

15-0067

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

SAMUEL ANSTEY,

Petitioner,

Vs.

CIVIL ACTION No. 14-C-134
HON. JOHN W. HATCHER, JR., JUDGE

DAVID BALLARD, Warden,
Mount Olive Correctional Complex

Respondent.

FAYETTE COUNTY
CIRCUIT CLERK
2015 JAN 20 A 11:20
DANIEL E. WRIGHT

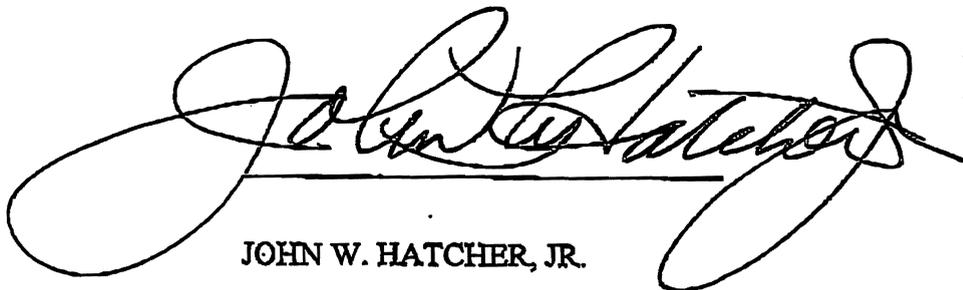
ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS

The above named Petitioner has filed with this court an Application and Affidavit to Proceed *In Forma Pauperis*. The Court has examined the Petitioner's Application and Affidavit to Proceed *In Forma Pauperis* and determined: (1) the Application and Affidavit do comply with the requirements of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, Section 3(a); and (2) as required by the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, Section 3(a), the Application and Affidavit do demonstrate to the Court's satisfaction that the Petitioner is unable to pay the costs of proceedings or employ counsel.

Accordingly, it is ORDERED that the Petitioner is GRANTED leave to file this action *In Forma Pauperis*.

The Clerk shall, fax a copy of this Order to Wiley Newbold, Attorney at Law, PO Box 6130, Morgantown, WV 26506. And mail a copy to Robert L. Lambert, Assistant Prosecuting Attorney.

Entered this 20th day of January, 2015



JOHN W. HATCHER, JR.

~~CHIEF~~ JUDGE

A TRUE COPY of an order entered

20 Jan. 2015

Teste: Daniel Z. Wright
Circuit Clerk Fayette County, WV

To Clerk

Pls FAX: 1.304.293.3762

**IN THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA**

SAMUEL ANSTEY,

Petitioner,

vs.

Civil Action No. 14-C-134-H

**DAVID BALLARD, Warden,
Mount Olive Correctional Complex,**

Respondent.

ORDER

FAYETTE COUNTY
CIRCUIT CLERK
2014 DEC 24 A 10:29
DANIEL E. WRIGHI

On May 12, 2014, the Inmate Petitioner (hereinafter "Petitioner") filed, by counsel, Valena Beety, supervising attorney of the West Virginia University College of Law Innocence Project Clinic, a Petition seeking a Writ of Habeas Corpus. In said Petition, the Petitioner seeks to collaterally attack his conviction, sentence, and incarceration at the Mount Olive Correctional Complex, Fayette County, West Virginia.

After full, careful, thorough consideration and review of the Petition; relevant law; complete contents of the court file in the Petitioner's underlying criminal case; and the complete contents of the court file in the above-styled civil action, including the Respondent's Reply to the Petition and the Petitioner's Response thereto, said

pleadings being described more fully, *infra*, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On May 11, 1994 [one (1) day shy of twenty (20) years from the filing of the aforementioned Petition], a Fayette County Grand Jury returned a true bill of Indictment No. 94-F-31-H, charging the Petitioner with one (1) count of murder and one (1) count of first degree arson. The Petitioner was accused of intentionally starting a fire in a residential trailer on February 8, 1994, for the purpose of killing his grandmother, Marie Donollo, with whom he lived in said residential trailer. They were the only two (2) people who lived in the trailer.
2. An eleven (11) day petit jury trial commenced on August 21, 1995. The Petitioner was represented at trial by a father/son defense team from Wyoming County, West Virginia, Warren R. McGraw and Warren R. McGraw, II, whom the Petitioner employed. The undersigned Judge presided over said jury trial, and is quite familiar with the facts of the underlying felony case.¹
3. The transcript of the Petitioner's jury trial totals more than two thousand four-hundred (2,400) pages, and admitted into evidence were ninety-three (93)

¹ The Court importantly notes that the trial defense team was made up of two (2) smart, aggressive, well-known and well-respected lawyers with statewide reputations. The younger McGraw went on to be a very successful lawyer in the mass tort litigation field, earning extraordinarily lucrative attorney fees. The elder McGraw is a former President of the West Virginia State Senate, former Justice of the Supreme Court of Appeals of West Virginia, and now a sitting Circuit Court Judge in Wyoming County, West Virginia.

State's exhibits and twelve (12) defense exhibits. Due to the vast record in the underlying criminal case, and the detailed summary of undisputed relevant testimony found in the Petition, the Court's findings of fact herein will primarily focus on those facts necessary to address the issues as to the relief sought by the Petitioner.

4. The State, at trial, called Assistant West Virginia State Fire Marshal Roger York; Harold Franck, a forensic engineer; and Fayette County Fire Coordinator Steven Cruikshank as expert witnesses.
5. Delbert Cordle, then the long time fire chief of the Oak Hill, Fayette County, West Virginia Fire Department, testified that he arrived at the scene of the fire and found the Petitioner screaming "my grandmother is in the bedroom." Chief Cordle observed a fire in the kitchen of the trailer, firefighters rescued Ms. Donollo from the burning trailer, and emergency medical procedures were promptly administered to Ms. Donollo. The fire occurred on February 8, 1994. On February 12, 1994, Ms. Donollo died at the age of 81 as a result of hypoxic encephalopathy (lack of oxygen to the brain). Chief Cordle testified that the back door (nearest to the victim's bedroom) of the trailer was locked. Trial, Volume III, p. 750-758.
6. State's Exhibit No. 2 at trial was a diagram of the aforementioned residential trailer. Said diagram shows that the main entrance to the trailer opens to the

living room. From the perspective of standing in the doorway of the main entrance to the trailer and facing inside, immediately to the right of the living room is the kitchen, which is the room at the far right end of the trailer; to the left of the living room is a hallway. Facing down the hallway, toward the extreme left end of the trailer, the first door in the hallway is an entrance to a storage closet; the second door on the left in the hallway leads to the Petitioner's bedroom; the third door on the left in the hallway is a bathroom door; at the end of the hallway is the victim's bedroom. A second door leading to the outside is found on the right of the hallway and facing the bathroom door. Said exit door leads to an enclosed porch.

7. Chief Cordle testified that the Petitioner gave him the following information:

"I tried to go up the hall when I heard Mom (the victim) yell at me like she wanted me to help her up to the bathroom. When I opened the door (his bedroom door), the smoke and heat was so bad I could not get to her (bedroom) door. So I shut the door (his door) and broke out the window, yelled for help, did not get any attention, so I threw on my pants and shoes. And my truck was parked up next to the trailer, and I just filled the tank with gas, so I moved it. I was afraid it would explode...I drove to a neighbor's house, beat on the door and got no answer, so I left and went to a neighbor across the lower road and beat on the door and got no answer...I then drove up to the neighbor's house above me and got them up. They called 911 for me." Id., p. 758.

8. The Petitioner also told Chief Cordle that “the neighbor said for him (the Petitioner) not to open the door to get the lady out, because it (the fire) would burn faster, and for him to wait on the fire department.” Id., p. 758, ¶ 24, to p. 759, ¶ 1-3.
9. Chief Cordle testified that, after the fire was extinguished he turned the investigation of the fire “over to the...investigating squad.” Id., p. 759, ¶ 11-12.
10. Fire Investigator, Lieutenant Robert Begley, a longtime member of the Oak Hill Fire Department, and Assistant West Virginia State Fire Marshal York Investigated the fire. The Petitioner signed a consent to search form, which was marked as State’s Exhibit No. 75 at trial. Trial, Volume IV, p. 1093. Lieutenant Begley noted that one of the firefighters had turned the *main* electrical circuit breaker for the trailer to the “off” position, and that all other circuit breakers for the trailer were in the “on” position, except for circuit breakers “three (3),” “four (4),” and “twelve (12). The firefighter turned the specific three (3) aforementioned circuit breakers to the “off” position to determine if said circuit breakers had been “tripped.” Id., p. 1098. They had not been tripped. Lieutenant Begley found an electric bread toaster in the kitchen on the countertop; the top of said toaster was covered with aluminum foil, and the plunger mechanism of the toaster was in the “down” position, as if the toaster had been activated or turned on. The toaster crumb tray at the bottom of the toaster had been detached from the toaster. Id.,

p. 1102-1106. Lieutenant Begley acknowledged that he “checked the plunger to see if it was down” and then “put it back to the original position” in which he found it. Id., p. 1106, ¶¶ 7-10. Lieutenant Begley photographed the toaster after he returned it to its original position or condition, and concluded his investigation. Id., p. 1107.

11. Mr. York testified that “examination revealed that the fire burn and char patterns came back to the kitchen area, and on top of a counter, which was adjacent to a kitchen range.” Trial, Volume V, p. 1243, ¶¶ 20-23. Mr. York noted that the toaster was covered in aluminum foil, which had been discovered by Lieutenant Begley, appeared to be connected to an electrical receptacle, and fire damage was heavy in the area near the toaster. Id., 1244-1246.
12. Mr. Franck testified the fire or fire’s effects could not have caused the toaster plunger to be placed in the “down” position, and that this could only have occurred by intentional manipulation. Trial, Volume VII, p. 1422. Mr. Franck discovered, upon disassembling the toaster, that two (2) electrical wires inside the toaster were in a condition which indicated that they had short-circuited, causing an extremely high temperature. He also noted that the toaster electrical cord had been shoved or placed inside the toaster. Id., p. 1422-1423, 1426-1427. Mr. Franck hypothesized that the extreme temperatures burned the

insulation of the electrical power cord, which ultimately caused a fire. Id., p. 1423.

13. The State's three (3) aforementioned experts also concluded that a separate fire had originated in the victim's bedroom. Trial, Volume V, p. 1150, 1250, and Trial, Volume VII, p. 1411. Mr. Cruikshank testified that, in the victim's bedroom, the investigation found "at the foot of the (victim's) bed, the interior wall, that (sic) was a floor (heat) register. Over top of this floor (heat) register there was some charred material." Trial, Volume 5, p. 1150, ¶¶ 16-19. He testified that the aforementioned kitchen fire was not of sufficient intensity to have caused the fire in the victim's bedroom. Id., p. 1157. Mr. Cruikshank, when asked by counsel for the State if anything struck him "unusual about the condition of the trailer," replied that investigators found a "towel and material" around the Petitioner's bedroom door, which "would serve to keep smoke out" of the Petitioner's bedroom. Id., p. 1157-1158. The Petitioner argues, on page six (6) the Petition, that the towels, which were secured by weather stripping, were for the purpose of attempting to "suppress any noise he created" from disturbing the victim and that the Petitioner and victim at times argued over the Petitioner making too much noise.
14. Based upon the multiple points of fire origin, the State's three (3) aforementioned experts each concluded that the fire was incendiary in nature

and had been intentionally caused. Id., p. 1159-1160, 136, and Trial, Volume VII, p. 1411.

15. West Virginia State Trooper John Morrison testified that the Petitioner told him that the victim had seven hundred thousand dollars (\$700,000.00) in the bank; that the Petitioner had previously been granted the victim's power of attorney, but that said power of attorney had recently been revoked by the victim; and that the Petitioner and the victim "would have arguments and she would get like that and threaten him with things," such as removing him as the sole beneficiary of her last will and testament and "taking him off of the will." Trial, Volume II, 358-359.
16. Philip J. Tissue, attorney at law, with years of general practice experience, of Oak Hill, West Virginia, testified that he had, on December 09, 1993, prepared a power of attorney for the victim, which named the Petitioner as her attorney in fact. Trial, Volume IV, p. 1022. Mr. Tissue subsequently prepared a revocation of the aforementioned power of attorney, and the victim signed the revocation document on February 02, 1994. Id., 1029. (The fatal fire occurred on February 08, 1994, six (6) days after the execution of said revocation document). Said revocation document was admitted into evidence at trial as State's Exhibit No. 69. Mr. Tissue testified that the victim told him that the Petitioner had removed between ten thousand dollars (\$10,000.00) and fifteen thousand dollars (\$15,000.00) from her bank safety deposit box, that the Petitioner was, at the

same time, the sole beneficiary of her will, and that she was considering changing her will, and that she wanted to change her will, but that she “could not figure out who she wanted to leave the assets to (sic).” Id., 1030-1033.

17. Diana Janney, then a customer service representative at Bank One (formerly Merchants and Miners Bank) in Oak Hill, West Virginia, testified that the victim had multiple certificates of deposit (CDs) at said bank, and that she met with the victim and Petitioner on December 09, 1993. The purpose of said meeting was to add the Petitioner’s name to the victim’s CDs, and Ms. Janney testified that the victim initially appeared reluctant to do so; that the Petitioner insisted that the change be made because, due to the power of attorney document that was being prepared by Mr. Tissue, he would have access to the victims CDs regardless of whether said change was made; that the Petitioner’s name had been added to the victim’s safety deposit box shortly before the aforementioned meeting; and that Ms. Janney felt so uncomfortable because of the Petitioner’s request that she called her supervisor. Trial, Volume II, p. 498-504. Ms. Janney testified that the victim said that adding the Petitioner to the victim’s CDs was “fine” with her, but that the victim returned a week later, without the Petitioner present, to say that she had changed her mind. Id., p. 506. Ms. Janney informed the victim that, at that time, the Petitioner’s name could not be removed from the CDs. Id., p.

507, ¶ 20-24. Thus, by having his name placed on the victim's CDs, the Petitioner gained sole control over the CDs following the victim's death.

18. Assistant Bank Branch Manager Becky Booth, who was Ms. Janney's supervisor on December 09, 1993, when asked by counsel for the State if the "amount of funds...that she (the victim) was adding him (the Petitioner) to" was "in excess of four hundred thousand dollars (\$400,000.00)," replied that said amount was "probably" accurate. Id., p. 476.
19. Rodney Carney, at the time an experienced firefighter and fire investigator for the City of Beckley, Raleigh County, West Virginia, testified for the defense as an expert witness. Mr. Carney testified that the bread toaster could not have been the cause of the fire. Trial, Volume IX, p. 1931. He also testified that he found no evidence of a fire having started in the victim's bedroom. Id., p. 1934-1935. Mr. Carney concluded that the fire in the residential trailer of the victim was accidental in origin. Id., 1938.
20. Tim May, a fire investigator and instructor who taught at the National Fire Academy in Emmitsburg, Maryland, testified for the defense as an expert witness. Mr. May, like Mr. Carney, aforementioned, testified that the trailer fire could not have originated with the toaster and that the second fire could not have originated in the victim's bedroom. Id., p. 2118, 2134. He also concluded that

the fire was accidental in origin and not intentionally set. Trial, Volume V, p. 1232.

21. On September 8, 1995, a unanimous petit jury found the Petitioner guilty of first degree murder without any recommendation of mercy.

22. The State had elected to proceed to trial only on the murder charge and not the arson charge. Trial, Volume VII, p. 1573-1574.

23. On September 8, 2014, the Court, upon receiving and accepting the aforementioned unanimous guilty verdict, sentenced the Petitioner to life in the West Virginia Penitentiary system without mercy. On September 14, 1995, the Court entered an Order memorializing the aforementioned conviction and sentence.

24. On March 15, 1996, the Petitioner, by his employed appellate counsel, Michael E. Foble, filed a direct appeal of his aforementioned conviction to the Supreme Court of Appeals of West Virginia. The Petitioner raised the following grounds for relief on appeal:

a) Insufficient evidence to support the Petitioner's guilt beyond a reasonable doubt;

b) Prosecutorial misconduct;

c) Ineffective assistance of counsel;

d) Denial of the right to a fair trial;

- e) Cumulative error;
- f) Failure of the jury to consider mitigating evidence when determining if the Petitioner should receive a sentence of life without mercy;
- g) Lack of impartiality by the trial Court and failure of the undersigned Judge (the trial Judge) to recuse himself;
- h) Prejudice suffered by the Petitioner arising from a dispute between his trial counsel and the Court, and the Court's discovery sanctions imposed against trial counsel.

25. On December 4, 1996, the Supreme Court of Appeals of West Virginia entered an Order refusing the aforementioned Petition for Appeal.

26. The Petitioner, pro se, filed a petition for writ of habeas corpus on February 6, 1998, thereby instituting Fayette County Civil Action No. 98-C-46-H. In said Petition, the Petitioner alleged the following as grounds for relief:

- a) Denial of the right to an impartial trial court, pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution;
- b) Denial of a fair trial, pursuant to the Fourteenth Amendment to the United States Constitution and "equivalent provision of the WV (sic) Constitution;" and

c) Ineffective assistance of counsel, pursuant to the Sixth Amendment to the United States Constitution and “equivalent provision of the WV (sic) Constitution;”

27. The relief sought in the aforementioned Petition in Civil Action No. 98-C-46-H was denied and said civil action was dismissed by an Order entered February 11, 1998. The Petitioner filed, pro se, a Petition for Appeal with the Supreme Court of Appeals of West Virginia on March 11, 1998 as to the aforementioned denial Order. The Supreme Court denied the Petition for Appeal on December 16, 1998, and denied the Petitioner’s subsequent motion for reconsideration of the Supreme Court’s denial by an Order entered January 21, 1999.
28. The Petition in the case sub judice alleges that, on February 16, 1999, the Petitioner filed a writ of habeas corpus in the United States District Court for the Southern District of West Virginia. On February 3, 2000, a United States District Court Magistrate Judge submitted to a Federal District Court Judge proposed findings of fact and conclusions of law, wherein she recommended that the Petition be denied for failing to comply with the applicable Federal statute of limitations. The United States District Court adopted the proposed findings of fact and conclusions of law of the Magistrate Judge and entered an Order denying the Petitioner’s requested relief. The Petitioner subsequently filed an

appeal with the United States Circuit Court of Appeals for the Fourth (4th) Circuit, and said Court denied said appeal on October 9, 2001.

29. In "Ground One (1)" of the Petition in the case sub judice, the Petitioner alleges that newly discovered evidence demonstrates that fire expert testimony relied upon at trial by the State was fundamentally unreliable. In support thereof, the Petitioner raises the following arguments:

- a) Evidence has been discovered since trial, which could not have been discovered by due diligence prior to the jury verdict, and the absence of said evidence is satisfactorily explained;
- b) The newly discovered evidence is material, and not merely cumulative;
- c) The aforementioned newly discovered evidence "is of a different kind and bears upon a different issue than that produced" at the Petitioner's trial;
- d) The newly discovered evidence would produce a different result at a second trial;
- e) The object of the new evidence is not solely to impeach the State's witnesses.

30. In "Ground Two (2)," the Petitioner alleges a violation of due process under the premise that "the mainstream shift in fire science demonstrates that his trial was fundamentally unfair."
31. The Petitioner alleges ineffective assistance of counsel in "Ground Three (3)," claiming that he is entitled to a new trial due to his trial counsel's failure to object to testimony which was unreliable under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, (1993). The Petitioner further alleges that "there is a reasonable probability that the result of his trial would have been different had his trial counsel objected to such testimony."
32. In "Ground Four (4)," the Petitioner alleges that the aforementioned ineffective assistance of counsel claim was not knowingly or intelligently waived in prior habeas corpus proceedings.
33. The Petitioner, in "Ground Five (5)," claims that he can utilize an "actual innocence" exception to overcome procedurally defaulted claims.
34. The Petitioner requests relief in the form of a new jury trial or, in the alternative, that the Court conduct an "evidentiary hearing on the claims presented in this motion for relief from judgment."
35. On August 8, 2014, following a preliminary review of the Petition, pursuant to Rule 4 of the Rules Governing Habeas Corpus Proceedings in West Virginia, the

Court entered an Order requiring the Respondent to file a response to the Petition.

36. On October 14, 2014, the Respondent, by counsel, filed "State's Reply to Petition for Writ of Habeas Corpus," arguing therein that the relief sought by the Petitioner should be denied for the following reasons:

- a) "Because Deviations from NFPA (National Fire Protection Association) 921 could only be used to impeach the State's expert witnesses, the Petitioner has failed to prove that the NFPA 921 constitutes newly discovered evidence under West Virginia law;" and
- b) Trial counsel was not legally ineffective for failing to file a "Daubert motion."

37. On November 10, 2014, the Petitioner, by counsel, filed "Petitioner's Response to State's Reply to the Petitioner's Petition for a Writ of Habeas Corpus," in which the Petitioner argued the following:

- a) The State mistakenly assumed that the Petitioner argued that "NFPA 921 is compulsory," and
- b) "Similarly situated courts have recognized the extraordinary shift in fire science and granted relief."

38. On November 13, 2014, Wiley Newbold, attorney at law, of the West Virginia University College of Law Innocence Project Clinic, filed a "Notice of Appearance" as counsel for the Petitioner.

CONCLUSIONS OF LAW

1. Jurisdiction and venue are properly in the Circuit Court of Fayette County, West Virginia.
2. A habeas corpus proceeding is not a substitute for a writ of error and ordinary trial error not involving constitutional violations will not be reviewed. Syl. Pt. 4, State ex rel McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979), cert. denied, 464 U.S. 831 (1983).
3. The Court concludes, because of the provisions of West Virginia Code § 53-4A-1(c), that "a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal..." W.Va. Code § 53-4A-1(c).
4. Rule 9(a) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia provides the following:

If the petition is not dismissed at a previous stage in the proceeding, the circuit court, after the answer is filed, shall, upon a review of the record, if any, determine whether an evidentiary hearing is required. If the court determines that an evidentiary hearing is not required, the court shall include in its final order specific findings of fact and conclusions of law as to why an evidentiary hearing was not required.

5. The Court, having completed its careful review of the Petition, the Respondent's Reply, and the Petitioner's Response to said Reply, concludes that the relevant facts of the case sub judice have been sufficiently and adequately developed and that the Court can now rule upon the Petition as a matter of law. The Petition and attached affidavits thoroughly set forth the nature of the claimed advancements in scientific fire investigation which constitutes the crux of the Petitioner's argument, and no testimony or other evidence is necessary for the Court to rule upon the application of the relevant law in the case sub judice.
6. In "Ground One (1)," the Petitioner argues that "newly discovered" evidence, in the form of expert witness opinions, renders the opinions of the State's trial expert witnesses unreliable. The Supreme Court of Appeals of West Virginia has held as follows concerning newly discovered evidence following a criminal trial:

A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or

its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.” Syllabus, State v. Davis, 217 W.Va. 93, 616 S.E.2d 89 (2004) citing Syllabus, State v. Frazier, 162 W.Va. 935, 253 S.E.2d 534 (1979).

7. The Petitioner argues that the State’s experts did not conduct any tests on the bread toaster or any other electrical appliances in the kitchen, and that the State’s experts relied solely on their personal observations of the fire scene as they found it after the fire was extinguished. The Petitioner further argues that a review by its experts, chemist Dr. Gerald L. Hurst and electrical engineer Mark Goodson, revealed that the methods of the, on scene, fire investigators were “wholly unreliable” and that the State’s experts “relied heavily on conclusions that were not scientifically valid.”
8. The Petitioner argues that “anyone who purports to be an expert in the origin and cause determination of fires is subject to the standard of care laid out in the 1992 National Fire Protection Association 921 (hereinafter NFPA 921).” He further

argues that burn indicators, such as those relied upon by the State's experts, are "unreliable."

9. The Petitioner argues that "new evidence" has been discovered since his trial because NFPA 921 was not widely accepted or recognized at the time of trial. Dr. Hurst's affidavit, attached to the Petition, reads, in part, that the "State's expert utterly failed to follow the scientific method." The Petitioner argues that the discovery of new evidence since trial and the unavailability of said evidence despite due diligence satisfies the first two (2) prongs of the above-quoted Frazier test.
10. The Supreme Court of Appeals of West Virginia has not specifically defined what constitutes materiality in the context of newly discovered evidence. The Petitioner points to United States Supreme Court case law which, in the context of wrongfully suppressed evidence, provides that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1565 (1995). The Petitioner argues that he must show only "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Id., 435, 1566, and the evidence "must be evaluated in the context of the entire record." United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2402.

11. The Petitioner further argues that the original investigative techniques were, in light of developments in investigative techniques since the Petitioner's trial, "wholly and completely deficient" due to a failure to follow scientific methods.
12. Further, the Petitioner argues that fire investigators at the crime scene failed to preserve relevant evidence by mishandling the toaster prior to its testing. The nature of the State's investigation and examination of the toaster were not at all complex or complicated, and were very clearly and plainly known to both sides in the case, the Court, and the jury, and to the Supreme Court on direct appeal. Thus, the Court concludes that any argument now of "new evidence" raised by the Petitioner concerning the State's experts' failure to preserve the electric bread toaster in its condition immediately after the fire are moot.
13. The Petitioner claims that the "newly discovered evidence is of a different kind and bears upon a different issue than that produced" at trial. The Petitioner claims that, since no evidence was presented at trial to show that NFPA 921 had been violated, the question of whether the aforementioned standard was violated now creates a new issue, thus claims his "new" evidence is not merely cumulative. The Respondent, in his Reply, correctly and persuasively argues that NFPA 921 was indeed in existence prior to the time of the Petitioner's trial, that its use was not at all compulsory at the time of the trial, that no legal precedent exists establishing that NFPA 921 presently is a compulsory

investigative standard, and that Section 1.3 of the NFPA itself reads, in pertinent part, that “(d)eviations from these procedures, however, are not necessarily wrong or inferior...” The Petitioner claims that he does not argue that NFPA 921 was “compulsory,” and that changes in fire science are more than mere impeachment evidence.

14. In State v. Davis, 217 W.Va. 93, 616 S.E.2d 89 (2004), a per curiam opinion, the Supreme Court addressed a case wherein a mother was convicted of murdering her infant daughter by administering poison. The defendant therein later filed a motion seeking a new trial, arguing that new developments in scientific testing would exonerate her of the aforementioned crime. The trial court denied the motion, and the Supreme Court, having applied the above-quoted test for “newly discovered evidence,” affirmed the trial court’s denial of the motion for new trial, writing:

Although it may be argued that the genetic test allegedly proving that Seth had the condition was not available at trial, in this Court’s view, the results of the test were merely cumulative of what was presented at trial. Furthermore, the test does not conclusively prove or establish that the insulin in Seth’s body was attributable to the condition or rebut the evidence that the insulin in Seth’s body was of exogenous origin. Overall, the evidence was not such “as ought to produce a second trial on the merits,” and consequently, it cannot be said that the circuit court abused its discretion in denying a new trial on the new genetic test results. Id., at 96, 100.

15. The Court concludes that, pursuant to the above-quoted language in Davis, the evidence the Petitioner now seeks to introduce or use is indeed cumulative and would clearly be used in an effort to impeach the State's expert witnesses. The Petitioner admits that NFPA 921 use is not compulsory. Thus, he cannot now argue that a new issue exists as to whether the non-mandatory standards of NFPA 921 were violated. Any expert testimony or reports submitted by the Petitioner's new experts would clearly be primarily used for the purpose of attempting to rebut the testimony of the State's experts.
16. Further, the nature of the findings made by the Petitioner's new experts support the Court's conclusion that said expert opinions are indeed for the purpose of rebutting the State's experts. The vast majority of the Affidavits of Dr. Gerald Hurst and Mark Goodson, attached to the Petition, focus on, or treat with primarily, their criticisms of the procedures used and findings made by the State's trial experts.
17. The Respondent, in his Reply, cites the following language of the United States District Court for the Eastern District of Michigan, which the undersigned finds quite persuasive:

Further, contrary to defendant's contention, NFPA 921 § 1.3 specifically indicates, "[d]eviations from these procedures, however, are not necessarily wrong or inferior but need to be justified." Hager's (the arson expert's) theory that the fire was intentionally set with an accelerant is based on sufficient evidence that Hager

reasonably applied to recognized and reliable fire investigation principles and methods based on NFPA 921. Although Hager's testimony was vulnerable to criticism because it was contrary to laboratory results indicating the absence of an accelerant, this discrepancy did not render it inadmissible. Such criticisms go to the weight rather than the admissibility of the testimony. People v. Jackson, Not Reported in N.W.2d, 2008 WL 2037805 (Mich.App., 2008), affirmed in People v. Jackson, 483 Mich. 912, 762 N.W.2d 518 (6th Circuit, 2009).

18. The Court agrees that the Petitioner's experts' testimony would indeed go to the weight of the testimony of the State's experts, not to its admissibility as evidence.
19. Of great importance and significance is the fact that indeed two (2) expert witnesses did testify at trial on behalf of the Petitioner. Both of said expert witnesses were unequivocally and clearly critical and contradictory of the State's expert witnesses, and both of the defense trial experts testified that the fire in the trailer was accidental in origin and that it was not started intentionally. The Petitioner's new expert witnesses may have had the benefit of approximately twenty (20) years of advancement in fire science, but the bedrock of their proposed testimony would certainly be the same as was the testimony of the Petitioner's two (2) experts who testified at trial, i.e. that the State's experts' investigative techniques and methods were flawed, and their conclusions wrong. The jury, having heard, at trial, the testimony of the State's experts and the

defense experts, found the evidence to be of sufficient weight to allow the jury to unanimously conclude beyond a reasonable doubt that the Petitioner was guilty of murder. The substantial and overwhelming circumstantial evidence presented to the jury during trial, when added to the State's experts' testimony, made for a quite convincing case against the Petitioner. Clearly, for the foregoing reasons, that which the Petitioner argues is "newly discovered evidence," is merely cumulative evidence, for the purpose of attempting to impeach the State's experts, and in no means satisfies the final requirement of the above-quoted Frazier test for newly discovered evidence.

20. Further, the Court concludes that the Petitioner could not satisfy the fourth factor of the Frazier test. The Court, having presided over the Petitioner's eleven (11) day jury trial and having reviewed the transcript thereof, finds that there was, beyond any doubt, overwhelming evidence clearly supporting the jury's unanimous guilty verdict. The Petitioner was the only person, other than the victim, who lived in the trailer and was in the trailer the night of the fire; the State's physical evidence concerning the conditions of the aforementioned electric bread toaster following the fire was and clearly would be suspicious to any reasonable person without any further interpretation or opinion by any expert witness; the Petitioner's use of weather stripping to seal the area around his bedroom door, despite his very weak argument that securing towels and other

materials with weather stripping around his bedroom door was to suppress or prevent noise made by the Petitioner from disturbing the victim in her bedroom, would clearly be considered, by any reasonable person, to be highly suspicious conduct and circumstances; the Petitioner's gaining sole control of the victim's CDs, totaling in excess of four hundred thousand dollars (\$400,000.00) following her death; and the victim's revocation of the aforementioned power of attorney within six (6) days and victim's desire to disinherit the Petitioner, expressed to Mr. Tissue a mere six (6) days prior to the fatal fire, which clearly is strong direct and circumstantial evidence, strongly supports the jury's unanimous guilty verdict, which was reached after two (2) hours and forty-nine (49) minutes of deliberations. Clearly, based upon the foregoing, the Court concludes that the expert testimony which the Petitioner now seeks to use as "newly discovered evidence" is clearly not "such as ought to produce an opposite result at a second trial on the merits," as required by Frazier. The Court concludes, having heard all the evidence at trial, that had the Petitioner's "new" experts testified at trial, the jury's verdict would have been the same.

21. Though the State need not prove motive as an element of the crime of murder, all of the aforementioned facts detailing the potentially large financial gain the Petitioner would enjoy, and the victim's conduct, in very close proximity to her

death, concerning her assets, clearly and beyond a reasonable doubt establishes a very clear motive for murder.

22. This Court need not determine if the other factors of the Frazier test were met, as the Petitioner clearly fails to meet the burden of the fourth (4th) and fifth (5th) factors of said test. Thus, "Ground One" of the Petition fails.

23. In "Ground Two (2)," the Petitioner argues that the subsequent advances in fire science render the Petitioner's trial fundamentally unfair, in violation of right to due process under the Fourteenth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. The Petitioner's argument is based on the fact that the Petitioner's "new" expert witnesses had access to sufficient evidence, not available at the time of the Petitioner's jury trial, which enabled them to make an independent determination as to the cause of the fire, i.e. Dr. Hurst concluded that "the only scientifically supportable conclusion is that the origin and the causation of the fire were undetermined" and Mr. Goodson concluded that the technical investigative methods utilized by the State's experts "can only lead to improper conclusions in trying to understand how the fire occurred." The Petitioner cites State v. Edmunds, 308 Wis.2d 374, 746 N.W.2d 590 (2008), a Wisconsin Court of Appeals case in which the petitioner therein was granted a new trial because new developments in scientific testing subsequent to the trial of the petitioner therein was not merely cumulative

and differed in substance and quality to that offered at trial. The Petitioner cites no Supreme Court of Appeals of West Virginia decision concerning fire science which supports this argument.

24. The case sub judice can be distinguished from Edmunds. The Court finds Edmunds to be unpersuasive as applied to the facts of the case sub judice. As the Court concluded above, the opinions of the Petitioner's "new" experts could only be used in an effort to impeach the testimony of the State's experts; were consistent with the trial testimony of the two (2) defense experts, both of whom concluded that the fire was accidental and they each were critical of the investigation conducted by the State's experts; and other overwhelmingly convincing direct and circumstantial evidence existed to strongly and clearly support the Petitioner's conviction. Further, the aforementioned Davis case, as valid West Virginia authority, supports the Court's reasoning that the Petitioner's "newly discovered evidence" is cumulative and would be used only in an effort to impeach the State's experts.
25. The Court notes that the Petitioner had an eleven (11) day public jury trial, at which overwhelming direct and circumstantial evidence of his guilt, beyond a reasonable doubt, was presented to a jury which returned a unanimous guilty verdict. The Petitioner subsequently sought appellate relief which was refused by the Supreme Court of Appeals of West Virginia. The Petitioner later sought

habeas corpus relief, which was denied by this Court, and the Petitioner's appeal of said denial was again refused by the Supreme Court of Appeals of West Virginia. Further, the Petitioner sought Federal habeas corpus relief, which was denied on procedural grounds. No court, on direct appeal or in any subsequent habeas corpus proceeding, has found the existence of any constitutional violations in the Petitioner's underlying felony case. This Court is not persuaded by the Petitioner's argument that he suffered a violation of his right to due process because his trial was fundamentally unfair, merely because fire science testing procedures are claimed to have evolved over the last twenty (20) years, when overwhelming direct and circumstantial evidence of the Petitioner's motive and guilt beyond a reasonable doubt was presented, in open court, to an impartial jury of twelve (12).

26. For the foregoing reasons, the Court concludes that "Ground Two (2)" of the Petition is also without merit.
27. In "Ground Three (3)," the Petitioner argues that his trial counsel was ineffective for failing to file a Daubert motion to challenge the scientific validity of tests performed by the State's experts. The Respondent, in response thereto, argues that the trial testimony of the State's experts was technical in nature, rather than scientific in nature and it would have been an abuse of discretion for the Court to apply the Daubert standards at trial. Indeed the State's experts' testimony was

based on practical, common sense technical experience. Such evidence cannot, in this case, be taken lightly or simply cast aside.

28. The Supreme Court of Appeals of West Virginia has adopted the following two-pronged test for determining ineffective assistance of counsel claims, which the United States Supreme Court established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): “(1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

29. In Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993) the Supreme Court of Appeals of West Virginia adopted the reasoning of the United States Supreme Court in Daubert, writing as follows:

In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is

known; and (d) whether the scientific theory is generally accepted within the scientific community. Syl. Pt. 2, Wilt.

30. The Respondent's argument is based upon the Supreme Court's decision in Watson v. Inco Alloys Intern., Inc., 209 W.Va. 234, 545 S.E.2d 294 (2001). In Watson, the Supreme Court wrote as follows:

We later clarified our Wilt holding by explaining:

The question of admissibility under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert. denied, 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994) only arises if it is first established that the testimony deals with "scientific knowledge." "Scientific" implies a grounding in the methods and procedures of science while "knowledge" connotes more than subjective belief or unsupported speculation. In order to qualify as ["scientific knowledge,["] an inference or assertion must be derived by the scientific method. It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to "scientific knowledge" and, in doing so, to analyze not what the experts say, but what basis they have for saying it.

Syl. pt. 6, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171. As Gentry plainly demonstrates, the Wilt gatekeeper function "only arises if it is first established that the testimony deals with 'scientific knowledge.'" Id. Watson, at 239, 299.

31. Our Supreme Court further distinguished between “technical” and “scientific” knowledge in Watson, writing the following:

Scientific knowledge differs from technical and specialized knowledge in that it is a validation. Scientific knowledge is the process of formulating a hypothesis and then engaging in experimentation or observation to verify or falsify that hypothesis. It is this knowledge garnered from experimentation and observation that was offered as evidence in Daubert....

Based upon the foregoing, we hold that unless an engineer’s opinion is derived from the methods and procedures of science, his or her testimony is generally considered technical in nature, and not scientific. Therefore, a court considering the admissibility of such evidence should not apply the gatekeeper analysis set forth by this Court in Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993), and Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995). Watson, at 240-241, 300-301. (Emphasis added).

32. Further, the Petition, on page 20, reads that “nothing in the record (of the Petitioner’s trial) shows that the State’s experts conducted any tests on the toaster to reach their conclusion that the toaster was the cause of the fire.” Clearly, the Petitioner cannot effectively and persuasively argue on one hand that the State’s experts failed to conduct scientific testing, and on the other hand argue that the basis of the State’s experts’ testimony was scientific in nature. Such argument defies logic and common sense.

33. Clearly, based upon the above-referenced case law, the trial testimony of the State's expert witnesses was "technical," not "scientific" in nature.
34. The Petitioner further cites U.S. v. Hebshie, 754 Supp. 2d. 289 (D. Mass. 2010), wherein a Federal District Court found that trial counsel was ineffective in an arson case for failing to challenge expert testimony pursuant to Daubert and that there was a reasonable probability that the result at trial would have been different had trial counsel done so. The case sub judice can be and is easily distinguished from this nonprecedential federal case from another jurisdiction. The Court finds persuasive the Respondent's argument that, under West Virginia law, it would be error to apply Daubert when technical knowledge, rather than scientific testing, was the basis of the State's expert witness's testimony in the case sub judice.
35. Based upon the foregoing, the Petitioner cannot convincingly argue that his trial counsel was ineffective by failing to file a Daubert motion when it is clear, under the Watson case, Daubert does not and did not apply to the State's expert witnesses in the underlying felony case.
36. The Court notes that the ineffective assistance of counsel claim also ignores a fundamental aspect of the Strickland and Miller standards; sufficient and credible evidence existed to support the Petitioner's conviction for murder separate and apart from any expert testimony. Thus, even if the Court were to conclude that

trial counsel was deficient or somehow ineffective under an objective standard of reasonableness, the Petitioner clearly cannot demonstrate, but for any unprofessional errors of trial counsel, that any reasonable probability exists, that the result of the jury trial would have been any different.

37. The Court concludes that, in consideration of all the law, facts and circumstances in the underlying criminal case, the Petitioner clearly received that to which he was constitutionally entitled--- a fair and public trial by an impartial jury of his peers. Nonprejudicial errors, if any, which may have occurred, even if considered cumulatively, would not entitle the Petitioner to his requested relief. The United States Supreme Court has held from March 1953 forward that a criminal defendant is entitled to a fair jury trial, but not a perfect jury trial. Lutwak v. United States, 344 U.S. 644, 73 S.Ct. 481 (1953). Human nature understandably causes convicted criminal defendants to see a fair and impartial jury trial only as one in which they have been exonerated and fully acquitted. Footnote No. 1 herein also speaks to the professional quality of the Petitioner's employed trial counsel.

38. For the foregoing reasons, the Court concludes that the Petitioner cannot demonstrate that his trial counsel was somehow ineffective or deficient under the Strickland and Miller tests, therefore "Ground Three (3)" of the Petition also fails.

39. "Ground Four (4)" of the Petition alleges that the Petitioner did not knowingly or intelligently waive his ineffective assistance of counsel claim in his previous, pro

se habeas corpus petition. This ground for relief is clearly now moot, as the Court has, herein, addressed the Petitioner's ineffective assistance of counsel claim on its merits.

40. In "Ground Five (5)," the Petitioner claims that, even if his constitutional claim is "procedurally barred," he can overcome any procedurally defaulted claims due to his "actual innocence." The Petitioner raises this claim "if this court were to conclude" that the aforementioned ineffective assistance of counsel claim was "procedurally defaulted." Again, the Court, having presided over the Petitioner's eleven (11) day jury and having considered the aforementioned ineffective assistance of counsel claim on its merits is further of the opinion that the Petitioner's actual innocence claim is wholly and totally weak, wrong, and of no substance or merit. Therefore, the relief sought in "Ground Five (5)" of the Petition is thereby moot and otherwise of no merit.
41. The Court concludes that the Petitioner's jury trial was replete with very convincing evidence of motive and very convincing direct and circumstantial evidence as to the Petitioner's criminal conduct. Had the Petitioner been represented by different defense counsel, the jury's verdict would have been, without any reasonable question, the same.
42. Pursuant to West Virginia Code § 53-4A-7(c) and Rule 9(c) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, the Court concludes that the Petitioner raised grounds for relief pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, and Article III,

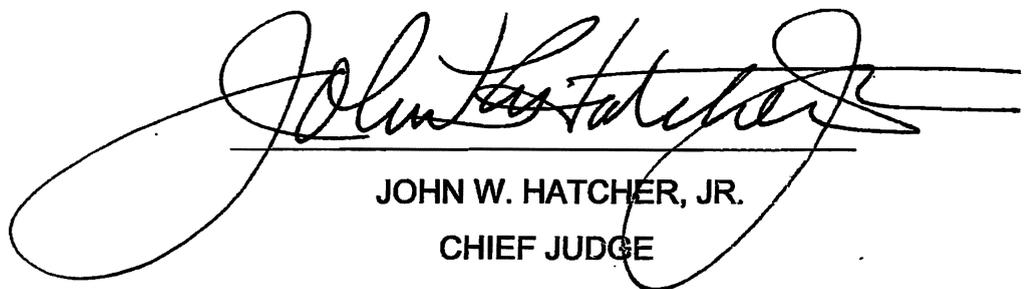
Section 10 of the West Virginia Constitution, and that said grounds for relief were argued and decided under the applicable West Virginia and federal law.

43. The Court notes, in passing, that several students at the West Virginia University College of Law Innocence Project Clinic identified themselves as “student attorneys” in pleadings and appeared in this matter pursuant to Rule 10 of the Rules for Admission to the Practice of Law. Rule 10 refers to such persons as “law students,” and not as “student attorneys.” Nothing in the court file indicates that these individuals have been admitted to the bar of any State or Federal Court. Thus, the Court believes that use of the term “student attorneys” is inappropriate, because one is either a law student or a lawyer.

Accordingly, it is ORDERED that the relief sought in the Petition for Writ of Habeas Corpus be and the same is hereby DENIED and said civil action be and the same is hereby DISMISSED.

The Clerk shall, forthwith, mail an attested copy of this Order to Wiley Newbold, Attorney at Law, P.O. Box 6130, Morgantown, West Virginia 26506 and Roger Lambert, Assistant Fayette County Prosecuting Attorney.

ENTERED this 24th day of December, 2014.



JOHN W. HATCHER, JR.
CHIEF JUDGE

A TRUE COPY of an order entered
December 24, 2014
Teste: Daniel E. Winger
Circuit Clerk Fayette County, WV