investigated the matter with Trooper Jeffries, testified similarly. [Id., 66-75.]

5. Based on this evidence, the trial court ruled that the statements were voluntarily given and the seizures had by voluntary consent and that all rights had been waived. [Pre-trial Tr., 1/26/90 (Vol. 2), 7-10.]

6. The jury was selected and several other pre-trial matters discussed. [Tr., 7/24/90.]

7. The following day, the single alternate juror was moved onto the jury before testimony began since another juror became ill and was hospitalized. The Appellant requested the selection of another alternate but the State opposed recalling a panel. The trial court would not select a new alternate without agreement of the parties. [Tr., 7/25/90, 4-7.]

8. Eva Longerbeam testified that she spoke with Ms. Bouldin on the phone on April 14, 1988, at about 7:30-8:00 p.m. [Id., 52-57.]

9. Mary Woodward testified that at about 9:40 on the morning of April 15, 1988, she went to Ms. Bouldin's house because Ms. Bouldin did not answer her phone. Going inside, she found Ms. Bouldin on the floor and called 911. Ms. Bouldin's prop used to secure her front door was on the floor on April 15. She last saw Ms. Bouldin on April 14 when there were painters at

the house. She had looked around the house at the paint job on April 14 and there were no broken windows. There was a broken window on April 15. The painters had a green pickup with wooden racks on the side. [Id., 58-88.]

10. After lunch the first day of trial Juror Cheryl Cook reported that she found out that the local bank where she works was handling the Bouldin estate and that her employer wanted the judge to know. Ms. Cook told the court that knowing this would not affect her ability to fairly and impartially hear the case and that she felt comfortable continuing. The Appellant moved to disqualify Ms. Cook. The court denied the motion. [Id., 94-108.]

11. Dr. William Miller, M.D., testified that he is the county coroner and arrived at Ms. Bouldin's house about 11:00 a.m. on April 15, 1988. He described the broken blood vessels and bruising on the face and hands of Ms. Bouldin. He estimated death to have occurred about 6-12 hours before the body was found, though it may have been 6-8 hours and not more than 10 hours. [Id., 109-146.]

12. Dr. James Frost, M.D., testified that he is the State Medical Examiner. He examined Ms. Bouldin's body on April 15, 1988, and conducted an autopsy on April 18, 1988. He described the bruising, abrasions and lacerations found, as well as fractures and hemorrhages around the eyes. He described evidence of strangulation by hand, a fractured jaw, a rib fracture and a spinal fracture. He described vaginal lacerations and bruising, indicative of a sexual assault, as well as lacerations and bruising of the anus. No sperm was found. There was a brain hemorrhage. He opined the cause of death to be manual strangulation and the time of death to have been about 8 to 10 to 12 hours before the body was found, plus or minus 4 hours. He described his reasons for placing the time of death. He opined that coarse work gloves could

cause some of the abrasions. [Id., 147-193.]

13. Charles Grim testified as to living near Ms. Bouldin's house. He testified that he knew the Appellant and that the Appellant came to his house on April 14, 1988, at about 8-8:30 p.m. He was not expecting the Appellant and the Appellant had never been to his house before. The Appellant told him that Lynn Fitzwater dropped him [the Appellant] off. He did not notice any scratches on the Appellant's face. His dog did not scratch the Appellant. The Appellant left about 9-9:30 p.m. but then returned again at about 11-11:30 p.m. The Appellant stayed the night on the couch. He left with the Appellant at about 5:00 the next morning and dropped the Appellant off at a 7-11. [Id., 196-227.]

14. Hilda Grim testified that she knows the Appellant and that he came to her [and Charles'] house on April 14, 1988, at 8-8:30 p.m., wearing jeans and a checkered shirt. The Appellant left about 9-9:30 p.m., saying he was going to Pumphrey's and then home. The Appellant returned about 11-11:30 p.m. The Appellant was wearing sneakers. [Tr., 7/26/90, 19-54.]

15. Marshall Fitzwater testified that he knows the Appellant. He worked with the Appellant for about six months painting and clearing brush. He worked with the Appellant in April 1988, picking the Appellant up and taking him home. He and the Appellant painted Ms. Bouldin's home with Kevin DeHaven. The Appellant was wearing a blue Breeder's Cup t-shirt, sneakers and, he was pretty sure, blue jeans. He identified an exhibit as looking like the same t-shirt. The Appellant was wearing new tennis shoes on April 14. None of the painters went into the basement that day. The Appellant did not have any scars or marks on his face that day. At about 8:05-8:10, he dropped the Appellant off by the river. The Appellant said he was going to

the Grim's and that Grim would bring him by in the morning. It was the first time he ever dropped the Appellant off there. The Appellant had the same clothes on the next day. The Appellant had a scratch on his nose that he said he got from Grim's dog. He has a green pickup with wooden racks on the side. The Appellant's footprint was left on the hood of the truck from when he would step on the hood to tamp brush down in the back. The Appellant wore gloves a lot. The Appellant never worked with him again after April 15, 1988. His truck was not at Ms. Bouldin's on April 15, 1988, at 6:45 a.m. [Id., 70-199.]

16. Deputy Shirley testified that he arrived at Ms. Bouldin's house at 10:48 a.m. on April 15, 1988. He identified various photos of the crime scene and the victim, which were admitted. He identified various items seized from the Appellant, including the blue Breeder's Cup t-shirt, which were all admitted. He testified to the Appellant's initial statement on April 16, 1988, and described the scratches on the Appellant's face. He identified the photos of the footprints on Fitzwater's truck, which were admitted. He described the Appellant's hands as red and swollen during the April 16, 1988 interview, and that the Appellant appeared nervous. He described the distance between the Grims' and Ms. Bouldin's as a ten-minute walk. He identified photos of footprints in Bouldin's basement taken on April 16, 1988, as very clear in the dirt. He measured the footprint on the hood of Fitzwater's truck and the basement footprints as being the same size. He described the clothing seized from the Appellant, including the Appellant's attempt to avoid providing the Breeder's Cup shirt. He testified that the Appellant seemed surprised, scared and with a wild look on his face when he was asked to hold up the shirt. He identified the Breeder's Cup shirt as an exhibit. He testified that the Appellant was hiding at his [the Appellant's] mother's on April 18, 1988, and testified as to the Appellant's statement given that day. On

cross-examination, he admitted that the Appellant was not connected forensically to any evidence found on the victim or in her house. He also admitted that none of the victim's genetic markers were found on the Appellant's seized clothing. [Id., 265; Tr., 7/27/90, 11-206.]

17. State Police Sergeant Neal was qualified as an expert in fingerprint testing and testified that fingerprints tested from the scene were not the Appellant's. [Tr., 7/27/90, 207-224.]

18. State Police Sergeant Smith was qualified as an expert in serology and testified that semen found on the blue Breeder's Cup t-shirt and the Appellant's jeans could be the Appellant's. No blood was found on those clothes. All of the blood samples taken from the victim's home was the victim's blood. No semen was found on the swabs taken from the victim. [Id., 229-254.]

19. State Police Trooper Barrick was qualified as an expert in forensic chemistry and testified that no carpet fibers from the victim's home were found on the Appellant's blue t-shirt or jeans. [Id., 255-260.]

20. Joyce Sutphin testified that she is the Appellant's cousin and Pumphrey's daughter and that she did not see the Appellant at Pumphrey's trailer on April 14, 1988, though she was there all night. [Tr. 7/30/90, 13-23.]

21. Gary Sutphin testified that he is Joyce Sutphin's husband and he did not see the Appellant the evening of April 14, 1988, either. [Id., 23-28.]

22. Discussion ensued about whether Corporal Jeffries' notes from his June 8, 1989, interview of the Appellant at the New Jersey facility were covered by the trial court's pre-trial ruling denying the Appellant's Motion to Suppress. [Tr., 7/30/90, 29-55.] A further *voir dire* of Trooper Jeffries, Deputy Shirley, the Appellant and Deputy Carbone was had. [Tr., 7/30/90, 29-

55, 55-89, 89-101, 101-108; Tr. 7/31/90, 36-42.] The trial court ruled Corporal Jeffries' notes of his June 8, 1989, interview with the Appellant admissible as voluntarily given with a waiver of rights. [Tr., 7/31/90, 29-36, 45.]

23. Corporal Jeffries testified regarding his investigation and his interviews with the Appellant. [Id., 53-110.]

24. Frank Ramsburg testified that he knows the Appellant from a long time ago. He testified that at about 9:15-9:30 p.m. on April 14, 1988, he was getting groceries out of his car when his wife said there was someone walking down the road. He testified that shortly thereafter he drove the short distance to his wife's grandmother's (Martha Ott) house, who lived near Ms. Bouldin. He testified that he saw and spoke with the Appellant as the Appellant was walking down the road past Ms. Ott's house. [Id., 110-141.]

25. Velma Penwell testified that she was with Frank Ramsburg and Terry Valencia at about 9-9:30 p.m. on April 14, 1988, after going to the grocery store when a man was walking down the road toward Ms. Bouldin's house with what looked like gloves on. She testified that Ramsburg said "Hi Alex" and spoke with the man. [Id., 141-163.]

26. Terry Valencia testified that she was at Frank Ramsburg's on April 14, 1988, at about 9:00 p.m. with Brenda Ramsburg and Velma Penwell when a person walked out of the shadows and scared Ms. Ramsburg. She testified that Frank Ramsburg called out the name Alex Farmer. She testified that she drove with Mr. Ramsburg and Ms. Penwell down the road and saw the same person going down the road. [Id., 164-183.]

27. David Tomlin testified that he knew the Appellant and that the Appellant told him that he had broken into [Ms. Bouldin's], but that he didn't kill the old lady. [Id., 188-214.]

28. James Lang testified that he knew the Appellant and was married to his sister. He overheard the Appellant tell Hough that he broke into [Ms. Bouldin's] house but that he didn't murder her. [Id., 214-227.]

29. The Appellant argued his Motion for Acquittal, which the State opposed and the trial court denied. [Id., 234-249; Tr., 8/1/90, 3-39.]

30. The Appellant called Ethel Long who testified that she saw a green truck with racks on it by the victim's house on April 15, 1988, at twenty of, or quarter of, seven in the morning. She testified that it was the same truck she had seen there the day before but admitted she never told Deputy Shirley that she had seen it the day before. [Tr., 8/1/90, 49-75.]

31. The defense then rested. [Id., 76.]

32. The State called Donna Fitzwater in rebuttal, who testified that she was married to Lynn Fitzwater in April 1988. She testified that he then had a green pickup. She testified that he was home from 3:30-8:00 p.m. on April 14, 1988, and then left with the Appellant from 8:00-9:20 p.m., at which time he returned without the Appellant. She testified that the Appellant returned to her home about 5:00 a.m. the next morning. She testified that when she left the house at 7:30 that morning her husband's truck was at the house, the Appellant was laying on her couch and her husband was in bed. The Appellant had scratches on his face that morning. She testified that her husband's truck always needed to be jumped to start. She testified that her husband did not leave the house during the night of April 14 through the morning of April 15, 1988. [Id., 78-97.]

33. The State recalled Deputy Shirley who testified that Ethel Long told him during the investigation that she had never seen the truck in Ms. Bouldin's driveway before April 15. He

testified that he followed up Ms. Long's story of the truck with the Fitzwaters and different people in the area. [Id., 97-113.]

34. The parties rested. The Motion for Acquittal was renewed and denied. [Id., 114, 119-120.]

35. Instructions and argument ensued.

36. During deliberations, the jury requested the use of a magnifying glass. The Appellant objected but the trial court permitted the jury the use of a magnifying glass. [Tr., 8/2/90, 118-121.]

37. The jury returned convictions on each of the indicted charges.

38. The following sentences were imposed: First Degree Murder (life without mercy); Two counts of First Degree Sexual Assault (15-25 years each); and Burglary (1-15 years). Each sentence runs consecutively to the others.

The Direct Appeal Refused.

39. The Appellant's direct appeal from that conviction and sentence alleged five grounds: A) the trial court erred in admitting his statement given in a New Jersey prison; B) a second alternate juror should have been selected; C) insufficient evidence; D) the trial court erred in denying the motion for new trial; and E) the sentences should not have been imposed consecutively since the jury recommended mercy on the murder conviction. [Petition for Appeal, 7/30/91.]

40. This appeal was refused by this Court. [Order, 1/29/92.]

The Zain Habeas Refused.

41. The Appellant filed a *Zain* habeas, challenging the forensic evidence against him,

which was denied by Order entered January 30, 1996. [SER Farmer v. Trent, Case No.: 94-P-13.]

42. The Appellant's direct appeal from that *Zain* habeas was refused by this Court.

[Order, 8/23/96.]

The Omnibus Habeas.

43. The Appellant filed a *pro se* Petition for Writ of Habeas Corpus alleging: A) the trial court erred in denying the motion for acquittal at the close of the State's case; B) the trial court erred in admitting his T-shirt with evidence of his semen on it; C) the trial court erred in admitting his statement given in a New Jersey prison; D) a second alternate juror should have been selected so a sitting juror could have been disqualified; E) the trial court erred in allowing the jury to have a magnifying glass; F) the prosecutor knowingly introduced false testimony of witnesses Tomlin, Lang and Fitzwater; G) the sentences should not have been imposed consecutively since the jury recommended mercy on the murder conviction; and H) trial counsel was ineffective in not investigating the statements of Tomlin, Lang and Ramsburg and in not obtaining an expert to determine the time of death. [Petition for Writ of Habeas Corpus, 4/4/05.]

44. A Losh list, verified by the Appellant and his appointed counsel, James Kratovil, was filed wherein the Appellant waived all grounds except: (15) Coerced Confessions; (17) State's Knowing Use of Perjured Testimony; (21) Ineffective Assistance of Counsel; (40) Claims of Using Informers to Convict; (41) Constitutional Errors in Evidentiary Rulings; (42) Instructions to the Jury; (45) Sufficiency of Evidence; (50) Severer Sentence than Expected; and (51) Excessive Sentence. [Losh List.]

45. The Appellant's counsel represented to the circuit court that the Appellant was relying on the *pro se* Petition filed, that no Amended Petition would be filed, and that he was

seeking an evidentiary hearing only on the two allegations of ineffective assistance of counsel. The circuit court denied the Appellant's Motion for Additional Investigation whereby the Appellant was seeking to have the State reopen its investigation of the 1988 murder and obtain genetic material from two witnesses who testified at trial for testing. [Order Directing Respondent to Answer Petition, 4/12/06.]

46. The Respondent filed his answer denying the allegations. [Respondent's Return to Petition for Habeas Corpus, 5/25/06.]

47. The Appellant then filed a Motion to Amend and a Motion to Exceed Costs, alleging that this Court's recent decision in In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division ("*Zain III*"), 219 W.Va. 408, 633 S.E.2d 762 (2006), which directly reviewed the serologic evidence in ten cases including the Appellant's, opened a door for him to renew his attack on the serology evidence. [Motions to Amend and to Exceed Costs, 6/27/06.]

48. The Respondent opposed the Motion to Amend, citing the conclusion of this Court in *Zain III* that "there is no evidence that serology evidence affected the prosecutions of any of the cases investigated." This conclusion included the serology evidence in the Appellant's case. [Respondent's Opposition to Motion to Amend Habeas Corpus Petition, 7/7/06.]

49. The circuit court took the matter under advisement. [Order from Motion to Amend Hearing, 7/18/06.]

50. The Motions to Amend and to Exceed Costs were subsequently denied, based on the Supreme Court's *Zain III* conclusion that there was no probative error in the Appellant's case.

[Order Denying Motion to Amend and to Exceed Costs, 7/18/06.]

51. The Appellant moved the circuit court to reconsider its Order denying the Motion to Amend, which the Respondent opposed and the circuit court ultimately denied. [Order Denying Motion to Reconsider Motion to Amend, 10/31/06; Respondent's Opposition to Motion to Reconsider, 8/4/06; Motion to Reconsider Motion to Amend, 7/28/06.]

52. Kevin Mills was substituted as retained counsel for Mr. Kratovil. [Order of Substitution of Counsel, 8/16/06.]

53. The Respondent opposed Mr. Mills' representation of the Appellant as Mr. Mills was the trial counsel whom the Appellant alleged in his habeas petition was ineffective. [Motion to Disqualify Kevin D. Mills as Appellant's Attorney, 8/21/06.]

54. Mr. Mills agreed to withdraw and Mr. Kratovil was reappointed. [Order Substituting Counsel and Extending Briefing Schedule, 8/30/06.]

55. The Appellant then moved to amend his petition to remove all allegations of ineffective assistance of trial counsel. [Motion to Amend , 10/24/06.]

56. The Motion to Amend to withdraw the claims of ineffective assistance was granted, the Appellant waived in writing any allegation of ineffectiveness of trial counsel, and Mr. Mills was once again substituted in as counsel for Mr. Kratovil. [Order, 11/2/06.]

57. The Appellant later represented that he would like to vouch the record regarding the denied *Zain III* Motion to Amend and that the only allegation for which an evidentiary hearing would have been necessary were the withdrawn ineffective assistance allegations. The allegations of the Petition to be briefed were then referenced and a briefing schedule established.

[Status Hearing Order, 2/28/07.]

58. The briefing schedule was extended by agreement of the parties. [Agreed Order to Extend Deadlines, 4/3/07.]

59. The circuit court denied the habeas corpus petition by written Order. [Order Denying Petition for Habeas Corpus, 8/15/07.]

III. RESPONSE TO THE APPEAL.

A. STANDARD OF REVIEW.

**B. THE CIRCUIT COURT PROPERLY DENIED THE APPELLANT'S
ZAIN III CLAIM.**

**C. THE CIRCUIT COURT PROPERLY RULED THAT THE MOTIONS FOR
ACQUITTAL WERE PROPERLY DENIED BY THE TRIAL COURT.**

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**F. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL
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DISQUALIFY JUROR COOK.**

**G. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL COURT
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PRESENTED NO EVIDENCE OF FALSE TESTIMONY BY WITNESSES.**

**I. THE CIRCUIT COURT PROPERLY RULED THAT THE SENTENCES
WERE PROPERLY IMPOSED.**

IV. AUTHORITIES RELIED UPON.

A. Federal Authorities.

<i>United States Constitution</i> , Amend. 5.....	34.
<i>United States Constitution</i> , Amend. 6.....	35.
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<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	33.
<u>Mathis v. United States</u> , 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968).....	35, 36, 37.
<u>U.S. v. Menzer</u> , 29 F.3d 1223 (C.A.7 1994), <i>certiorari denied</i> 115 S.Ct. 515, 513 U.S. 1002, 130 L.Ed.2d 422.....	35, 36, 37.
<u>U.S. v. George</u> , 56 F.3d 1078, 1084 (C.A.9 1995).....	41.
<u>United States v. Brewer</u> , 783 F.2d 841, 843 (9th Cir.1986), <i>cert. denied</i> , 479 U.S. 831, 107 S.Ct. 118, 93 L.Ed.2d 64 (1986).....	41.
<u>United States v. Miranda</u> , 986 F.2d 1283, 1286 (9th Cir.1993), <i>cert. denied</i> , 508 U.S. 929, 113 S.Ct. 2393, 124 L.Ed.2d 295 (1993).....	41.
<u>Evans v. U.S.</u> , 883 A.2d 146, 151-152 (D.C. 2005).....	41.
<u>Washington v. U.S.</u> , 881 A.2d 575, 583 (D.C. 2005).....	41.
<u>Western Spring Service Co. v. Andrew</u> , 229 F.2d 413 (C.A.10 1956).....	41.

B. *West Virginia Authorities.*

<i>West Virginia Constitution</i> , Art. III, §§ 5 and 10.....	34.
<i>West Virginia Constitution</i> , Art. III, § 14.....	35.
<u>SER Hatcher v. McBride</u> , 221 W.Va. 760, 656 S.E.2d 789 (2007)	20, 25, 27, 32, 38, 41-42, 43, 44.
<u>Phillips v. Fox</u> , 193 W.Va. 657, 458 S.E.2d 327 (1995).....	20.
<u>In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division</u> ("Zain III"), 219 W.Va. 408, 633 S.E.2d 762 (2006).....	20, 21, 22, 23, 24, 25.
<u>Matter of W.Va. State Police Crime Lab. ("Zain I")</u> , 190 W.Va. 321, 438 S.E.2d 501 (1993).....	21, 24.
<u>State ex rel. Markley v. Coleman</u> , 215 W.Va. 729, 601 S.E.2d 49 (2004)	23, 24, 27, 32, 40, 41, 42, 44.
<u>Perdue v. Coiner</u> , 156 W.Va. 467, 194 S.E.2d 657 (1979).....	23, 24, 25, 27, 32, 40, 41, 42, 44.
<u>Beahm v. 7-Eleven, Inc.</u> , — W. Va. —, — S.E.2d —, (No. 33833, decided September 26, 2008).....	24.
<u>State v. Taylor</u> , 200 W. Va. 661, 490 S.E.2d 748 (1997).....	25, 27.
<u>State v. Farmer</u> , 185 W. Va. 232, 406 S.E.2d 458 (1991).....	27.
<u>State ex rel. Cooper v. Caperton</u> , 196 W. Va. 208, 470 S.E.2d 162 (1996).....	28.
<u>State v. Rodoussakis</u> , 204 W. Va. 58, 511 S.E.2d 469 (1998).....	28.
<u>Ford v. Coiner</u> , 156 W. Va. 362, 196 S.E.2d 91 (1972).....	28.
<u>State v. Shrewsbury</u> , 213 W. Va. 327, 582 S.E.2d 774, 781 (2003).....	29-30.

<u>State ex rel. McMannis v. Mohn</u> , 163 W.Va. 129, 254 S.E.2d 805 (1979), <i>cert. den.</i> , 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983).....	30.
<u>State ex rel. Azeez v. Mangum</u> , 195 W. Va. 163, 465 S.E.2d 163 (1995).....	30.
<u>State ex rel. Phillips v. Legursky</u> , 187 W. Va. 607, 420 S.E.2d 743 (1992).....	30.
<u>State v. Marple</u> , 197 W. Va. 47, 475 S.E.2d 47 (1996).....	31.
<u>State v. Miller</u> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	31.
<hr/>	
<u>State v. Jones</u> , 220 W.Va. 214, 640 S.E.2d 564 (2006).....	32-33, 38.
<u>State v. Middleton</u> , 220 W.Va. 89, 640 S.E.2d 152 (2006).....	34, 38.
<u>State v. Bradshaw</u> , 193 W.Va. 519, 457 S.E.2d 456 (1995).....	34.
<u>State v. Miller</u> , 197 W.Va. 588, 476 S.E.2d 535 (1996).....	38, 39, 40.
<u>O'Dell v. Miller</u> , 211 W.Va. 285, 565 S.E.2d 407 (2002).....	39.
<u>State ex rel. Scott v. Boles</u> , 150 W. Va. 453, 147 S.E.2d 486 (1966).....	40.
<u>State ex rel. Massey v. Boles</u> , 149 W. Va. 292, 140 S.E.2d 608 (1965).....	40.
<u>State ex rel. Ashworth v. Boles</u> , 148 W. Va. 13, 132 S.E.2d 634 (1963).....	40.
<u>State ex rel. Massey v. Hun</u> , 197 W. Va. 729, 478 S.E.2d 579 (1996).....	43, 44.
<u>State v. Lucas</u> , 201 W. Va. 271, 496 S.E.2d 221 (1997).....	43, 44.
<u>State v. Allen</u> , 208 W.Va. 144, 539 S.E.2d 87 (1999).....	43.
W. Va. Code § 53-4A-3(a)	23, 24, 27, 32, 38, 40, 41, 42, 44.
W. Va. Code § 53-4A-7(a)	23, 24, 27, 32, 38, 40, 41, 42, 44.
W. Va. Code § 53-4A-2	25, 41.
W. Va. Code § 53-4A-1(b)	26, 28, 32, 33, 38, 39, 40.
W. Va. Code § 53-4A-1(c)	28.

W. Va. Code § 61-11-21	43.
W. Va. Code § 61-2-2	44.
W. Va. Code § 62-3-15.....	44.
W.V.R.E. 103(a).....	30.

C. Other States' Authorities.

<u>Whitfield v. State</u> , 287 Md. 124, 411 A.2d 415 (1980).....	36, 37.
<u>Shatzer v. State</u> , 405 Md. 585, 954 A.2d 1118, 1135 (2008).....	37.
<u>Com. v. Chacko</u> , 500 Pa. 571, 459 A.2d 311 (1983).....	37.
<u>State v. Walker</u> , 280 Mont. 346, 930 P.2d 60 (1996).....	41.
<u>Boland v. Dolan</u> , 140 N.J. 174, 657 A.2d 1189 (1995).....	41.

V. ARGUMENT.

A. STANDARD OF REVIEW.

In reviewing the findings of fact made by a circuit court in a habeas corpus proceeding, this Court applies the following standard:

“Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975).

Syl. Pt. 1, *SER Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007).

The general standard for reviewing circuit court decisions, applicable to this case, is:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Id., at p.3, citing *Phillips v. Fox*, 193 W.Va. 657, 458 S.E.2d 327 (1995).

B. THE CIRCUIT COURT PROPERLY DENIED THE APPELLANT'S *ZAIN III* CLAIM.

The circuit court properly denied the only *Zain* claim that the Appellant sought to bring in this omnibus habeas: a *Zain III* claim (In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division (“*Zain III*”), 219 W.Va. 408, 633 S.E.2d 762 (2006)). The circuit court properly denied the Appellant's Motion to Amend to include a *Zain III* allegation as part of this habeas proceeding because the Appellant's case was one of ten cases in which the serological evidence was reviewed by appointed experts, a special judge and this Court in *Zain III*, *id.* [Order Denying Motion to Amend and to Exceed Costs, 7/18/06; Order Denying Motion

to Reconsider Motion to Amend, 10/31/06.]

The findings and conclusions of the special judge and this Court in *Zain III* concluded that there was *no probative error* in the serology evidence in the Appellant's case. In *Zain III*, at the behest of the Chief Justice, two experts, Mark Stolorow and Ronald Linhart, were appointed by a special judge to review the serology evidence in ten different cases. One of those ten cases is the underlying murder conviction of your Appellant. Included in that thorough review was the Appellant's prior *Zain I*¹ habeas evidence.² Although these two experts diverged somewhat in the characterization of the evidence they independently reviewed, including specifically in the Appellant's case, both agreed there was no exculpatory evidence or misconduct found. *Id.*, 633 S.E.2d 762, 765-766 n. 6, 767-768.

This Court's unanimous opinion noted the joint Conclusions and Recommendations of the two serology experts that in *only one* instance was there a false association between a defendant and the biological evidence. That single instance *did not involve the Appellant herein* and was determined to be non-probative nonetheless: "It must be stressed that in only one

¹ Matter of W.Va. State Police Crime Lab. ("*Zain I*"), 190 W.Va. 321, 438 S.E.2d 501 (1993).

²The full scope of the evidence reviewed by Stolorow and Linhart, the special judge and this Court is not categorized in the *Zain III* opinion. However, that evidence, as it relates specifically to the Appellant's case, included a thorough review and comparison of Trooper Ted Smith's 1990 trial testimony, Trooper Smith's 1992 Affidavit, Trooper Smith's 1994 testimony in the Appellant's *Zain I* habeas proceeding, and Trooper Smith's 1998 testimony before the Kanawha County Grand Jury about former Trooper Zain's testing performed in the Appellant's case. "At the heart of this review is whether there was a valid basis for Judge Steptoe's decision in ruling in the habeas proceedings, January 26, 1996, to deny the petitioner's motion to declare the case to be eligible for relief as a *Zain I* case." [Report, December 2, 2004, p. 21.] After comparing noted contradictions in Trooper Smith's testimony, Stolorow and Linhart still concluded that "It does not appear that erroneous procedures, documentation, reporting or testimony led to a false association in this case." [*Id.*, 28.]

instance does it appear that erroneous procedures, documentation, reporting or testimony led to a false, but non-probative, association between a defendant and the biological evidence (*State v. Gray and Finney*).” *Id.*, 766, 768.

This unanimous Court noted further from the joint Conclusions and Recommendations that in just three cases was there a false association between a victim and the biological evidence. In those three cases, the association was also determined to be non-probative. *Id.*, at 768. None of those three cases were the Appellant’s. [Report, December 2, 2004, *supra*, p. 109.]

These factual findings led this Court to hold that:

The finding that inaccurate serology evidence did not affect the outcome of the prosecutions reviewed indicates a lack of evidence that the most important element in the setting aside of a conviction is present in this case. Accordingly, because Stolorow and Linhart did not find the type of systematic and intentional misconduct discovered in Zain I, and because there is no evidence that serology evidence affected the prosecutions of any of the cases investigated, we adopt the special judge’s report to the extent that it recommends that the evidence offered by serologists, other than Zain, is not subject to invalidation and systematic review of those cases in which serology evidence was presented.

Zain III, supra, 633 S.E.2d 762, 768 (emphasis added).

The conclusion of this unanimous Court that “there is no evidence that serology evidence affected the prosecutions of any of the cases investigated” is unambiguous. This unanimous Court’s adoption of the special judge’s recommendation “that the evidence offered by serologists, other than Zain, is not subject to invalidation and systematic review of those cases in which serology evidence was presented” is unambiguous. Relying on this plain and unambiguous holding, the circuit court in the case *sub judice* properly concluded that:

Combined with the fact that serological evidence did not

link Appellant to these crimes in the first place, this further information leads this Court to conclude that there is no basis to allow a "Zain III" Count to be added [...] This Court can simply not perceive of any circumstance in the context of the specifics of this case such that development of a Zain-III claim could produce such evidence as "ought to produce an opposite result at a second trial on the merits."

[Order Denying Motion to Amend and to Exceed Costs, 7/18/06.]

Since all question of the serology evidence offered in the Appellant's trial is now fully reviewed, and previously finally adjudicated, in *Zain III*, the circuit court did not err in determining that the Appellant is entitled to no relief in the habeas proceeding *sub judice*. **W. Va. Code** § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49, 54 (2004); Perdue v. Coiner, 156 W.Va. 467, 469-470, 194 S.E.2d 657, 659 (1979).

This Court went on to prescribe in *Zain III* a procedure for challenge by habeas petition of convictions where serologists, other than Zain, presented evidence. However, that holding does not open the door for the Appellant to have the serology evidence and Trooper Smith's testimony reviewed again. This Court adopted the special judge's recommendations in *Zain III* specifically "because there is no evidence that serology evidence affected the prosecutions of *any of the cases investigated*." *Zain III, supra*, 633 S.E.2d 762, 768 (emphasis added). This Court's prescribing such a habeas procedure can only logically be read as applying to *other convicts whose cases were not investigated as part of the rigorous review of Zain III*. Logic is defied were this Court to adopt the Appellant's suggestion that *Zain III* permits him to have reviewed again by a lower court the same evidence that this Court has already reviewed and affirmatively ruled upon.

While not specifically ruled upon by the circuit court in the case *sub judice* with the use of the term "*res judicata*," *Zain III* is plainly *res judicata* as to this Appellant. This Court very

recently reiterated its standard for applying the doctrine of *res judicata*:

“Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

Beahm v. 7-Eleven, Inc., — W. Va. —, — S.E.2d —, (No. 33833, decided September 26, 2008).

All three elements of the doctrine of *res judicata* (final adjudication by this Court; same parties, or privity therewith; identical cause of action) are plainly met when this Court’s *Zain III* review of the Appellant’s case is applied to the Appellant’s current demand for a new *Zain III* proceeding. Beahm.

The circuit court’s ultimate conclusion that the record is plain that the Appellant was not entitled to any relief on this previously adjudicated *Zain III* ground is correct. **W. Va. Code** § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, *supra*; Perdue v. Coiner, *supra*.^{3 4}

³ The record is plain that the Appellant’s *Zain I* claim, challenging the forensic evidence against him, was finally adjudicated more than ten years ago. The Appellant’s *Zain* habeas was denied by Order entered January 30, 1996. [SER Farmer v. Trent, Jefferson County Circuit Court Case No.: 94-P-13.] The record is also plain that the Appellant’s direct appeal from that *Zain* habeas was refused by this Court. [Order, 8/23/96.] The record is plain that the circuit court’s ruling in that *Zain I* habeas was subject of the Stolorow and Linhart report and, hence, of this Court’s *Zain III* review. *See n. 1, supra*.

⁴ While the Appellant acknowledges that his *Zain I* claim was previously adjudicated back in 1996, the Appellant attempts to bootstrap a new appeal of that claim onto this appeal. This Court is requested to refuse the Appellant’s attempt.

First, the Appellant’s *Zain I* habeas was previously finally adjudicated. The Appellant is entitled to no relief. **W. Va. Code** § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, *supra*;

The Appellant does not prove that the circuit court's findings of fact were clearly erroneous or that the circuit court misapplied the law in ruling that the Appellant's *Zain III* claim was previously adjudicated. SER Hatcher v. McBride, *supra*. This Court is respectfully requested to affirm the ruling of the circuit court.

C. THE CIRCUIT COURT PROPERLY RULED THAT THE MOTIONS FOR ACQUITTAL WERE PROPERLY DENIED BY THE TRIAL COURT.

The standard of review for reviewing the denial of a motion for acquittal is:

“Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969).” Syllabus Point 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Syl. Pt. 3, State v. Taylor, 200 W. Va. 661, 490 S.E.2d 748 (1997).

Additionally, in the context of habeas proceedings, in order to prevail on an issue

Perdue v. Coiner, *supra*.

Second, this Court's review of the Appellant's serological evidence in *Zain III* confirms that there was no probative error in the Appellant's case.

Finally, the Appellant never alleged a renewed *Zain I* claim in the case *sub judice*. The Appellant's Motion to Amend Habeas Corpus Petition, and Motion to Reconsider the Denial of that motion, sought only to add a *Zain III* count. Because of the strong presumption of regularity in judicial proceedings, a petition for writ of habeas corpus ad subjiciendum shall “specifically set forth the contention or contentions and grounds in fact or law in support thereof upon which the petition is based[.]” **W. Va. Code § 53-4A-2**. The Appellant's reference to *Zain I* in his Proposed Findings of Fact and Conclusions of Law submitted to the circuit court cannot be construed as properly “setting forth the contention or contentions.” Rather the reference is simply the Appellant's vouching the record regarding the denied *Zain III* claim, as he requested the circuit court permission to do. [Status Hearing Order, 2/28/07.]

previously adjudicated during the criminal proceeding, the Appellant must prove that the trial court's ruling is "clearly wrong". **W. Va. Code § 53-4A-1(b)**.⁵

The circuit court properly found that the trial court properly exercised its discretion in denying the Appellant's motion for acquittal based on the evidence presented at trial. Viewing the evidence summarized above in the light most favorable to the State, the jury had before it the following. Ms. Bouldin's house was broken into and she was sexually assaulted both vaginally and anally and died from manual strangulation. The crimes occurred sometime after she was last heard from about 8:00 p.m. on April 14, 1988, and when her body was found around 9:40 a.m. on April 15, 1988. Medical personnel placed the time of death as approximately 6-12 hours before her body was found. The Appellant had been painting at the victim's house during the day on April 14, 1988. Various witnesses testified to unexpectedly seeing the Appellant in the victim's neighborhood the night she was raped and murdered. The Grims testified that the Appellant arrived unexpectedly at their house (situated near the victim's) at about 8:00-8:30 p.m. the night the victim was raped and murdered, and then left about 9:00-9:30 p.m. The Ramsburgs and their relatives testified that they saw the Appellant walking down the road in the direction of the victim's house around 9:00-9:30 that night. The Grims testified that the Appellant unexpectedly returned to their house about 11:00-11:30 p.m. that same night. The hours the Appellant was unaccounted for from the Grim house, but was seen walking toward the victim's, were within the time frame that both the county coroner and the state medical examiner placed the time of death. The Appellant's statement that he was at the nearby Pumphrey home

⁵ The sufficiency of the evidence was an issue raised by the Appellant in his direct appeal from the trial conviction, which appeal was then refused by this Court. [Order, 1/29/92.]

during that time was refuted by residents of the Pumphrey home who denied that he was there that night. Witnesses Lang and Tomlin testified that the Appellant later stated to them that he broke into the victim's house, though he denied killing her. [Tr. Trs., *passim*.]

The record is plain that substantial evidence was presented to the jury upon which they might justifiably find the Appellant guilty beyond a reasonable doubt of the felonies of First Degree Murder, two counts of First Degree Sexual Assault, and Burglary. State v. Taylor, supra. The circuit court properly found the record plain that the trial court did not abuse its discretion in denying the motion for acquittal at the close of the State's case and properly ruled that the Appellant was not entitled to any relief on this allegation of insufficiency of the evidence. W. Va. Code § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

The Appellant does not prove that the circuit court's findings of fact were clearly erroneous or that the circuit court misapplied the law in denying this allegation. SER Hatcher v. McBride, supra. This Court is respectfully requested to affirm the rulings of the circuit court.

D. THE CIRCUIT COURT PROPERLY RULED THAT THE SEROLOGY EVIDENCE FROM THE T-SHIRT WAS PROPERLY ADMITTED BY THE TRIAL COURT.

The standard for admissibility of evidence is a discretionary standard:

“Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.” *State v. Louk*, W. Va., 301 S.E.2d 596, 599 (1983).” Syl. pt. 2, *State v. Peyatt*, W. Va., 315 S.E.2d 574 (1983).

Syl. Pt. 4, State v. Farmer, 185 W. Va. 232, 406 S.E.2d 458 (1991). Additionally, in the context of habeas proceedings, in order to prevail on an issue previously adjudicated during the criminal proceeding, the Appellant must prove that the trial court's ruling is “clearly wrong”. W. Va.

Code § 53-4A-1(b).

Trial testimony reflects that the Appellant was wearing a blue Breeder's Cup t-shirt the night of the murder and the following morning. Trial testimony further reflects that a blue Breeder's Cup t-shirt was seized from the Appellant. Testimony at trial from the State's serologist was that testing demonstrated that seminal fluid was found on that t-shirt, which seminal fluid could have come from the Appellant. [Tr. Trs., *passim*.]

The Appellant alleged in his habeas petition that the seminal fluid evidence was inadmissible. However the Appellant did not then, and does not on this appeal, point to any place in the trial record where he objected to the admission of this serology evidence. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. Syl. Pt. 2, State ex rel. Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996)." Syl. Pt. 1, State v. Rodoussakis, 204 W. Va. 58, 511 S.E.2d 469 (1998).

A habeas petitioner waives any contention which he could have advanced but intelligently and knowingly failed to advance before trial, at trial, on direct appeal, or in any other proceeding to secure relief from the conviction or sentence. **W. Va. Code § 53-4A-1(c)**. *See also*: Syl. Pt. 1, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972).

The Appellant *did* move to suppress the seizure of the T-shirt, a motion properly denied by the trial court as the search and seizure was with the consent of the Appellant. [Tr., 1/26/90 (Vol. 1), 25-29; Tr., 1/26/90 (Vol. 2), 7-10.] The Appellant *did* object to Sergeant Smith testifying to the results of the serology test *on the basis that he did not conduct the test*. That objection was resolved to the satisfaction of the Appellant by Smith's testimony that he

personally participated in the testing of the T-shirt. [Tr., 7/27/90, 226-234.]

However, the Appellant *waived* any objection to the admissibility of the seminal fluid evidence on relevancy grounds by not objecting to the presentation and admission of that evidence at trial. No record was developed by the Appellant in any of the trial or post-conviction proceedings as to why no objection was lodged.⁶ The Appellant argued in rebuttal to the circuit court in the habeas proceeding below, as he now does on appeal, that the failure to object was not a knowing and intelligent waiver. However, lacking any allegation of trial counsel's error, the failure to object must be viewed as a waiver of that claim:

This Court has consistently held that “[o]bjections on non-jurisdictional issues, must be made in the lower court to preserve such issues for appeal.” *Loar v. Massey*, 164 W.Va. 155, 159, 261 S.E.2d 83, 86 (1979). “ ‘Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.’ Syllabus Point 1, *State Road Commission v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964).” Syl. Pt. 3, *O’Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991).

⁶ Without suggesting that the lack of an objection to this evidence by trial counsel was in any way defective conduct, the Appellee points out that the Appellant in the habeas case below waived in writing all claims of ineffective assistance of trial counsel when he requested the circuit court's permission to replace his appointed habeas counsel, James Kratovil, with his former trial counsel, Kevin Mills. [Order, 11/2/06; Motion to Amend, 10/24/06; Order Substituting Counsel and Extending Briefing Schedule, 8/30/06; Motion to Disqualify Kevin D. Mills as Appellant's Attorney, 8/21/06; Order of Substitution of Counsel, 8/16/06.]

State v. Shrewsbury, 213 W. Va. 327, 582 S.E.2d 774, 781 (2003). See **W.V.R.E.** 103(a).⁷

Regardless of the lack of an objection to the admission of the evidence at trial, the Appellant concedes that the admission “in and of itself, does not constitute a constitutional error.” [Petition for Appeal, p. 22.] This concession should end any further inquiry for “A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed. Syl. Pt. 4, State ex rel. McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. den.*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983).” Syl. Pt. 9, State ex rel. Azeez v. Mangum, 195 W. Va. 163, 465 S.E.2d 163 (1995); Syl. Pt., State ex rel. Phillips v. Legursky, 187 W. Va. 607, 420 S.E.2d 743 (1992).

Despite this concession, however, the Appellant goes on to wildly speculate that the serological evidence that the Petitioner’s own seminal fluid may have been found on his own t-shirt may have been prejudicial. Even had a timely objection been made and sustained and the seminal fluid evidence on the Appellant’s own t-shirt been kept out, the weight of the rest of the evidence against the Appellant is more than enough for the jury to have found him guilty beyond a reasonable doubt of all charges.

The jury had before it the following. Ms. Bouldin’s house was broken into and she was sexually assaulted both vaginally and anally and died from manual strangulation. The crimes

⁷ **W.V.R.E.** 103(a) reads in significant part:

(a) *Effect of erroneous ruling.*-Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.*-In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

occurred sometime after she was last heard from about 8:00 p.m. on April 14, 1988, and before her body was found around 9:40 a.m. on April 15, 1988. Medical personnel placed the time of death as approximately 6-12 hours before her body was found. The Appellant had been painting at the victim's house during the day on April 14, 1988. Various witnesses testified to unexpectedly seeing the Appellant in the victim's neighborhood the night she was raped and murdered. The Grims testified that the Appellant arrived unexpectedly at their house (situated near the victim's) at about 8:00-8:30 p.m. the night the victim was raped and murdered and then left about 9:00-9:30 p.m. The Ramsburgs and their relatives testified that they saw the Appellant walking down the road in the direction of the victim's house around 9:00-9:30 that night. The Grims testified that the Appellant unexpectedly returned to their house about 11:00-11:30 p.m. that same night. The hours the Appellant was unaccounted for from the Grim house, but was seen walking toward the victim's, were within the time frame that both the county coroner and the state medical examiner placed the time of death. The Appellant's statement that he was at the nearby Pumphrey home during that time was refuted by residents of the Pumphrey home who denied that he was there that night. Witnesses Lang and Tomlin testified that the Appellant later stated to them that he broke into the victim's house, though he denied killing her. [Tr. Trs., *passim*.]

Even were there error in the admission of the unobjected-to serological evidence, which there was not, the Appellant did not bear his burden to the circuit court below that "the jury verdict in his or her case was actually affected by the assigned but unobjected to error." Syl. Pt. 3, State v. Marple, 197 W. Va. 47, 475 S.E.2d 47 (1996). See also: Syl. Pt. 9, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)("To affect substantial rights means the error was

prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.”) The outcome of the proceedings in trial are not proved by the Appellant to have been affected by this evidence, given the weight of all of the other evidence presented.

The record is plain that the trial court did not abuse its discretion in admitting, without objection, the State’s serology evidence regarding the Appellant’s seminal fluid found on the t-shirt he was wearing the day that Ms. Bouldin was raped and murdered. The Appellant failed to prove that the trial court’s ruling admitting the evidence was “clearly wrong”. **W. Va. Code § 53-4A-1(b)**. The circuit court properly found that the record is plain that the trial court did not abuse its discretion in admitting the serology evidence of the T-shirt. **W. Va. Code § 53-4A-3(a), -7(a)**; State ex rel. Markley v. Coleman, *supra*; Perdue v. Coiner, *supra*.

The Appellant does not prove that the circuit court’s findings of fact were clearly erroneous or that the circuit court misapplied the law in denying this allegation. SER Hatcher v. McBride, *supra*. This Court is respectfully requested to affirm the rulings of the circuit court.

E. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL COURT PROPERLY ADMITTED THE APPELLANT’S STATEMENT.

The standard of admissibility of a defendant’s statement is:

1. “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

3. “When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had

the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Syl. Pts. 1 & 3, *State v. Jones*, 220 W.Va. 214, 640 S.E.2d 564 (2006). Similarly, in order to prevail on this issue previously adjudicated during the criminal proceeding, the Appellant must prove that the trial court's ruling is "clearly wrong". **W. Va. Code § 53-4A-1(b)**.⁸

Corporal Jeffries testified that on June 8, 1989, he and Deputy Shirley interviewed the Appellant at New Jersey's Bayside Prison, that the Appellant was not under arrest [for any charges concerning Ms. Bouldin], that the Appellant signed a *Miranda*⁹ waiver, and that the Appellant gave a statement. [Pre-trial Tr., 1/26/90 (Vol. 1), 29-41, Exhs. 6-7.] Deputy Shirley, who investigated the matter with Trooper Jeffries, testified similarly. [Id., 66-78.] Based on this evidence, the trial court ruled that the statements were voluntarily given and the seizures had by voluntary consent and that all rights had been waived. [Pre-trial Tr., 1/26/90 (Vol. 2), 7-10.]

Further discussion ensued during the trial about whether Corporal Jeffries' notes from his June 8, 1989, interview of the Appellant at the New Jersey facility were covered by the trial court's pre-trial ruling denying the Appellant's Motion to Suppress. [Tr., 7/30/90, 29-55.] A further *voir dire* of Trooper Jeffries, Deputy Shirley, the Appellant and Deputy Carbone was had outside of the presence of the jury. [Tr., 7/30/90, 29-55, 55-89, 89-101, 101-108; Tr. 7/31/90, 36-42.] The trial court ruled the Appellant's statement given on June 8, 1989, and Corporal Jeffries'

⁸ The admissibility of the Appellant's statement was also an issue raised by the Appellant in his direct appeal from the trial conviction, which appeal was then refused by this Court. [Order, 1/29/92.]

⁹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

notes of that interview, admissible as voluntarily given and that the Appellant's waiver of rights was properly obtained. [Tr., 7/31/90, 29-36, 45.]

This Court holds:

A police officer may continue to question a suspect in a noncustodial setting, even though the suspect has made a request for counsel during the interrogation, so long as the officer's continued questioning does not render statements made by the suspect involuntary.

Syl. Pt. 3, State v. Middleton, 220 W.Va. 89, 640 S.E.2d 152 (2006). *See also* Syl. pt. 3, State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995), ("To the extent that any of our prior cases could be read to allow a defendant to invoke his *Miranda* rights outside the context of custodial interrogation, the decisions are no longer of precedential value.").

The circuit court ruled that the Appellant's statement given to Trooper Jeffries and Deputy Shirley at the New Jersey prison was non-custodial. The Appellant was not at the time arrested for these crimes committed in the State of West Virginia and was otherwise never in custody relating to these crimes. The Appellant had no valid Fifth Amendment¹⁰ or Sixth

¹⁰ *United States Constitution*, Amend. 5, reads in pertinent part: "No person [...] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]" *See also West Virginia Constitution*, Art. III, §§ 5 and 10.

Amendment ¹¹ rights implicated because he was not in custody. State v. Middleton, *supra*.¹²

Contrary to the Appellant's argument, the United States Supreme Court has never held that incarceration on an unrelated charge is "custody" for Fifth or Sixth Amendment purposes. The case of Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), referenced by the Appellant, stands only for the proposition that a person in custody for an unrelated offense is entitled to be informed of his *Miranda* rights before his statement will be deemed admissible as evidence. There is no dispute that the Appellant herein was informed of, and waived, those *Miranda* rights when he was interviewed at the New Jersey prison. The requirement of Mathis was, therefore, plainly met.

Mathis does not explicitly hold that incarceration on an unrelated charge is "custody" for Fifth or Sixth Amendment purposes. This is made apparent by the Seventh Circuit Court of Appeals in U.S. v. Menzer, 29 F.3d 1223 (C.A.7 1994), *certiorari denied* 115 S.Ct. 515, 513 U.S. 1002, 130 L.Ed.2d 422. In affirming an arson conviction based, in part, on a statement obtained by the defendant while he was incarcerated on an unrelated offense, the Menzer court analyzed that very aspect of the Mathis opinion:

¹¹ *United States Constitution*, Amend. 6, reads in pertinent part: "In all criminal prosecutions, the accused shall [...] have the Assistance of Counsel for his defence." *See also West Virginia Constitution*, Art. III, § 14.

¹² The Appellant also asserted in his brief below that any statement given by him while awaiting transport to New Jersey in 1988 should be suppressed. However, the record never bore out that such a statement was given. The Appellant does not appear to appeal the denial of this issue to this Court.

Thus in *Mathis*, the question presented to the court was whether government agents could interrogate a prisoner without giving *Miranda* warnings regarding an offense separate and distinct from the offense for which he was incarcerated. The Court did not expressly address the question of whether imprisonment *per se* constitutes being “in custody” for purposes of *Miranda*. The Second, Fourth, Eighth and Ninth Circuits have held that, when challenging a statement given by a defendant, merely because the defendant is in prison on an unrelated charge does not mean the defendant is “in custody” under *Miranda*. See *United States v. Willoughby*, 860 F.2d 15, 23 (2d Cir.1988) (“we believe that the mere fact of imprisonment does not mean that all of a prisoner's conversations are official interrogations that must be preceded by *Miranda* warnings”), *cert. denied*, 488 U.S. 1033, 109 S.Ct. 846, 102 L.Ed.2d 978 (1989); *Leviston v. Black*, 843 F.2d 302, 303 (8th Cir.) (“[w]hile *Miranda* may apply to one who is in custody for an offense unrelated to the interrogation, [*Mathis*, 391 U.S. at 4-5, 88 S.Ct. at 1504-55], incarceration does not *ipso facto* render an interrogation custodial”), *cert. denied*, 488 U.S. 865, 109 S.Ct. 168, 102 L.Ed.2d 138 (1988); *United States v. Conley*, 779 F.2d 970, 972 (4th Cir.1985) (“declin[ing] to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations and [holding] that a prison inmate is not automatically always in ‘custody’ within the meaning of *Miranda*”), *cert. denied*, 479 U.S. 830, 107 S.Ct. 114, 93 L.Ed.2d 61 (1986).

Menzer, at 1231.

The United States Supreme Court refused certiorari in the Menzer case. The Respondent’s research reveals no cases of the United States Supreme Court or of this Court holding that incarceration on an unrelated offense is *ipso facto* “custody” for Fifth or Sixth Amendment purposes. To the contrary, Menzer makes clear that the Appellant’s assertion that Mathis so holds is incorrect.

Also incorrect is the Appellant’s assertion that Whitfield v. State, 287 Md. 124, 411 A.2d 415 (1980), so holds. Just last year, the Court of Appeals of Maryland, referencing its own

earlier decision in Whitfield, held: "This Court has *declined to reach the question* of whether incarceration is *per se* custody. See *Whitfield v. State*, 287 Md. 124, 411 A.2d 415 (1980)."

Shatzer v. State, 405 Md. 585, 954 A.2d 1118, 1135 (2008) (emphasis added).

In Whitfield the issue was whether an inmate questioned about the presence of a gun in the facility where he was incarcerated was "in custody" for *Miranda* purposes *and* whether there was an emergency exception that may apply. Under the unique facts of that case, Whitfield held that there was no such exception to the giving of *Miranda* warnings.¹³ Consistent with the holding of Mathis, the Whitfield court required that *Miranda* warnings must be given to an inmate interrogated about an in-facility crime. Similarly consistent with the holding of Mathis, the Appellant herein, incarcerated for unrelated crimes in New Jersey, was given, and voluntarily waived, his *Miranda* warnings.¹⁴

The Appellant was not in custody at the time his statement was taken in the New Jersey prison in June 1989. Mathis; Menzer. The Appellant was given, and voluntarily waived, his *Miranda* warnings at that time, making his statement admissible. Mathis; Menzer.

¹³ The Shatzer opinion also recognized that this holding of Whitfield was implicitly overruled by the United States Supreme Court in 1984:

In Whitfield v. State, 287 Md. 124, 133, 411 A.2d 415, 421 (1980) declined to recognize an emergency exception to *Miranda*, noting that "the United States Supreme Court itself has not placed any *per se* limitation on where and when *Miranda* safeguards should be applied." The Supreme Court subsequently recognized an emergency exception in N.Y. v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), implicitly overruling this portion of Whitfield.

Shatzer v. State, *supra*, 405 Md. 585, 954 A.2d 1118, 1135 n. 12 (2008).

¹⁴ Much like Menzer, *supra*, the other case cited by the Appellant, Com. v. Chacko, 500 Pa. 571, 459 A.2d 311 (1983), affirmed a conviction for an in-prison murder upon ruling that the defendant was given, and waived, his *Miranda* warnings.

The record is plain that the trial court did not abuse its discretion in admitting the Appellant's statements. State v. Jones, supra; State v. Middleton, supra. The Appellant fails to prove that the trial court's ruling admitting the evidence was "clearly wrong". **W. Va. Code § 53-4A-1(b)**. The circuit court properly found that the record is plain that the trial court did not abuse its discretion in admitting the Appellant's statement. **W. Va. Code § 53-4A-3(a), -7(a)**; State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

The Appellant does not prove that the circuit court's findings of fact were clearly erroneous or that the circuit court misapplied the law in denying this allegation. SER Hatcher v. McBride, supra. This Court is respectfully requested to affirm the ruling of the circuit court.

F. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO DISQUALIFY JUROR COOK.

The standard of review for disqualifying a juror for partiality is:

The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for caused [sic]. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.

Syl. Pt. 6, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Deference is accorded to the trial court because "[t]he trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight." *Id.*, 476 S.E.2d at 553 (citing State v. Phillips, 194 W.Va. 569, 590, 461 S.E.2d 75, 96) ("[g]iving deference to the trial court's determination, because it was able to

observe the prospective jurors' demeanor and assess their credibility, it would be most difficult for us to state conclusively on this record that the trial court abused its discretion’’)).

In the case *sub judice*, after lunch the first day of trial Juror Cheryl Cook reported that she found out that the local bank where she works was handling the Bouldin estate and that her employer wanted the judge to know. Ms. Cook told the court that knowing this would not affect her ability to fairly and impartially hear the case and that she felt comfortable continuing. The Appellant moved to disqualify Ms. Cook. The trial court denied the motion. [Tr., 7/25/90, 94-108.]

The Appellant cited nothing in the record to reflect that Juror Cook actually harbored any bias or partiality against him. Ms. Cook’s testimony was unequivocal that her employer handling the victim’s estate would not affect her ability to fairly and impartially hear the case and that she felt comfortable continuing. Considering the totality of the circumstances, and the lack of any vague or inconclusive remark by the juror about her ability to fairly and impartially hear the case, the trial court properly denied the Appellant’s motion to disqualify. See O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002). The Appellant did not carry his burden to persuade the trial court otherwise. State v. Miller, *supra*. The Appellant did not prove that the trial court was clearly wrong in denying the motion. **W. Va. Code § 53-4A-1(b)**.

At the time of the motion to disqualify, the jury was composed of twelve members, the one alternate having already been seated prior to the presentation of any testimony due to the illness of another juror. Whether there were another alternate juror available or not is immaterial to the analysis of Juror Cook’s qualifications. The Appellant cites nothing in the record to demonstrate in any way that the unavailability of another alternate juror influenced the trial court

to deny the motion to disqualify Juror Cook. To the contrary, the testimony of Juror Cook demonstrated her qualifications to serve as a juror. “There is a strong presumption in favor of the regularity of court proceedings and the burden is on the person who alleges irregularity to show affirmatively that such irregularity existed.” Syl. Pt. 2, State ex rel. Scott v. Boles, 150 W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, 148 W. Va. 13, 132 S.E.2d 634 (1963).

The record is plain that the trial court did not abuse its discretion in denying the Appellant’s motion to disqualify Juror Cook. State v. Miller, *supra*. The Appellant failed to prove that the trial court’s ruling denying the motion was “clearly wrong”. **W. Va. Code § 53-4A-1(b)**. The circuit court properly found that the record is plain that the trial court did not abuse its discretion in denying the Appellant’s motion to disqualify Juror Cook. **W. Va. Code § 53-4A-3(a), -7(a)**; State ex rel. Markley v. Coleman, *supra*; Perdue v. Coiner, *supra*.

The Appellant does not prove that the circuit court’s findings of fact were clearly erroneous or that the circuit court misapplied the law in denying this allegation. SER Hatcher v. McBride, *supra*. This Court is respectfully requested to affirm the ruling of the circuit court.

G. THE CIRCUIT COURT PROPERLY RULED THAT THE TRIAL COURT PROPERLY ALLOWED THE JURY TO HAVE A MAGNIFYING GLASS.

During deliberations, the jury requested the use of a magnifying glass. The Appellant objected but the trial court permitted the jury the use of a magnifying glass. [Tr., 8/2/90, 118-121.]

There is no West Virginia law found on the subject of permitting a jury a magnifying glass. Other jurisdictions that have considered the issue of the jury’s use of a magnifying glass in

deliberations have concluded it appropriate. U.S. v. George, 56 F.3d 1078, 1084 (C.A.9 1995), citing: United States v. Brewer, 783 F.2d 841, 843 (9th Cir.1986), *cert. denied*, 479 U.S. 831, 107 S.Ct. 118, 93 L.Ed.2d 64 (1986) (holding use of a magnifying glass indistinguishable from a juror's use of corrective eyeglasses to examine evidence); United States v. Miranda, 986 F.2d 1283, 1286 (9th Cir.1993), *cert. denied*, 508 U.S. 929, 113 S.Ct. 2393, 124 L.Ed.2d 295 (1993) (noting that defendant alleging juror misconduct involving magnifying glass conceded, "as he must," that a magnifying glass is not extrinsic evidence). *See also* Evans v. U.S., 883 A.2d 146, 151-152 (D.C. 2005); Washington v. U.S., 881 A.2d 575, 583 (D.C. 2005); State v. Walker, 280 Mont. 346, 930 P.2d 60 (1996); Boland v. Dolan, 140 N.J. 174, 657 A.2d 1189 (1995); Western Spring Service Co. v. Andrew, 229 F.2d 413 (C.A.10 1956).

The use of a magnifying glass is not extrinsic evidence and is indistinguishable from the use of eyeglasses. The jury's request for, and use of, a magnifying glass in the Appellant's trial was not erroneous. The Appellant's speculation that the jury may have been conducting "experiments" with the evidence or acting like Sherlock Holmes is supported by no reference to the record that would justify such an assertion.

The record is plain that the trial court did not abuse its discretion in permitting the jury the use of a magnifying glass over the Appellant's objection. The circuit court properly found that the trial court did not abuse its discretion in record is allowing the jury the use of a magnifying glass. **W. Va. Code § 53-4A-3(a), -7(a)**; State ex rel. Markley v. Coleman, *supra*; Perdue v. Coiner, *supra*.

The Appellant does not prove that the circuit court's findings of fact were clearly erroneous or that the circuit court misapplied the law in denying this allegation. SER Hatcher v.

McBride, *supra*. This Court is respectfully requested to affirm the ruling of the circuit court.

H. THE CIRCUIT COURT PROPERLY RULED THAT THE APPELLANT PRESENTED NO EVIDENCE OF FALSE TESTIMONY BY WITNESSES.

The circuit court properly ruled that the Appellant presented no evidence that the trial testimony of witnesses David Tomlin, James Lang and Marshall Fitzwater was false. Each of these witnesses was vigorously cross-examined at trial by the Appellant's trial counsel. The Appellant offered no new evidence that the witnesses recanted their testimony or that there are other persons who have come forward to substantially refute their testimony. The Appellant offered no evidence that the testimony of these witnesses was false. The Appellant offered no evidence that, even if false, the Prosecuting Attorney knowingly used such false testimony.

The best the Appellant could drum up for this allegation is that the State should have acted like Sherlock Holmes with a big magnifying glass and gone and found the real killer. The Appellant suggests that these witnesses all should have been suspects in the murder and the State did not properly investigate them as such. The Appellant presented no new evidence that the witnesses Tomlin, Lang or Fitzwater were in any way implicated in the crimes for which the Appellant was convicted.

Due to the strong presumption of regularity, statutory law requires that a petition for writ of habeas corpus ad subjiciendum shall "specifically set forth the contention or contentions and grounds in fact or law in support thereof upon which the petition is based[.]" **W. Va. Code § 53-4A-2**. The circuit court properly ruled that the Appellant did not prove that he is entitled to any relief on this allegation. **W. Va. Code § 53-4A-3(a), -7(a)**; State ex rel. Markley v. Coleman, *supra*; Perdue v. Coiner, *supra*.

The Appellant does not prove that the circuit court's findings of fact were clearly erroneous or that the circuit court misapplied the law in denying this allegation. SER Hatcher v. McBride, *supra*. This Court is respectfully requested to affirm the ruling of the circuit court.

I. THE CIRCUIT COURT PROPERLY RULED THAT THE SENTENCES WERE PROPERLY IMPOSED.

The sentencing court is given broad discretion in imposing sentence, as long as it is within the statutory limits and not based on an impermissible factor. State ex rel. Massey v. Hun, 197 W. Va. 729, 478 S.E.2d 579 (1996). *See also* State v. Lucas, 201 W. Va. 271, 496 S.E.2d 221 (1997). The Appellant does not allege that the sentences imposed were not the statutory sentences for the crimes of which he was convicted. Rather, the Appellant alleged only that the sentences should not have been run consecutively.

Regarding the imposition of consecutive sentences, this Court holds

“When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively.” Syllabus point 3, Keith v. Leverette, 163 W.Va. 98, 254 S.E.2d 700 (1979).

Syl. Pt. 3, State v. Allen, 208 W.Va. 144, 539 S.E.2d 87 (1999).

W. Va. Code § 61-11-21 provides that sentences for two or more convictions shall be consecutive unless the sentencing court orders them to run concurrently.

In the case *sub judice*, the trial court's imposition of consecutive sentences for the Appellant's convictions of First Degree Murder, Burglary and two counts of First Degree Sexual Assault complied with the provisions of W. Va. Code § 61-11-21 and this Court's holding in State v. Allen, *supra*. The trial court did not frustrate the jury's recommendation of a life

sentence with mercy on the First Degree Murder conviction as the trial court followed that recommendation. **W. Va. Code** §§ 61-2-2, 62-3-15. The trial court merely followed the letter of the law in sentencing the Appellant for the heinous crimes for which he was convicted by imposing the sentences consecutively to each other.

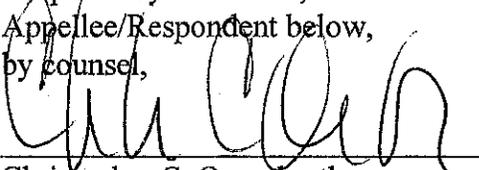
The trial court did not abuse its discretion in sentencing the Appellant to consecutive sentences for each of his four felony offenses. State ex rel. Massey v. Hun, supra; State v. Lucas, supra. The circuit court properly ruled that the trial court did not abuse its discretion in sentencing the Appellant. **W. Va. Code** § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

The Appellant does not prove that the circuit court's findings of fact were clearly erroneous or that the circuit court misapplied the law in denying this allegation. SER Hatcher v. McBride, supra. This Court is respectfully requested to affirm the ruling of the circuit court.

VI. CONCLUSION

For the reasons stated above, the Respondent respectfully requests that this Court affirm the Circuit Court's August 15, 2007, Order Denying Petition for Habeas Corpus and deny the Petition for Appeal.

Respectfully submitted,
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by counsel,


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