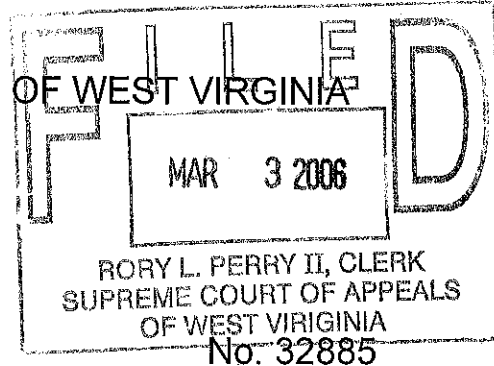


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

STATE'S RESPONSE TO PRISONERS'
OBJECTIONS TO REPORT OF SPECIAL
JUDGE THOMAS A. BEDELL

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The Renewed Investigation of the West Virginia State Police Crime Laboratory, Serology Division yielded no indication of intentional misconduct on the part of the other members of that division during the time period in question. This led to accurate findings, conclusions and recommendations by the Special Judge in his report to this Court.

For the following reasons the findings of fact, conclusions of law and recommendations of the Special Judge should be followed and the Prisoners' suggested alternatives should be rejected.

I. Background of Renewed Investigation.

In syllabus point three of *In re: An Investigation of the West Virginia State Police Laboratory, Serology Division*, 191 W.Va. 224, 445 S.E.2d 165 (1994) (hereinafter *Zain II*) the West Virginia Supreme Court of Appeals held that Serology Reports prepared by other members of the of the West Virginia State Police Crime Laboratory, Serology Division (hereinafter the "Serology Division"), were not subject to the invalidation and other strictures contained within *In The Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 438 S.E.2d 501 (1993) (hereinafter *Zain I*) because "...there was no evidence of a pattern or practice of intentional misconduct which would warrant systematic review..." of the other Serology Division employees work. The Honorable James O. Holliday presided at the circuit level in both matters.

Subsequently the West Virginia Supreme Court of Appeals recalled Judge Holliday in it's order of June 10th 1999, and required him to cause a thorough review of the policy, procedure and records of the Serology Division, to appoint counsel and conduct such proceedings as he deemed fit in furtherance of such review and render a written report to the West Virginia Supreme Court of Appeals. Said report was to contain findings of fact, conclusions of law and recommendations as to actions to be taken in light of the renewed investigation findings.

The order further provided guidance on the question of whether other serology division personnel engaged in intentional misconduct and identified a specific issue to be scrutinized centering around his finding in his *Zain II* report that "there is not a scintilla of evidence of intentional misconduct on the part of the other serologists who worked with Fred Zain." and a subsequent, apparently contradictory finding, by United States Magistrate Hogg in *Wilbert Thomas v. Trent*, Civil Action No. 2:98-0912 (S. D. W. Va., April 12, 1999). In that case another member of the Serology division of the Laboratory had, according to Magistrate Hogg, "falsely testified about nonexistent serology tests supposedly linking a criminal defendant to a crime at issue". The specific issues to be addressed by Judge Holliday were whether any nonexistent serology testing was reported and, if so, why the ASCLD team review and report of February 10, 1994 did not identify such.

Shortly after the West Virginia Supreme Court of Appeals had commissioned Judge Holliday's renewed investigation United States District Judge Copenhaver rejected Magistrate Hogg's recommended findings and explaining that false testimony about nonexistent serology tests which allegedly linked the defendant to the crime at issue simply did not occur. (Judgment Order in *Trent*, supra, at 45)

Judge Holliday nevertheless began the review process as ordered, appointed a special prosecutor and counsel for any interested prisoners, caused a review of the serology lab to ensue by Mark Stolorow, Executive Director of Orchid Cellmark, and, subsequently, Ronald Linhart, inspector for ASCLD/LAB (hereinafter Stolorow/Linhart

report). On November 25, 2003 the West Virginia Supreme Court of Appeals assigned Judge Thomas A Bedell to replace Judge Holliday and preside in this matter. On March 3, 2005, Special Judge Bedell appointed Philip W. Morrison, II as special prosecutor to replace William J. Charnock after his resignation from the case.

Special Judge Bedell received the Stolorow/Linhart report on December 2, 2004 and subsequently offered to hear testimony which was declined by the parties. Then, after review of the record and the Stolorow/Linhart report, found the report details no instances where nonexistent serology testing was intentionally reported by Serology Personnel other than Zain. Special Judge Bedell cited the reviewers' conclusions that "...errors found by this investigation were frequent, recurring and multi-faceted, spanning the spectrum of examiners. *However, it must be stressed* that in only one instance does it appear that erroneous procedures, documentation, reporting or testimony led to a false, *but non-probative* association between a defendant and the biological evidence." (Emphasis added by Special Judge Bedell) and "In three cases, it appears that erroneous procedures, documentation, reporting or testimony led to the false, but non-probative, association between a victim and the biological evidence." (Emphasis added by Special Judge Bedell)

Special Judge Bedell further cited the reviewers' conclusion that "...there is a significant and qualitative difference between the errors discovered in this investigative review and the shocking and egregious misconduct documented in *Zain I*. The intentional and willful malfeasance and reckless disregard of both truth and good

scientific practice exhibited by Fred Zain were *not* found to exist in these cases among the remaining serologists in the laboratory.” (Emphasis added by the reviewers) and, further, that the reviewers concluded that the serological results in the tests actually conducted appeared to be substantially correct and the errors noted could have been caused by a wide variety of factors rather than due to any particular motive, intent or design.

Special Judge Bedell found that “there is not a scintilla of evidence of intentional misconduct on the part of the other serologists who worked with Fred S. Zain as suggested by Magistrate Hogg’s report which began this renewed investigation” and that errors found were non-probative and did not significantly compromise prosecution of the reviewed cases. He further found, based upon the joint conclusions of the reviewers, no evidence of probative error which would change the result of the reviewed prosecutions.

Special Judge Bedell also found no evidence of a pattern of actions by serologists or errors attributable to any intentional or bad motive and recommended that the West Virginia Supreme Court of Appeals continue to follow the principles set forth in *Zain II* wherein the Court declined to subject the work of the other serologists to the invalidation and other strictures set forth in *Zain I*. Noting that Habeas Corpus remains a viable alternative for any affected prisoners if said prisoner can show that false evidence was offered against them in addition to satisfying the remaining five factors detailed in *Zain I* he further recommended the Renewed Investigation be closed.

II. The Prisoners Mistakenly Mischaracterize the Findings of the Independent Experts in Claiming that Zain's Assistants Committed Misconduct.

The Prisoners claim that Independent Expert Mark Stolerow Found that Zain's Assistants committed every single category of misconduct that Fred Zain committed. This is not the case. Mark Stolerow (hereinafter Stolerow) clearly does not label the work of the other lab personnel during the period in question as misconduct. (Stolerow/Linhart report at 103) Mischaracterization of errors, as Stolerow terms them, connotes that the other lab personnel intentionally committed them.

As noted by Special Judge Bedell the Independent Experts found that the "...intentional and willful malfeasance and reckless disregard of both truth and good scientific practice exhibited by Fred Zain were *not* found to exist in these cases among the remaining serologists in the laboratory." and "...that the serological results in the tests actually conducted appeared to be substantially correct and the errors that were noted could have been caused by a wide variety of factors rather than due to any particular motive, intent or design.". (Stolerow/Linhart report at 109,110) Indeed, the Independent Experts further stated that they did not ascribe any particular motive, intent or design to the scientists in regard to their errors.

These results are significantly different than the conclusion of the American Society of Crime Laboratory Directors (hereinafter ASCLD) that Fred Zain committed a pattern and practice of misconduct. The basis of that conclusion, in summary, was a systematic practice of deception in a variety of forms.

In that the irregularities discovered in both reviews of the work of the other members of the Serology Division are not deemed, by the Independent Experts in either case, misconduct it would hardly be equitable to paint the other Serology Division personnel with the same brush as Fred Zain nor would it be appropriate to subject their work to the same strictures.

III The Conclusions and Recommendations of the Special Judge do not minimize or ignore errors made by other members of the Serology Division.

The Prisoners also claim that Special Judge Bedell concludes that problems identified in the Renewed Investigation should be ignored and that their work should not be validated by the reviewers' findings that errors discovered were non-probative. Nothing contained in Special Judge Bedell's report lends itself to either proposition; rather, the report provides direction to any prisoners who wish to take to task the evidence brought against them by referencing the newly discovered evidence standard previously enunciated in both Zain I and II.

Specifically as to the latter the Special Judge found no evidence of probative error which would change the result of the prosecutions studied. This finding does not validate the work of the other members of the Serology Division nor does it preclude relief where warranted. It merely places the additional requirement, on any collaterally attacking prisoner, of showing that a particular serologist offered false evidence against said prisoner. Such a requirement is entirely consistent with the principles found in Zain I and II as well as the long standing body of law upon which they are based.

IV. The Conclusions of the Independent Experts Fail to Support the Prisoners Contentions That Other Serology Division Personnel Reported Nonexistent Serology Tests and/or Committed Other Misconduct.

The conclusions of the Independent Experts (beginning at 109) include the language upon which Judge Bedell bases his opinion. Of definitive note are the following statements:

“The errors found by this investigation were frequent, recurring and multi-faceted, spanning the spectrum of examiners. However, it must be stressed that in only one instance does it appear that erroneous procedures, documentation, reporting or testimony led to a false, but non-probative association between a defendant and the biological evidence.” and “In three cases, it appears that erroneous procedures, documentation, reporting or testimony led to the false, but non-probative, association between a victim and the biological evidence.”

“...there is a significant and qualitative difference between the errors discovered in this investigative review and the shocking and egregious misconduct documented in *Zain I*. The intentional and willful malfeasance and reckless disregard of both truth and good scientific practice exhibited by Fred Zain were **not** found to exist in these cases among the remaining serologists in the laboratory.” (Emphasis added by the reviewers) and, further, that the reviewers concluded that the serological results in the tests actually conducted appeared to be substantially correct and the errors noted could have been caused by a wide variety of factors rather than due to any particular motive, intent or design.

Nowhere in the language of those statements or the remainder of the conclusions section of the report do the Independent Examiners set forth any claim or protestation that nonexistent serology testing was reported. Additionally Stolerow, in his separate summary findings, points out errors in documentation omissions, conflicts and genetic typing results and further points out the lack of entries on data sheets which correspond to reports. He does not, however, make the claim that nonexistent serology testing was reported. Nor does Linhart.

The Prisoners cite examples where they claim Stolerow found non-existent testing was reported. (Prisoners Objections at 7, 8 and 9) It is important to note however that these instances are not the product of a joint conclusion of the Independent Experts; rather, they seem to be the subject of disagreement between them.

The Prisoners cite the cases of *State v. Farmer*, *State v. Garrett Louk* and *State v. Calvin Gray and Karl Finney*.

In *Farmer* the Prisoners claim that nonexistent reporting occurred in this case because Stolerow notes that "...no test results occurred or, at least, recorded." (Stolerow/Linhart report at 17) Stolerow further notes that no genetic markers for certain items were detected on oral slides and a rug. Stolerow did not claim that nonexistent serology testing was reported as do the Prisoners rather he makes the distinction that results may have not been recorded. While this poor documentation may have been an unacceptable practice it does not rise to the level of an intentionally deceptive practice which is the measuring stick applied in *Zain I and II*.

Another example, proffered by the Prisoners is Stolerow's claim that "Reported Blood Group Tests Were Fabricated". Linhart disagrees, however, and states his belief "...that it is more likely that the error, including the Lewis types on bloodstains, were the result of inadequate care in preparation and review of the report than fabrication of results as suggested by Mr. Stolerow." (Stolerow/Linhart report at 20, 21) Further,

Stolerow opines that it does not appear that erroneous procedures, documentation, reporting or testimony led to a false association in this case. False association meaning an incorrect association between the defendant and the biological evidence.

Regarding *Farmer* it should be noted that Linhart observes that the vast majority of items were recorded by Fred Zain not other members of the laboratory. Perhaps testimony would have developed these points. Further, he could have developed his other claims of unethical practices, false portrayal of male population frequencies and repeated overstatement of laboratory results in favor of the prosecution. If this Prisoner remains convinced that he was somehow prejudiced by the Serology Division results on the issue of identification despite Stolerow's finding he could take advantage of the statutory right to DNA testing contained within West Virginia Code § 15-2B-14.

In *Louk* the Prisoners find two more purported examples of nonexistent results being reported in the Stolerow review notes wherein he points out the lack of detected ABO results. (Stolerow/Linhart report at 47, 48) This appears to be a continuation of Stolerow's penchant of claiming data was nonexistent despite being aware that the lab at the time did not make a practice of recording ABO typing data as noted by Linhart. (Stolerow/Linhart report at 17) Again, Stolerow opines, while there did appear to be a non probative false association between the victim and some of the particular items, that it does not appear that erroneous procedures, documentation, reporting or testimony led to a false association in this case with the defendant. (Stolerow/Linhart report at 51)

Finally, in *Gray and Finney Stolerow* makes the observation that testing for one certain coat revealed no PGM result but does not take mention that the Serology Division analyst may have failed to document the late developing results different than those initially indicated or a subsequently run retest. Further, in like manner he appears to assume the lack of exactly corresponding entries on raw data sheets meant no ABO, ESD or AK results with regard to certain pants that were tested. As we have seen the Serology Division, at the time, did not make a practice of recording ABO typing data according to Linhart. (Stolerow/Linhart report at 17) The ESD and AK results may have been transposed incorrectly or any number of logical rational explanations other than the Prisoners claims of reporting of nonexistent serology testing. Nonetheless Stolerow uses these observations as a basis for his assertion that; "The practice of grouping evidence and genetic marker test results in laboratory reports and testimony when not all markers were detected for all items is an unethical practice." (Stolerow/Linhart report at 66)

Although Stolerow's proposition is sound in principle, as demonstrated above, his underlying assumptions do not pass muster. Linhart appears have come to a similar conclusion also when he makes the finding that; "...after reviewing the defects described by Mr. Stolerow in the cases herein reported, I still do not conclude that there is evidence of misconduct as we define it." and "In this context we interpreted misconduct to mean the intentional misrepresentation of analytical results or opinions for the purpose of increasing the strength of the evidence against the defendant."

Interestingly there was what Stolerow terms an erroneous association between defendant Finney and certain pillow cases in this matter as opposed to any of the items referenced above, however, Stolerow indicates there did not appear to be any testimony in regard to that association.

V. The Special Judge Properly Declined to Invalidate the Work in Question on Reliability Grounds, Unseal Records and Reports of Other Investigations of the Crime Laboratory and Adopt the Prisoners Proposed Findings of Fact, Conclusions of Law and Recommendations.

As previously mentioned the focus of this investigation required the determination of whether lab personnel, other than Fred Zain, reported non-existent serology testing and, if true, why the ASCLD team review and resulting report to the Supreme Court of February 10, 1994 did not identify such. (Supreme Court Administrative order of June 10, 1999) In light of the facts and circumstances such findings cannot be reasonably made. Therefore it would be inappropriate to mandate sweeping changes and initiatives based upon this case.

A. Reliability

The Prisoners would have this Court ignore the findings, conclusions and recommendations of the Special Judge and the judgment of various Trial Courts by declaring that the work of the whole Serology Division, during this period, fails to meet the Standards of *Daubert* and *Frye*. Long has the Trial Court been the 'gatekeeper'

regarding the admission in West Virginia Courts of scientific evidence and as such decisions are made by the presiding judges with abuse of discretion as the standard of review pursuant to syllabus point three of *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993). To do as the Prisoners suggest would have the practical effect of having the work of the other members of that Serology Division imbued with the same presumption of invalidity as Zain without proof of intentional misconduct.

The State counters that, if successful in a collateral attack, the opportunity would then exist for a Prisoner to convince a Trial Court of the efficacy of the Prisoners arguments against reliability of the serology testing in question before or during any retrial of that particular case.

B. Unsealing Records of other Investigations into the Crime Laboratory.

The Special Judge found these records to be irrelevant to the Renewed Investigation after in camera review. Further the Prisoners references to the Todd McDaniel case as support for unsealing these records are simply untenable because this particular instance of intentional misconduct was a technician in another part of the lab not currently under scrutiny, and who was exposed by the lab's own, ASCLD required, Quality Control protocols.

C. The Prisoners Proposed Findings of Fact, Conclusions of Law and Recommendations.

Absent compelling evidence to the contrary there exists no reason to adopt the Prisoners findings because, while more errors have been discovered, the Findings and Conclusions of the Independent Examiners do not warrant it. Additionally, intentional misrepresentation was not found to exist in these cases among the remaining serologists in the laboratory by the reviewers, either in the 1994 ASCLD report or the current report. Therefore the work of the other serology division personnel does not need to be imbued with a *Zain I* type presumption of invalidity because, as can be seen from the record and the previous findings and conclusions, there was no infraction, intentional or accidental, of sufficient magnitude to require such drastic measures.

It is also illogical to assume that the Prisoners proposal to remove the Laboratory from its current location would decrease the potential for deception or improve the likelihood of successfully legislating morality. The potential for human error will exist regardless of whether the lab is operated under the aegis of the West Virginia State Police or any other agency and independent laboratories are no less immune from misconduct merely by virtue of being independently run. Similarly the results of both the original and renewed investigations do not demand creation of an independent supervisory board, regardless of suggested makeup of such, or requiring an "innocence" project.

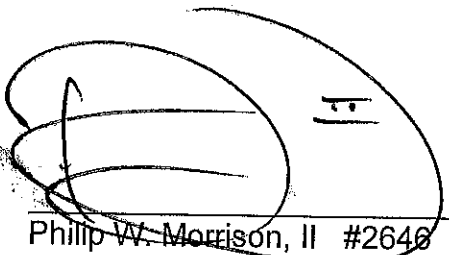
These types of oversight are particularly not warranted where there is a statutory right, found in West Virginia Code § 15-2B-14 , to DNA testing for any Prisoner convicted of a felony upon a showing that the perpetrators identity was, or should have

been, a significant issue in their criminal trial. Finally; to suggest the Court mandate a specific type of continuing education for Police and Prosecutors or apply rules for litigators (*Brady & Kyles*) to Lab personnel, on the basis of the Renewed Investigation seems ill advised given the findings.

Reply to the Relief Requested by the Prisoners

The findings of the Stolorow/Linhart report are not inconsistent with the 1994 ASCLD report regarding the Serology Division and these reports contain no compelling information establishing that nonexistent serology testing was intentionally reported. Further, based upon the foregoing, Judge Holliday's Zain // recommendation that the work of the other Serology Division personnel not be subject to the invalidation and other strictures contained within In The Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 438 S.E.2d 501 (1993), as well as Special Judge Bedell's nearly identical finding in the instant matter, militate against adopting the relief sought by the Prisoners. Therefore the State respectfully requests that relief sought by the Prisoners be denied by the Court.

Respectfully submitted,
The State of West Virginia and
The West Virginia State Police
By Counsel



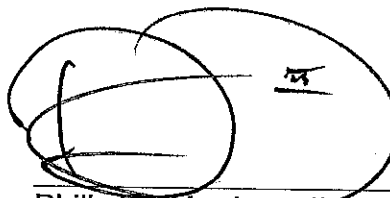
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CERTIFICATE OF SERVICE

I Philip W. Morrison, II, do hereby certify that on the 3rd day of March, 2006, I served a copy of the foregoing RESPONSE TO PRISONERS' OBJECTIONS TO REPORT OF SPECIAL JUDGE THOMAS A. BEDELL, by first class mail upon:

George Castelle
Kanawha County Public Defender
Counsel for the Prisoners
P. O. Box 2827
Charleston, WV 25330

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by 'W. Morrison, II'. The signature is written over a horizontal line.

Philip W. Morrison, II