

K. Mirel

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA  
STATE EX REL. ALEX FARMER,

Petitioner,

v.

THOMAS MCBRIDE, Warden,

Respondent.

Case No.: 05-C-102  
(Judge Steptoe)

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AUG 15 2007  
JEFFERSON COUNTY  
CIRCUIT COURT

**ORDER DENYING PETITION FOR HABEAS CORPUS**

On a previous date came the parties, by counsel, pursuant to this Court's prior order.

Upon review of the Petition for Writ of Habeas Corpus, the pleadings and papers filed herein, the argument of counsel and review of the underlying criminal file, State v. Alexander E. Farmer, Jefferson County Criminal Action Number 89-F-21, the Court rules as follows:

**FINDINGS OF FACT.**

The Crime.

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 Petitioner, 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 Petitioner 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 Petitioner, the Petitioner signed a Miranda waiver, the Petitioner was not under arrest, and the Petitioner 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 Petitioner was living, obtained consent from

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the Petitioner and his brother to search the home. The Petitioner 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 Petitioner at New Jersey's Bayside Prison, that the Petitioner was not under arrest [for any charges concerning Ms. Bouldin], that the Petitioner signed a Miranda waiver, and that the Petitioner 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 Petitioner 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 Petitioner 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 Petitioner and that the Petitioner came to his house on April 14, 1988, at about 8-8:30 p.m. He was not expecting the Petitioner and the Petitioner had never been to his house before. The Petitioner told him that Lynn Fitzwater dropped him [the Petitioner] off. He did not notice any scratches on the Petitioner's face. His dog did not scratch the Petitioner. The Petitioner left about 9-9:30 p.m. but then returned again at about 11-11:30 p.m. The Petitioner stayed the night on the couch. He left with the Petitioner at about 5:00 the next morning and dropped the Petitioner off at a 7-11. [Id., 196-227.]

14. Hilda Grim testified that she knows the Petitioner 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 Petitioner left about 9-9:30 p.m., saying he was going to Pumphrey's and then home. The Petitioner returned about 11-11:30 p.m. The Petitioner was wearing sneakers. [Tr., 7/26/90, 19-54.]

15. Marshall Fitzwater testified that he knows the Petitioner. He worked with the Petitioner for about six months painting and clearing brush. He worked with the Petitioner in April 1988, picking the Petitioner up and taking him home. He and the Petitioner painted Ms. Bouldin's home with Kevin DeHaven. The Petitioner 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 Petitioner was wearing new tennis shoes on April 14. None of the painters went into the basement that day. The Petitioner did not have any scars or marks on his face that day. At about 8:05-8:10, he dropped the Petitioner off by the river. The Petitioner 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 Petitioner off there. The Petitioner had the same clothes on the next day. The Petitioner 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 Petitioner'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 Petitioner wore gloves a lot. The Petitioner 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 victim, which were admitted. He identified various items seized from the Petitioner, including the blue Breeder's Cup t-shirt, which were all admitted. He testified to the Petitioner's initial statement on April 16, 1988, and described the scratches on the Petitioner's face. He identified the photos of the footprints on Fitzwater's truck, which were admitted. He described the Petitioner's hands as red and swollen during the April 16, 1988 interview, and that the Petitioner 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 Petitioner, including the Petitioner's attempt to avoid providing the Breeder's Cup shirt. He testified that the Petitioner 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 Petitioner was hiding at his mother's on April 18, 1988, and testified as to the Petitioner's statement given that day. On cross-examination, he admitted that the Petitioner 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 Petitioner'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 Petitioner'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 Petitioner's jeans could be the Petitioner'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 Petitioner's blue t-shirt or jeans. [Id., 255-260.]

20. Joyce Sutphin testified that she is the Petitioner's cousin and Pumphrey's daughter and that she did not see the Petitioner 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 Petitioner 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 Petitioner at the New Jersey facility were covered by the trial court's pre-trial ruling denying the Petitioner's Motion to Suppress. [Tr., 7/30/90, 29-55.] A further voir dire of Trooper Jeffries, Deputy Shirley, the Petitioner 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 Petitioner 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 Petitioner. [Id., 53-110.]

24. Frank Ramsburg testified that he knows the Petitioner 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 Petitioner as the Petitioner 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 Petitioner and that the Petitioner 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 Petitioner and was married to his sister. He overheard the Petitioner tell Hough that he broke into [Ms. Bouldin's] house but that he didn't murder her. [Id., 214-227.]

29. The Petitioner 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 Petitioner 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 Petitioner from 8:00-9:20 p.m., at which time he returned without the Petitioner. She testified that the Petitioner 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 Petitioner was laying on her couch and her husband was in bed. The Petitioner 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 Petitioner 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 petitioner'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 the West Virginia Supreme Court of Appeals. [Order, 1/29/92.]

The Zain Habeas Refused.

41. The petitioner 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 petitioner's direct appeal from that *Zain* habeas was refused by the West Virginia Supreme Court of Appeals. [Order, 8/23/96.]

The Current Omnibus Habeas.

43. The petitioner 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 petitioner and his appointed counsel, James Kratovil, was filed wherein the petitioner 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 petitioner's counsel represented to this Court that the petitioner is relying on the *pro se* Petition filed, that no Amended Petition will be filed, and that he is seeking an evidentiary hearing only on the two allegations of ineffective assistance of counsel. The Court denied the Petitioner's Motion for Additional Investigation whereby the Petitioner 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 petitioner then filed a Motion to Amend and a Motion to Exceed Costs, alleging that the West Virginia Supreme 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 petitioner'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 the Supreme Court in *Zain III* that "there is no evidence that serology evidence affected the prosecutions of any of the cases investigated." [Respondent's Opposition to Motion to Amend Habeas Corpus Petition, 7/7/06.]]

49. The 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 petitioner's case. [Order Denying Motion to Amend and to Exceed Costs, 7/18/06.]

51. The petitioner moved the court to reconsider its Order denying the Motion to Amend, which the respondent opposed and the 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 petitioner as Mr. Mills was the trial counsel which the petitioner alleges in his habeas petition was ineffective. [Motion to Disqualify Kevin D. Mills as Petitioner'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 petitioner 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 petitioner 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 petitioner 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.]

#### CONCLUSIONS OF LAW

1. The petitioner is entitled to one omnibus habeas corpus proceeding. Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606, 609 (1981).

2. "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).

3. Moreover, "[t]here 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).

4. Due to this 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 reviewing court shall refuse, by written order, to grant a writ of habeas corpus if the petition, along with the record from the proceeding resulting in the conviction and the record from any proceeding wherein the petitioner sought relief from the conviction show that the petitioner is entitled to no relief or that the contentions have been previously adjudicated or waived. **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).

5. The Court may summarily deny each allegation expressly waived, previously and finally adjudicated, waived for failure to raise on appeal, or for which there are insufficient facts to support the allegations. **W. Va. Code § 53-4A-3(a), -7(a);** State ex rel. Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49 (2004); Perdue v. Coiner, 156 W.Va. 467, 469-470, 194 S.E.2d 657, 659 (1979); Syl. Pts. 1 & 2, Ford v. Coiner, 156 W. Va. 362, 196 S.E.2d 91 (1972); **W.V.R. Governing Post-conviction Habeas Corpus Proceedings 4(c).**

6. HABEAS GROUNDS WAIVED.

The petitioner expressly waived each of the habeas grounds waived on his Losh list, which are 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. The Petitioner subsequently withdrew his allegations of ineffective assistance of trial counsel and waived any claims of ineffective assistance of counsel. [Order, 11/2/06.] The record is plain that the petitioner is not entitled to any relief on these expressly waived grounds. **W. Va. Code § 53-4A-3(a), -7(a);** State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

7. ZAIN III CLAIM PREVIOUSLY DENIED.

This Court twice previously denied the Petitioner's Motion to Amend to include a *Zain*

*III* allegation as part of this habeas proceeding. [Order Denying Motion to Amend and to Exceed Costs, 7/18/06; Order Denying Motion to Reconsider Motion to Amend, 10/31/06.] Having already so ruled in this case, this Court need not rule again but restates herein the reasons stated for those rulings.

The Petitioner's case was one of ten cases in which the serological evidence was reviewed by appointed experts, a special judge and the West Virginia Supreme Court of Appeals. 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 findings and conclusions of the special judge and the West Virginia Supreme Court of Appeals revealed no probative error in the Petitioner's case. Considering the Supreme Court's holding of no probative error in that *Zain III* review, this Court ruled in the case *sub judice* that

Combined with the fact that serological evidence did not link Petitioner 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.]

This Court's subsequent allowance of the Petitioner to vouch the record regarding the denied *Zain III* Motion to Amend (*see* Status Hearing Order, 2/28/07), does not reopen this matter for further consideration. The record is plain that the Petitioner is not entitled to any relief on this previously adjudicated ground. W. Va. Code § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

#### 8. MOTIONS FOR ACQUITTAL PROPERLY DENIED BY TRIAL COURT.

The standard of review utilized by the Supreme Court when 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).

The trial court properly exercised its discretion in denying the Petitioner’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 Petitioner had been painting at the victim’s house during the day on April 14, 1988. Various witnesses testified to unexpectedly seeing the Petitioner in the victim’s neighborhood the night she was raped and murdered. The Grims testified that the Petitioner 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 Petitioner walking down the road in the direction of the victim’s house around 9:00-9:30 that night. The Grims testified that the Petitioner unexpectedly returned to their house about 11:00-11:30 p.m. that same night. The hours the Petitioner 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 Petitioner’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 Petitioner later stated that he broke into the victim’s house, though he denied killing her.

The record is plain that substantial evidence was presented to the jury upon which they might justifiably find the Petitioner 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 record is plain that the trial court did not abuse its discretion in denying the motion for acquittal at the close of the State's case. The record is plain that the Petitioner is 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.

**9. SEROLOGY EVIDENCE FROM T-SHIRT PROPERLY ADMITTED.**

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, supra, 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 petitioner must prove that the trial court's ruling is “clearly wrong”. W. Va. Code § 53-4A-1(b).

Trial testimony reflects that the Petitioner 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 Petitioner. 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 Petitioner. The Petitioner now alleges that the seminal fluid evidence was inadmissible. However the Petitioner does not point to any place in the 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).

The Petitioner 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 Petitioner. [Tr., 1/26/90 (Vol. 1), 25-29; Tr., 1/26/90 (Vol. 2), 7-10.] The Petitioner 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 Petitioner by Smith’s testimony that he personally participated in the testing of the T-shirt. [Tr., 7/27/90, 226-234.]

The Petitioner waived any objection to the admissibility of the seminal fluid evidence on relevancy grounds by failing to object to the presentation and admission of that evidence.

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).

State v. Shrewsbury, 213 W. Va. 327, 582 S.E.2d 774, 781 (2003). See W.V.R.E. 103(a)<sup>1</sup>.

The record is plain that the trial court did not abuse its discretion in admitting, without

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<sup>1</sup> 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.

objection, the State's serology evidence regarding the Petitioner's seminal fluid found on the t-shirt he was wearing the day that Ms. Bouldin was raped and murdered. The Petitioner fails to prove that the trial court's ruling is admitting the evidence was "clearly wrong". W. Va. Code § 53-4A-1(b). The record is plain that the Petitioner is not entitled to any relief on this allegation of admission to 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.

**10. PETITIONER'S STATEMENT IN NEW JERSEY PROPERLY ADMITTED.**

The standard of admissibility of a defendant's statement is recently reiterated by the West Virginia Supreme Court of Appeals:

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 petitioner must prove that the trial court's ruling is "clearly wrong". W. Va. Code § 53-4A-1(b).

Corporal Jeffries testified that on June 8, 1989, he and Deputy Shirley interviewed the Petitioner at New Jersey's Bayside Prison, that the Petitioner was not under arrest [for any charges concerning Ms. Bouldin], that the Petitioner signed a Miranda waiver, and that the Petitioner 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 Petitioner at the New Jersey facility were covered by the trial court's pre-trial ruling denying the Petitioner's Motion to Suppress. [Tr., 7/30/90, 29-55.] A further voir dire of Trooper Jeffries, Deputy Shirley, the Petitioner 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 the Petitioner's statement given on June 8, 1989, and Corporal Jeffries' notes of that interview, admissible as voluntarily given and that his a waiver of rights was properly obtained. [Tr., 7/31/90, 29-36, 45.]

The West Virginia Supreme 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 Petitioner's statement given to Trooper Jeffries and Deputy Shirley at the New Jersey prison was non-custodial. The Petitioner was never arrested for these crimes committed in the State of West Virginia or otherwise in custody relating to these crimes. The Petitioner had no valid Fifth or Sixth Amendment rights implicated because he was not in custody. State v. Middleton, supra.<sup>2</sup>

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<sup>2</sup> The Petitioner asserts in his brief that any statement given by him while awaiting transport to New Jersey in 1988 should be suppressed. However, the Petitioner cites to no such statement in the record. Deputy Shirley testified that no statement was ever obtained at that time. [Tr., 7/30/90, 94-96.] No such statement is otherwise found to have been offered or received into evidence. [Record, *passim*.] The record is plain that the Petitioner is not entitled to any relief on this allegation of admission of the Petitioner's statement. W. Va. Code § 53-4A-

The record is plain that the trial court did not abuse its discretion in admitting the Petitioner's statements. State v. Jones, supra. The Petitioner fails to prove that the trial court's ruling is admitting the evidence was "clearly wrong". W. Va. Code § 53-4A-1(b). The record is plain that the Petitioner is not entitled to any relief on this allegation of admission of the Petitioner's statement. W. Va. Code § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

**11. THE TRIAL COURT PROPERLY DENIED THE PETITIONER'S MOTION TO DISQUALIFY JUROR COOK. NO ADDITIONAL ALTERNATE JUROR WAS REQUIRED.**

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

3(a), -7(a); State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

her ability to fairly and impartially hear the case and that she felt comfortable continuing. The Petitioner moved to disqualify Ms. Cook. The trial court denied the motion. [Tr., 7/25/90, 94-108.]

The Petitioner cites 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 Petitioner's motion to disqualify. See O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002). The Petitioner did not carry his burden to persuade the trial court otherwise. State v. Miller, *supra*. The Petitioner has not proved 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 Petitioner 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, *supra*, 150 W. Va. 453, 147 S.E.2d 486 (1966); State ex rel. Massey v. Boles, *supra*, 149 W. Va. 292, 140 S.E.2d 608 (1965); Syl. Pt. 1, State ex rel. Ashworth v. Boles, *supra*, 148 W. Va. 13, 132 S.E.2d 634 (1963).<sup>3</sup>

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<sup>3</sup> Nor does the Petitioner cite any legal authority for his suggestion that, after the jury was picked and the remainder of the panel released, the trial court had the power over the objection of

The record is plain that the trial court did not abuse its discretion in denying the Petitioner's motion to disqualify Juror Cook. State v. Miller, supra. The Petitioner fails to prove that the trial court's ruling is denying the motion was "clearly wrong". W. Va. Code § 53-4A-1(b). The record is plain that the Petitioner is not entitled to any relief on this allegation of juror qualifications. W. Va. Code § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

**12. THE TRIAL COURT PROPERLY ALLOWED THE JURY TO HAVE A MAGNIFYING GLASS.**

During deliberations, the jury requested the use of a magnifying glass. The Petitioner 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). This Court agrees with these other

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a party to impanel another jury for the purposes of selecting another alternate. The record is plain that the Petitioner is not entitled to any relief on this allegation of juror qualifications. W. Va. Code § 53-4A-3(a), -7(a); State ex rel. Markley v. Coleman, supra; Perdue v. Coiner, supra.

decisions that 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 Petitioner's trial was not erroneous. The Petitioner's speculation that the jury may have been conducting "experiments" with the evidence 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 Petitioner's objection. The record is plain that the Petitioner is not 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.*

**13. THE PETITIONER PRESENTS NO EVIDENCE OF ANY FALSE TESTIMONY BY WITNESSES.**

The Petitioner's unsupported assertion that the testimony of witnesses David Tomlin, James Lang and Marshall Fitzwater was false is just that, unsupported. Each of these witnesses was vigorously cross-examined by the Petitioner's trial counsel. The Petitioner offers 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 Petitioner offers no evidence that the testimony of these witnesses was false. The Petitioner offers no evidence that, even if false, the Prosecuting Attorney knowingly used such false testimony.

From this unsupported base of alleged false testimony, the Petitioner goes on to suggest that these witnesses all should have been suspects in the murder and the State did not properly investigate them as such. The Petitioner presents no new evidence that the witnesses Tomlin, Lang or Fitzwater were in any way implicated in the crimes for which the Petitioner was convicted.<sup>4</sup>

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<sup>4</sup> After hearing and the argument of counsel, this Court denied the Petitioner's Motion for Additional Investigation. The Petitioner was seeking to have the State reopen its investigation of the 1988 murder as part of this habeas proceeding and obtain genetic material for testing from

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 record is plain that the Petitioner does 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.

**14. 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 Petitioner does not allege that the sentences imposed were not the statutory sentences for the crimes of which he was convicted. Rather, the Petitioner alleges that the sentences should not have been run consecutively.

Regarding the imposition of consecutive sentences, the West Virginia Supreme 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 Petitioner'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 the Supreme Court's

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two witnesses who testified at trial. [Order Directing Respondent to Answer Petition, 4/12/06.]

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 and imposed the sentences consecutively to each other.

The record is plain that the trial court did not abuse its discretion in sentencing the Petitioner to consecutive sentences for each of his four felony offenses. State ex rel. Massey v. Hun, supra; State v. Lucas, supra. The record is plain that the Petitioner is not 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.

15. No evidentiary hearing is required for the Court to make these findings and conclusions because all of the matters alleged can readily be determined by reference to the record in State v. Alexander E. Farmer, Jefferson County Criminal Action Number 89-F-21.

Accordingly, it is hereby ORDERED that the Petition for Writ of Habeas Corpus is DENIED.

The Clerk shall enter this Order as of the date noted below and transmit attested copies to: Mr. Mills; Mr. Quasebarth; Thomas McBride, Warden, Mount Olive Correctional Complex, One Mountainside Way, Mount Olive, West Virginia 25185; and the Clerk, West Virginia Supreme Court of Appeals, State Capitol Complex, Building One, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

ENTERED: August 15, 2007

Thomas W. Steptoe, Jr.  
HONORABLE THOMAS W. STEPTOE, JR.  
CIRCUIT JUDGE

Prepared by  
Christopher C. Quasebarth  
Christopher C. Quasebarth, Esq.  
Chief Deputy Prosecuting Attorney  
State Bar No.: 4676

**The Clerk is directed to retire this action from the active docket and place it among causes ended.**

A TRUE COPY  
ATTEST:

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PATRICIA A. NOLAND  
CLERK, CIRCUIT COURT  
JEFFERSON COUNTY, W.VA.

BY ym Scott  
DEPUTY CLERK

4cc  
K. Mills  
C. Quasebarth  
T. McBride  
WV Supreme Ct  
8/15/07  
ms