

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 34157

STATE EX REL. ALEX FARMER,

Petitioner-Appellant,

v.

THOMAS MCBRIDE, Warden,

Respondent-Appellee.

APPELLANT'S REPLY BRIEF

Appeal from Circuit Court of Jefferson County, West Virginia
Order Denying Petition for Habeas Corpus.

Case No. 05-C-102
Honorable Thomas W. Steptoe

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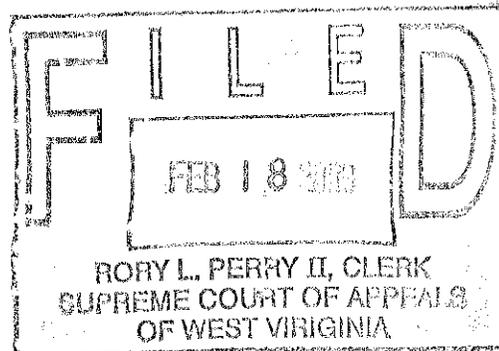


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ARGUMENT

I. PETITIONER FARMER'S ZAIN CLAIMS WERE NOT PREVIOUSLY ADJUDICATED

Rather than addressing the Petitioner's argument, the Appellee makes the conclusory statement that both of Petitioner's *Zain* claims, pursuant to *In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division* ("*Zain III*"), 633 S.E.2d 762 (W. Va. 2006) and *Matter of West Virginia State Police Crime Lab* ("*Zain I*"), 438 S.E.2d 501 (W. Va. 1993), were previously adjudicated. Petitioner asserts that neither his *Zain III* or *Zain I* claim meet the definition of 'previously adjudicated,' and therefore the Circuit Court abused its discretion in denying these claims without even holding an evidentiary hearing or addressing Petitioner's substantive arguments.

W. Va. Code, § 53-4A-1(b) defines 'previously and finally adjudicated' as follows:

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

A. Petitioner's *Zain III* Claim Was Not Previously Adjudicated

Appellee states that Petitioner's *Zain III* claim had been previously adjudicated because Petitioner Farmer'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*." Response Brief at 20. Therefore, the Appellee argues that because the special judge found no probative error in the

Petitioner's case, the Circuit Court was correct in denying relief on the *Zain III* claim because it had been previously adjudicated. Response Brief at 21.

Petitioner states that even though the special judge generally found no probative error in his special report reviewed in *Zain III*, the finding in *Zain III* does not meet the definition of previously adjudicated as to deny relief. The *Zain III* decision specifically allowed for any prisoner, whether investigated by the special judge or not, to bring an individual *Zain III* claim.

This Court held in *Zain III*:

In order to guarantee that the serology evidence offered in each prisoner's prosecution will be subject to searching and painstaking scrutiny, this Court now holds that a prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence may bring a petitioner for a writ of habeas corpus based on the serology evidence *despite the fact that the prisoner brought a prior habeas corpus challenge to the same serology evidence, and the challenge was finally adjudicated.*

Zain III, 633 S.E.2d at 770 (emphasis added).

No matter the finding of the special judge, this Court made it explicit that any prisoner, including the prisoners whose cases were reviewed by the special judge, may bring an individual *Zain III* habeas petition. The creation of the full habeas review in *Zain III* specifically suspended the rules of *res judicata* as to previous adjudications. Furthermore, the procedure set forth in *Zain III* does not specifically exclude those prisoners whose cases were the subject of the special report, from bringing a *Zain III* claim.

Moreover, the finding of the investigatory special judge that any error was not probative in Petitioner Farmer's case cannot be considered as a final adjudication after a full and fair hearing. The judge was not acting as a normal trier of fact, but was rather exercising investigatory duties to determine whether other serologists had engaged in intentional

malfeasance with respect to serological testing. The investigatory finding that there was no probative error does not substitute for a decision on the merits pursuant to a full and fair hearing.

Furthermore, every defendant and petitioner deserves individual adjudication of his or her own case. A hearing and decision is not full and fair unless it was particularized as to the specific prisoner. In *Zain III*, this Court made no decision as to the individual disposition of Petitioner Farmer's case. Nor did Petitioner Farmer have his own attorney advocating for him. Rather, one attorney represented all ten of the prisoners whose cases were investigated in the special judge's report. Such procedure is not indicative of a full and fair hearing on the merits. In this adversarial criminal justice system, a hearing cannot be considered full and fair unless the prisoner has his own legal advocate advancing the Petitioner's position.

Finally, any statement regarding the probative error in Petitioner Farmer's case was clearly dicta. The holding in *Zain III* only adopted "the special judge's report to the extent that it finds insufficient evidence of intentional misconduct by Zain's assistant serologists to warrant invalidation of serology evidence and a systematic review of those cases in which serology evidence was offered. However, because of the frequent and recurring errors identified in the work of Zain's assistant serologist, we deem it necessary to enact a special habeas corpus procedure...." 633 S.E.2d at 764. Thus, the holding was particularized to a finding, as a whole, that there was not sufficient evidence of intentional misconduct to justify per se invalidation of all serology evidence. Such a holding in no way finally adjudicated the issue of whether the introduction of the serology evidence constituted probative error in Petitioner Farmer's case.

Therefore, because *Zain III* specifically allows for an individualized, painstaking, full and fair habeas determination for any and every prisoner convicted between 1979 and 1999 in which

a West Virginia State Police serologist offered evidence, Petitioner Farmer should at the very least be granted an evidentiary hearing as to the merits of his claim. There is nothing in *Zain III* that suggests that Petitioner Farmer's *Zain III* claim has been finally and previously adjudicated after a full and fair hearing. Thus, the Circuit Court abused its discretion in denying Petitioner's *Zain III* claim as previously adjudicated.

1. Petitioner's *Zain III* Claim is Not Precluded as *Res Judicata*

The *Zain III* Court explicitly stated that Petitioner's individualized habeas proceeding is not *res judicata*. This Court need not go any further in finding that the Circuit Court erred in failing to grant a painstaking and individualized examination of Petitioner's *Zain III* claim. An examination of *res judicata* law reveals that this position is correct and that the State is mistaken. Petitioner's habeas claim in the case *sub judice* is not precluded by the doctrine of *res judicata*.

In its response brief, the State provides the standard for *res judicata* and then summarily asserts that “[a]ll 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.” Response Brief at 24. However, an examination of the elements of *res judicata* as applied to the case *sub judice* and the Court's decision in *Zain III* clearly reveals that the doctrine of *res judicata* does not apply.

This Court has held that “for a second action to be a second vexation with the law will forbid, the two actions must have (1) substantially the same parties who sue and defend in each case in the same respective character, (2) the same cause of action, and (3) the same object.” *Blake v. Charleston Area Medical Center, Inc.*, 498 S.E.2d 41 (W. Va. 1997) (quoting *Hannah v.*

Beasley, 53 S.E.2d 729, 733 (W. Va. 1949)). More specifically, for *res judicata* to apply, “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.” *Blake*, 498 S.E.2d at 49.

Specific to the case *sub judice* is whether a decision of the West Virginia Supreme Court of Appeals acting as a special investigatory body has a *res judicata* effect to future individualized habeas claims by prisoners in the circuit court. “Generally, authorities require an assessment of three factors in determining whether *res judicata* and collateral estoppel may be applied to a hearing body: (1) whether the body acts in a judicial capacity; (2) whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and (3) whether applying the doctrines is consistent with the express or implied policy in the legislation which created the body.” *Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124, 133 (W. Va. 1987). In determining whether the parties had a “full and fair opportunity to litigate the matters in dispute,” a court should examine whether the special hearing body “possessed all of the indicia of an adversarial judicial proceeding,” including “represent[ation] by counsel,” “methods of pretrial discovery,” “authori[zation] to produce witnesses and exhibits on their behalf, to procure evidence through compulsory process, and to cross-examine the witnesses of opposing parties.” *Id.* at 133.

The State is claiming that the Petitioner’s habeas claim was barred by *res judicata* because of this Court’s decision in *Zain III*. The background to *Zain III* is as follows. “A special

judge was appointed to conduct a third investigation of the Serology Division of the State Police Crime Laboratory. After an investigation, Thomas A. Bedell, special judge, submitted a report in which he concluded, inter alia, that there was not a scintilla of evidence of intentional misconduct on the part of serologist who had worked with” Zain. *Zain III*, 633 S.E.2d at 762.

The prisoners, represented by one attorney, then submitted objections to the report of the special judge and the State responded. *Id.* Those objections to the report were at issue in the *Zain III* decision of this Court. After review, this Court made the following findings:

We now adopt the special judge’s report **to the extent** that it finds insufficient evidence of intentional misconduct by Zain’s assistant serologists to warrant invalidation of serology evidence and a systematic review of those cases in which serology evidence was offered. However, because of the frequent and recurring errors identified in the work of Zain’s assistant serologists, we deem it necessary to enact a special habeas corpus procedure, outlined below, to be utilized by those prisoners against whom serologists, other than Zain, offered evidence.

Id. at 764 (emphasis added).

- a. *In Zain III, this Court Did Not Render a Final Decision on the Merits of Petitioner’s Habeas Claim that Errors in the Work of a Serologist, Trooper Smith, Violated His Due Process Rights*

As evinced by the holding of *Zain III*, this Court did not make a final decision on the merits of Petitioner’s claim that the errors of Trooper Smith in testing serology evidence and in presenting such evidence to the court violated his constitutional due process rights. Specifically, the only decision on the merits of *Zain III* was that there was no per se rule of invalidation of all serology evidence by serologists other than Zain and that each prisoner would have access to special habeas corpus procedures to determine if there cases were prejudiced by these “frequent and recurring errors.” *Id.* This Court was silent as to the specific issue underlying the habeas petition in the case *sub judice*- whether Petitioner’s constitutional rights were violated by the

errors committed by Trooper Smith. This Court specifically did not adopt the portion of the special report which found that the errors did not affect the outcome of the trials of the prisoners whose cases were being investigated.

b. The Decision and Issues in Zain III Are Not Identical to the Issues and Decision Sought in Petitioner's Habeas Petition

The ultimate issues in *Zain III* were fundamentally different than the issue underlying Petitioner's habeas claim. In *Zain III*, the ultimate issues were whether serologists other than Zain had committed errors and what type of procedures should be afforded to prisoners who had evidence introduced at their trials by serologists other than Zain. Here, the specific issue is whether Trooper Smith's erroneous testing of serology evidence and Trooper Smith's introduction of testimony about erroneous tests that he had performed violated Petitioner's due process rights. The *Zain III* Court did not address this issue. As such, there can be no *res judicata* claim.

c. Petitioner Was Not Afforded a Full and Fair Hearing to Litigate His Habeas Claim in Zain III

Moreover, it is clear beyond peradventure that the proceedings underlying the *Zain III* decision were fundamentally different than the proceedings under Petitioner's instant habeas claim. Under the painstaking and individualized habeas review, Petitioner would have the opportunity to produce witnesses, produce evidence, cross-examine State witnesses, have individualized counsel, procure evidence, and present argument in pleadings and in open court. Petitioner was afforded none of these opportunities under *Zain III*. The investigation by the special judge was independent of the adversarial process. Petitioner neither produced any evidence nor had opportunity to examine evidence found by the special judge. The only

opportunity presented to Petitioner was to file objections to the report by the special judge. Further, Petitioner was not provided separate counsel under *Zain III*, but, rather, all ten prisoners whose cases were being investigated were provided with one counsel to make objections to the report for them. In short, the proceedings under *Zain III* bore none of the indicia of the adversarial process that would be required by the habeas proceeding in the circuit court. Therefore, the decision under *Zain III* does not preclude the circuit court from conducting painstaking and individualized review of Petitioner's habeas claim.

B. Petitioner's *Zain I* Claim Was Not Previously Adjudicated

Furthermore, the Circuit Court abused its discretion in finding that Petitioner's *Zain I* claim had been previously adjudicated.

The Appellee stated that because the *Zain I* claim was subject to a previous adjudication, such a claim was properly denied. Response Brief 24 n.3. However, Petitioner Farmer asserts that this previous adjudication and decision on the merits of the *Zain I* claim was "clearly wrong." See W. Va. Code, § 53-4A-1(b). Furthermore, a petitioner may still bring claims based on newly discovered evidence even if a decision has been fully adjudicated. *Markley v. Coleman*, 601 S.E.2d 49, 51 (W. Va. 2004) (quoting *Losh v. McKenzie*, 277 S.E.2d 606 (1981)). Therefore, the prior decision on the *Zain I* claim cannot be considered to have been a previous adjudication that denies relief because newly discovered evidence demonstrates that the original *Zain I* decision was clearly wrong.

The Petitioner's *Zain I* claim was denied on January 30, 1996. In denying the claim, the Circuit Court held that Petitioner was not entitled to relief because Trooper Ted Smith, and not Trooper Fred Zain, conducted tests on the serology evidence and presented the serology evidence

at trial. During the *Zain* habeas hearing, Trooper Smith testified that he had personally conducted tests on the evidence and presented the evidence at trial. The 1996 court denied the habeas petition “[d]ue to the chronology of this case, and even assuming that he would wish to do so, Fred Zain could not have manipulated the results of the testing herein to inculcate Petitioner. Zain’s involvement in this case was minimal, at most. He was never a witness. The report he signed was never introduced into evidence....” *State ex. rel. Farmer v. Trent*, Case No. 94-P-13, Order (January 30, 1996). This reasoning was clearly wrong for two reasons. First, Zain’s involvement was substantial, not minimal, as evinced by newly discovered evidence resulting from Ted Smith’s subsequent testimony, and second, the chronology of the case did not preclude Zain from manipulating the results.¹

Subsequent to the January 30, 1996 order denying Petitioner’s *Zain* claim, Trooper Ted Smith appeared before a Kanawha County grand jury on January 9th, 1998 and testified that he was merely a mouthpiece during the trial, his only part being to impart to the jury the findings of the tests that Fred Zain had personally conducted. Smith may have written up the report, but the report was based upon Zain’s tests and findings.² Thus, Zain had ample opportunity to manipulate the serological evidence because he was the only one testing such evidence.

The following represents Trooper Smith’s January 9th, 1998 grand jury testimony which directly contradicted his testimony given during Petitioner’s original *Zain* habeas hearing:

¹ This argument was fully developed in Petitioner’s original brief and was not addressed by the Appellee. Thus, Petitioner relies upon his argument in the original pleading, whereby Petitioner argued that Trooper Zain could have manipulated the results as to create a false negative rather than a false positive. *See Appeal of Denial of Petition for Habeas at 11-14.*

² The normal procedure was to have the serologist who tested the evidence testify at the trial. However, because Zain had left the laboratory, other serologists had to take his place at trial, testifying to evidence that Zain alone had tested.

A: Well, the Farmer case is one for example. For example, I was going to tell you. [Zain] had listed on his worksheet a full set of genetic markers off a set of fingernail clippings for blood. I mean, I can't tell you how unusual that is. That just made me wonder, wow, that's real unusual. That's strange.

Q: Are you saying because the blood samples would be very minimal –

A: My own experience is we're lucky to get hardly anything off of fingernails. In that case – and when I looked back through the data on that case, I thought, well, darn there's stuff that I think I should be able to find but can't find. But at the same time, on that case I actually – it was close enough in time when the testing was done, I remember doing tests in that case.

I actually remember doing this. And so I thought, well, maybe I screwed up or maybe we lost something or whatever. And so, like I say, I issued the report based on that.

... At that point in time, after the incident, it troubled me so much, I came back and I ordered Brent [Myers] and Jeff [Bowles], "Do not write any reports that you cannot absolutely verify everything that is on that report."

(Jan. 9, 1998 Grand Jury Tr. 28-29).

In fact, the Stolorow/Linhart Report, upon which the *Zain III* decision was based, stated that:

The review of [Trooper Smith's] testimony raises unsettling questions as to whether or not Trooper Smith was completely forthcoming in his testimony at trial and in the habeas proceedings about his participation in the testing process and his confidence in the reliability of the results Fred Zain wrote on the serology worksheet.

Stolorow and Linhart Report at 27. This Court, in *Zain III*, recognized the report's finding of "the contradictory testimony of Trooper Smith in the *Farmer* case." *Zain III*, 633 S.E.2d at 767.

Such subsequent testimony is in direct contradiction to Trooper Smith's testimony at Petitioner's original trial and during the original habeas hearing. At trial, Trooper Smith testified that "[w]e identified blood on the fingernail clippings and that blood was consistent with the genetic markers of [the victim]." (July 27, 1990 Trial Tr. 239). In the July 4, 1994 habeas

affidavit, Trooper Smith asserted that he had personally participated in the serological testing that Zain reported:

That with respect to the report... prepared by Fred Zain on May 17, 1988, I participated in the serological testing that was done on the items delineated in that report, I have a specific memory of this... the bodily fluids and genetic markers were identified at that time on the following items: ... fingernail clippings.

Furthermore, at the November 7, 1994 habeas hearing, Trooper Smith testified that he personally witnessed the testing of the fingernail clippings:

Q: ... Did you participate in testing that identified the existence of blood on those items?

A: I reviewed the work that was done on those items and saw the tests performed.

(Nov. 7, 1994 Habeas Tr. 13-14).

The subsequent testimony indicates that Trooper Smith did not conduct or oversee the testing, but merely used Fred Zain's results to write up his report to use as a basis for his testimony at trial. Therefore, one of the following is true: Trooper Smith did not participate in the original testing of the serological evidence but rather Trooper Zain conducted the original tests, and, thus, Petitioner's original *Zain* habeas should not have been denied based upon Zain's ostensible lack of participation, or Trooper Smith perjured himself before the 1998 grand jury. At the very least, based upon this contradictory testimony, the Petitioner should be entitled to an evidentiary hearing to determine Trooper Zain's participation in the serological testing. If Fred Zain had indeed performed the tests, then the January 30, 1996 decision denying habeas relief is clearly wrong, and Petitioner is entitled to a full and fair hearing using the *Zain I* rather than the *Zain III* procedure.³ Therefore, Petitioner suggests that the Circuit Court abused its discretion in

³ Petitioner is not sure of what to make of Appellee's argument in Footnote 2. (Appellee's Brief 19n.2). The *Zain I* claim was part of his pleading before the Circuit Court. Petitioner may bring such a claim because of

denying his *Zain I* claim as having been previously adjudicated.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN RULING THAT THE SEROLOGY TESTS CONDUCTED ON THE SEMINAL STAIN FROM THE PETITIONER'S T-SHIRT WAS PROPERLY ADMITTED

Petitioner asserts that the trial court clearly erred and violated the Petitioner's constitutional rights to a fair and impartial jury by admitting into evidence a seminal stain found on his t-shirt and the subsequent serology tests conducted on the stain that determined that the seminal fluid belonged to Petitioner. Thus, the Circuit Court abused its discretion in denying Petitioner's claim.

The Appellee relies on the fact that the Petitioner never specifically objected to the constitutionally infirm prejudicial introduction of the seminal fluid and the tests conducted on the seminal fluid. Reply Brief 28. Therefore, Appellee contends that Petitioner knowingly and intelligently waived this claim under W. Va. Code, § 53-4A-1[c].

W. Va. Code § 53-4A-1[c] defines what constitutes waiver by stating:

a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal,... or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence..., *unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver.*

W. Va. Code § 53-4A-1[c] (emphasis added). The waiver provisions of the habeas statute only

newly discovered evidence that Trooper Smith misrepresented facts in the original habeas hearing, which the court relied upon in making its decision. Thus, Petitioner is allowed to bring his *Zain I* claim based upon the discovery of new evidence that rendered the first adjudication clearly wrong. The Petitioner sufficiently set forth this contention and the grounds in fact or law in support thereof in his pleading before the Circuit Court, which was denied.

kick in when there is “a knowing and intelligent waiver, in the vein of a waiver of a constitutional right, which cannot be presumed from a silent record.” *Gibson v. Dale*, 319 S.E.2d 806, 811 (W. Va. 1984) (citing *Losh*, 277 S.E.2d 606). There is no indication that the Petitioner knowingly and intelligently waived his right to review of this issue in the habeas proceedings. The Petitioner could not waive his constitutional right to a fair trial and an unbiased jury by merely remaining silent.

Second, the Appellee attempts to argue that this error should not be reviewed because it does not constitute a constitutional violation. Reply Brief 30. In so doing, the Appellee misquotes the Petitioner’s argument. Appellee states that Petitioner conceded that “admission in and of itself, does not constitute a constitutional error.” Reply Brief 30. Petitioner stated that the lack of probative value of the admission of the evidence did not in and of itself constitute a constitutional violation, but because the evidence was so unduly prejudicial it overtook the jury’s ability to remain an impartial and unbiased arbitrator of the facts. Thus, the lack of probative value combined with the extreme prejudicial nature of the introduction of the evidence constituted a violation of the Petitioner’s Sixth and Fourteenth Amendment rights to a fair trial.

Therefore, the Petitioner is entitled to relief for the deprivation of his Sixth and Fourteenth Amendment rights when the trial court, in clear error, admitted this irrelevant and extremely prejudicial piece of evidence. The Circuit Court abused its discretion in denying his claim.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT DID NOT COMMIT CLEAR ERROR IN ADMITTING THE PETITIONER’S ILLEGALLY OBTAINED STATEMENTS, VIOLATING HIS FIFTH AND SIXTH AMENDMENT RIGHTS

As argued in his original brief, Petitioner states that the Circuit Court abused its discretion in finding that the trial court did not commit clear error in admitting his illegally obtained statements.

The Appellee argues that “Petitioner’s statement given to Trooper Jeffries and Deputy Shirley at the New Jersey prison was non-custodial” because the “Petitioner was never arrested for these crimes committed in the State of West Virginia or otherwise in custody relating to these crimes.” Response Brief 34. Such a conclusory statement ignores case law which states that an actual arrest for the crime charged is not determinative of the whether an interrogation is custodial. *See State v. Middleton*, 640 S.E.2d 152, 156 (W. Va. 2006). A court must look to the totality of the circumstances to determine whether the interrogation was custodial. In the case *sub judice*, where the interrogation took place in a prison where the Petitioner was being held on separate charges, it is clear that such interrogation was custodial.

As stated in the Petitioner’s opening brief, the Court of Appeals of Maryland adopted the Supreme Court’s standard that ‘custody’ for *Miranda* purpose includes “questioning which takes place in a prison setting during a suspect’s term of imprisonment on a separate offense.” *Whitfield v. State*, 411 A.2d 415, 420 (Md. 1980) (quoting *Mathis v. United States*, 391 U.S. 1 (1968)). The Supreme Court reasoned that “[t]here is no substance to... a distinction” between “questioning one who is ‘in custody’ in connection with the very case under investigation” and one in custody in connection with an independent case. *Mathis*, 391 U.S. at 4. Such a distinction would go “against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. [The Supreme Court found] nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under

interrogation by officers based on the reason why the person is in custody.” *Id.* at 4-5. *See also Com. v. Chacko*, 459 A.2d 311, 315 (Pa. 1983).

The State misconstrues Petitioner’s argument regarding these cases. The State is correct in arguing that these cases do not hold that being in custody on unrelated charges is not per se custody. However, these cases make clear that being in custody on unrelated charges *may* constitute custody based on the totality of the circumstances. Courts cannot simply hold that the questioning was unrelated to the charges for which the prisoner was being held to dispense with the custody inquiry, which is exactly what the trial court did here. The trial court held that because the questioning related to different charges than what Petitioner was being held for, there was no custody. Such a holding is erroneous—why Petitioner is being held is irrelevant to the determination of custody. Here, based on the totality of the circumstances, it is clear that Petitioner was in custody at the time he was questioned in the New Jersey prison.

Therefore, Petitioner’s statements made to the police officer while in prison on unrelated crimes constitutes ‘custody’ for *Miranda* purposes. While the police officer read the Petitioner his *Miranda* rights, Petitioner invoked his *Miranda* rights by requesting an attorney. Yet, the police officer continued to interrogate the Petitioner. The statements made by the Petitioner to the police officer after his request for a lawyer are clearly inadmissible, and the erroneous inclusion of the statements violated the Petitioner’s Fifth and Sixth Amendment rights. Thus, Petitioner is entitled to a new trial and the Circuit Court abused its discretion in ruling otherwise.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT DID NOT VIOLATE PETITIONER’S SIXTH AMENDMENT RIGHT TO A FAIR JURY WHEN IT FAILED TO DISMISS A BIASED JUROR

The State asserts that “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.” Response Brief 43-44. However, Petitioner has cited the trial transcript in which the trial court made this clear on the record that it was concerned with this effect in disqualifying Juror Cook. *See* Appellant’s Brief at 27 (citing July 25, 1990 Trial Tr. 102-03). Here, the trial court clearly made its decision not to disqualify Juror Cook not by reference to whether there was cause to disqualify her, but to the practical effects of failing to impanel enough alternate jurors. Petitioner specifically requested that the trial court empanel more jurors after the alternate juror pool was depleted, which the court denied. Petitioner’s right to a fair and unbiased jury should not be based on the trial court’s error in failing to impanel additional alternate jurors. That is exactly what occurred here. Juror Cook should have been dismissed for cause because her employer had an interest in the underlying criminal case. The failure to dismiss Ms. Cook deprived the Petitioner to his Sixth Amendment right to have a fair and unbiased jury.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT’S DECISION TO ALLOW THE JURY TO HAVE A MAGNIFYING GLASS DID NOT VIOLATE THE PETITIONER’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

The State alleges that the jury’s use of the magnifying glass was no different than use of corrective glasses. However, the State does not offer any admissible evidence at trial that would have required the use of a magnifying glass. There was absolutely no admissible evidence that the magnifying glass could have been used by the jurors to magnify. The case against Petitioner was based almost entirely on circumstantial evidence.

The State did, however, introduce pictures of footprints taken at the victim’s house and

Petitioner's sneakers. An expert testified that it was impossible to determine whether the footprints matched Petitioner's sneakers. Because there was no other physical evidence introduced by the State that would require a magnifying glass, it is likely that the jury used the magnifying glass to conduct its own unscientific experiments outside the presence of the accused.

Moreover, Petitioner objected to the jury's use of the magnifying glass. The court overruled the Petitioner's objection and failed to question the jury on its reason for requesting to use the magnifying glass. Thus, Petitioner is left to make educated and logical guesses as to how the jury actually employed the magnifying glass. Petitioner should not be prejudiced in his habeas claim because the trial court failed to adequately question the jury over Petitioner's objections. If the trial court had questioned the jury, the record would disclose the reason for the jury's request for the magnifying glass. Now, only an evidentiary habeas hearing can decide such an issue. If the jury used the magnifying glass to conduct experiments outside the presence of Petitioner by comparing the Petitioner's shoes with the footprints, Petitioner's right to due process has been violated and a new trial is necessary. To even refuse an evidentiary hearing on this matter is an abuse of discretion by the Circuit Court.

VI. PETITIONER STANDS ON HIS OTHER ARGUMENTS AND ASSERTS THAT THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING RELIEF FOR THESE CONSTITUTIONAL VIOLATIONS

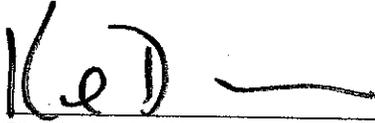
Petitioner respectfully stands on his other arguments offered in his original brief and asserts that the Circuit Court abused its discretion in failing to grant Petitioner habeas relief because the trial court improperly denied Petitioner's motion for an acquittal, the trial court improperly admitted false testimony by the State's witnesses, and the trial court improperly sentenced Petitioner to consecutive sentences.

CONCLUSION

WHEREFORE Petitioner respectfully requests that this Court overturn the Circuit Court's decision in denying Petitioner habeas relief.

Respectfully Submitted,

ALEX FARMER
By Counsel

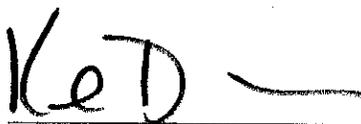


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CERTIFICATE OF SERVICE

I, Kevin D. Mills, hereby certify that an original plus nine (9) copies of this Reply Brief was served, via Federal Express, postage pre-paid upon Rory Perry, Clerk of the West Virginia Supreme Court of Appeals at Room E-301, State Capitol, Charleston, West Virginia 25305 and one (1) copy upon Christopher C. Quasebarth, Special Assistant Prosecuting Attorney by mailing same to 380 W. South Street, Martinsburg, WV 25401 all this 17th day of February, 2009.

Respectfully submitted,



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