



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' OBJECTIONS TO REPORT OF
SPECIAL JUDGE THOMAS A. BEDELL

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In the Renewed Investigation of the State Police Crime Lab, independent expert Mark Stolorow found that every category of misconduct that was committed by Fred Zain was also committed by Fred Zain's assistants. The misconduct by Zain's assistants includes numerous examples of falsely reporting test results in instances where, in fact, no results were obtained.

Despite the findings of repeated instances of fabrication by Zain's assistants, the Report of the Special Judge erroneously fails to acknowledge a single instance of it. Instead, the Special Judge inexplicably states what appears to be the opposite: that there is not a scintilla of evidence of intentional misconduct on the part of Zain's assistants.

For the following reasons, the findings of fact, conclusions of law, and recommendations contained in the Report of Special Judge Bedell are clearly erroneous and should be rejected. The findings, conclusions, and recommendations proposed by the prisoners, as modified herein, should be adopted in its place.

I. Background of Renewed Investigation.

The current Investigation is a Renewed Investigation of the serology division of the West Virginia State Police Crime Lab. This Renewed Investigation is a re-opening of the original court-ordered Investigation of the Lab in 1993 and 1994. The Investigation in 1993 and 1994 resulted in two published opinions, one addressing the work of Tpr. Fred Zain, and one addressing the work of Fred Zain's assistants. *In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 438 S.E.2d 501 (1993) (finding extensive fabrication of evidence by Fred Zain and invalidating all of Zain's tests and testimony), and *In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 191 W.Va. 224, 445 S.E.2d 165 (1994) (finding occasional errors in the work of Zain's assistants, but no pattern or practice of intentional misconduct and declining to invalidate their tests and testimony).

The Renewed Investigation was ordered by this Court to re-examine the finding in 1994 that the work of Zain's assistants contains only minor and insignificant errors and to determine if Zain's assistants falsely reported serology testing when, in fact, the tests had not been performed. The Supreme Court of Appeals recalled Judge James O. Holliday to preside over the Renewed Investigation. Administrative Order, *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*, West Virginia Supreme Court of Appeals, June 10, 1999.

Special Judge Holliday subsequently resigned and was replaced by Special Judge Thomas Bedell. Administrative Order, *Temporary Assignment of the Honorable Thomas A.*

Bedell to the Thirteenth Judicial Circuit to Preside in the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division, West Virginia Supreme Court of Appeals, November 25, 2003.

As the primary component of the Renewed Investigation, the Special Judge designated an independent expert, Mark Stolorow, Executive Director of Orchid Cellmark Laboratories, to examine the records of the work of Zain's assistants.¹ The Special Judge then authorized Ronald Linhart, one of the independent experts in the original 1993-94 Investigation, to review Mr. Stolorow's proposed draft and to either join in the draft or submit his own report.

Stolorow and Linhart merged their work and issued a combined Report on December 2, 2004. The Stolorow/Linhart Report examines 10 cases that involve the tests and trial testimony of Zain's assistants. Of the 10 cases that were examined, two involved tests and trial testimony by Zain's assistants while working under Zain's supervision. The remaining eight were completed by Zain's assistants in the years after Zain's departure from the laboratory in 1989, during a period of time that Tpr. Ted Smith was head of the serology division.

In certain instances, Mr. Linhart disagreed with Mr. Stolorow's characterization of some of the work by Zain's assistants as "fabrication." Linhart and Stolorow also disagreed at times on the definition of the term "misconduct." Mr. Linhart sets forth his separate analysis on pages 106-08 of the combined Report. Stolorow and Linhart both agree with the conclusions set forth in their combined Report.

¹ The Report of Special Judge Bedell erroneously states that the independent expert, Mark Stolorow, was retained by counsel for the prisoners. In fact, the Administrative Order establishing the investigation directed Special Judge Holliday, Judge Bedell's predecessor, to appoint an independent expert and Special Judge Holliday did so, upon consulting with counsel for both the prisoners and the State. Counsel for the prisoners, through Public Defender Services, shared in the costs of the independent expert, but both of the experts, Mark Stolorow and Ronald Linhart, were independent experts authorized by the Court, rather than private experts retained by one of the parties.

II. Independent Expert Mark Stolorow Found That Every Single Category of Misconduct That Was Committed by Fred Zain Was Also Committed by Fred Zain's Assistants.

In the 1993 Investigation of the Serology Division, Fred Zain was found to have committed eleven different categories of misconduct:

- (1) overstating the strength of results;
- (2) overstating the frequency of genetic matches on individual pieces of evidence;
- (3) misreporting the frequency of genetic matches on multiple pieces of evidence;
- (4) reporting that multiple items had been tested, when only a single item had been tested;
- (5) reporting inconclusive results as conclusive;
- (6) repeatedly altering laboratory records;
- (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested;
- (8) failing to report conflicting results;
- (9) failing to conduct or to report conducting additional testing to resolve conflicting results;
- (10) implying a match with a suspect when testing supported only a match with the victim;
- (11) reporting scientifically impossible or improbable results.

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).

In the Renewed Investigation of the serology division, independent expert Mark Stolorow prepared a table that itemizes the eleven categories of misconduct identified in Fred Zain's work in the 1993 Investigation. In comparing the eleven categories of misconduct in Zain's work to

the work of Zain's assistants, Stolorow found that, collectively, the misconduct committed by Zain's assistants was not as egregious as the misconduct committed by Zain. Yet Stolorow nevertheless made the significant finding that every one of the eleven categories of misconduct committed by Zain was also committed by Zain's assistants. Stolorow/Linhart Report, at 101-02.

In one case alone, *State v. Garrett Louk*, Tpr. Myers was found to have committed seven of the eleven categories of misconduct committed by Zain. Tpr. Myers was found to have committed six of the eleven categories of misconduct in the *Calvin Gray* and *Karl Finney* cases. Stolorow/Linhart Report, at 101-02. (The work on both of these cases was conducted in the years after Zain had departed the lab and accepted a position in Texas.)

For the ten cases that were reviewed in the Renewed Investigation, the Stolorow/Linhart Report catalogues a long list of deficiencies in the work of Zain's assistants, including:

- (1) Lack of concordance, missing data, discrepancies and conflicting data (pp. 5-7, 12-16, 29-36, 38-44, 52-53, 56-62, 68-77, 84-86, 88-89, App. *Thomas* 7-9, App. *Bush* 8-9)
- (2) Inadequate standards and controls (pp. 8, 17, 36, 45, 53-54, 62-63, 77-78, 87. App. *Thomas* 9-12)
- (3) Misreported or non-reported non-concordant results, altered results, and/or erroneous testimony (pp. 8-9, 45-48, 55, 63-65, 78-79, App. *Bush* 4-8, *Bush* suppl. 2-5, *Bush* amended suppl. 2-5)
- (4) Inaccurate portrayal of male population frequencies (pp. 9-10)
- (5) Grouping evidence exhibits, overstating actual results (pp. 17-18, 48-49, 65-66, 79-81)
- (6) Frequency errors and/or overstatement (pp. 18, 49, App. *Thomas* 14-16)
- (7) Fabrication of Lewis Blood Group Tests (pp. 18-20, App. *Thomas* 12-14)
- (8) Unrecorded exclusions and/or possible unrecorded exclusions and non-concordant test results (pp. 37, 67, 78-79)

Stolorow and Linhart's Report was provided to the State Police for an opportunity for the Lab to respond and rebut its findings. It is significant to note that, upon reviewing the Stolorow/Linhart Report, the State Police did not contest or rebut a single finding. See *Response of West Virginia State Police to Combined Report of Mark D. Stolorow and Ronald A. Linhart*, January 13, 2005 (stating that, upon reviewing the Stolorow/Linhart Report, the West Virginia State Police "does not respond to specific cases," and asserting that "the issues identified as problematic procedures in the Lab did not adversely impact any criminal trials.")

Consequently, Zain's assistants did not even rebut the finding that they committed every single category of misconduct that Zain himself committed. The Special Judge's conclusion that the Stolorow/Linhart Report contains not a scintilla of evidence of intentional misconduct on the part of Zain's assistants is clearly erroneous.

III. Fred Zain's Assistants, On Numerous Occasions, Reported And Testified To Nonexistent Serology Results.

Of the numerous findings of misconduct committed by Fred Zain, one of the most serious was the finding that Zain reported results of tests when, in fact, no results had been obtained. The principle focus of the Renewed Investigation was to determine whether Zain's assistants similarly reported the results of serology tests when no results had been obtained. The focus of the Investigation is explicitly stated in the Administrative Order of this Court that established this Investigation:

Whereas, the issues regarding testimony by troopers about results in allegedly nonexistent serology testing have cast a renewed shadow of doubt on the State Police Laboratory Serology Division. Whether there was a practice of reporting a result for a

test that was not performed and whether the newly-raised questions represent another systemic procedural deficiency at the Serology Division is unknown.

Administrative Order, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, West Virginia Supreme Court of Appeals, June 10, 1999, at 6.

Consequently, this Court ordered the Special Judge to determine if nonexistent serology results were reported by Zain's assistants and, if so, to investigate why the previous Investigation in 1993-94 did not identify this matter. Administrative Order, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, West Virginia Supreme Court of Appeals, June 10, 1999, at 7.

During the course of the Renewed Investigation, Mark Stolorow found repeated instances of test results reported by Zain's assistants, when, in fact, no results had been obtained. Of the numerous instances of nonexistent serology testing contained in the Report, five examples are set forth herein. Many more exist throughout the complete Report.

Example No. 1: (State v. Alexander Farmer)

On Page 17 of the combined Report, Stolorow states:

A complete blood profile was reported for two evidence items for which, according to the serology worksheet, no test results were observed or, at least, recorded. Trooper Smith's laboratory report dated February 9, 1990, page 2, *lists results detected for a group of 12 items of evidence that includes a full genetic profile for 8 genetic markers*. The group included oral slides and a rug. *No genetic marker results were detected on those items.*

(emphasis added)

Example No. 2: (*State v. Alexander Farmer*)

On page 18 of the Report, Stolorow states, in the title to Section E: "*Reported Lewis Blood Group Tests Were Fabricated.*" The Report notes that the State Police often excused the fabrication of Lewis types by explaining that they used Lewis terminology as a substitute for denoting secretor status. In this instance, however, the excuse does not apply, because the claimed testing was not performed on secretions, it was performed on bloodstains. As the Report explains, "there is no scientific explanation to excuse the fabrication by Trooper Smith of Lewis testing results on bloodstains. Report, at 19.

Example No. 3: (*State v. Garrett Louk*)

On page 47 of the Report, Stolorow states:

Trooper Myers stated in his laboratory report and testimony that the bloodstain samples from this item of evidence were consistent with the victim, Harry Powell [RT 298]. However, *the laboratory report and testimony of ABO O were contradicted by both the raw data worksheet dated June 22, 1990 and the serology worksheet which show that no ABO results were detected.*

(emphasis added)

Example No. 4: (*State v. Garrett Louk*)

On page 48 of the Report, Stolorow states:

The laboratory report of Trooper Myers, dated December 10, 1990, and his testimony stated that the steering wheel, beer carton, door opening and running board contained the following genetic markers: ABO O, PGM 1+, ACP BA and AK 2-1. *In fact only the steering wheel shows recorded data for ABO O, the other three evidence items show that ABO tests failed to detect any ABO result (door opening and running board) or no results whatever were recorded (beer carton).*

(emphasis added)

Example No. 5: (State v. Calvin Gray and Karl Finney)

On page 65 of the Report, Stolorow states:

The laboratory report of Trooper Myers, dated August 21, 1991, stated that human bloodstains were identified on the pants, coat, scarf and leaves. These items were reported as a group with results for all of those items in the group listed for each of the genetic markers ABO, PGM, ACP, AK and ADA. . . . *In fact, the notes revealed that for the pants, no ABO results were detected, no ESD results were detected, and AK results were crossed out . . . The coat was also included in that group of evidence items but the coat was, in fact, tested twice for PGM and no PGM result was detected either time.*

(emphasis added)

Despite the directives set forth in this Court's Administrative Order, and despite the multiple findings of nonexistent serology testing by Zain's assistants, the Report of the Special Judge does not contain a single acknowledgment that nonexistent serology testing was reported. In its failure to acknowledge that Zain's assistants reported nonexistent serology testing, the Report of the Special Judge is clearly erroneous.

IV. The Report of the Special Judge Fails to Acknowledge Numerous Additional Examples of Misconduct.

In addition to the repeated examples of reporting and testifying to nonexistent serology testing, the Stolorow/Linhart Report identifies numerous other areas of what appears to be intentional misconduct, including unethical practices in the *Alexander Farmer* case, contradictory testimony of Trooper Smith in the *Farmer* case, false portrayal of male population frequencies, and repeated overstatement of laboratory results in favor of the prosecution.

A. Unethical practices in the *Alexander Farmer* case.

In reviewing the *Alexander Farmer* case, Stolorow states:

The practice of grouping evidence and genetic marker test results in laboratory reports and/or testimony when not all markers were detected for all items is an unethical practice.

Stolorow/Linhart Report, at 18.

The practice of stating the frequencies of the bloodstained items by using the frequency of the victim's complete blood genetic marker profile is also an exaggeration of the weight of the evidence and has been described as an unethical practice.

Stolorow/Linhart Report, at 18.

... there is no scientific explanation to excuse the fabrication by Trooper Smith of Lewis testing results of bloodstains.

Stolorow/Linhart Report, at 19.

B. Contradictory Testimony of Trooper Smith in the *Farmer* case.

Additionally, in the *Farmer* case there are other examples of what appears to be intentional misconduct. For example, Trooper Smith foreclosed habeas relief for Farmer by his testimony at trial, by his habeas affidavit, and by his habeas testimony, where Trooper Smith swore that he had personally observed and verified Zain's results. Despite this sworn testimony, in later Grand Jury proceedings against Fred Zain, Trooper Smith appears to concede precisely the opposite: that in actuality, it was the *Farmer* case that first alerted Trooper Smith to the possibility of Zain's fraud.

The details of this disturbing testimony are as follows:

At Alexander Farmer's trial in 1990, Tpr. Smith testified that he personally tested the fingernail scrapings of the victim and obtained genetic markers consistent with the blood of the

victim. (Fingernail scrapings are significant in cases where the victim, in defending herself, may have scratched or clawed the assailant and retained testable evidence under her nails. In this regard, an accurate finding of the victim's own blood in her fingernail scrapings is ordinarily not material to guilt or innocence. On the other hand, an inaccurate report could fail to identify the presence of blood from a third party, a matter that could exonerate an innocent defendant.) As Tpr. Smith testified at trial:

Q: [by the prosecution] The--you examined--did you do some testing of fingernail scrapings?

A: [by Tpr. Smith] Yes, sir, I did.

Q: Fingernail clippings?

A: Yes, sir, that was part of the evidence submitted to us.

Q: Were you able to identify genetic markers or blood--strike that. Were you able to identify any bodily fluids upon that evidence?

A: Yes, sir. We identified blood on the fingernail clippings and that blood was consistent with the genetic markers of [the victim].

Trial transcript, July 27, 1990, *State v. Farmer*, Circuit Court of Jefferson County, No. 89-F-21, at 239.

Because Fred Zain also participated in the serology testing in this case, upon the disclosure of Zain's misconduct in 1993, Farmer filed a *Zain* petition for habeas corpus relief. *State ex rel. Farmer v. Trent*, Circuit Court of Jefferson County, 94-P-13. On July 4, 1994, Tpr. Smith signed an affidavit for use in the habeas proceeding. In the affidavit Smith confirmed that he participated in the serological testing that Zain reported:

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

At the habeas hearing on November 7, 1994, Tpr. Smith again testified that he personally witnessed the testing of the fingernail clippings:

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

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

Transcript, November 7, 1994, *State ex rel. Farmer v. Trent*, Circuit Court of Jefferson County, 94-P-13, at 13-14.

Based in significant part on Trooper Smith's confirmation of the test results as set forth in his affidavit and habeas testimony, Judge Steptoe declined to invalidate the serology testimony in this case and denied habeas relief. As Judge Steptoe stated:

Trooper Ted Smith personally participated in all of the serological testing that occurred in connection with the items submitted in this case.

Final Order, January 26, 1996, *State ex rel. Farmer v. Trent*, Circuit Court of Jefferson County, 94.

On January 9, 1998, Tpr. Smith was called to testify before the Kanawha County Grand Jury that was convened by the Special Prosecutors to consider criminal charges against Fred Zain. Tpr. Smith was asked if there was a "specific occurrence or problem" that alerted him to the untrustworthiness of Zain's work. In contrast to his trial testimony, affidavit, and habeas testimony in the *Farmer* case, where Tpr. Smith personally verified Zain's results, in the Grand

Jury proceeding Tpr. Smith stated the opposite: that it was the *Farmer* case that first alerted him to the possibility of Zain's fraud. As Smith testified to the Grand Jury:

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

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

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

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

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

Testimony of Ted Smith, January 9, 1998, *In re: Grand Jury Proceedings*, Circuit Court of Kanawha County, at 28-29; unsealed for use in this Investigation by Order Granting Disclosure of Grand Jury Proceedings, August 16, 1999, *State v. Zain*, Circuit Court of Kanawha County, No. 98-F-106.

Trooper Smith's conflicting testimony about the testing in the *Farmer* case is deeply troubling because in the *Farmer* trial and *Farmer* habeas Trooper Smith did not reveal a hint of doubt about Zain's work, and Farmer was denied habeas relief on the basis of Trooper Smith's verification of Zain's work. Yet, when testifying before the Zain grand jury, Smith conceded that he could not verify the work and, in reality, had grave doubts about it.

Upon a review of this conflicting testimony, the Stolorow/Linhart Report states,

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

Stolorow and Linhart Report, at 27.

It is significant to note that Trooper Smith (now Captain Smith) is now head of the entire State Police Crime Laboratory, not just head of the Serology Division. As such, Trooper Smith, as well as counsel for the State, has had a full opportunity to review and comment upon Stolorow and Linhart's "unsettling questions as to whether or not Trooper Smith was completely forthcoming" in his serology testimony. The discussion of Trooper Smith's testimony in the *Farmer* case covers seven full pages of the Stolorow and Linhart Report. Additionally, Stolorow and Linhart note that Trooper Smith's questionable testimony was "pivotal" in the Circuit Court's decision to deny habeas relief.

Upon receiving the opportunity to explain the conflicting testimony, Trooper Smith chose not to do so. See *Response of West Virginia State Police to Combined Report of Mark D. Stolorow and Ronald A. Linhart*, January 13, 2005 (stating that, upon reviewing the combined Report, the West Virginia State Police "does not respond to specific cases," and asserting that "the issues identified as problematic procedures in the Lab did not adversely impact any criminal trials.")

Despite the extensive discussion of Trooper Smith's testimony in the Stolorow/Linhart Report, and despite the failure of the State Police to offer any denial or any explanation of the apparent wrongdoing contained in it, the Report of the Special Judge contains no discussion of the testimony of Trooper Smith at all. Instead the Report of the Special Judge erroneously states that "Based on the Stolorow/Linhart Report, the undersigned finds that there is not a scintilla of

intentional misconduct on the part of the serologists who worked with Fred S. Zain . . . " Report of Special Judge Bedell, September 23, 2005, at 5.

C. False Portrayal of Male Population Frequencies.

The Stolorow/Linhart Report also gives numerous examples of false mathematical calculations that erroneously enhance the strength of the State's evidence. Stolorow characterizes this testimony as a "hoax . . . perpetrated not only by Fred Zain . . . but also by Troopers Ted Smith and H.B. Myers":

The fallacy that the male population has only half of the percentage of a particular trait that is demonstrated in the entire population is a hoax that was perpetrated on West Virginia juries during this period in history not only by Fred Zain but also by Troopers Ted Smith and H.B. Myers. This practice is an enhancement of frequency statistics which is scientifically impermissible and which has the effect of making the circumstantial evidence against the defendant more damning than would otherwise occur.

Stolorow/Linhart Report, at 10 (*State v. Blevins*).

The finding, in the Stolorow/Linhart Report, of a "hoax that was perpetrated on West Virginia juries . . . by Troopers Ted Smith and H.B. Myers" flatly contradicts the finding in the Report of the Special Judge that the Stolorow/Linhart Report contains not a scintilla of intentional misconduct.

D. Repeated Overstatement of Laboratory Results in Favor of the Prosecution.

The Stolorow/Linhart Report contains an almost endless list of examples of overstated and exaggerated testimony in favor of the prosecution. It is difficult to find a single example of

the opposite: that is, understated testimony in favor of the defense. The numerous examples of overstated testimony in favor of the prosecution fall into a wide array of categories:

- inaccurate portrayal of male population frequencies (page 9)
- grouped items of evidence reported, overstating actual results (pages 17, 48, 65, 79)
- frequencies of genetic marker results overstated (page 18)
- reporting Lewis blood group tests that were fabricated (pages 18)
- failure to report conflicting data and failure to report exclusions (pages 37, 45, 63, 67, 78)

It should be immediately apparent that these extensive errors, if truly unintentional, would fall at random across the spectrum -- that is, unintentional errors would occur as frequently in favor of the defense as they would occur in favor of the prosecution. The sheer imbalance in errors by Zain's assistants, almost in every instance in favor of the prosecution, is compelling evidence of intent -- certainly enough evidence to establish the error in the finding of the Special Judge that there is not a "scintilla" of evidence of intentional wrongdoing.

V. The Finding That The Work of Zain's Assistants Is Less Egregious Than Zain's Should Not Provide a Basis for Disregarding The Defects in Their Work.

The Special Judge correctly notes that the Stolorow/Linhart report found that there is a significant qualitative difference between the errors committed by Zain and the errors committed by Zain's assistants. September 23, 2005, Report, p. 5. The Special Judge is erroneous, however, in his conclusion that the problems identified in the Renewed Investigation should be ignored.

The threshold set by Zain was extraordinarily low. The defects in Zain's work were so egregious that Zain, to this day, has international notoriety. *See, e.g.*, L'Appel Pour Un Moratoire ("le scandale de Fred Zain"), <http://www.cdinet.demon.co.uk/frmorat.htm>; Le dossier de Hank Skinner ("le syndrome de Fred Zain"), <http://www.hanskinner.org>; Wenn Experten lügen ("Fred Zain war forensischer Experte der Staatspolizei von West Virginia"), <http://www.initiative-gegen-die-todesstrafe.de/experten.htm>; Il Terzo Secolo ("un perito chimico della polizia, Fred Zain, aveva falsificato i risultati"), <http://www.scaruffi.com/feltri/us22.html>.

A finding that the work of Zain's assistants is less egregious than Zain's should provide no basis for disregarding the defects in their work.

VI. The Finding That the Errors That Were Identified Were "Non-probative" Does Not Validate the Work of Zain's Assistants, Because There Is No Means of Knowing What the Test Results Would Have Shown If All of the Tests That Were Reported Had Actually Been Conducted.

Stolorow and Linhart were directed to examine the records that Zain's assistants retained: the raw data, the worksheets, the written reports, and the trial testimony. They did not search clerk's storage rooms and police evidence lockers for remaining biological evidence and attempt to retest it. Consequently, the errors that they found were only those contained in the contradictory and incomplete records that were left behind.

In instances where results were reported that were different from the test results that appeared on the raw data sheets, Stolorow and Linhart could identify the errors. In instances where the tests weren't actually performed, however, Stolorow and Linhart have no means of knowing what actual tests would have revealed. Consequently, their conclusions that the errors

that they did find were "non-probative" may be correct, but doesn't serve to validate the assistants' work.

The *Alexander Farmer* case, discussed in part IV.B., above, provides an instructive example. If Ted Smith's subsequent grand jury testimony is correct, it appears that Fred Zain falsified the test results on fingernail scrapings, and that Ted Smith testified to those results at trial -- thereby eliminating a potential defense. If the fingernail scrapings had actually been tested, and contained the blood type of a third party, *Alexander Farmer* would have a strong defense. Instead, Smith appears to have fictitiously testified at trial that the fingernail scrapings only contained the blood of the victim. Such testimony may be characterized as "non-probative" only because the actual results, which may be very probative, will never be known.

VII. Whether the Errors in the Lab Reports and Testimony of Zain's Assistants Were Intentional or Inadvertent, the Result Is the Same: The Evidence Presented in Court Fails To Meet the Reliability Requirements of Both *Frye* and *Daubert* and Should Be Deemed Inadmissible.

The Administrative Order authorizing the Renewed Investigation directed the Special Judge to determine if nonexistent serology testing was reported by Zain's assistants. Administrative Order, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, West Virginia Supreme Court of Appeals, June 10, 1999, at 6-7. As discussed in Part III, above, the Report of the Special Judge fails to acknowledge that the Renewed Investigation, in fact, did determine that nonexistent serology testing was reported. Instead, the Report of the Special Judge addressed *intent*, and concluded that "there is not a scintilla of evidence of *intentional* misconduct" on the part of Zain's assistants.

Although the Special Judge's conclusion with regard to intent appears to be erroneous, the intent of the expert is not an issue with regard to the admissibility of scientific evidence at trial. At the time of the laboratory testing and courtroom testimony of Zain's assistants, the standard for the admissibility of scientific evidence in the courtroom was that set forth in *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923) (the *Frye* "general acceptance" test). After 1993, to be admissible in West Virginia courts, scientific testimony must meet the four-prong reliability assessment set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and adopted by the West Virginia Supreme Court of Appeals in *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

Stolorow and Linhart conclude that the problems identified in the work of Zain's assistants "represent a divergence from good science and on occasion ethical conduct, and raise a strong inference that the problems were systemic in the Serology Division." Stolorow/Linhart Report, p. 110. Based on the inadequate standards and high rate of error found in the work of Zain's assistants, as set forth throughout Stolorow and Linhart's Report, it is apparent that the work of Zain's assistants was not of a quality that was generally accepted in the forensic science community at the time, and had the deficiencies in their work been discovered at the time, their testimony would have failed the *Frye* general acceptance test. Additionally, had the information about the unreliability of this work been known in any habeas proceedings that have occurred since the date of the adoption of *Daubert* (such as at the time of Tpr. Smith's 1994 testimony in the *Alexander Farmer* habeas, discussed in part IV.B., above) the evidence would have failed the admissibility requirements of *Daubert v. Merrell Dow* and *Wilt v. Buracker*. The test of admissibility is whether the evidence is *reliable*, not the good or bad faith of the expert presenting it.

VIII. This Court Should Unseal the Records of the Reports of Other Investigations Into the Crime Laboratory for Counsel to Examine or Should Conduct a De Novo Review of These Other Investigations to Determine if They Are Relevant to the Current Investigation and to the Recommendations that Should Emerge From This Investigation.

During the course of the Renewed Investigation, counsel for the Prisoners filed a Motion for Production of Reports of Investigations Into Crime Laboratory, filed October 28, 2004. The Motion was based on numerous indications that the problems identified in the Serology Division may be more widespread and may include analysts in other divisions who may still be committing much of the same misconduct that was committed by Trooper Zain and his assistants.

In support of the Motion for Production of Reports of Investigations Into Crime Laboratory, counsel for the Prisoners cited the guilty plea of drug analyst Todd McDaniel, admitting to faking numerous tests within the Laboratory during the seven-year period from 1993 to 2000. Guilty Plea, October 18, 2000, *United States v. Todd McDaniel*, Criminal Action No. 2:00-00211-01 (S.D.W.Va.). Counsel for the Prisoners also cited published reports of an FBI Investigation into the West Virginia State Police Crime Laboratory, as well as an internal investigation, conducted in the years 2000 and 2002, reportedly involving faking of test results, faking test dates, and testifying falsely in court about the performance of tests. "State Police Lab Closed Amid Probe: 'We may have the Whole Zain Thing Again,' Prosecutor Says," *Charleston Gazette*, September 15, 2000. "Report Details Allegations Against Police Drug Lab," *Charleston Gazette*, January 27, 2002; "Another Shake-up at the State Police Lab," *Charleston Gazette*, May 25, 2002.

Because there have been simultaneous Investigations into similar misconduct in other divisions of the Lab, the findings and conclusions of those Investigations are important to an assessment of how widespread and systemic the problems are that are the subject of the current Investigation. Without the identification and disclosure of the reports of parallel investigations into the Laboratory, it cannot be known if these other investigations addressed matters that also involve the Serology Division.

In fact, without review of such reports, it is impossible to know if evidence has been uncovered that, if disclosed, would have a significant impact on the current Investigation or an impact on the recommendations that may emerge from the current Investigation. The results of parallel investigations into other sections of the Lab, when reviewed along with the results of this Investigation, may reveal a pattern of deficiencies that would result in recommendations involving the overall supervisory structure, management, and independent oversight of the Lab.

On December 28, 2004, the Court ordered that the State Police submit to the Court copies of the reports of the investigations in question, for the Court to review *in camera*. Counsel for the Prisoners was not permitted to review the reports. Order Resulting from Further Status Conference, December 28, 2004, *In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division*, Kanawha Circuit Court, No. 99-CR-M-270.

Upon *in camera* review of the Investigations submitted to the Special Judge by the State Police, in the absence of counsel, the Court concluded that the documents are not relevant to the issue before the Court. The Court ordered the documents filed under seal. Order Declaring In Camera Documents Irrelevant and Filing Said Documents Under Seal, March 3, 2005, *In re: Renewed Investigation, supra*.

Because counsel was not permitted to review the reports of other investigations into the

Laboratory, it is not possible for counsel to know if the Special Judge's ruling that the other investigations are irrelevant is correct or is also erroneous. Consequently, the Court should allow counsel to inspect the sealed reports of other investigations or the Court should review the sealed reports itself and make a *de novo* determination of their relevance to this Investigation and the recommendations that should emerge from it.

IX. The Prisoners' Proposed Findings of Fact, Conclusions of Law, and Recommendations Should Be Adopted by the Court.

A. The Prisoners' Proposed Findings of Fact.

The Prisoners' Proposed Findings of Fact contain much significant information that is not contained in the September 23, 2005, Report of the Special Judge. The Prisoner's Proposed Findings include an account of the history of the Serology Lab; the court-ordered Investigation of 1993-94; the steps that the Lab took to gain ASCLD accreditation; the results of the habeas proceedings and civil litigation upon the conclusion of the 1993 Investigation; additional disclosures regarding the Serology Division that were not uncovered during the 1993 Investigation; the results of the criminal prosecutions of Fred Zain; the background of the Renewed Investigation into the Serology Division; the Stolorow/Linhart combined report; and the evidence of overstatement and fraud extending beyond the Serology Division.

All of these matters are helpful to an understanding of the background of this Investigation and the recommendations that should emerge from it. For the reasons set forth above, the Court should reject the Special Judge's findings of fact and adopt the prisoners' proposed findings of fact in its place.

B. The Prisoners' Proposed Conclusions of Law.

The Prisoners' Proposed Conclusions of Law contain eight separate conclusions:

1. Significant Matters Involving the Roles of Zain's Supervisors Were Withheld From the 1993 Investigation. The Withheld Documents Would Have Significantly Strengthened the Findings and Conclusions Set Forth in the November 4, 1993, Report of Judge Holliday and in the Resulting Opinion of the Supreme Court of Appeals 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).
2. Disclosures During the Habeas Proceedings and Civil Suits Arising From the 1993 Investigation Revealed Violations of the State's Duty to Disclose Evidence Favorable to the Defense, As Required By *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995). These Disclosures Support the Conclusions That Zain's Misconduct Was Not the Sole Reason for the Wrongful Convictions in West Virginia.
3. ASCLD Accreditation and the Establishment of the Professional Standards Unit Has Been Helpful in Upgrading the Work of the Crime Laboratory, But Has Not Been Sufficient to Eliminate Ongoing Overstatement and Fraud.
4. The Work of Fred Zain's Assistants Contain All of the Problems That Were Identified in the Work of Fred Zain, Although With Lesser Frequency and Lesser Magnitude.
5. Unlike With Fred Zain's Cases, a Pattern of Intentional Fraud Was Not Found In the Work of Fred Zain's Assistants.
6. Whether the Errors in the Lab Reports and Testimony of Zain's Assistants Were Intentional or Inadvertent, the Result Is the Same: The Evidence Presented in Court Fails To Meet the Reliability Requirements of Both *Frye* and *Daubert*.
7. Stolorow and Linhart's Review of Ten Cases Involving the Work of Zain's Assistants Found No Evidence the Serology Tests, If Reported Correctly, Would Have Excluded the Defendant. (Although there is no means of knowing what the test results would have shown if all the tests that were reported had actually been conducted.)
8. Upon Review, *In Camera*, of the Reports of Other Investigations into the Crime Laboratory, the Court Concludes That the Matters Contained Therein Are Not Relevant to the Current Investigation.

The first seven Proposed Conclusions of Law are all firmly based on the Prisoners' Proposed Findings of Fact and the evidence developed in the Renewed Investigation. (As discussed above, the eighth Proposed Conclusion of Law is based on the ruling of the Special Judge that should now be reconsidered.)

The details supporting the Conclusions of Law are set forth in full in the Prisoners' Proposed Findings of Fact, Conclusions of Law, and Recommendations, previously filed herein. Because the prisoners' proposed conclusions of law are based on a more accurate evaluation of the evidence developed in the Renewed Investigation, the Special Judge's conclusions of law should be rejected and the prisoners' proposed conclusions of law should be adopted in its place.

C. The Prisoners' Proposed Recommendations.

The Prisoners' Proposed Recommendations contained five components.

Recommendation 1. The Presumption of Invalidity That the Supreme Court of Appeals Applied in Zain Habeas Proceedings Should Also Be Applied to Habeas Proceedings Involving the Work of Zain's Assistants.

In the Supreme Court of Appeal's 1993 opinion adopting the recommendations of Judge Holliday, the Court agreed with Judge Holliday's recommendation that "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal proceeding should be deemed invalid, unreliable, and inadmissible in determining whether to award a new trial in any subsequent habeas corpus proceeding." In Zain habeas proceedings, "the only issue is whether the evidence presented at trial, independent of the forensic evidence presented by Trooper Zain, would have been sufficient to support the verdict. *In re: An Investigation of the*

West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 326, 438 S.E.2d 501, 506 (1993).

In its 1994 opinion regarding the work of Zain's assistants, the Court adopted Judge Holliday's recommendation that the same presumption of invalidity should not be applied to the work of Zain's assistants. *In re: An Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 191 W.Va. 224, 445 S.E.2d 165 (1994).

Since the date of the 1994 opinion regarding the work of Zain's assistants, additional information has become available from two sources: the federal habeas proceeding in *Wilbert Thomas v. Trent*, Civil Action No. 2:98-0912 (S.D.W.Va.) (the proceeding which triggered the Renewed Investigation), and the combined Report of Mark Stolorow and Ronald Linhart, a Report that the State Police themselves have reviewed and do not contest.

As the Stolorow/Linhart Report states, "The errors found [in the work of Zain's assistants] were frequent, recurring and multifaceted, spanning a spectrum of examiners." Stolorow/Linhart Report, at 109. As discussed above, because of the inadequate laboratory standards and high rate of error found in the work of Zain's assistants, their work was neither generally accepted in the scientific community, as required by the former *Frye* test, *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923), nor can it be found to be reliable under the current standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

Consequently, should there be further habeas proceedings based on the work of Zain's assistants, the presumption of invalidity that the Court applied in habeas proceedings involving Zain should equally be applied in any habeas proceedings involving the serology work of Zain's assistants. (Although it is not possible to estimate how many cases may be affected by the

presumption of invalidity, it is anticipated that the cases should be few in number. Although Zain's assistants performed work in numerous cases, the serology era ended in the early 1990's when conventional serology testing was replaced by DNA testing. DNA testing has also been available in post-conviction proceedings to address the lingering issues from the serology era. Although the total number of unresolved serology cases may be few, the presumption of invalidity may be significant if, in fact, prisoners remain in custody based on little evidence to support their convictions other than the unreliable serology tests and trial testimony by Zain and Zain's assistants.)

Recommendation 2: The Crime Laboratory Should Be Removed From State Police Supervision and Placed Under the Supervision of an Independent Agency.

A review of the history of the Serology Division indicates a long history of supervisory failures. As set forth in detail in the prisoners' proposed findings of fact, the supervisory failures include (1) retaining Zain as a serologist despite his known failure of Basic Serology Training; (2) concealing Zain's failure and promoting Zain to head of the Serology Division, placing him in charge of training his assistants, and placing him in charge of establishing Serology Division policies and practices; (3) ignoring reports of Zain's fabrication by Zain's colleagues; (4) filling Zain's personnel file with praise while concealing the existence of serious investigations into his misconduct; (5) concealing records from Judge Holliday's 1993 Investigation which would have confirmed the supervisory failures; (6) allowing fraud to go undetected in drug section of the Lab, from 1993 to 2000, despite the disclosure of Zain's fraud in 1993, and despite ASCLD accreditation in 1994; and (7) allowing overstatement and exaggeration of results to continue to be presented in court by analysts from other divisions in the lab.

The Kanawha County grand jury that returned indictments against Fred Zain also set forth significant recommendations in a Grand Jury Report (discussed in paragraphs 67-69 of the Prisoners Proposed Findings of Fact, previously filed herein). The Grand Jury concluded that the supervisory structure contributed to the problems they identified in the Lab and recommended that the Executive and Legislative branches of government consider removing the State Crime Laboratory from the jurisdiction of the State Police. As the Grand Jury Report states:

We question the wisdom of operating a West Virginia Crime Laboratory within the chain of command of a law enforcement agency. We believe this structure contributed to some of the problems in the operation of the Crime Laboratory during the 1980's.

March 11, 1998, Grand Jury Report, *In re: The Investigation and Potential Prosecution of Fred Salem Zain for Crimes Relating to the Falsification of Evidence*, Circuit Court of Kanawha County, No. 94-CR-MISC-130 and 98-F-106, at 4, unsealed by Order of July 2, 2001. (Attachment D of Prisoners Proposed Findings of Fact, Conclusions of Law, and Recommendations.)

Numerous national commentators who have studied deficiencies in crime laboratories have recommended that the laboratories be placed under independent supervision. As Professor Bennett Gersham noted:

To the extent that crime labs are part of police agencies, the labs typically operate with a police officer's mentality of solving crimes rather than a scientist's mindset of finding the truth. This conviction-oriented mentality was underscored in the [U.S.] Inspector General's Report [of problems in the FBI Crime Lab], citing "inaccurate and incomplete testimony and . . . invalid opinions that appeared tailored to the most incriminating result."

Given the recent disclosures of incompetence and dishonesty by the FBI and other crime labs, safeguards need to be established to ensure that such mistakes do not recur. Forensic laboratories should be separated from police agencies and police supervision, accredited and operated by civilian personnel.

Bennett L. Gersham, "Independent Labs Are Best," *National Law Journal*, June 14, 2004.

Similarly, after a detailed study of the nature and the causes of wrongful convictions in courts throughout the United States, including the numerous wrongful convictions in West Virginia, the Innocence Project and the National Association of Criminal Defense Lawyers issued a Joint Position Paper urging the independence of crime labs. As the Joint Position Paper explains:

As a standard practice, crime laboratories must function as an independent third force within the criminal justice system. When state and local crime laboratories are operating within a police department, there will be pressure to misrepresent or slant data for the prosecution. Similarly, when state and local crime laboratories are in the control of law enforcement officials who rely on the lab's data, there will be less of a desire to investigate that same lab whenever there are allegations of serious misconduct.

In order to ensure that lab results are influenced only by scientific principles, crime laboratories must operate as independent state or local agencies. Lab directors, not police officers, should have the supervisory authority over their lab's personnel and work product.

Scheck and Tofte, *Junk Science in the Courtroom*: Innocence Project/National Association of Criminal Defense Lawyers Joint Position Paper.

Although the 1993 Investigation into the State Police Crime Laboratory focused only on the Serology Division, one the remedies that the Court ordered, accreditation by the American Society of Crime Laboratory Directors (ASCLD), addressed not just the Serology Division alone, but applied to the entire Crime Laboratory. Unfortunately, as discussed above, ongoing problems in the Laboratory have demonstrated that ASCLD accreditation has not brought the problems of the Laboratory to an end.

As the Kanawha County Grand Jury and numerous national commentators have noted, there may be an inherent conflict in placing a scientific institution under the supervision of a law enforcement agency. Nowhere has the inherent conflict been more apparent than in West

Virginia. The fraud committed by Fred Zain, from the date of his first testimony in 1977 to his last testimony in 1991, spanned a period of 14 years, a period of time marked by numerous State Police Superintendents and middle level supervisors, all of whom failed to address and curtail the fraud. The fraud committed by drug analyst Todd McDaniel during the seven-year period from 1993 to 2000 demonstrates the failure of ASCLD accreditation or other internal safeguards to promptly identify and eliminate the ongoing problems.

The twenty-one years of nearly unbroken fraud demonstrate that the supervisory structure within the State Police has been inadequate to ensure neutral science in West Virginia courtrooms. For these reasons, the Court should recommend that the Crime Laboratory be removed from State Police jurisdiction and placed within a neutral state agency.

Recommendation 3: In the Event That the Crime Laboratory Is Not Removed From State Police Supervision, the Crime Laboratory Should Have an Independent Supervisory Board Consisting of Scientists, Judges, Prosecutors and Defense Lawyers.

In the event that the Court does not recommend that the Crime Laboratory be removed from State Police Supervision, the Court should recommend that other means of independent oversight be established, such as an independent supervisory board, consisting of scientists, judges, prosecutors, law enforcement personnel, and defense lawyers. The state of New York, for example, has adopted by statute a Commission on Forensic Science, charged with the oversight of the crime labs within the state. The Commission consists of fourteen members, including forensic scientists, judges, police officers, prosecutors, public defenders, and the private defense bar. N.Y. Executive Law § 995-a. A similarly composed independent supervisory board should be established in West Virginia.

Recommendation 4: Police, Prosecutors, and Crime Lab Personnel Should Receive Regular Training on the Requirements of Brady v. Maryland and Kyles v. Whitley.

As discussed in paragraphs 118 through 123 of the Prisoners Proposed Findings of Fact, Conclusions of Law, and Recommendations, previously filed herein, a significant contributing factor to at least some of the wrongful convictions in West Virginia appears to be that, in addition to the false serology evidence presented in the Zain era, there was also a failure of either police or prosecutors, or both, to have mechanisms in place to identify and disclose evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring disclosure of evidence favorable to the defense); *Kyles v. Whitley*, 514 U.S. 419 (1995), requiring the prosecution to have procedures in place to ensure that evidence favorable to the defense, in the possession of law enforcement agencies, is identified and disclosed.

Consequently, to help ensure that the problems that led to the wrongful convictions in West Virginia do not recur in the future, police, prosecutors, and Crime Lab personnel, including Crime Lab supervisors, should have regular training in the requirements of *Brady v. Maryland* and *Kyles v. Whitley*.

Recommendation 5: The State of West Virginia Should Establish a Standing Commission to Review Cases of Wrongful Convictions, Identify Their Causes, and Make Recommendations for Changes in the Criminal Justice System to Help Ensure That the Wrongful Convictions Are Less Likely to Recur in the Future.

Dr. David Lazer, Professor at the Kennedy School of Government at Harvard University, studied the state-by-state rates of post-conviction DNA exonerations. In his study, Dr. Lazer found that West Virginia ranks first in the country in the number of wrongful convictions per

capita. There is not a close second. Dr. David Lazer, November 2002, presentation, National Legal Aid and Defender Association, Milwaukee, Wisconsin.

When faced with other significant problems in the judicial system, this Court has established a number of worthwhile commissions, task forces, and committees to address the problems and propose reforms. Examples include the Commission on Mental Hygiene Reform, Committee on Equality in the West Virginia Judiciary, Task Force to Study Perceived Racial Disparity in the Juvenile Justice System, Court Improvement Program for Child Abuse and Neglect Proceedings, and the Fatality Review Teams.

As discussed above in paragraphs 37 and 40 of the Prisoners Proposed Findings of Fact, since the exposure of Zain's wrongdoing in 1993, innocent prisoners have been released after spending a total of over 33 years in prison, and over \$6,000,000 has been paid by state agencies in civil settlements.

The wrongful convictions have not been limited to Zain cases. In 1999, for example, in a West Virginia case not involving the State Police Crime Lab, Larry Holdren was released from prison, in a DNA exoneration, after spending 15 years in prison for a crime he did not commit. "Jailed 15 Years, Rape Convict Has His Freedom: Holdren Couldn't Have Committed 1982 Crime, DNA Experts Testify," *Charleston Gazette*, June 11, 1999.

Because West Virginia has had the highest number of wrongful convictions per capita in the nation, a standing commission should be established, charged with an ongoing effort to identify the causes of wrongful convictions in West Virginia and to propose reforms to help ensure that the high rate of wrongful convictions does not continue in the future.

Relief Requested

As set forth above, the findings of fact, conclusions of law, and recommendations contained within the September 23, 2005, Report of the Special Judge are clearly erroneous. The Prisoners respectfully request that the Court decline to adopt the findings, conclusions and recommendations of the Special Judge. The prisoners request that the Court adopt the findings, conclusions and recommendations previously proposed by the prisoners, with the exception of those addressing the sealed reports of other investigations into the Crime Lab.

With respect to the sealed reports of other investigations, the prisoners request that counsel be provided an opportunity to review the reports, or that the Court conduct its own *de novo* review of the sealed reports to determine if, in fact, the sealed reports contain information relevant to the findings, conclusions and recommendations that should emerge from this Investigation.

Respectfully submitted,

WEST VIRGINIA PRISONERS WHOSE CONVICTIONS
WERE OBTAINED BY SEROLOGY LAB EVIDENCE,
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CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 31st day of January, 2006, I served a copy of the foregoing PRISONER'S OBJECTIONS TO REPORT OF SPECIAL JUDGE THOMAS A. BEDELL, by first class mail, upon:

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