No. 31676 - *State of West Virginia ex rel. Clyde H. Richey v. Colonel Howard E. Hill, Jr., and Mike Clifford, Prosecuting Attorney for Kanawha County*

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Albright, Justice, dissenting:

I dissent because, having improvidently decided the instant case on the narrow ground of *res judicata*, the majority has proceeded to unnecessarily "make law." If followed, that unnecessary decisional law would improperly limit the power of this Court to address post-conviction criminal cases in which presently known or hereafter developed DNA technology might support reversal of unjust convictions.

Finality

In its fervor to provide guidance to the lower courts regarding post-conviction DNA testing requests,[1] the majority addressed issues not squarely before this Court, issues which also have not been fully addressed by the parties. The majority undertakes to answer the broad question of which courts should consider what factors in what cases when faced with motions for post-conviction DNA testing. I find the result of this misadventure to be immoderately narrow tests for relief and artificial and improvident foreclosure of effective

[1]The urgency for using this case to decide the issue is unclear since the lower courts have been faced with these requests for nearly ten years as a consequence of *Zain I. In the Matter of the Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190 W.Va. 321, 438 S.E.2d 501 (1993).

application of the rapidly evolving technology of DNA testing. Beyond lack of foresight, I fear the factors enunciated by the majority will result in misunderstandings and thus, divergent results, all for the misplaced purpose of promoting finality of criminal convictions and judgments.

"The strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA results." National Commission on the Future of DNA Evidence, National Institute of Justice, *Postconviction DNA Testing: Recommendation for Handling Requests*, www.ncjrs.org/txtfiles1/nij/177626.txt (1999).[2] It is axiomatic that exclusionary DNA results will lead to challenges to the finality of related convictions and judgments. The majority's blind adherence to conventional notions of finality fails to acknowledge the unique potential DNA testing currently and potentially has for determining the ultimate question of guilt or innocence, fails to credit the nationwide reality that such tests – as far as the technology has

[2]The National Commission on the Future of DNA Evidence was established in the late 1990's by then Attorney General Janet Reno in response to documentation of erroneous convictions. The Commission consists of five working groups. The members of the Working Group on Postconviction Issues which developed the cited document included two defense counsel and two prosecutors, a judge, a victims' rights advocate, a scientist, and academics having experience with various issues relating to the forensic use of DNA. The report of this group regarding recommendations for the handling of post-conviction requests for DNA testing include suggestions for all segments of the criminal justice system, including the judiciary, and warrants further study by the bench and bar of this state.

thus far progressed – have corrected miscarriages of justice in a substantial number of cases, and fails to appreciate that a request for such testing is a mere "first step." A request for DNA testing is, by its nature, only a preliminary step to determining whether there is even a basis to petition for post-conviction relief. In the instant case, the request is even less a cause of concern because it does not involve the extraction of a DNA sample from anyone but the Petitioner or from any object other than items supposedly in the possession of the State or its agencies. At the time Petitioner was convicted, DNA testing was not available[3] as a means of supporting or refuting Petitioner's contention that no crime had been committed. Petitioner and those similarly situated should not be deprived the benefit of the testing due to ill-suited orthodox notions of finality. As Justice Brennan stated in *Sanders v. United States*, 373 U.S. 1 (1963), the "[c]onventional notions of finality of litigation have no place where life or liberty is at stake . . . ." *Id.* at 8. To reiterate, the testing itself simply determines what further action *may* be warranted. Thus, the consequence of granting DNA testing requests in relevant cases is aimed at identification of individuals who have been wrongly convicted so that justice results. In those circumstances ought not justice prevail over finality?

Incarceration

[3]The first use of DNA technology in an American criminal trial occurred in *Andrews v. State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1989). Daryl E. Harris, *By Any Means Necessary: Evaluating the Effectiveness of Texas' DNA Testing Law in the Adjudication of Free-Standing Claims of Actual Innocence*, 6 Scholar 121, 138 (2003).

A good example of the improvidence of the rules for DNA testing set forth by the majority is the requirement that the Petitioner be incarcerated, supported by citation to a laundry list of statutes that require incarceration for *an action at law* to compel DNA testing. The instant case is a petition for relief *where there is no adequate remedy at law.* Would the majority have us believe that a citizen believing himself or herself wrongly convicted has no legitimate interest in overturning that conviction after release from prison? Or while on probation? Or on home confinement? That may be good statutory law in several states. It hardly suits the ends of justice.[4] Rather, the limitation suggests itself to be a bureaucratic tool to avoid granting appropriate DNA testing in all instances meriting such testing.

If it be the intent of the majority to completely bar persons unjustly convicted of crimes from ever utilizing DNA technology to regain their good names and reputations in the community simply because those persons have been released from prison or had the better fortune of undergoing probation, parole, home incarceration or community service for crimes of which they are innocent, I submit that intent must fail, the majority opinion in this

[4]The majority opinion correctly points out that as the use of DNA testing in crime investigation grows, the number of post-conviction DNA test requests may well decrease because appropriate tests will be performed before trial in a significant number of cases. This is no solace to a person wrongfully convicted before such testing has become commonplace. Nor is it solace to the Petitioner, whose prior prayers for post conviction relief have been, at every turn, given short shrift by the Circuit Court of Kanawha County and this Court, despite the substantial involvement of Fred Zain in the Petitioner's conviction.

case notwithstanding. There can be no sound reason for making a distinction on the basis of how a sentence is served or whether it has been fully served, since it hardly promotes the overriding aim of our criminal justice system: "that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Requiring Application To Circuit Courts

Simply put, the requirement manufactured by the majority that applications for post-conviction DNA testing *must* be initiated in the circuit courts is an inappropriate intrusion into the constitutional jurisdiction of this Court to grant extraordinary relief in any appropriate case[5] where the remedy at law is inadequate and the common-law requirements for a given writ are met by a petitioner. While the contents of syllabus point six of the majority opinion[6] could conceivably form the basis for a circuit court rule of practice and

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[5]*See* W.Va. Const. art. VIII, § 3 ("The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."); *see also* Syl. Pt. 10, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963) ("The Supreme Court of Appeals has original jurisdiction in cases of habeas corpus, mandamus and prohibition and appellate jurisdiction in all other cases mentioned in Article VIII, Section 3, of the Constitution of this State *and in such additional cases* as may be prescribed by law . . . .") (emphasis added).

[6]Syllabus point six of the majority opinion reads:

> 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

(continued...)

procedure to be promulgated by this Court after adequate public comment, its promulgation by way of decisional law is both inappropriate and ill-advised. In a similar vein, the majority opinion suggests that the Legislature's recent enactment of Enrolled Committee Substitute for House Bill 4156 (Reg. Sess. 2004) binds the manner in which courts handle DNA testing requests after its effective date and vindicates the majority's procedural limitations on applications for DNA testing. That statute does indeed establish a statutory right to DNA testing. It does not effect a limitation on the constitutional authority of this Court. Neither the majority's decision nor Enrolled Committee Substitute for House Bill 4156 should be permitted to bar from this Court any meritorious application to it for relief by way of an extraordinary writ within our constitutional jurisdiction.

Limiting the Tests of "Identity"

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[6](...continued)
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 [testing]; 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 5) 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.

As to the requirement that identity must have been a significant issue at trial, I am dismayed by the majority's impliedly restrictive definition of identity as evidenced by its observation in footnote fifteen.[7] From this note, it appears that "mistaken identity" must have been asserted as a defense at trial in order to have a request for DNA testing granted. This is patently absurd as the instant case readily demonstrates. Petitioner claimed that no crime was committed, in effect arguing that the prosecution and resultant conviction of *anyone*, including Petitioner, should not have occurred. If DNA testing would show that the sperm on the underwear of the alleged victim was that of anyone other than Petitioner, including the alleged victim, it might be shown to the satisfaction of a reviewing court that the wrong person was *identified* as a perpetrator and convicted. Identity in this context – that no crime was committed – was certainly at issue in the present case despite the fact that a defense of mistaken identity of the accused was not.

A Framework For Evaluating Applications For DNA Testing

Notwithstanding my strong disagreements with the dismissal of this case on the basis of *res judicata* and the overly broad terms of the majority opinion, I must evidence sympathy with the view that the Petitioner here did not bring us a clear picture of how the tests, if conducted, might have justified relief from the Petitioner's conviction. That clear

[7]The text of footnote fifteen of the majority opinion reads: "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."

picture, frankly, did not appear from the briefs or from the oral argument, in part because the clothing involved apparently was not introduced into evidence in the case.

Despite these deficiencies, I see absolutely no logical reason or other justification to support the majority's position that individuals *initially applying* for DNA testing bear the burden of proving factors which are beyond their knowledge and outside their possession. It is most unreasonable at this *preliminary stage* to expect persons who are least likely, especially if they are incarcerated or similarly incapacitated, to have access to the information to prove that the material to be tested exists and is available for testing, is in a condition which would permit DNA testing, and has a chain of custody which demonstrates the material has not been altered or otherwise tainted. Proof of these factors *may* at times be helpful in processing the request, but it seems more likely that some of this desired information will actually emerge from the testing process itself. To the extent such information is needed at this initial stage, a practical suggestion made by one authority[8] is that it be derived from the cooperative efforts of the state and the convicted person's counsel. This seems to be an even-handed and fair approach at the application stage and would do nothing to disturb the established burden of proof if an attack on the judgment of conviction

[8]*See* National Commission on the Future of DNA Evidence Report, supra, Chapter 6: Recommendations for the Judiciary in Handling Initial Requests [for DNA Testing].

is later mounted by a convicted person. The convicted person making the attack would then bear the burden of proving the elements necessary to support the requested relief.

Moreover, the neat little rule that the petitioner's theory supporting a request for post-conviction DNA testing may not be inconsistent with the trial defenses is in many factual circumstances quite reasonable and appropriate. I see no reason, however, to exclude the possibility that a factual situation might arise – beyond the imagination of the majority to conceive – where that rule, set in stone, would work a horrible injustice. The facts of the case before us not requiring a ruling on the point, I dissent from the enunciation of that rule by reason of lack of knowledge of what might arise and by reason of awe for the unknown future. This Justice does not want our courts put in a box of unknown possibilities.

All of that being said, it seems to me indispensable that one applying to this Court, or under the majority's preferred route, to a circuit court, for DNA testing in a post-conviction situation *must* present a convincing and practical scenario under which, if the requested tests were to be performed and the results found favorable to the applicant, a legally sound motion might justify disturbing the finality of the conviction. For instance, from the showings made in this case, it seems eminently fair to insist that the Petitioner should be required to demonstrate that favorable test results, if available, would be, in the words of the majority opinion, "outcome determinative." I would suggest that without such

a showing or very good cause for the absence of such a showing, it is highly unlikely that any court would be persuaded to order such tests.

Summary

As I find the majority's solution of forcing the round peg of DNA testing into the square hole of traditional post-conviction remedies to be unduly restrictive and founded on factors not before us and largely unknown to us, I respectfully dissent.