**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 2004 Term**

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**SUPREME COURT OF APPEALS**
**OF WEST VIRGINIA**

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**No. 31676**

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**STATE OF WEST VIRGINIA EX REL.**
**CLYDE H. RICHEY,**
**Petitioner,**

**V.**

**COLONEL HOWARD E. HILL, JR., AND**
**MIKE CLIFFORD, PROSECUTING ATTORNEY FOR KANAWHA COUNTY,**
**Respondents.**

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**PETITION FOR A WRIT OF MANDAMUS**
**WRIT DENIED**

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**Submitted: March 30, 2004**
**Filed: May 27, 2004**

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**JUSTICE DAVIS delivered the opinion of the Court.**

**JUSTICE STARCHER, deeming himself disqualified, did not participate in the decision of this case.**

**JUDGE PAUL ZAKAIB, JR., sitting by temporary assignment.**

**JUSTICE ALBRIGHT dissents and reserves the right to file a dissenting opinion.**

**CHIEF JUSTICE MAYNARD concurs and reserves the right to file a concurring opinion.**

**SYLLABUS BY THE COURT**

1. "“‘Mandamus lies to require the discharge by a public officer of a nondiscretionary duty.” Point 3 Syllabus, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W. Va. 479[, 153 S.E.2d 284 (1967)].’ Syllabus point 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d 545 (1969).” Syllabus point 1, *State ex rel. Williams v. Department of Military Affairs*, 212 W. Va. 407, 573 S.E.2d 1 (2002).

2. "To invoke mandamus the relator must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another adequate remedy." Syllabus point 2, *Myers v. Bartle*, 167 W. Va. 194, 279 S.E.2d 406 (1981).

3. "Petitioners in mandamus must have a clear legal right to the relief sought therein and such right cannot be established in the proceeding itself." Syllabus point 1, *State ex rel. Kucera v. Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

4. "“‘An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter

should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*." Point 1, Syllabus, *Sayre's Adm'r v. Harpold*, 33 W. Va. 553[, [11 S. E. 16] [(1890)].' Syl. Pt. 1, *In re McIntosh's Estate*, 144 W. Va. 583, 109 S.E.2d 153 (1959)." Syllabus point 1, *State ex rel. West Virginia Department of Health & Human Resources v. Cline*, 185 W. Va. 318, 406 S.E.2d 749 (1991) (per curiam).

5. "Before the prosecution of a lawsuit may be barred on the basis of *res judicata,* three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syllabus point 4, *Blake v. Charleston Area Medical Center*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

6. Before a petitioner is entitled to post-conviction DNA testing the petitioner must file a motion for post-conviction DNA testing in the circuit court that entered the judgment of conviction that the petitioner challenges. In the motion the petitioner must allege, and subsequently prove by a preponderance of the evidence, that: 1) the petitioner is

incarcerated; 2) the material upon which the petitioner seeks testing exists and is available; 3) the material to be tested is in a condition that would permit DNA; 4) a sufficient chain of custody of the material to be tested exists to establish such material has not been substituted, tampered with, replaced, or altered in any material respect; 5) identity was a significant issue at trial; and, 6) a DNA test result excluding the petitioner as being the genetic donator of the tested material would be outcome determinative in proving the petitioner not guilty of the offense(s) for which the petitioner was convicted. Finally, the petitioner's theory supporting the request for post-conviction DNA testing may not be inconsistent with the trial defenses.

7. A petitioner bears the costs of post-conviction DNA testing unless the petitioner qualifies as an indigent, in which case the cost of testing shall be borne by the State.

**Davis, J.:**

Clyde H. Richey (hereinafter "Mr. Richey") seeks an original jurisdiction writ of mandamus directing Colonel Howard E. Hill, Jr., Superintendent of the West Virginia State Police, and Mike Clifford, Prosecuting Attorney for Kanawha County, West Virginia (hereinafter "Colonel Hill" or "Mr. Clifford"), to either conduct DNA tests on certain evidence used in Mr. Richey's 1979 trial for third-degree sexual assault or to release such evidence so that he can arrange his own testing. Having reviewed the petition and supporting memorandum, Colonel Hill's and Mr. Clifford's responses and exhibits, and pertinent records, we find mandamus does not lie and therefore deny the petition.

## I.

## FACTUAL AND PROCEDURAL HISTORY

A jury convicted Mr. Richey in 1979 on one count of third-degree sexual assault for having had anal intercourse with a fourteen year-old boy in a motel in Charleston, West Virginia. At the time of the assault, Mr. Richey was in the House of Delegates. His victim was a legislative page whom Mr. Richey knew through the Big Brothers program. Mr. Richey arranged for the victim to accompany him from Morgantown and to stay with him for several days in a motel room Mr. Richey was renting during the legislative session. After conviction, Mr. Richey was not incarcerated but instead received five years probation. We affirmed the conviction in *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982).

At trial, the State introduced three-pairs of the victim's underwear.[1] State Police Serologist Fred Zain subjected one pair of the underwear to an unauthorized acid phosphate test (a test which determines if semen is present), but apparently obtained no test results. State Police Serologist Robert Murphy performed other testing on all three pairs of the underwear, which found semen on two of them. However, there was insufficient semen to determine the blood type of the semen.[2]

After conviction, Mr. Richey filed a number of habeas petitions culminating in a habeas proceeding held before Judge A. Andrew MacQueen of the Circuit Court of Kanawha County.[3] This proceeding included a claim under *In re West Virginia State Police*

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[1]At trial, Robert Hutton, a staff physician in the Emergency Room of the West Virginia University Hospital, testified he examined the victim a day or two after the assault. Dr. Hutton ordered three standard tests, which included a cytological examination – a test to look for spermatozoa in the victim's rectum. Because Dr. Hutton did not personally perform the cytological test and was not present when the test was done, the circuit court precluded him from testifying concerning any test results. The physician to whom the cytological specimens were sent for testing was a Dr. Boyd, who did not testify at Mr. Richey's trial.

[2]It appears that Murphy testified in a 1995 habeas hearing that Zain's unauthorized preliminary acid phosphate test could have possibly interfered with Murphy's results. At the trial, Zain denied having conducted any testing and did not venture any opinion that the semen on the underwear could be connected with Mr. Richey. Importantly, Murphy's findings that there was insufficient semen to match to a blood type were the same for the two pairs underwear upon which he (Murphy) detected semen tested – the one pair that Zain tested as well as one Zain did not test.

[3]Mr. Richey recognized that a habeas may not have been the appropriate procedural vehicle with which to proceed since he was not incarcerated. He apparently moved to convert the habeas to a writ of *coram nobis*, but the circuit court never ruled on this motion. *See infra* note 10.

*Crime Laboratory*, 190 W. Va. 321, 438 S.E.2d 501 (1993) (hereinafter *"Zain I"*).[4] Judge MacQueen dismissed the *Zain I* claim on April 23, 1996, and the remaining claims on December 2, 1996. We refused a petition for appeal.

After we refused Mr. Richey's habeas appeal, he filed a *coram nobis* petition, a W. Va. R. Civ. P. Rule 60(b) motion, and a petition for DNA testing[5] in the Circuit Court of Kanawha County, Judge George M. Scott, sitting by temporary assignment. Judge Scott denied relief in 1998 finding "the claims of the petitioner . . . are . . . barred by the doctrine of *res judicata*." Mr. Richey never petitioned for an appeal from Judge Scott's final order.

In 2002, Mr. Richey filed with the Circuit Court of Kanawha County, Judge Louis H. Bloom, a motion for DNA testing that Judge Bloom found was "nearly identical" to the one Mr. Richey filed before Judge Scott.[6] While this motion was pending, Mr. Richey

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[4] *Zain I* was an extraordinary proceeding arising from Fred Zain's misconduct while a serologist at the State Police Crime Laboratory. *Zain I* documented Zain's long history of falsifying evidence to obtain criminal convictions. As a result, we provided for habeas corpus review of all convictions in which Zain performed serological testing and/or testified. *State ex rel. McLaurin v. Trent*, 203 W. Va. 67, 70 n.2, 506 S.E.2d 322, 325 n.2 (1998) (per curiam). In syllabus point 3 of *In re West Virginia State Police Crime Laboratory, Serology Division*, 191 W. Va. 224, 445 S.E.2d 165 (1994), we refused to extend *Zain I* to employees of the State Police Laboratory other than Zain.

[5] For a discussion of forensic DNA testing, see Louis J. Palmer, Jr., *Encyclopedia of DNA and the United States Criminal Justice System* 106-111 (2004).

[6] Mr. Richey filed his motion in front of Judge Bloom under Civil Action No. 93-W-52, the same number as his unsuccessful *Zain I* habeas, which Judge MacQueen had denied almost six years earlier, and which petition for appeal we refused some five years earlier.

filed an original jurisdiction habeas corpus petition in this Court seeking DNA testing, which we refused. On November 26, 2002, Judge Bloom denied the motion for DNA testing finding that it was nearly identical to the *coram nobis* petition Judge Scott denied and was barred by Judge Scott's decision. Mr. Richey never petitioned for appeal. Mr. Richey now asks us to order Colonel Hill and Mr. Clifford to perform DNA testing or allow him to perform such testing.

## II.

## STANDARD FOR ISSUANCE OF WRIT OF MANDAMUS

We have explained that "'"[m]andamus lies to require the discharge by a public officer of a nondiscretionary duty." Point 3 Syllabus, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W. Va. 479[, 153 S.E.2d 284 (1967)].' Syllabus point 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver,* 153 W. Va. 636, 171 S.E.2d 545 (1969)." Syl. pt. 1, *State ex rel. Williams v. Department of Mil. Aff.*, 212 W. Va. 407, 573 S.E.2d 1 (2002). "To invoke mandamus the relator must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another adequate remedy." Syl. pt. 2, *Myers v. Bartle*, 167 W. Va. 194, 279 S.E.2d 406 (1981). As "the burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief[,]" 52 Am. Jur. 2d *Mandamus* § 3 at 271 (2000) (footnote omitted), a failure to meet any one of them is fatal. With these factors in mind, we turn to the parties' contentions.

## III.

## DISCUSSION

Mr. Richey claims that DNA testing will prove his innocence. He further asserts that he has a clear legal right to exculpatory evidence and that the Respondents have a corresponding duty to provide him such evidence. He also summarily claims that "without this Honorable Court's involvement he is not likely to ever obtain what he needs."

The Respondents counter that they are not the custodians of the evidence and do not know if the evidence Mr. Richey seeks still exists. They also respond that Mr. Richey does not have a clear legal right to a mandamus because he has previously sought the same relief he now seeks before this Court and was unsuccessful. Consequently, he is barred by *res judicata* from proceeding in this action. We find that Mr. Richey has not shouldered his "heavy" burden of showing a right to mandamus. 52 Am. Jur. 2d *Mandamus* § 3 at 272 (2000) (footnote omitted).

### *A. DNA Testing Is Not a Clear Legal Right and a Mandamus Cannot Be Used to Create Such a Right.*

"We have characterized the purpose of the writ [of mandamus] as the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999). Because mandamus enforces only an established right, "[p]etitioners in mandamus must have a clear legal right to the relief sought therein and such right cannot

be established in the proceeding itself." Syl. pt. 1, *State ex rel. Kucera v. Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

Mr. Richey directs us to no authority mandating the State conduct, or allow to be conducted, DNA testing when the petitioner is not incarcerated. Rather, he directs us to *Zain I* where we required inmates seeking relief due to Fred Zain's involvement in their trials to consent to DNA testing. 190 W. Va. at 327,438 S.E.2d at 507. Our concern in *Zain I* revolved around those who were still incarcerated and not those who had already been released or who had never been incarcerated. We specifically provided in *Zain I*, "we will direct the Clerk of this Court to prepare and cause to be distributed to the *Division of Corrections* an appropriate post-conviction habeas corpus form." *Id.* at 327, 438 S.E.2d at 507 (emphasis added). Our concern in *Zain I* for those still incarcerated flowed, at least in part, from the jurisdictional requirement that habeas lies only for one "convicted of a crime and incarcerated under sentence of imprisonment therefore[.]" W. Va. Code § 53-4A-1(a) (1967) (2000 Repl. Vol.).[7] Mr. Richey's memorandum of law recognizes that habeas is

[7]Indeed, many other jurisdictions providing for post-conviction DNA testing require a petitioner be incarcerated, imprisoned, in custody, or serving a sentence before seeking testing. *See, e.g.,* Cal. Penal Code § 1405(a) (West 2004 Cum. Pocket Part) ("currently serving a term of imprisonment"); Me. Rev. Stat. Ann. tit. 15, § 2137 (West 2003) ("actual execution of a sentence of imprisonment"); Mich. Comp. Law § 770.16(1) (2003 Cum. Pocket Part) ("serving a prison sentence"); Mo. Rev. Stat. § 547.035(1) (2002) ("custody of department of corrections"); Mont. Code Ann. § 46-21-110(1) (2003) ("serving a term of incarceration"); N.J. Stat. Ann. § 2A:84A-32A(a)a (West 2003 Cum. Ann. Pocket Part) ("currently serving a term of imprisonment"); Ohio Rev. Code Ann. § 2953.72(C)(1)(b) & (c) (2003) (Anderson 2003 Repl. Vol.) (petitioner must be sentenced to a prison term and

unavailable to him as he is not incarcerated. Thus, he seeks to extend *Zain I* to include those who are not, or as here, who have never been, incarcerated.[8] This, as we have shown above, we cannot do.[9]

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must have at least one year remaining to serve on the sentence); Okla. Stat. tit. 22, § 1371.1(A) (2003) ("presently incarcerated"); 42 Pa. Cons. Stat. § 9543.1(a)(1) (2003 Cum. Ann. Pocket Part) ("serving a term of imprisonment"); R.I. Gen. Laws § 10-9.1-11 (c) (2003 Pocket Supp.) ("serving an actual term of imprisonment and incarceration"); Wash. Rev. Code § 10.73.170 (1) (2004 Cum. Ann. Pocket Part) ("currently serving a term of imprisonment"). *Cf.* Ky. Rev. Stat. Ann. § 422.285 (Banks-Baldwin 2003 Cum. Supp.) (post-conviction DNA testing available to one sentenced to death). The United States Congress is considering legislation mandating DNA testing for federal prisoners. The Innocence Protection Act of 2003, contained in Title III of the Advancing Justice Through DNA Technology Act, S. 1700, 108th Cong. (2003) (hereinafter "the FIPA") authorizes such testing for those "under a sentence of imprisonment or death pursuant to a conviction for a Federal offense[.]" FIPA § 3600(a).

[8]Mr. Richey's counsel admitted in his opening oral argument before this Court that he was seeking an extension of *Zain I,* but in rebuttal argument claimed that his position did not require an extension of *Zain I.* We find that Mr. Richey's initial assessment is correct. *See also EF Oper. Corp. v. American Bldgs.*, 993 F.2d 1046, 1050 (3d Cir. 1993) ("It goes without saying that one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so, and under the circumstances here, a reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations.").

[9]While Mr. Richey correctly notes that he has a well-established right to the disclosure of exculpatory evidence, he makes no further argument to illuminate why this observation supports his claim to DNA testing. In *Bell v. State*, 90 S.W. 2d 301 (Tex. Crim. App. 2002) (En Banc) (citations omitted), the Texas Court of Criminal Appeals refused to reach this exact issue in a post-conviction proceeding for DNA testing finding that the petitioner's citation to a general constitutional doctrine was insufficient to perfect the issue. "It is not sufficient that appellant raise only a general constitutional doctrine in support of his request for relief. It is incumbent upon appellant to cite specific legal authority and to provide legal arguments based upon that authority. This is especially important where, as here, the relevant area of law is new or not well defined." *Id.* at 305 (citations omitted). Our general law is consistent with the *Bell* approach. *See State v. Sprague*, ___ W. Va. ___, ___ n.4, 590 S.E.2d 664, 670 n.4 (2003) (per curiam) ("The appellant's general accusation does not

### *B. No Clear Legal Right Because of Res Judicata*

In their responses, both Colonel Hill and Mr. Clifford claim that Mr. Richey lacks a clear legal right to the relief he seeks because his claim is barred by *res judicata*. We have explained *res judicata* as follows:

> """An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*." Point 1, Syllabus, *Sayre's Adm'r v. Harpold*, 33 W. Va. 553[, [11 S. E. 16] [(1890)].' Syl. Pt. 1, *In re McIntosh's Estate*, 144 W. Va. 583, 109 S.E.2d 153 (1959)." Syllabus point 1, *State ex rel. West Virginia Department of Health & Human Resources v. Cline*, 185 W. Va. 318, 406 S.E.2d 749 (1991) (per curiam).

Syl. pt. 1, *State ex rel. West Virginia Dep't of Health & Hum. Res. v. Cline*, 185 W. Va. 318, 406 S.E.2d 749 (1991) (per curiam). Additionally, we have observed that

> [o]ur prior cases have recognized that the principles undergirding *res judicata* serve "to advance several related policy goals--(1) to promote fairness by preventing vexatious litigation; (2) to conserve judicial resources; (3) to prevent inconsistent decisions; and (4) to promote finality by bringing

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discuss this issue with any meaningful specificity or particularity or provide authority to support his contention that the trial court's ruling was erroneous or that the charges were not consistent with the laws of West Virginia. In the absence of such supporting arguments or authority, we deem this assignment of error to have been waived."). Consequently, we find Mr. Richey's exculpatory evidence claim waived and we do not address it.

litigation to an end."

*State v. Miller*, 194 W. Va. 3, 10 n.8, 459 S.E.2d 114, 121 n.8 (1995) (citations omitted).

Mr. Richey responds, however, that *res judicata* should not be applied if it would be unjust. While we have been cognizant of the need to ensure that application of *res judicata* does not "plainly defeat the ends of Justice[,]" *Gentry v. Farruggia*, 132 W. Va. 809, 811, 53 S.E.2d 741, 742 (1949), such an exception must be based upon "extraordinary circumstances" and "courts should be loathe to exercise this power." *Sims v. State*, 771 N.E.2d 734, 738 n.2 (Ind. Ct. App. 2002). *Accord Arwood v. J.P. & Sons, Inc.*, 759 So. 2d 848, 850 (La. Ct. App. 2000) (interests of justice exception should be granted only in exceptional cases in order to not defeat the purposes of *res judicata*). In this case, we face a situation that even more than usual justifies application of *res judicata.*

As one leading treatise notes, "a dismissal of a second action on the ground that it is precluded by a prior action is itself effective as res judicata, and a judgment on the merits that forecloses further litigation of the preclusion question in a third action." 18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4435 at 148 (2d ed. 2002) (footnote omitted). In short, a determination of *res judicata* is itself *res judicata*. If anything, the rule that a finding of *res judicata* is itself *res judicata* is of stronger force than a determination to apply *res judicata* in the first instance. "The principles of res judicata apply to preclude relitigation of the res judicata issue just as cogently as with any other issue, and perhaps even

more cogently." 18 *Federal Practice & Procedure, supra* § 4404 at 65 (footnote omitted).

Judge MacQueen denied Mr. Richey relief under *Zain I* in 1996. We subsequently refused Mr. Richey's petition for appeal by a 4-0 vote. Subsequently, Mr. Richey filed a petition for a writ of *coram nobis* and Rule 60(b) motion along with a motion for DNA testing. Judge Scott denied relief based on *res judicata* in 1998.[10] Mr. Richey did not petition for appeal.[11] In 2002, Judge Bloom denied Mr. Richey DNA testing based upon Judge Scott's *res judicata* dismissal. Again, Mr. Richey did not petition for appeal.

In syllabus point 4 of *Blake v. Charleston Area Medical Center*, 201 W. Va. 469, 498 S.E.2d 41 (1997), we explained:

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.

[10]We have noted that even though *coram nobis* is abolished in purely civil cases, it may still be available in a post-conviction context when the petitioner is not incarcerated. *Kemp v. State*, 203 W. Va. 1, 2 n.4, 506 S.E.2d 38, 39 n.4 (1997) (per curiam); *State v. Eddie "Tosh" K.*, 194 W. Va. 354, 363 n.10, 460 S.E.2d 489, 498 n.10 (1995) (per curiam). *Coram nobis*, however, is of "limited scope" since it does not reach "prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence[.]" *United States v. Mayer*, 235 U.S. 55, 69, 35 S. Ct. 16, 20, 59 L. Ed. 129, 136 (1914) (dicta). Likewise, even assuming *coram nobis* reaches the issue of conviction based upon perjured testimony, relief does not lie in circumstances, such as found here by Judge MacQueen, where the result of the trial was not affected by the false testimony. 24 C.J.S. *Criminal Law* § 1622 at 236 (1989).

[11]Mr. Richey missed two hearings in the *coram nobis* proceeding before Judge Scott.

> Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Here, *Blake* is met. Judge Bloom entered a final order finding that Judge Scott's final order barred Mr. Richey from pursuing a claim for DNA testing. This finding by a court of competent jurisdiction was a final adjudication on the merits of whether Mr. Richey could seek DNA testing. *See* 18A *Federal Practice and Procedure, supra,* § 4435 at 148 (footnote omitted) (dismissal on grounds of *res judicata* is "a judgment on the merits that forecloses further litigation of the preclusion question in a third action."). Moreover, Mr. Richey never appealed either order. *See Hustead on behalf of Adkins v. Ashland Oil, Co.*, 197 W. Va. 55, 60, 475 S.E.2d 55, 60 (1996) ("The Appellant admittedly chose not to file a direct appeal from the circuit court's final order. That decision resulted in the judgment becoming final and subject to the principles of res judicata."). Further, both cases involved the same parties, Mr. Richey and the State of West Virginia (represented in both cases by the Kanawha County Prosecuting Attorney). Finally, the two cases were based on the same cause of action-post – conviction DNA testing relating to Mr. Richey's 1979 conviction. Thus, we are compelled to conclude that *res judicata* precludes granting Mr. Richey the relief he seeks.[12]

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[12]Of course, the important finality interest protected by *res judicata* is enhanced here as Mr. Richey is not incarcerated. *See United States v. Rankin*, 1 F. Supp. 2d 445, 453 (E.D.

### *C. Failure to otherwise establish a right to DNA testing*

We have never spoken as to the precise contours of post-conviction DNA testing. However, other states have done so by crafting statutes that control the availability of post-conviction DNA testing. Our research has revealed many of these statutes share certain common provisions. Thus, we believe that this case provides us an opportunity to encapsulate the requirements to award post-conviction DNA testing by looking to these statutes.[13]

We begin by observing that a petitioner in a post-conviction proceeding bears the burden of pleading and subsequently proving his claims by a preponderance of the evidence. As we said in syllabus point 1 of *State ex rel. Scott v. Boles*, 150 W. Va. 453, 147

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Pa. 1998) ("'The interest in finality of judgments is a weighty one that may not be casually disregarded. Where sentences have been served, the finality concept is of an overriding nature, more so than in other forms of collateral review such as habeas corpus, where a continuance of confinement could be manifestly unjust.'" (citation omitted) (emphasis deleted)), *aff'd by unpublished disposition*, 185 F. 3d 863 (3d Cir. 1999).

[13]We note that this discussion does not apply to Mr. Richey as we have already found that he is not entitled to relief. Nevertheless, we think this an appropriate time to discuss the issue of post-conviction DNA testing requirements since it is an issue of great public concern and the bench, bar, and public would greatly benefit from our guidance. *See State v. Allah Jamaal W.*, 209 W. Va. 1, 4 n.7, 543 S.E.2d 282, 285 n.7 (2000) (addressing otherwise moot claims made by one who had been released from prison because the "issue [raised] is of great public and legal concern and should be addressed by this Court for guidance to trial courts."). *See also Hart v. NCAA*, 209 W. Va. 543, 549, 550 S.E.2d 79, 85 (2001) (per curiam) (addressing otherwise moot claims of college wrestler against rules prohibiting him from wrestling even though he graduated due to the importance of the issue to many college students and the importance we attach to education in West Virginia).

S.E.2d 486 (1966):

> Under the statute of this state dealing with habeas corpus proceedings a prima facie case, in order for this Court to issue the writ, may be made by petition showing by an affidavit or other evidence probable cause to believe that a person is detained without lawful authority. However, this does not in any way warrant the release of a petitioner confined in the penitentiary. Such petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release.

Placing the burden upon a petitioner seeking post-conviction DNA to plead and then to prove by a preponderance of the evidence his right to DNA testing is consistent with the view of other jurisdictions. *See, e.g.*, Mo. Rev. Stat. §§ 547.035(6) (2002) ("The movant shall have the burden of proving the allegations of the motion by a preponderance of the evidence."); N.M. Stat. Ann. § 31-1A-2(C) (Michie 2003 Cum. Supp.) ("The petitioner shall show, by a preponderance of the evidence . . . ."); Utah Code Ann. § 78-35a-301(6)(b) (2002 Repl. Vol.) ("[T]he court shall order DNA testing if it finds by a preponderance of the evidence that all criteria . . . have been met.").

Having set forth the evidentiary standard a petitioner seeking post-conviction DNA testing must meet, we turn to establishing what the petitioner must actually prove in order to prevail. We note initially that we have already observed that the general nature of habeas corpus, our own post-conviction habeas corpus statute, and the views of other jurisdictions establish that a post-conviction petitioner seeking DNA testing must be incarcerated. *See supra* Part III.A. note 7 and accompanying text and Part III.B note 12. We

also find that a general requirement is that the petitioner prove the material he or she seeks to test exists and is available. *See, e.g.*, Ga. Code Ann. § 5-5-41(c)(7)(A) (2003 Supp.) ("The court shall grant the motion for DNA testing if it determines that . . . The evidence to be tested . . . is available[.]"); Mont. Code Ann. § 46-21-110(5)(a)(ii) ("The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that . . . the evidence to be tested . . . is available[.]"); N.J. Stat. Ann. § 2A:84A-32a(d)(1) (West 2003 Cum. Ann. Pocket Part) ("The court shall not grant the motion for DNA testing unless, after conducting a hearing, it determines that . . . the evidence to be tested is available[.]").

Likewise, because a DNA test result is only useful if it is accurate, it is generally acknowledged that the petitioner must prove that the material to be tested is in a condition that would permit DNA testing. *See, e.g.*, Ga. Code Ann. § 5-5-41(c)(7)(A) ("The court shall grant the motion for DNA testing if it determines that . . . The evidence to be tested is . . . . in a condition that would permit the DNA testing requested in the motion[.]"); Mont. Code § 46-21-110(5)(a)(iii) ("The court shall grant the petition if it determines that . . . the evidence to be tested . . . is in a condition that would permit the requested testing[.]"); N.J. Stat. Ann. § 2A:84A-32a(d)(1) ("The court shall not grant the motion for DNA testing unless, after conducting a hearing, it determines that . . . the evidence to be tested is . . . in a condition that would permit the DNA testing that is requested in the motion[.]"); Ohio Rev. Code Ann. § 2953.74(C)(2)(c) (Anderson 2003 Repl. Vol.) ("If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code, the court may

accept the application only if . . . The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.”).

A similar concern for accuracy undergirds the general requirement that a petitioner seeking post-conviction DNA testing prove a sufficient chain of custody of the material to be tested that establishes the material to be tested has not been substituted, tampered with, replaced, or altered in any material respect. *See, e.g.*, Ga. Code Ann. 5-5-41(c)(7)(B) (“The court shall grant the motion for DNA testing if . . . The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect[.]”); Mont. Stat. Ann. § 46-21-110(5)(b) (“The court shall grant the petition if . . . the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect[.]”); 42 Pa. Cons. Stat. § 9543.1(d)(1)(ii) (2003 Cum. Ann. Pocket Part) (“[T]he court shall order the testing requested in a motion . . . after review of the record of the applicant’s trial, that the . . . evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect[.]”) *See also* FIPA of 2003 § 3600(a)(4) (“[T]he court that entered the judgment of conviction shall order DNA testing of specific evidence if . . . the specific evidence to be tested is in the possession of the Government and has been

subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing[.]")[14]

At this junction we must point out that meeting these requirements does not entitle a petitioner to post-conviction DNA testing. Courts and legislatures have recognized an additional critical element. We turn to that element now–the relevancy of DNA testing in a given case.

While DNA testing is a powerful tool it "'is not a magic bullet in post-conviction cases.'" Jennifer Boemer, Note, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates,* 27 Wm. Mitchell L. Rev. 1971, 1985 (2001) (quoting Chris Asplen, Executive Director of the National Commission on the Future of DNA Evidence). DNA "'is only as powerful as it is relevant in a given scenario.'" *Id.* DNA testing is irrelevant when the issue in the case involves non-identity issues such as consent or intent. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions,* 38 Cal. W. L. Rev. 333, 337 (2002) ("Moreover, biological evidence is useless where issues of consent or intent, rather than identity, are in dispute."). Indeed, many DNA testing statutes require identity to have been a significant

[14]See supra note 7 for information about FIPA.

issue at trial before testing is permitted. *See, e.g.*, Ga. Code Ann. § 5-5-41(c)(7)(E) ("The court shall grant the motion for DNA testing if it determines that . . . The identity of the perpetrator of the crime was a significant issue in the case[.]"); N.J. Stat. Ann. § 2A:84A-32a(d)(3) ("The court shall not grant the motion for DNA testing unless . . . the identity of the defendant was a significant issue in the case[.]"). Ohio Rev. Code Ann. § 2953.74(C)(3) (permitting post-conviction DNA testing if, *inter alia*, "[t]he court determines that, at the trial stage in the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing, the identity of the person who committed the offense was an issue."). *See also* FIPA § 3600(a)(7) (court that entered judgment of conviction shall order DNA testing, *inter alia*, "if the applicant was convicted following a trial, [and] the identity of the perpetrator was at issue in the trial[.]"). If the issue of identity of the perpetrator is not an issue or if DNA testing would not be "virtually dispositive" in establishing the petitioner's innocence then DNA testing is not warranted. *See, e.g., Jenner v. Dooley*, 590 N.W.2d 463, 472 (S.D. 1999) (discussing the importance of identity as an issue in the case and, *inter alia*, that "the nature of the biological evidence makes testing results on the issue of identity virtually dispositive."); Ohio Rev. Code Ann. § 2953.74(C)(4) (post-conviction DNA testing may be allowed if "[t]he court determines that one or more of the defense theories asserted by the inmate at the trial stage in the case . . . was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative."). In other words, DNA testing is warranted

> where the defendant claims he is "actually innocent" of the crime, and

> demonstrates that such testing shows that they [sic] did not commit the crime. DNA testing will not be permitted where such a test would only muddy the waters and be used by the defendant to fuel a new and frivolous series of appeals.

149 Cong. Rec. S12,294 (daily ed. Oct. 1, 2003) (statement of Sen. Hatch).

We also observe that post-conviction proceedings are not a venue for a petitioner to retry his case under different theories than those advanced at trial. *United States ex rel. Darcy v. Handy*, 97 F. Supp. 930, 939 (M.D. Pa. 1951) (holding in a federal habeas case that "[h]aving taken the position assumed at the trial, defendant cannot now properly ask to retry his case on a different theory."), *rev'd on other grounds*, 203 F.2d 407 (3d Cir. 1953). Consistent with this, we also recognize that a petitioner may not request DNA testing if the theory supporting the testing contradicts the defenses raised at trial. *See, e.g.*, Ohio Rev. Code Ann. § 2953.74(C)(4) (post-conviction DNA testing allowed if "[t]he court determines that one or more of the defense theories asserted by the inmate at the trial stage in the case . . . was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative."); Utah Code § 78-35a-301(2)(c) & (6)(b) (petitioner must show "a theory of defense, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support"). *See also* FIPA § 3600(a)(6)(A) & (B) (DNA testing mandated, *inter alia*, if "the applicant identifies a theory of defense that--is not inconsistent with an affirmative defense presented at trial; and would establish the actual innocence of the applicant[.]") In circumstances where the petitioner

seeking post-conviction DNA did not contest identity at trial,[15] the petitioner would not be entitled to post-conviction DNA testing. *See, e.g., Bell v. State,* 90 S.W.3d 301, 308 (Tex. Crim App. 2002) (En Banc) (post-conviction DNA rule "requires that identity 'was or is' an issue, not that future DNA testing could raise the issue."); *Sanders v. State*, No. 01-00084-CR, 2004 WL 440426 (Tex. App. Mar. 11, 2004) (post-conviction DNA test denied as trial defense was that the attack never occurred and was fabricated by the victim).

We now find it would be beneficial to crystalize our conclusions here today and therefore so hold that before a petitioner is entitled to post-conviction DNA testing the petitioner must file a motion for post-conviction DNA testing in the circuit court that entered the judgment of conviction that the petitioner challenges. In the motion the petitioner must allege, and subsequently prove by a preponderance of the evidence, that: 1) the petitioner is incarcerated; 2) the material upon which the petitioner seeks testing exists and is available; 3) the material to be tested is in a condition that would permit DNA; 4) a sufficient chain of custody of the material to be tested exists to establish such material has not been substituted, tampered with, replaced, or altered in any material respect; 5) identity was a significant issue at trial; and, 6) a DNA test result excluding the petitioner as being the genetic donator of the tested material would be outcome determinative in proving the petitioner not guilty of the

[15]At oral argument before us, Mr. Richey's counsel confirmed that Mr. Richey's trial defense was not based on mistaken identity; rather, Mr. Richey's sole trial defense was based upon the theory that the victim fabricated the story of the assault.

offense(s) for which the petitioner was convicted. Finally, the petitioner's theory supporting the request for post-conviction DNA testing may not be inconsistent with the trial defenses. Of course, if the test result excludes the petitioner as being the genetic donator of the tested material, the circuit court shall award appropriate relief.

We wish to further point out that motions for post-conviction DNA testing would fall under the definition of eligible proceeding under the West Virginia Public Defender Services Act. W. Va. Code § 29-21-2(2) (1996) (2001 Repl. Vol.). Therefore, we also hold that a petitioner bears the costs of post-conviction DNA testing unless the petitioner qualifies as an indigent, in which case the cost of testing shall be borne by the State. *See, e.g.*, Ga. Code Ann. § 5-5-41(c)(8) ("If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and forfeiture fund as provided in Article 3 of Chapter 5 of Title 15."); Mont. Code Ann. § 4621-110(11) ("The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing.").[16]

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[16]On March 13, 2004, the West Virginia Legislature passed H.B. 4156 (to be codified at Chapter 15, Article 2B of the West Virginia Code) concerning post-conviction DNA testing. This statute is effective ninety days from date of passage. Therefore, our opinion herein controls those post-conviction DNA requests filed before the effective date of H.B.

It is our hope that "[a]s DNA is used increasingly before conviction, the body of wrongful convictions that can be exposed through postconviction DNA testing will diminish, and ultimately disappear." Findley, *Learning from our Mistakes*, 38 Cal. West. L. Rev. at 337 (footnote omitted). *See also* 149 Cong. Rec. S12,294 (daily ed. Oct. 1, 2003) (statement of Sen. Hatch) ("DNA testing is now standard in pretrial criminal investigations today[.]"). For those who have been convicted but have not received pre-conviction DNA tests, we believe our opinion provides the appropriate guidelines for post-conviction testing.

In conclusion, we again reiterate that "the purpose of the legal system is to provide final resolution of legal controversies[.]" *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 207, 557 S.E.2d 254, 261 (2001). Since 1979, Mr. Richey has filed numerous suits over his conviction.[17] However, "'[n]o effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial.'" *State v. Lo*, 264 Wis. 2d 1, 38, 665 N.W.2d 756, 774 (2003) (citation omitted). We have thus found no one is "entitled to appeal upon appeal, attack upon attack, and *habeas corpus* upon *habeas corpus*." *Call v. McKenzie*, 159 W. Va. 191, 194, 220 S.E.2d 665, 669 (1975). *Accord United States*

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4156. Requests made after June 11, 2004, will be governed by H.B. 4156.

[17]Mr. Richey has not limited his filings to state court. In 1996, the federal district court dismissed a complaint Mr. Richey filed against the State of West Virginia and the West Virginia State Police as frivolous under 28 U.S.C. § 1915(d), and in 1999 the federal court dismissed Mr. Richey's suit against Judge Scott over his *coram nobis* as frivolous under 28 U.S.C. § 1915(e)(2)(D).

*v. Quinones*, 313 F.3d 49, 62 (2d Cir. 2002) (finding no fundamental right to "the continued opportunity to exonerate oneself throughout the natural course of one's life[.]"), *cert. denied*, ___ U.S. ___, 124 S. Ct. 807, 157 L. Ed. 2d 702 (2003). Having thoroughly considered the merits of his claims, we agree that litigation must end sometime and "[t]hat time has come for Mr. [Richey]." *United States v. Keane*, 852 F. 2d 199, 206 (7th Cir. 1988).

**IV.**

**CONCLUSION**

For the foregoing reasons, the petition for a writ of mandamus is denied.

Writ denied.