



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF: RENEWED INVESTIGATION
OF THE STATE POLICE CRIME LABORATORY,
SEROLOGY DIVISION

No. 32885

PRISONERS' BRIEF IN REPLY

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TABLE OF CONTENTS

I. The State erroneously asserts that Zain's assistants did not commit intentional misconduct, while failing to acknowledge the unrebutted evidence of intentional misconduct that is set forth in the record	1
II. The State erroneously asserts that nonexistent serology testimony "did not occur" in the case that triggered the Renewed Investigation	6
III. The State erroneously describes the significance of false associations as "nonprobative," because there is no means of knowing the probative or nonprobative nature of tests that were not performed	7
IV. The statutory right to DNA testing is not an adequate remedy because in many cases the biological evidence has not been preserved or has been totally consumed by prior testing	9
V. The right to attempt to discredit the serology of Zain's assistants on a case-by-case basis is a practical impossibility for prisoners	10

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In Reply to the State's Response, the Prisoners state as follows:

I. The State Erroneously Asserts that Zain's Assistants Did Not Commit Intentional Misconduct, While Failing to Acknowledge the Unrebutted Evidence of Intentional Misconduct That Is Set Forth In the Record.

In its Response to the Prisoners' Objections, the State repeatedly asserts that the Renewed Investigation found "no indication of intentional misconduct" on the part of Fred Zain's assistants. State's Response, at 1, 5, 11, 14, and 16. In making this assertion, the State fails to acknowledge the evidence of intentional misconduct that is set forth throughout the Stolorow/Linhart Report. As set forth herein, much of the evidence of intentional misconduct is undisputed.

A key example of what appears to be undisputed evidence of intentional misconduct is the contradictory testimony of Captain Smith in the *Alexander Farmer* case. As discussed in detail throughout seven pages of the Stolorow/Linhart Report, in 1994 Capt. Smith foreclosed

habeas relief for Farmer by testifying that he personally witnessed and verified the serology testing in that case. Four years later, in testifying before the grand jury that indicted Fred Zain, Capt. Smith appears to concede precisely the opposite: that (in contrast to his habeas testimony) he could not verify the serology work in the *Farmer* case and, instead, that it was the *Farmer* case where Capt. Smith first realized that the serology testing by Fred Zain was a fraudulent. Stolorow/Linhart Report, 21-27.

The State of West Virginia, and Capt. Smith himself, have had numerous opportunities to respond to Stolorow and Linhart's seven-page discussion of Capt. Smith's apparently false serology testimony in the *Farmer* habeas. These opportunities include:

- *Order*, December 28, 2004. In Special Judge Bedell's Order of December 28, 2004, the Court provided the State with the opportunity for an evidentiary hearing. At the evidentiary hearing, the State would be provided the opportunity to call Capt. Smith or any of Fred Zain's other assistants to respond to and to rebut any findings and conclusions in the Stolorow/Linhart Report. By letter of January 31, 2005, the State declined the opportunity for any evidentiary hearing and, consequently, chose not to call Capt. Smith or anyone else to provide an explanation or rebuttal of Capt. Smith's apparently false serology testimony in the *Farmer* case.

- *Response of West Virginia State Police to Combined Report of Mark D. Stolorow and Ronald A. Linhart*, January 13, 2005. The State Police filed its Response to the Stolorow/Linhart Report on January 13, 2005. In its Response, the State Police had a second opportunity to explain or rebut the apparently false serology testimony of Capt. Smith in the *Farmer* case. The State Police declined this opportunity. Instead, the State Police, upon reviewing the Stolorow/Linhart Report, simply stated that the West Virginia State Police, in its Response,

"does not respond to specific cases." The State Police also asserted in its Response that "the issues identified as problematic procedures in the Lab did not adversely impact any criminal trials."

The assertion by the State Police that the problems that were identified did not adversely impact any criminal cases is also wholly erroneous, because the Order denying relief in the *Farmer* habeas sets forth the questionable serology testimony of Capt. Smith as a key basis for its ruling. Final Order, January 26, 1996, *State ex rel. Farmer v. Trent*, Circuit Court of Jefferson County, No. 94-P-13. Not only did the State Police decline to deny that Capt. Smith provided false serology testimony, but contrary to the State's assertions, the Order of the Court sets forth the false testimony as a key factor in the denial of habeas relief.

- *State's Proposed Findings of Fact, Conclusions of Law, and Recommendations*, May 12, 2005. In the Prisoners' Proposed Findings of Fact, Conclusions of Law, and Recommendations, filed with Special Judge Bedell on April 11, 2005, the Prisoners devote four pages of proposed findings to the Stolorow/Linhart discussion of Capt. Smith's apparently false serology testimony in the *Farmer* case. In the State's Proposed Findings of Fact, Conclusions of Law, and Recommendations, filed a month later on May 12, 2005, the State had a third opportunity to address Capt. Smith's apparently false serology testimony, and once again chose not to respond. While ignoring the documented misconduct, the State erroneously asserted the opposite: that the Stolorow/Linhart Report "doesn't present any new information which would cause this Court to amend Judge Holliday's 1994 finding that 'there is not a scintilla of evidence of intentional misconduct on the part of the other serologists who worked with Fred Zain.'" *State's Proposed Findings of Fact, Conclusions of Law, and Recommendations*, p. 2. In light of the contents of the Stolorow/Linhart Report, and the State's failure to rebut key portions of it, the

assertion by the State that the Stolorow/Linhart Report doesn't contain evidence of misconduct is wholly erroneous.

- *State's Response to Prisoners' Objections to Report of Special Judge Thomas A. Bedell, March 3, 2006.* In the Prisoners' Objections to Report of Special Judge Thomas A. Bedell, filed herein on January 31, 2006, the Prisoners devote six pages of discussion to Capt. Smith's apparently false serology testimony in the *Farmer* case. In the State's Response, filed March 3, 2006, the State has a fourth opportunity to reply to or rebut the finding of false serology testimony by Capt. Smith. Once again, the State doesn't even respond to this portion of the Prisoners' Objections. The State's Response, as in every other filing of the State in this matter, is totally silent on the subject. To this day, Capt. Smith's apparently false serology testimony in the *Farmer* case has never been denied, explained, or rebutted by the State.

The Stolorow/Linhart Report is filled with additional indications of intentional misconduct by Zain's assistants. In the Report, Mr. Stolorow (the principal analyst and principal author of the Report) variously describes the practices of Zain's assistants as a "hoax" (p. 10); "fabrication" (pp. 18, 19, 106, and appendix one, pp. 9, 12, 13, 21); "gross exaggeration" (p. 66); "deceptive" (appendix one, p. 13); and "unethical" (pp. 18, 48, 66, 81, and appendix one, pp. 5, 6, 13, 16). The State's assertion that this Report "yielded no indication of intentional misconduct" on the part of Zain's assistants (State's Response, p. 1) is wholly erroneous.

Furthermore, the State erroneously asserts that Mark Stolorow "clearly does not label the work of the other lab personnel during the period in question as "misconduct." State's Response, p. 5. On page 101 of the Stolorow/Linhart Report, Mr. Stolorow presents a chart documenting that all eleven categories of "problems" committed by Zain were also committed by Zain's assistants. The fact that Stolorow chose the words "problems" does not mean that Stolorow was

not describing misconduct, because on page 102 of the Report, Stolorow sets forth the key that describes what he means by the word "problems." The problems are a direct quote of the problems that this Court labeled as "misconduct" in *In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 323, 438 S.E.2d 501, 503 (1993). They include ". . . reporting that multiple items had been tested, when only a single item had been tested . . . reporting inconclusive results as conclusive . . . repeatedly altering laboratory records; etc." 190 W.Va. at 323, 538 S.E.2d at 503. These problems are, by definition, "misconduct." The fact that Mr. Stolorow does not use the term "misconduct" is meaningless when Mr. Stolorow repeatedly uses terms such as "hoax," "fabrication," and "unethical practices" -- terms which -- at a minimum -- are synonyms for misconduct.

II. The State Erroneously Asserts That Nonexistent Serology Testimony "Did Not Occur" In The Case That Triggered The Renewed Investigation.

As this Court explained in its Order establishing the Renewed Investigation, the Renewed Investigation was triggered by the finding of Federal Magistrate Hogg that Trooper H.B. Myers, an assistant of Fred Zain, testified to nonexistent serology testing in the *Wilbert Thomas* case. Administrative Order, June 10, 1999, *In re: Recall of the Honorable James O. Holliday, Retired Judge of the Twenty-Ninth Judicial Circuit, to Active Service to Preside in Kanawha County, Thirteenth Judicial Circuit, in the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, at 5.

In its Response, the State points out that District Judge Copenhaver declined to adopt Judge Hogg's recommendation that the Court award Wilbert Thomas a new trial. But the State is erroneous in its assertion that Judge Copenhaver held that the false serology testimony by

Trooper Myers "simply did not occur." State's Response, p. 3. Instead, Judge Copenhaver ruled that "the finding of the state court that Myers' testimony was *immaterial and did not affect the outcome* of Thomas' trial is reasonable." (emphasis added) *Wilbert Thomas v. Trent*, Civil Action No. 2:98-0912 (S.D.W.Va. August 17, 1999).

Needless to say, there is a substantial difference between a finding that nonexistent serology testimony was "immaterial" in this particular case and a finding that nonexistent serology testimony "did not occur." Judge Copenhaver did not find that testimony to nonexistent serology did not occur. It was for this precise reason that Special Judge Holliday chose to proceed with the Renewed Investigation, despite the finding of Judge Copenhaver that Trooper Myers testimony in the *Wilbert Thomas* case did not affect the outcome of the *Wilbert Thomas* trial.

III. The State Erroneously Describes the Significance of False Associations As "Nonprobative," Because There Is No Means Of Knowing the Probative Or Nonprobative Nature Of Tests That Were Not Performed.

In its Response, the State misstates the significance of the findings that the false associations that were identified in the Stolorow/Linhart Report were "nonprobative." Because numerous tests were either not performed or not recorded on the raw data sheets, there is no means of knowing what the results would have been if the tests had actually been performed and/or recorded.

A review of most of Fred Zain's serology files did not show "probative" false associations either, yet even the State conceded that Zain's results contained massive fraud and should be presumptively discredited. *ASCLD/LAB Investigation Report, West Virginia State Police Crime*

Laboratory, August 6, 1993; In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 438 S.E.2d 501 (1993).

Furthermore, false associations are only a small portion of the problems that were identified in the serology of Fred Zain's assistants. Wholly aside from false associations, overstated and exaggerated results by Zain's assistants were found throughout the Stolorow/Linhart Report (Stolorow/Linhart Report pp. 10, 17, 18, 49, 66, 106, and appendix one p. 6, 16, and 21), much as overstated and exaggerated results were found throughout the work of Fred Zain himself. *ASCLD/LAB Investigation Report, West Virginia State Police Crime Laboratory, August 6, 1993; In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 438 S.E.2d 501 (1993).*

Also, because the tests results that were recorded by Zain's assistants revealed an unusually high rate of error, there is no means of knowing if the results that were recorded were recorded correctly. Consequently, the conclusion that the false associations found in the records of the cases that were examined were "nonprobative" may be accurate, but is relatively meaningless.

With regard to tests that were reported but were not performed, in the *Donald Taylor* case, for example, tests results were reported for 127 separate tests. The raw data sheets, however, (where most test results are recorded) contain the results of only 65 tests. The results of the remaining 62 tests are not contained on the raw data sheets. Stolorow/Linhart Report, pp. 29-35.

The reasons for the missing data for 62 tests are either because the tests weren't performed, or, if they were performed, the results were not recorded on the data sheets that were preserved. Consequently, there appear to be 62 tests that were reported in the *Donald Taylor*

case where the results were either fabricated, unrecorded, or unpreserved. There is no means of determining whether the results in these 62 tests would be probative or not because there is no record of these tests actually being performed. Perhaps the greatest consequence of the reporting of nonexistent serology testing is the prospect that, had the tests actually been performed, an innocent prisoner may have been identified and exonerated.

There are numerous instances where the results on the raw data sheets of Zain's assistants contradict the results on the lab report or contradict the trial testimony. Stolorow/Linhart Report, pp. 34, 35, 39, 40, 41, 42, and 86. Because of the inaccuracy of many of the entries, there is no means of knowing what data is accurate and what is not. The fact that the data that remains in the ten cases that were reviewed doesn't show false associations that were "probative" does not mean that there were no probative errors.

Furthermore, the associations (or "matches") reported by Zain's assistants that appear to be correct also appear to be grossly overstated. Stolorow/Linhart Report pp. 10, 17, 18, 49, 66, 106, and appendix one, pp. 6, 16, and 21. The overstatement of probative value is one of the most frequently reported findings in the work of Fred Zain himself. *ASCLD/LAB Investigation Report, West Virginia State Police Crime Laboratory, August 6, 1993; In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 438 S.E.2d 501 (1993).*

Finally, in the ten cases that were reviewed in the Renewed Investigation, Stolorow and Linhart found one instance where the errors led to a false, but non-probative, association between the *defendant* and the biological evidence, and three cases where it appears that the errors led to a false, but non-probative association between the *victim* and the biological evidence. Four false associations in ten cases is, in some respects, a forty percent error rate -- and the forty percent

error rate is only in the limited serology records that remained in the lab to be reviewed. It is impossible to know what the results would be if, for example, the 62 missing results in the *Taylor* case had actually been tested and preserved.

Because numerous tests were either not performed or were not recorded, and because the significance of tests that were performed was frequently overstated, the finding that the four erroneous associations are non-probative is relatively meaningless.

IV. The Statutory Right To DNA Testing Is Not an Adequate Remedy Because In Many Cases the Biological Evidence Has Not Been Preserved Or Has Been Totally Consumed By Prior Testing.

The State erroneously suggests that the statutory right to DNA testing is an adequate remedy for the prisoners whose convictions were obtained by the tests and testimony of Zain's assistants. This suggestion is erroneous because in numerous cases the biological evidence was either totally consumed by prior testing (as in the fingernail scrapings in the *Alexander Farmer* case), or has long ago been lost or destroyed (as in numerous *Zain* cases). In instances where there is nothing left to test, the right to DNA testing is meaningless. The only appropriate remedy in such cases is to remove the untrustworthy testimony from consideration and weigh the sufficiency of the evidence that remains -- the remedy that was applied to Zain's cases in *In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 438 S.E.2d 501 (1993), and the remedy that should be applied to the work of Zain's assistants.

V. The Right To Attempt To Discredit the Serology Of Zain's Assistants On a Case-By-Case Basis Is a Practical Impossibility For Prisoners.

In its Response, the State suggests that the prisoners can obtain adequate relief by means of traditional habeas proceedings, conducted on a case-by-case basis. The massive amount of time, effort, and expense involved in the 1993 Investigation into the Serology Division, and the even greater amount of time, effort, and expense in the current Renewed Investigation of the Serology Division, demonstrate the impracticality, if not the impossibility, of a case-by-case approach. Furthermore, much as in the work of Fred Zain, the inadequacy of record keeping in the Serology Division will make it impossible to demonstrate the validity or the invalidity of the serology work in many of the individual cases where the work was performed by Zain's assistants.

In numerous individual cases, sufficient data was not recorded or preserved for an assessment of validity to be performed. *ASCLD/LAB Investigation Report, West Virginia State Police Crime Laboratory*, August 6, 1993, pp. 8 (reciting a series of cases for which "No record was found in the data sheets for any work done . . . " so that "No evaluation could be made.") Consequently, the only means of assessing the reliability of a serologist's work in the West Virginia Lab is the comprehensive review of a series of cases, the type of review that was performed in the 1993 Investigation and was performed in the current Renewed Investigation.

Because Zain's assistants were found in this Investigation to have committed every category of misconduct that Zain himself committed (although not as egregiously as Zain), the wrongs will have no meaningful remedy unless the same presumption of invalidity that was applied in Zain proceedings is applied in proceedings involving Zain's assistants.

Respectfully submitted,

WEST VIRGINIA PRISONERS WHOSE CONVICTIONS
WERE OBTAINED BY SEROLOGY LAB EVIDENCE,
By Counsel



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CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 20th day of March, 2006, I served a copy of the foregoing PRISONER'S BRIEF IN REPLY, by first class mail, upon:

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