LEXSEE

WAYNE EUGENE DUMOND, PETITIONER v. A.L. LOCKHART, Director Arkansas Department of Correction, RESPONDENT

Case No. PB-C-88-631

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, PINE BLUFF DIVISION

1989 U.S. Dist. LEXIS 994

January 31, 1989, Decided; Affirmed in Part, Reversed in Part and Remanded by 1989 U.S. App. LEXIS 13196

COUNSEL: [*1] John W. Hall, Jr., Hall & Vaught, Little Rock, AR, ATTORNEY for petitioner.

Theodore Holder, Assistant Attorney General, Little Rock, AR, ATTORNEY for respondent.

OPINION BY: YOUNG

OPINION

MEMORANDUM AND ORDER

H. DAVID YOUNG, UNITED STATES MAGISTRATE

I. INTRODUCTION

Wayne Eugene Dumond petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that his convictions for rape and kidnapping were imposed in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments. He was convicted in St. Francis County, Arkansas, Circuit Court in August of 1985, and received consecutive sentences of life and twenty years. He has been in the custody of the Arkansas Department of Correction since that time, and his status as a prisoner in respondent's custody has therefore been admitted.

Dumond's convictions were affirmed on direct appeal by the Arkansas Supreme Court on December 22, 1986. Dumond v. State, 290 Ark. 593, 721 S.W.2d 663 (1986) (Dumond I). While his direct appeal was pending, Dumond unsuccessfully pursued a writ of *error coram nobis* in the state supreme court, alleging that newly discovered evidence existed in the form of exculpatory evidence said to have been **[*2]** withheld by the Forrest City Police Department, and also alleging that he had been arrested pursuant to the issuance of an illegal arrest warrant. [1] In a one-sentence mandate, relief was denied on the Petition for Writ of *Error Coram Nobis.* [2]

1 Respondent's Exhibit A to Response to Petition for Writ of Habeas Corpus.

2 Respondent's Exhibit B to Response to Petition for Writ of Habeas Corpus.

After his unsuccessful direct appeal, Dumond filed a state petition for postconviction relief pursuant to A. R. Cr. P. 37.1, [3] alleging that his defense counsel were ineffective and that the state had withheld exculpatory evidence from the defense. On January 25, 1988, the Arkansas Supreme Court denied the petition, in part, and remanded the matter to the trial court for a limited evidentiary hearing. *Dumond v. State, 294 Ark. 379, 743 S.W.2d 779 (1988)* (Dumond II). In the partial denial and remand, the Arkansas Supreme Court refused to consider petitioner's assertion that newly discovered scientific evidence excluded him from being the perpetrator of the crimes for which he stands convicted. Even though the state joined Dumond in the request for an evidentiary hearing before **[*3]** the trial court on the allegation, the supreme court refused to grant such permission, citing it's rule that "[a] claim of new evidence is a direct rather than a collateral attack on the judgment and not within the purview of our postconviction rule." *Id., at 385* (citation omitted). [4]

3 Respondent's Exhibit E to Petition for Writ of

Habeas Corpus.

4 Not having raised this issue on direct appeal, it might be argued that Dumond has procedurally defaulted in presenting this claim in his federal habeas petition. *See Wainwright v. Sykes, 433 U.S. 72 (1977)*. However, because this allegation raises a colorable claim of innocence, such a default would not bar federal habeas review. See *Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986)*. It also could be argued that the state's rule, which seemingly forecloses a criminal defendant from ever raising a newly discovered evidence claim after the limited time for filing a direct appeal expires, constitutes an external impediment to Dumond's ability to proceed in state court. This impediment could be construed as *Wainwright v. Sykes* "cause." *See Murray v. Carrier, supra at 488*.

The limited hearing **[*4]** was held and the record certified to the Arkansas Supreme Court, which again remanded the case to the trial court with express directions to make specific findings of fact. These findings were made, and the case was again certified back to the Arkansas Supreme Court, which denied all state postconviction relief. *Dumond v. State, 297 Ark. 21, 759 S.W.2d 36 (1988)*. Because Dumond has no remedy in the Arkansas state court system, the respondent has conceded the exhaustion requirement of *section 2254*.

Dumond's petition for federal habeas corpus relief contains the following claims:

A. Defense counsel were ineffective at trial and engaged in conduct prejudicial to the accused because:

1. Defense counsel failed to seek an independent serological test which would have excluded petitioner as the rapist;

2. Defense counsel failed to move for a mistrial based upon the state's failure to disclose exculpatory fingerprint evidence;

3. Defense counsel Horton had a publication contract with the petitioner which gave Horton the rights to petitioner's story which affected his performance to the prejudice of the petitioner;

4. Defense counsel failed to call witnesses which corroborated **[*5]** petitioner's testimony or to properly cross-examine witnesses to petitioner's prejudice.

B. The state denied petitioner a fair trial and due process of law by withholding exculpatory evidence from him that: (1) the state's fingerprint analysis did not identify him; (2) the victim previously identified someone else from a photo array; and (3) the victim at first could not identify petitioner at the line-up and the police chief took her out of the room whereupon she returned and picked out petitioner as the person who raped her.

C. Defense counsel was ineffective for failing to challenge the line-up which was (1) suggestive, (2) the product of an illegal arrest, or (3) both.

D. Defense counsel were ineffective for failing to challenge the search of petitioner's truck as being: (1) based on stale information and as lacking probable cause; (2) being done to cover an illegal search of the truck which earlier produced the gun; or (3) done on a presigned warrant.

E. Petitioner was denied due process of law because the only scientific test conducted by the state and used at trial was based upon ABO typing, which is not accurate enough to satisfy the due process clause in rape cases; **[*6]** the state's failure to utilize a serological test which would have excluded petitioner as the rapist violated due process.

F. Inmunoglobulin allotyping which completely excludes petitioner as the rapist constitutes newly discovered evidence entitling petitioner to habeas relief as a matter of due process.

Petition for Writ of Habeas Corpus at 1-2.

II. FACTUAL BACKGROUND

On September 11, 1984, the victim in this case was a seventeen-year-old Forrest City, Arkansas, high school student. Because she was participating in some sort of work program, she left school early that day at approximately 2:30 p.m. On the way home, she stopped at the Diamond Burger and purchased a soft drink. After purchasing the drink, she went immediately home and began watching television. Shortly after she began watching television, a man, whom she described as tall and skinny with a beard, appeared beside her. He was holding a sack in one hand and a gun in the other. The

victim was made to lie on her stomach, whereupon her hands were tied with a rope. After being tied, she was told that someone wanted to see her. Her assailant took her out to her car and they drove away. To avoid detection, the assailant **[*7]** instructed the victim to lie down on the seat. The victim testified that she was able to look up and out of the car's window, and her familiarity with the streets on the route driven by the assailant enabled her to describe with particularity the location of the secluded area to which she was driven. After the assailant pulled off the road and parked in a location hidden from view, he had the victim get out of the car and lie down. He took the victim's jeans and panties off of her and put them underneath her. He then reached into the brown sack, pulled out a large knife, and cut off her sweater and brassiere. He taped the victim's mouth shut, removed his jeans, and put on a prophylactic, which he told the victim was a "French tickler." After a short period of vaginal intercourse, the assailant removed the prophylactic and instructed the victim to "help him" by engaging in fellatio. He eventually ejaculated in the victim's mouth, and then again penetrated the victim's vagina for a brief period. The victim testified that she spit out the ejaculate.

After the rape was completed, the assailant indicated that he intended to kill the victim to prevent her from later identifying him to the **[*8]** authorities. After several minutes of pleading, the assailant abandoned his murder plans, allowed the victim to put on her underwear and jeans, and returned her to her home. He told her when he let her out at her home that he would leave her car down the street. The victim went inside her home, showered, and unsuccessfully tried to telephone one of her close girlfriends. She then went down the street, retrieved her car, and then successfully reached her friend, whom she summoned to her home. When her friend arrived, the victim told her about the rape, and the two of them drove to where the victim's parents worked and thereafter to the police station.

The victim led the police to the scene of the rape, at which a roll of tape was found. Other physical evidence fitting her description of the events was also found. [5] She described the assailant as very tall, very thin, with dishwater-blonde hair and a full beard which was darker than his eyes. His eyes were described as crystal blue. She was also taken to the hospital for a standard physical examination, and preparation of a routine "rape kit."

5 The victim testified that the assailant had trouble backing out of the spot where he had parked her car immediately prior to the rape and that he had to change his mind and drive forward and over some small bushes as he left the crime scene. At the crime scene, officers found a spot on the ground where it appeared that a car's tires had been spinning, unable to gain traction, and also some small bushes were beaten down as if they had been run over by a car.

[*9] On either the evening after the rape or the next day, the victim went to the Forrest City police station and viewed a book containing the pictures of approximately 200 white males who had at one time or another had their picture taken by the Forrest City Police. The victim indicated that one of the pictures "resembled" the assailant. This individual, "R.W.," was investigated by the police, who determined that he had an airtight alibi because he was out of town working on September 11, 1984. Nevertheless, he was brought in for a one-man "show-up" before the victim, who stated that R.W. was not the assailant.

Another individual, "W.S.," who had physical characteristics similar to those described by the victim, worked at a shop in the vicinity of the Diamond Burger (where the victim had stopped for a soft drink on the day of the rape). About six days after the rape, the police decided to place W.S. in a lineup. The victim did not pick him, or any other individual, out of this lineup.

Some forty-five days later, while a passenger in a vehicle, the victim saw Dumond driving a pick-up truck on a Forrest City street. She told her companion that the driver of the truck was her assailant. **[*10]** At that time, Dumond did not have a beard, but he did have a moustache. The victim and her friend memorized the license plate number of Dumond's truck and reported the identification to the Forrest City police. Dumond was brought in by the police, put in a lineup, and identified by the victim as the man who had kidnapped and raped her.

At his trial, Dumond claimed that he had been home from work on the day of the rape because he was sick, and, in an effort to corroborate this alibi, several family members and friends were called.

With this procedural and factual background in mind, the Court will now turn to the merits of the claims raised in Dumond's habeas petition.

III. DUMOND'S CLAIMS FOR HABEAS RELIEF

A. *Ineffective Assistance of Counsel*

As set forth earlier herein, Dumond asserts that he suffered from ineffective assistance of counsel in the following particulars

A. 1. Defense counsel failed to seek an independent serological test which would have excluded petitioner as the rapist;

2. Defense counsel failed to move for a mistrial based upon the state's failure to disclose exculpatory fingerprint evidence;

3. Defense counsel Horton had a publication contract with the petitioner **[*11]** *which gave Horton the rights to petitioner's story which affected his performance to the prejudice of the petitioner;*

4. Defense counsel failed to call witnesses which corroborated petitioner's testimony or to properly cross-examine witnesses to petitioner's prejudice.

C. Defense counsel was ineffective for failing to challenge the line-up which was (1) suggestive, (2) the product of an illegal arrest, or (3) both.

D. Defense counsel were ineffective for failing to challenge the search of petitioner's truck as being: (1) based on stale information and as lacking probable cause; (2) being done to cover an illegal search of the truck which earlier produced the gun; or (3) done on a presigned warrant.

Petition for Writ of Habeas Corpus at 1-2.

In order to prove ineffective assistance of counsel, petitioner must prove that (1) his attorney's actions were unreasonable when viewed in the totality of the circumstances; and (2) he was prejudiced because there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 688 (1983); *Ryder v. Morris, 752 F.2d 327, 331 (8th Cir.* **[*12]** *1985)*. The petitioner bears a heavy burden in overcoming "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, 466 U.S. at 689*; *Kellogg v. Scurr, 741 F.2d 1099, 1101 (8th Cir. 1984)*; *Bell v. Lockhart, 741 F.2d 1105, 1106 (8th Cir. 1984)*. This presumption is created to "eliminate the distorting effects of hindsight," and recognizes that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland, 466 U.S. at 689*; *Ryder, 752 F.2d at 331*.

At Dumond's trial, the state called Mr. Charles Dorsey, Chief Serologist for the State Crime Laboratory, in an attempt to narrow the population from which the assailant could have come and in an attempt to establish that Dumond was a member of this narrower population group. Dorsey's testimony was based, *inter alia*, upon ABO blood-typing which was performed at the state crime laboratory, and upon testing aimed at determining whether or not semen was present in various samples taken from the victim and her clothing and from Dumond. Dorsey **[*13]** concluded that the assailant belonged to a group consisting of twenty-eight percent of the population (Tr. 636-37). During his testimony, Dorsey also explained that spermatozoa was not present in the semen he examined. He testified that this fact suggested that the assailant was either sterile or had undergone a vasectomy (Tr. 624). However, under cross-examination, Dorsey admitted that there were "a lot of explanations for a person not to be producing male reproductive cells." (Tr. 628). He also admitted that there were a number of other reasons (e.g., degeneration of sperm cells) which prevented him from saying with certainty that there were no sperm cells present at the time of ejaculation.

The absence of sperm cells in the semen samples in this case was significant, according to the prosecution, because Dumond had undergone a vasectomy several years before the rape. The prosecutor, through the testimony of Dorsey, attempted to narrow the population group from which the assailant could have come by adding the vasectomy factor to his ABO blood type equation. His attempts to do so were resisted by formal objection from Dumond's counsel, which was overruled. Dorsey thereupon testified **[*14]** that individuals with the assailant's blood type who had also undergone vasectomies comprised only six-tenth of one percent of the country's population and that Dumond fit into this very narrow group. Dorsey's testimony on direct was not strong on this point, however, and under cross-examination, Dorsey admitted that the assailant could only be narrowed to twenty-eight percent of the population, or, as he testified, "approximately one in

four." (Tr. 637). Dumond argues that, because of the serological evidence introduced by the state, his attorneys were ineffective in failing to seek an independent serological test.

Dumond's attorneys had, in fact, contacted Dr. Jim Geyer about the state's serological proof. Dr. Geyer is the president of Genetic Design, Inc., a North Carolina company which performs genetic testing primarily in disputed paternity cases. rice testified at the habeas hearing that his business employs approximately 80 persons and that they handle approximately 20,000 cases per year. When contacted by Dumond's attorney in late summer of 1985, Geyer explained that the ABO blood group testing performed by the state only excluded people. He also told them about a "PGM" test **[*15]** which can often be performed upon sperm. This test detects particular enzymes and is much more specific in narrowing the possible population group from which a semen donor can belong than the ABO blood-grouping procedure. At the habeas hearing, Dr. Geyer testified that PGM testing was common in 1985, but that its efficacy in this particular case would have depended largely upon storage conditions of the items to be tested because the enzymes do break down. [6] After several conversations with one or more of Dumond's attorneys, Dr. Geyer agreed to testify regarding criticism of the ABO blood testing performed by the state.

6 In 1987, Geyer attempted to per form "PGM" tests, but there were insufficent enzymes present.

As Dumond's trial date approached, there was some question about whether Dr. Geyer's testimony would be necessary. Rather than make an unnecessary trip, Dr. Geyer sent one of his assistants, Dr. Barwich, to assist with the defense. Geyer still planned upon coming to testify if necessary. However, during the course of the trial, Geyer became ill and was unable to make the trip to Forrest City to testify. Geyer was confident that Barwich could testify in his place, but **[*16]** Dumond's attorneys did not call Barwich because, according to them, there was some doubt about whether Barwich could be qualified to testify as an expert witness. No attempt was made to qualify Barwich.

Had Geyer or Barwich been called to testify as planned, they would have testified that the ABO blood-grouping test performed by the state was an inadequate scientific test to be performed in rape cases and that the test in this case only narrowed the possible group of which the assailant was a member to thirty-three percent of the population. While this testimony would have further detracted from the state's serological proof, it can't be said that counsel's failure to call such a witness was unreasonable under the circumstances. The transcript clearly demonstrates that Dumond's counsel, through cross-examination, exposed the weakness of the state's serological proof to the jury, and their decision to not put Dr. Barwich on or request a continuance to get Dr. Geyer there was not unreasonable. Such testimony would not have had any effect upon the jury verdict.

Dumond also criticizes counsel for failing to have additional testing (e.g., PGM) performed upon the evidentiary samples. It **[*17]** is clear that at least one of Dumond's attorneys was familiar with PGM testing, [7] and, according to Dr. Geyer, several states now routinely conduct PGM tests as a part of their "rape kit." While hindsight suggests that such testing could have been important in this case, [8] there is no evidence in the record to suggest that counsel's failure to secure the testing was an unreasonable professional judgment. No testimony was introduced to prove that other counsel, under similar circumstances, would have acted any differently.

7 During cross-examination, Dorsey, the state's serological expert, testified that, at the time of Dumond's trial, he had gone to work for the Arizona State Crime Laboratory and that they routinely performed PGM testing in rape cases (Tr. 630).

8 It should be recalled that the PGM testing wouldn't necessarily have been effective when Dr. Geyer got in the case because of the deterioration of the enzymes.

The same conclusion must be drawn with regard to Dumond's criticism of counsel's failure to have allotyping performed. It is the allotyping evidence, which came to light in 1987, that Dumond advanced in support of his newly discovered evidence claim in **[*18]** state court and herein. The significance of this evidence will be discussed presently only as it relates to Dumond's claim of ineffective assistance of counsel, and will be dealt with in greater detail *infra* with regard to his assertion that this newly discovered evidence entitles him to habeas relief. While allotyping, as a science, according to Dr. Moses Schanfield, has been with us since the late 1950's, Dumond again failed to present any evidence which would lead to the conclusion that a reasonable attorney,

under the circumstances, would have sought such testing. In fact, Dr. Geyer, whom Dumond's attorney had contacted as an expert, did not consider recommending the allotyping process until the summer of 1987. If an expert in the field did not consider this test an option and discuss the same with Dumond's attorneys, the attorneys cannot be faulted for not having sought the test. Again, no evidence has been introduced to demonstrate that another attorney would have performed differently under the circumstances.

Dumond next asserts that counsel was ineffective for failing to move for a mistrial based upon the state's failure to disclose exculpatory fingerprint evidence. After **[*19]** the rape, the victim's car was examined for fingerprints. The samples taken by the Forrest City Police Department were sent to the state crime laboratory, which reported that the prints were not of sufficient quality upon which to base an opinion. Specifically, there were no fingerprints which could be identified as Dumond's. Although Dumond's attorneys specifically sought discovery of information such as the results of fingerprint analysis, this information was not provided them, and they did not learn about the negative fingerprint report until trial. While an in-chamber conference took place when counsel learned of the fingerprint analysis, no formal motion for a mistrial was made on the record, and therefore, the issue was not preserved for appeal.

At the habeas hearing, Dumond was unable to demonstrate how he was prejudiced by this late discovery of the fingerprint reports. Granted, this evidence was favorable to his defense, and had the jury never been apprised of this fact, Dumond's argument of prejudice would be stronger. But, the fact is, this evidence was put before the jury, and Dumond was able to gain whatever advantage there was to be gained from this evidence even though **[*20]** it was not discovered in a timely fashion. No evidence was introduced to demonstrate any other advantage Dumond stood to gain from an earlier discovery of this evidence, and none is readily apparent. [9] Although the state should have produced this report prior to his trial, Dumond suffered no prejudice from its tardy disclosure, and he is entitled to no habeas relief on this claim.

> 9 A vague reference was made at the habeas hearing regarding the possibility that Dumond could have had other tests performed upon the fingerprint evidence, but there is no indication of what tests those might have been or what they might have disclosed.

While Dumond was on bail awaiting his trial, several men entered his home, subdued him, and castrated him. This series of events, and the fact that the rape victim was purportedly a member of one of Forrest City's more prominent families, escalated the notoriety of this case. Because of this, Dumond's family and one of Dumond's attorneys, Larry Horton, discussed the possibility that Dumond's "story" might have some commercial value. It was agreed that Horton and Dumond would split the profits from any commercial sale of the story and that Horton would **[*21]** have complete authority to negotiate any sale (Plaintiff's Exhibit 3 - Assignment of Literary Rights). Dumond now alleges that this arrangement caused Horton to suffer from a conflict of interest, which caused Horton to render an ineffective defense.

A contract such as this between a client and his attorney can, at the very least, raise serious questions of impropriety. *See* Rule 1.8(d), Rules of Professional Conduct; DR5-104(B), Code of Professional Responsibility. This sort of contract can only open the door for speculation, such as herein, that the attorney made decisions about strategy, etc. more out of a motivation to enhance the market value of the story than to properly defend his client. However, the existence of the contract does not necessarily lead to the conclusion that a conflict of interests existed or that prejudice to the defense occurred. In this case, Dumond cites a number of decisions by Horton which he asserts could only be explained by a conflict of interest. None of these actions/inactions of Horton amount to ineffective assistance of counsel, however, and the mere existence of the contract does not alter the situation. Horton's motivation regarding any pecuniary **[*22]** gain from the literary rights could only logically lead to his attempting to gain Dumond's acquittal. Any claim of ineffective assistance of counsel must rise or fall upon the particular attorney conduct at issue, because there has been no demonstration of what Horton did, as a result of the contract, which served to prejudice Dumond.

Dumond also claims that counsel rendered deficient performance in failing to call two witnesses, Dr. Barwich and James Taylor, and in failing to introduce a tape he made of a conversation between himself and his employer on the date of the alleged rape. The Court does not agree. As discussed earlier herein, Dr. Barwich, if

called, would have testified that the assailant and Dumond were members of a group consisting of twenty-five percent of the population. The calling of Barwich could have served to emphasize this fact, but it would simply have been cumulative of the testimony of the state's expert on cross-examination.

Similarly, with regard to Mr. Taylor, other witnesses had testified in support of Dumond's alibi that he went home from work early because he was sick, and Taylor's testimony in this regard would simply have been cumulative. Admittedly, **[*23]** Mr. Taylor would have been an apparent unbiased witness, but his testimony was not such that it would have provided an alibi for Dumond, and it would not have been so strong in corroborating Dumond's other alibi witnesses that the Court could conclude that his testimony would have affected the jury's verdict. Dumond's assertions with regard to the tape (Plaintiff's Exhibit 12) are similarly without merit. While it may have corroborated his alibi defense and rebutted, in part, his employer's testimony at trial, its introduction would not have affected the outcome of the trial. It was self-serving, and cumulative of Dumond's own testimony.

Dumond makes other allegations of ineffectiveness, which will be discussed, *infra.* At this time, however, the Court will turn to an examination of other issues, the significance of which impacts upon the remaining allegations of ineffectiveness.

B. *Failure to Disclose Exculpatory Evidence*

The next three issues to be examined are rooted in the allegation that the state withheld excuplatory evidence from petitioner in violation of the principles set forth in Brady v. Maryland, 373 U.S. 83 (1963).

First, petitioner alleges that the state **[*24]** violated *Brady v. Maryland* with regard to the fingerprint evidence discussed, *supra*. As stated earlier herein, this evidence was of limited value to Dumond, and its earlier production did not prejudice his defense. In the *Brady v. Maryland* context, this evidence was not "material", [10] because there is no reasonable probability that the result would have been different had the fingerprint evidence been produced in a timely fashion, *see Patterson v. Black, 791 F.2d 107, 110 (8th Cir. 1986).* There is an additional reason for denying relief on this claimed *Brady v. Maryland* violation. Because the fingerprint evidence was produced at trial, the *Brady* rule would not apply. The rule of *Brady* is limited to the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. *United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49* LEd.2d 342, 349 (1976). In appellant's case the August 24th tape was discovered during trial and admitted into evidence during trial. Therefore, the *Brady* rule would not apply.

Nassar v. Sissel, 792 F.2d 119, 121 (8th Cir. 1986).

10 In making this materiality determination, the Court relies upon its review of the facts *supra,* as well as the discussion to appear *infra* in the consideration of Dumond's newly discovered evidence claim.

[*25] Next, Dumond alleges that the state withheld a prior misidentification by the victim which could have been used to test the strength of her identification of him as the rapist. This allegation centers upon the facts concerning the victim's picking of R.W. out of the Forrest City Police Department "mug book" as resembling her assailant. It should be recalled that the police investigated the whereabouts of R.W. at the time of the rape and determined that he had a solid alibi. Nevertheless, he was brought in for a show-up with the victim, who said that he was not the assailant. One of Dumond's attorneys, Larry Horton, while investigating the case, had learned through conversations with the prosecutor [11] that there had been another suspect but that the victim had not identified him. Horton then interviewed one of the investigating officers, Bill Dooley, who also stated that the victim had said R.W. was not the rapist. Dumond's claim now is that he should have been informed of the sequence of events leading up to R.W.'s show-up: namely, the victim saying that R.W. "resembled" the assailant. While this may be true, the omission does not compel habeas relief for several reasons. First, **[*26]** it is inaccurate to characterize this scenario as a withholding of a prior misidentification. The victim's statement of "resemblance" was not such to support that characterization. Secondly, this evidence could have been used to strengthen the victim's identification testimony as well as detract from it, because the state could have argued that her rejection of R.W., at the show-up, as the assailant demonstrated the conscientiousness and honesty of the victim (i.e., she wasn't simply pointing the finger at whomever the police brought to her attention). Finally, this evidence is not material in that there is no

"reasonable probability" that the result of the trial would have been different had this evidence been presented to the jury. *U.S. v. Bagley, 475 U.S. 1023, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985)*.

> 11 Horton testified at the habeas hearing that he first learned of this possibility from a state trooper who had informed him of another "idenitification" by the victim.

Dumond's final *Brady* claim concerns the facts surrounding the lineup conducted in which Dumond was a participant and was identified by the victim. Dumond alleges that, when the victim first viewed this **[*27]** lineup, she did not identify Dumond. Dumond further contends that it was only after the victim was taken to another room by Forrest City Chief of Police Joe Goff and returned for another view of the lineup that she was able to identify Dumond. In support of these allegations, Dumond filed the affidavit of a former St. Francis County Deputy Sheriff, Henry Leary (Plaintiff's Exhibit 9). [12] Leary states in part, in his affidavit, that:

6. I stood beside the viewing window while [the victim] viewed the line up twice.

7. The first viewing was after she was brought out of a detective room by Police Chief Joe Golf [sic] and he instructed her to look through the viewing window and see if she could identify her assailant. She did not identify Wayne Dumond or anyone else.

8. After her first viewing, she was taken back into the detective room for a few minutes, brought back for a second viewing and identified Wayne Dumond without hesitation.

9. I know that the Forrest City Police Department was in possession of a photograph of Wayne Dumond at the time of the line up.

> 12 At the habeas hearing, the state stipulated that, if called, Leary would testify in accordance with this affidavit.

[*28] The inference Dumond would have the Court draw from this series of events is that the Forrest City Chief of Police tainted the victim's identification by prompting her between the first and second viewing. There are several reasons that this theory cannot be embraced. The lineup was conducted by utilizing a room at the end of a hallway, and, as described by other witnesses, an individual could actually leave the area of the two-way mirror and either be in a different "room" or merely "down the hall." Additionally, the other witnesses who testified, stated that Chief Goff was not present at the lineup. [13] It should also be noted that Dumond testified that one of the Forrest City police officers told the victim to look at number two (Dumond) "real good" and then repeated the lineup procedure. Were Leary's recollection of the events accurate, one would expect him to recall this obvious prompting of the victim, had it actually occurred.

> 13 The victim and her father were subpoenaed to testify, but these subpoenas were quashed, in part, because there was no allegation directed to what their testimony would be and the Court did not intend to allow the petitioner to simply engage in a "fishing expedition." Discovery could have been taken to develop any facts that the victim or her father could have brought to bear on this issue. The state court's findings on the identification issue, *see* discussion, *infra*, were also a factor in quashing the subpoenas.

[*29] Another reason the Court has difficulty accepting Dumond's theory of a tainted lineup stems from the fact that the victim had already identified Dumond on the streets of Forrest City. It was not a case of the police providing the victim with a suspect. Rather, the victim, independent of the police, identified Dumond prior to the lineup, and it was this pre-lineup identification that caused the police to arrest Dumond. While this series of events could conceivably have been part of some elaborate scenario undertaken to "frame" Dumond, there are no credible facts to support such a scheme. To the contrary, it would appear that the police were "checking" the victim's memory rather than prompting it. Otherwise, the lineup would have been pointless. The victim had already identified Dumond as her assailant.

Although the above satisfies the Court that there is a factual basis for rejecting Dumond's final *Brady* claim, there is an even stronger legal basis. The victim's in-court identification of Dumond as her assailant was based not upon her identification of Dumond at the lineup, but upon her observation of Dumond at the scene of the crime.

We are satisfied that the in-court identification **[*30]** stemmed from the victim's extended contact with her assailant during the attack rather than from the lineup.

The victim testified that she was with the petitioner at approximatley 2:45 p.m. for forty to forty-five minutes. He was not disguised and she stated that she saw him clearly. She had to persuade him not to kill her while standing face to face with him. The victim was absolutely positive about her identification of him in the courtroom. All of these factors are indicative of the reliability of the victim's identification. Under these circumstances we find that the in-court identification was not the product of the arrest or resulting lineup.

Dumond v. State, 294 Ark. 379, 392-93.

This finding of the Arkansas Supreme Court is presumptively correct, *Sumner v. Mata, 455 U.S. 591, 597,* and entitled to a high measure of deference. *Id., at 598. See also, Vinston v. Lockhart, 850 F.2d 420, 424 (8th Cir. 1988).* Even if the lineup procedure were conducted as described by Leary, the victim's identification had a reliable basis and would have, therefore, been admissible. *Cooley v. Lockhart, 839 F.2d 431 (8th Cir. 1988).* The significance of this state-court deference **[*31]** is that the evidence of lineup misconduct, if any there was, is not "material." *U.S. v. Bagley, supra.* There is no reasonable probability that the result of Dumond's trial would have been different had this evidence been provided prior to his trial. The victim's in-court identification of Dumond would not have been suppressed, and the transcript of her testimony convinces the Court that cross-examination concerning the lineup procedure would not have affected the weight the jury gave to her identification of Dumond. [14]

> 14 Dumond's testimony at the habeas hearing also gives rise to the question of whether this "lineup misconduct" was actually suppressed. Recall, Dumond testified that a police officer told the victim to look at Dumond "real good." His knowledge of this "misconduct" would attenuate any suggestion of suppression.

C. *Ineffective Counsel Claims Relating to Identification, Search, and Arrest Issues*

With regard to his identification by the victim, Dumond alleges that his attorneys were ineffective in failing to challenge the lineup. He argues that the lineup photograph (Plaintiff's Exhibit 8) reveals the inherent suggestiveness of the lineup array, that the prior **[*32]** *"misidentification" of R.W. should have caused the attorneys to challenge the victim's identification, and also that the lineup was the product of an illegal arrest.*

Contrary to Dumond's assertions, the lineup picture does not compel a conclusion of inherent suggestiveness. Dumond was not, as he alleges in his petition, the only individual "remotely" fitting the victim's description of the assailant. Even if this were true and counsel were unreasonable in failing to challenge the lineup, no prejudice resulted. As stated earlier in this opinion, the victim's in-court identification was based upon her observation of Dumond during the criminal episode and not the lineup. A successful challenge to the lineup would, therefore, have had no impact upon the outcome of the trial.

The allegation that the lineup should have been challenged as the product of an illegal arrest warrant is without merit, because the evidence at the habeas hearing provided no support for this allegations. The allegation that Dumond's arrest was the product of the former "pre-signed" arrest warrant policy of the municipal court was not substantiated by the evidence. The Court credits Judge Bridgeforth's testimony **[*33]** *that he reviewed a statement given by the victim prior to the issuance of the warrant.* [15]

> 15 *His recollection of typed versus handwritten statement and three-page versus four-page length of statement was not positive, but this does not reduce the credibility of his testimony.*

Defense counsel are also criticized for failing to seek the suppression of a handgun which was discovered in a search of Dumond's truck. Dumond asserts that the affidavit for search warrant failed to provide probable cause, that the truck had actually been searched prior to the issuance of the warrant, and that the search warrant had been presigned. No evidence was introduced to support the latter two allegations and they, therefore, provide no support for his ineffectiveness/suppression claim. If the Court assumes that the affidavit is lacking in its statement of probable cause and that a suppression motion would have been successful, Dumond is entitled to no relief on this ineffective claim. The handgun, as evidence in this case, played a very minor role in gaining Dumond's conviction. There can be little doubt that its suppression would have had no impact upon the outcome of Dumond's trial.

D. Denial **[*34]** *of Due Process from State's Reliance Only Upon ABO Typing*

Dumond next argues that he was deprived of due process of law because the state could have used a serological test which would have been more sophisticated than the ABO typing and which would have excluded him as the rapist. This argument must fail. A recent United States Supreme Court case makes it clear that the state does not have a constitutional duty to perform any particular tests in a rape case.

The Arizona Court of Appeals [in reversing the defendant's rape conviction] also referred somewhat obliquely to the State's "inability to quantitatively test" certain semen samples with the newer P-30 test. 153 Ariz., at 54, 734 P.2d, at 596. If the court meant by this statement that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunk driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalizer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

Arizona v. Youngblood, **[*35]** U.S. Sup. Ct. Slip Op. No. 86-1904 at 8 (Nov. 29, 1988).

E. *Newly Discovered Evidence*

Dumond's final claim is that, since his state conviction, scientific evidence has become available which demonstrates that he couldn't have been the rapist. This is the claim, referred to earlier, which the state supreme court failed to consider.

The claim of newly discovered evidence relevant to the guilt of a state prisoner is generally not a ground for relief on federal habas corpus. Mastrian v. McManus, 554 F.2d 813, 822 (8th Cir. 1977), cert. denied, 433 U.S. 913 (1977). Before it may provide the basis for federal habeas relief, the newly discovered "evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a State prisoner is not a ground for relief. . . ." *Townsend v. Sain, 372 U.S. 293, 317, 83 S. Ct. 745, 759, 9 L.Ed.2d 770 (1962).* Our circuit has concluded that newly discovered evidence meets this standard if its introduction would "probably produce an acquittal on retrial." *Mastrian v. McManus, supra at 823. See also Drake v. Wyrick, 640 F.2d 912, 914 (8th Cir. 1981).* **[*36]** In fact, before a hearing is required upon such a claim, "it must be shown that the new evidence, if introduced at a new trial, would likely produce an acquittal." *Hall v. Lockhart,* 8i *06 F.2d 165, 168 (8th Cir. 1986), citing Privitt v. Housewright, 624 F.2d 851 (8th Cir. 1980).* With this standard in mind, the Court will now turn to Dumond's claim of newly discovered evidence.

In 1987, after his unsuccessful attempt to subject the various items of evidence to the "PGM" test, Dr. Geyer requested that Dr. Moses Schanfield conduct inmunoglobulin allotyping tests upon the evidence. Dr. Schanfield is the president and laboratory director of Allo-Type Genetic Testing, Inc., a company which performs genetic testing for forensic analysis and cases of disputed parentage. His methodology and credentials as an expert are not challenged by the state. His allotyping test seeks to identify certain genetic markers found in the antibody fraction of blood plasma and body fluids. Dr. Schanfield found genetic markers consistent with the victim in, among other samples, the samples from her panties and the pant leg of her jeans. Both of these samples had tested positive for semen according to state **[*37]** crime laboratory reports (Plaintiff's Exhibit 15 - Report of State Crime Laboratory dated December 6, 1984). Schanfield found no genetic markers consistent with Mr. Dumond on these two samples. Because the panties stains were not composed of pure semen, [16] Schanfield could attach no significance to the absence of Dumond's genetic markers in the panties stains. [17] However, assuming that the stain from the pant leg was pure semen, the absence of Dumond's genetic markers in this particular stain caused Schanfield to conclude that there was a ninety-nine percent chance that Dumond was not the rapist in this case.

16 Vaginal secretions were present as well.

17 According to Schanfield, the failure to find Dumond's markers in such a "mixed" stain would render any opinion inconclusive.

If the assumption upon which Schanfield's opinion is based [18] is supported by facts in the record, or which reasonably could be inferred from the record, Dumond's argument that this newly discovered evidence would likely produce a verdict of acquittal on retrial is persuasive. This assumption, however, cannot be made based upon the record in this case. Even though the state, in its response to **[*38]** Dumond's habeas petition, suggests that this assumption may be accurate, [19] an examination of the record fails to support this assumption

under any evidentiary standard.

18 Presence of pure semen in the pant leg stain.

19 At the hearing, it became apparent that the state did not concede the accuracy of this assumption.

In his posthearing brief, Dumond argues that the status of this pant leg stain as pure semen is the "only conclusion that can be drawn from" the evidence. The victim testified that the assailant ejaculated only during oral sex (Tr. 616) and that she spit the ejaculate out. She also testified that the assailant wore a condom during the first vaginal intercourse (Tr. 616). Dumond argues that the semen stain appearing upon the pant leg necessarily resulted from the victim spitting out the ejaculate. This is a possibility, but it is not the only possibilty, nor is it necessarily the most likely possibility. As Dr. Schanfield points out, in criticizing the inconsistency of the rape victim's testimony and the findings of the state crime laboratory, there was a large concentration of semen present in the panties stain, which contradicts the notion of a single oral **[*39]** ejaculation. This panties stain suggests that there was at least another ejaculation in the vagina. Dr. Schanfield further explained that this stain did not represent "neat" semen. In other words, the presence of vaginal secretions had to be assumed. [20]

20 This is the reason that Schanfield could not base his opinion excluding Dumond as the rapist upon the failure to find Dumond's genetic markers in this stain.

The source of the stain on the pant leg could well be the same source as that of the stain in the panties. This is true because the evidence did not rule out the possibility that the stain could have occurred as a result of the way the jeans were arranged under the victim. The panties could also have come in contact with the pant leg when the victim was getting dressed at the crime scene, when she was getting undressed at home after the rape, or, importantly, when the two items were simply placed together in the paper sack and taken to the hospital (Tr. 580). It should be recalled that the stain in the panties and in the pant leg were consistent as to blood type and genetic markers, and this fact would also suggest a likelihood of originating from the same source. The **[*40]** point is that it cannot be assumed, as Dumond suggests, that the pant leg stain is composed of pure semen, and Dr. Schanfield readily admits that, without this assumption, he can offer no opinion relative to excluding Dumond as the rapist herein.

The conclusion that this newly discovered evidence would not probably produce a verdict of acquittal seems apparent, but before leaving this issue, the Court will make the following observation about the evidence which had to be weighed both in considering whether Dumond had been prejudiced by any alleged errors of counsel and in deciding whether the newly discovered evidence entitled him to habeas relief.

Mr. Dumond's conviction herein primarily flowed from the victim's identification of him as the rapist. The state's serological proof and other circumstantial proof such as the handgun discovered in Dumond's truck was not particularly compelling. The victim's clear recollection of the incident and corroboration of her recollection by undisputed facts provided strong evidence for the jury to conclude, beyond a reasonable doubt, that her identification of Dumond as the rapist was accurate. She had the opportunity to view the rapist for approximately **[*41]** forty-five minutes. During this period of time, she looked him "straight in the eye" (Tr. 537) and begged for her life for ten minutes (Tr. 543). Her description of events at the scene of the crime (tiremarks, tape, bushes apparently run over by a car) were accurate. The cutting off of her sweater and brassiere was confirmed by a knife-like mark upon her shoulder (Tr. 530, 582). Her description of the assailant's blue eyes matches those of Dumond. (Compare victim's testimony at page 565 and the lineup picture, Plaintiff's Exhibit 8, in which Dumond is subject number two.) She also was able to give the Police a description of a truck she said she had seen her assailant driving in her neighborhood on the day of the rape, and this description was similar to the truck driven by Dumond. The victim testified that she "knew [the rapist] was" Dumond (Tr. 570), and she explained that, upon this issue, she had "no doubt." (Tr. 571).

The victim's identification of Dumond as her rapist and kidnapper was strong, and the newly discovered evidence of an inconclusive scientific test would not likely produce a verdict of acquittal upon retrial. [21]

21 Although Schanfield's report and testimony primarily focused upon the absence of Dumond's genetic markers upon the pant leg, he also, as alluded to earlier, questioned the accuracy of the victim's testimony concerning only a single oral ejaculation. This criticism is well-taken, but it

> does not seem likely that the victim's confusion about the number and location of ejaculations would have necessarily enured to Dumond's benefit. In other words, it does not seem likely that this inconsistency would produce a verdict of acquittal upon retrial.

[*42] CONCLUSION

In summary, the Court concludes that none of the errors asserted by Dumond, either separately or collectively, entitle him to federal habeas relief. It is, therefore, ordered that his petition for habeas corpus relief be dismissed.

DATED this 31st day of January, 1989.

JUDGMENT

Pursuant to the Memorandum and Order filed this date, it is Considered, Ordered, and Adjudged that this case be, and it is hereby, dismissed; the relief sought is denied.

DATA this 31st day of January, 1983.