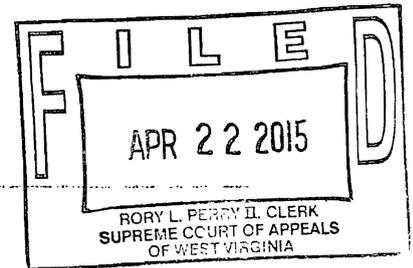


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0067



SAMUEL ANSTEY,
Petitioner,

V.

DAVID BALLARD,
Warden,
Mount Olive Correctional Complex,
Respondent.

Appeal from a final order
of the Circuit Court of Fayette County
(14-C-134)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT MR. ANSTEY'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE DRAMATIC REVOLUTION IN FIRE SCIENCE SINCE HIS CONVICTION TWENTY-ONE YEARS AGO CONSTITUTES NEWLY DISCOVERED EVIDENCE; THIS NEWLY DISCOVERED EVIDENCE SHOWS THAT THE EVIDENCE ADMITTED AT MR. ANSTEY'S TRIAL WAS SO UNRELIABLE THAT IT VIOLATED HIS DUE PROCESS RIGHTS; THAT EVIDENCE WOULD NOT BE ADMISSIBLE TODAY.

- II. BECAUSE THE COURT DENIED MR. ANSTEY THE ABILITY TO DEVELOP THE RECORD ON NEWLY DISCOVERED EXCULPATORY EVIDENCE OF AN EXTREMELY COMPLICATED AND SCIENTIFIC NATURE THAT SHOWS HE IS INNOCENT OF ARSON, THE CIRCUIT COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING.

STATEMENT OF THE CASE

Mr. Samuel Anstey was convicted in 1994 of a crime that never occurred: first-degree murder by arson. He has been in prison for twenty-one years because of an accidental fire.

On the night of February 8, 1994, a fire erupted in the Harvey, West Virginia, home of Mr. Samuel Anstey and his grandmother, Marie Donollo. (A.R. 749, 1087, 285.) Mr. Anstey was awakened and alerted to the fire by the sounds of both his grandmother screaming and debris falling from the kitchen area. (A.R. 1224.) Unable to help his grandmother, Mr. Anstey escaped the blaze through a window to get help, stopping at three neighbors' houses before he finally was able to get help and alert emergency services. (A.R. 758, 1225.) He injured himself while climbing out the window. (A.R. 1225.) Firefighters responded quickly to the 911 call. (A.R. 750, 753.) Mr. Anstey observed the firefighters removing his grandmother through a window and performing CPR. (A.R.

754-57, 1226.) Ms. Donollo was transported to the hospital by ambulance; she passed away four days later. (A.R. 759, 370.)

After the fire was extinguished, the fire investigation team quickly went to work. (A.R. 760.) The team was composed of Roger York, West Virginia State Fire Marshall; Robert Begley, a Lieutenant of the Oak Hill Fire Department; and Delbert Cordle, the Chief of the Oak Hill Fire Department, who had also responded to the fire. (A.R. 1223, 1086, 759.) The team obtained Mr. Anstey's consent to search the trailer, and in the course of the investigation of the trailer, they observed what they believed to be indicators of arson. (A.R. 1237, 1242.) During this investigation, the team members manipulated crucial evidence before photographing it and made observations about evidence that they knew had been previously moved.¹ (A.R. 1097, 1106-07.) Later on, the team also contacted Steven Cruikshank, Fayette County Fire Coordinator; John Morrison, a member of the West Virginia State police; and Harold Franck, a forensic engineer, for their input. (A.R. 1241-42, 343, 1405.) During this investigation, Mr. Anstey volunteered to investigators that he would gain financially from his grandmother's passing and that he had a history of family spats with her. (A.R. 358.)

Before his grandmother's funeral, Mr. Anstey was arrested for first-degree murder under W. Va. Code § 61-2-1 and first-degree arson under W. Va. Code § 61-3-1. (A.R. D2:6) Mr. Anstey's trial started at the end of August 1994 and lasted eleven days. (AR. 278.) The State called Roger York, Harold Franck, and Steven Cruikshank as expert witnesses in fire investigation. (A.R. 1214, 1405, 1141.) The State's experts testified that

¹ Mr. Begley testified that he had moved the toaster, believed to be one of the points of origin, before photographing it. (A.R. 1106-07.) Also, Mr. Cordle testified that he knew before he examined the breaker box located in Mr. Anstey's bedroom that the firemen had flipped it prior to the first steps in the investigation. (A.R. 1097.)

the fire had been intentionally set with two points of origin: a rigged toaster in the kitchen and a covered heating vent in Ms. Donollo's bedroom. (A.R. 1147, 1246, 1407, 1419, 1150, 1255, 1410–11.) They also stated that Mr. Anstey had disarmed the smoke detector by flipping its electrical breaker and had deliberately directed the smoke to his grandmother's room. (A.R. 1448–51, 1315–16.)

These conclusions were based on the State's experts' discredited understanding of char, burn, and smoke patterns; on visits to the scene of the fire; and on photographs of the scene, the recreated scene, and evidence that had previously been moved. (A.R. 1147, 1150, 1243–44, 1407, 1452–53, 1238, 1406, 1419, 1448, 1104, 1106–07, 1510.) The experts also cited the following items to support their conclusions: saddle marks on the toaster wires (A.R. 1424); beading on the toaster wires (A.R. 1431); discoloration of the linoleum in the second bedroom (A.R. 1177, 1497–98, 1523); and the V shaped burn pattern by the toaster. (A.R. 1252, 1429, 1461.)

The Defense presented two expert witnesses at trial: Rodney Carney, a career firefighter in Beckley and Tim May, a fire investigator who had experience teaching about arson investigations. (A.R. 1914, 2105.) The Defense experts stated that, after eliminating all other possible origins, they determined that a fire had accidentally started in the living room from a short-circuited lamp. (A.R. 1947.) They stated that the lamp was the only point of origin. (A.R. 1919–20, 2127.) They concluded that there was no evidence of a secondary fire starting in Ms. Donollo's bedroom. (A.R. 1934–35.) The State claimed that debris found in her bedroom was proof of a second point of origin. In fact, first responders tracked in that debris. (A.R. 2140–42.) Also, the short circuit in the lamp could have tripped the smoke detector's breaker. (A.R. 1937–40, 2199.)

The defense's experts' conclusions were based on their training and personal knowledge of burn levels, depth of char, time of burning, burn patterns, and wiring; the accounts of firefighters on the scene; the State's report; and their own investigation of the scene. (A.R. 1917, 1923, 2106, 2108, 2111, 2114–16, 2185.)

None of the expert witnesses at trial relied upon the NFPA 921 Guide for Fire and Explosion Investigations, nor did they follow the scientific method during their investigation of the fire. (A.R. 1527.) Nothing in the record shows that any experts conducted tests or experiments on the toaster or heat vent to reach their conclusions.

On September 8, 1995, a jury in the Circuit Court of Fayette County convicted Mr. Anstey of first-degree murder under West Virginia Code § 61-2-1. (A.R. 2457.) Judge Hatcher sentenced him to life imprisonment without mercy. (A.R. 2462.) The West Virginia Supreme Court of Appeals declined to hear Mr. Anstey's direct appeal on December 4, 1996. (A.R. D8:112.)

On February 6, 1998, Mr. Anstey filed a Petition for Writ of Habeas Corpus in the Circuit Court of Fayette County. *Anstey v. Trent*, No. Civ.A 98-C-48-H (Cir. Ct. Fayette Cnty. 1998). Judge Hatcher denied his petition five days later. *Id.* Mr. Anstey appealed the Circuit Court's decision to the West Virginia Supreme Court of Appeals. On December 16, 1998, the Supreme Court of Appeals denied his petition. Mr. Anstey moved the Court to reconsider its refusal, but it denied the motion on January 21, 1999.

On February 16, 1999, Mr. Anstey filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of West Virginia under 28 U.S.C. § 2254. *Anstey v. Painter*, No. Civ.A. 5:99-0120, 2000 WL 34012352, at *1 (S.D. W. Va. Mar. 16, 2000). Adopting the recommendations of a magistrate judge, the district judge dismissed Mr. Anstey's petition. *Id.* Mr. Anstey then filed an appeal in the United States

Court of Appeals for the Fourth Circuit; that appeal was denied on October 9, 2001. *Anstey v. Painter*, Docket No. 00-06521 (4th Cir. Apr 21, 2000).

On May 12, 2014, with the help of the West Virginia Innocence Project, Mr. Anstey filed a Petition for Writ of Habeas Corpus in the Circuit Court of Fayette County presenting newly discovered evidence of his innocence. (A.R. D1:1.) On December 24, 2014, Judge Hatcher denied Mr. Anstey's Petition without holding an omnibus hearing. (A.R. D1:9.)

SUMMARY OF THE ARGUMENT

Twenty-one years ago, Samuel Anstey was convicted of first-degree murder by arson on the basis of arson investigation techniques that are now thoroughly discredited by current scientific methods for fire investigation. Because this current scientific method for fire investigation was unknown and unavailable at the time of Mr. Anstey's trial, the change in accepted fire investigation science constitutes newly discovered evidence. The newly discovered evidence warrants the reversal of the previous conviction and a new trial.

The Circuit Court's refusal to grant an omnibus evidentiary hearing prevented Mr. Anstey from demonstrating the substantial impact of the new fire investigation science on the expert testimony presented at his trial. The impact of this science is significant: by discrediting any evidentiary basis for believing arson caused the fire that killed Mr. Anstey's grandmother, the new fire investigation science undermines the theory that Mr. Anstey committed murder.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule of Appellate Procedure 20(a), Mr. Anstey respectfully requests that this Court hear oral argument because this case involves (1) issues of first impression and (2) issues of fundamental public importance.

ARGUMENT

Mr. Anstey is entitled to a new trial because newly discovered evidence shows that he cannot be guilty of arson or murder by arson. The newly discovered evidence is a seismic shift in fire investigation science. There is growing recognition that old arson investigation techniques are unreliable, and courts all over the country are reversing convictions based on those techniques.²

Mr. Anstey was convicted based on alleged evidence of arson testified to by prosecution experts Mr. York, Mr. Franck, and Mr. Cruikshank. The validity of this evidence has been entirely discredited by the relevant scientific community. More specifically, leading fire experts have examined the evidence in Mr. Anstey's case using the current scientific standards for fire investigation that were unknown to all parties at the time of Mr. Anstey's trial, rather than the now-discredited arson investigation techniques used at his trial. These scientifically trained experts, using current scientific

² See, e.g., *Han Tak Lee v. Tennis*, Civil No. 4:08-CV-1972, 2014 WL 3894306, at *19 (M.D. Pa. June 13, 2014); Victoria Kim, *Man Serving Life Sentence for 1997 Arson Deaths Ordered Freed*, L.A. Times (Apr. 12, 2013), <http://articles.latimes.com/2013/apr/12/local/la-me-ln-arson-convict-ordered-freed-20130412>; *After 42 Years in Jail, Conviction Overturned in Case of Deadly Fire*, PBS NewsHour (Apr. 3, 2013, 12:00 AM), http://www.pbs.org/newshour/bb/law-jan-june13-prisoner_04-03/; Gretchen Gavett, *New Fire Science Helps Overturn Michigan Man's Murder Conviction*, PBS Frontline (June 8, 2012, 5:09 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/death-by-fire/new-fire-science-helps-overturn-michigan-mans-murder-conviction/>; David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, The New Yorker, Sept. 7, 2009, at 63, available at <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire>.

techniques, have determined that there is no evidence that the trailer fire was caused by arson. (See A.R. 2551, Hurst Aff. at ¶¶ 20, 23, 26, 27, 30, 33 (“Based on all the available evidence, and the testing performed on that evidence, the only scientifically supportable conclusion is that the origin and causation of the fire were undetermined.”); see also A.R. 2570, Goodson Aff. at ¶ 30.)

Moreover, if current fire investigation science had been available to the defense experts who testified on Mr. Anstey’s behalf at trial, they could have presented much stronger evidence of Mr. Anstey’s innocence. (See A.R. 2563–65, Goodson Aff. at ¶¶11–19; see also A.R. 2554, Hurst Aff. at ¶¶ 31, 33.) Current fire investigation science trumps the arson investigative techniques the defense experts used, as well. (See A.R. 2563–64, Goodson Aff. at ¶¶11–16.)

Therefore, relief from judgment is warranted on the basis of newly discovered evidence. Furthermore, given that it can now be shown that the evidence used to convict Mr. Anstey has been discredited as fundamentally unreliable, he is entitled to relief for two additional reasons: First, the arson investigation techniques presented at his trial would be inadmissible today. Second, because Mr. Anstey is actually innocent and his conviction was based on unreliable evidence, the trial violated his right to due process. At the very least, Mr. Anstey is entitled to an omnibus post-conviction habeas corpus hearing so the new evidence can be fully developed and tested through cross examination of the State’s trial experts.

I. THE CIRCUIT COURT MISAPPLIED THE RULE GOVERNING NEWLY DISCOVERED EVIDENCE AND WRONGLY DENIED MR. ANSTEY'S PETITION.

Mr. Anstey is entitled to a new trial because newly discovered evidence—the new scientific standards for fire investigation—thoroughly debunks the expert testimony presented at his original trial and consequently undermines his conviction. The Circuit Court improperly denied habeas relief because it misapplied the law of newly discovered evidence.

A three-prong standard of review applies in appeals of habeas corpus cases. *Mathena v. Haines*, 219 W. Va. 417, 421, 633 S.E.2d 771, 772 (2006). This Court “review[s] the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” *Id.* This Court is reviewing whether the Circuit Court correctly applied the legal rule about newly discovered evidence, a question of law. Therefore, the Circuit Court’s denial of a new trial based on newly discovered evidence should be reviewed *de novo*.

A. The Circuit Court’s statement of the rule for newly discovered is inaccurate.

The dramatic revolution in fire science since Mr. Anstey’s 1994 conviction fits the standard for newly discovered evidence, but the Circuit Court misapplied the rule governing new trials based on newly discovered evidence.

West Virginia courts apply a five-part test to determine whether a petitioner is entitled to a new trial based on newly discovered evidence. *State v. Frazier*, 162 W. Va. 935, 941, 253 S.E.2d 534, 537 (1979). First, “The evidence must appear to have been discovered since the trial.” *Halstead v. Horton*, 38 W. Va. 727, 727, 18 S.E. 953, 954

(1894). Second, “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.” *Id.* Third, “Such evidence must be new and material, and not merely cumulative.” *Id.* Fourth, “The evidence must be such as ought to produce an opposite result at a second trial on the merits.” *Id.* These four prongs must be met for a petitioner to be entitled to a new trial based on newly discovered evidence.

Whereas the first four prongs must be satisfied, the fifth part is merely explanatory. *See State v. Stewart*, 161 W. Va. 127, 136, 239 S.E.2d 777, 782 (1977). The fifth part of the test states that “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.” *Halsted*, 38 W. Va. at 727, 18 S.E.2d at 954 (emphasis added). This Court cautions that the “fifth ‘rule’ does not mean that a new trial will always be refused when the sole object of the newly-discovered evidence is merely to impeach. It simply states as a general rule that the discovery of new impeachment evidence will not *normally* mandate a new trial.” *Stewart*, 161 W. Va. at 137, 239 S.E.2d at 783 (emphasis added). This Court “strenuously disapprove[s] any interpretation of these ‘five rules’ to the effect that a new trial will never be warranted if the newly-discovered evidence merely impeaches a witness.” *Id.* Accordingly, “[I]f the first four rules are satisfied in cases involving after-discovered impeachment evidence where the impeachment goes to the key prosecution witness, then a new trial should be granted.” *Id.*³

³ *See also State v. Kennedy*, 205 W. Va. 224, 235, 517 S.E.2d 457, 468 (1999) (explaining that *Stewart* holds that in certain circumstances impeachment evidence may be sufficient to warrant a new trial), *overruled on other grounds* by *State v. Mechling*, 219 W. Va. 366, 372, 633 S.E.2d 311, 317 (2006); *Fluharty v. Wimbush*, 172 W. Va. 134, 138, 304 S.E.2d 39, 43 (1983) (listing the

The Circuit Court made three serious errors in applying the test for newly discovered evidence to Mr. Anstey's case: First, contrary to *Stewart* and *Frazier*, the Circuit Court treated the fifth part of the test for newly discovered evidence as mandatory. (See A.R. 2844, 2848.) Second, the Circuit Court also incorrectly concluded that the newly discovered evidence was solely to impeach or discredit a witness. *See id.* The new fire investigation science does not merely impeach the State's expert witnesses, it renders their testimony entirely obsolete and inadmissible. Third, the Circuit Court incorrectly held that the newly discovered evidence would not have produced a different result at a new trial. (See A.R. 2841–42.) The new fire investigation science undermines any basis for believing arson caused the trailer fire, which may *eliminate probable cause* to believe a murder occurred. These errors are discussed more fully below.

Finally, even though the Circuit Court only ruled on the fourth and fifth parts of the test, (see A.R. 2848), it is also important to note that Mr. Anstey satisfies the first three prongs: the new evidence was discovered since trial, could not have been discovered at the time of trial through due diligence, and is material and non-cumulative. Mr. Anstey's satisfaction of these requirements is discussed below.

Correctly applying the law makes clear that Mr. Anstey is entitled to a new trial based on newly discovered evidence.

requirements for newly discovered evidence as: discovery since trial, due diligence, materiality and non-cumulativeness, and potentially producing a different result at a new trial, and omitting the fifth part of the test); *State v. Nicholson*, 170 W. Va. 701, 703, 296 S.E.2d 342, 344 (1982) (“In *Stewart*, we recognized that, under certain circumstances, newly discovered evidence consisting solely of impeachment evidence may be sufficient to warrant a new trial if all the other elements are met.”).

B. Mr. Anstey is entitled to a new trial based on newly discovered evidence.

The dramatic revolution in fire investigation science since Mr. Anstey's 1994 conviction undermines the evidence used against him at trial and meets the *Stewart/Frazier* test.

1. Mr. Anstey discovered the new fire investigation science since his trial.

According to experts relying on science discovered since Mr. Anstey's trial, there is no basis to conclude that arson played any role in the fire.

For evidence to be considered newly discovered, the defendant and his counsel must have discovered its existence since trial. *See Frazier* 162 W. Va. at 938, 253 S.E.2d at 537; *Stewart*, 161 W. Va. at 132, 239 S.E.2d at 782.

The new evidence at issue in this case is the current fire investigation science as embodied in NFPA 921, which is now the standard of care for fire investigators. (*See* A.R. 2564, Goodson Aff. at ¶ 14; A.R. 2546, Hurst Aff. at ¶ 5.)⁴ Neither Mr. Anstey, nor his attorneys, nor the experts who testified on his behalf could have known about the huge

⁴ As discussed more fully below, many courts have recognized NFPA 921 as the standard of care for fire investigations. *See, e.g., United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1341 (11th Cir. 2013) (describing NFPA 921 as “a peer reviewed fire investigation guide that is the industry standard for fire investigation”); *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707, 725 (W.D. Va. 2004) (“Many courts have recognized NFPA 921 as a peer reviewed and generally accepted standard in the fire investigation community.”); *Indiana Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 849–50 (N.D. Ohio 2004) (“NFPA–921 is a recognized guide for assessing the reliability of expert testimony in fire investigations.”); *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 653 (D. Kan. 2003) (“The ‘gold standard’ for fire investigations is codified in NFPA 921, and its testing methodologies are well known in the fire investigation community and familiar to the courts.”); *Royal Ins. Co. of Am. v. Joseph Daniel Canst, Inc.*, 208 F. Supp. 2d 423, 426 (S.D.N.Y. 2002) (“The NFPA 921 sets forth professional standards for fire and explosion investigations.”); *Travelers Prop & Cas. Corp. v. Gen. Elec. Co.*, 150 F. Supp. 2d 360, 366 (D. Conn. 2001) (describing NFPA 921 as “a peer reviewed and generally accepted standard in the fire investigation community”); *People v. Watson*, No. 307741, 2013 WL 6508833 (Mich. Ct. App. Dec. 12, 2013); *People v. Jackson*, No. 272776, 2008 WL 2037805, (Mich. Ct. App. May 13, 2008).

shift in fire investigation that led to the modern standard of care. Therefore, current fire investigation science constitutes new evidence in this case.

2. Mr. Anstey could not have discovered the new fire investigation science at the time of trial through due diligence.

Neither Mr. Anstey nor his attorneys could have discovered the new fire investigation science through due diligence because in 1994 the new standards for fire investigation did not yet exist. Even the version of NFPA 921 available at the time referred to fire investigation as partly an “art.” See Nat’l Fire Prot. Ass’n, NFPA 921: Guide for Fire and Explosion Investigations § 2-1 (1992 ed.) (“A fire or explosion investigation is a complex endeavor involving both art and science.”). Early versions also failed to reject certain unscientific investigative techniques. See Paul Bieber, *Anatomy of a Wrongful Arson Conviction* at 9, <http://the arsonproject.org/anatomy/> (“Recent editions of NFPA 921 have rejected *negative corpus* as a clear violation of the scientific method.”) (emphasis added).

To satisfy the second prong of the test for newly discovered evidence, a petitioner must show that “the new evidence is such that due diligence would not have secured it before the verdict.” *Frazier* 162 W. Va. at 938, 253 S.E.2d at 537; *Stewart*, 161 W. Va. at 132, 239 S.E.2d at 782. The requirement is not that the evidence did not exist before the verdict, only that due diligence would not have secured it. See *State v. William M.*, 225 W. Va. 256, 261, 692 S.E.2d 299, 304 (2010).

Mr. Anstey and his attorneys could not have discovered the new fire investigation science through due diligence. Not even the experts who testified at Mr. Anstey’s trial—either on his behalf or for the prosecution—realized massive new developments were

about to occur.⁵ It is not surprising that neither Mr. Anstey nor his attorneys or experts were aware that NFPA 921 would eventually become the national standard. Mr. Goodson explains in his affidavit that “widespread acceptance” of NFPA 921 “was not immediate.” (A.R. 2564, Goodson Aff. at ¶ 14.)

In 1992, the National Fire Protection Association issued NFPA 921, *Guide for Fire and Explosion Investigations*, to examine and improve the fire investigation process. John Lentini, *Scientific Protocols for Fire Investigation* 13 (2d ed. 2012). The Association revises NFPA 921 every few years. For decades prior to the issuance of NFPA 921, “fire investigation was unscientific, inconsistent, and seriously flawed.” (A.R. 2563, Goodson Aff. at ¶ 11.) Investigators, untrained in scientific methodology, were taught “the mythology of arson investigation,” now recognized as wholly inaccurate indicators of arson. (*Id.* (internal quotations omitted).) NFPA 921 was initially met with resistance, which lasted nearly a decade. “As with any new standard, NFPA 921 aroused the ire of those accustomed to working to their own subjective standards.” Lentini at 12; *see also* (A.R. 2564, Goodson Aff. at ¶ 14.) “The outrage that NFPA 921 sparked is understandable. The validity of the NFPA 921 conclusions meant [there were] hundreds, if not thousands, of incorrect conclusions characterizing an accidental fire as intentionally set.” (A.R. 2564, Goodson Aff. at ¶ 15.) “NFPA 921 faced hostility from fire investigators until roughly 2000” (including a write-in campaign against it in 1999). (*Id.* at ¶¶ 14, 16.)

⁵ There is one quick discussion of NFPA 921 at trial, and this discussion makes clear that all of the experts or attorneys were either unaware of NFPA 921’s existence or unaware of its importance. An expert for the State says to one of Mr. Anstey’s attorneys, “NFPA is a set of guidelines. It is not a law or standard as such[.] . . . So it is a set of guidelines that have been developed over the past few years, and, hopefully, the NFPA wants to have those as national standards at some point.” (A.R. 1528.)

Finally, in 2000, the Department of Justice, Office of Justice Programs, and National Institute of Justice published *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel*, which “proclaimed NFPA 921 to be a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires.” (A.R. 2564, Goodson Aff. at ¶ 16 (internal quotation omitted)); *see also* United States Department of Justice, *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel* 6 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181584.pdf>. This document finally and firmly “established the reliability and validity of NFPA 921.” (*Id.*)

Because NFPA 921 did not gain acceptance among fire investigators until around 2000, it was unlikely that the average fire investigator would have relied on NFPA 921 at the time of Mr. Anstey’s 1994 trial. So at the time of Mr. Anstey’s trial, it can hardly be expected that a reasonable attorney—or even a very good attorney—exercising due diligence could have learned about the new fire science embodied in the current version of NFPA 921, which is now accepted as the standard of care.

There is every reason to believe that Mr. Anstey’s attorneys were diligent because they hired two arson experts to testify. In 1994, these experts simply did not have the benefit of new fire investigation science.

3. The new fire investigation science is material and not merely cumulative.

The change from old arson investigation techniques to current fire investigation science that occurred since 1994 constitutes newly discovered evidence that is not merely cumulative in nature.

a. The new fire investigation science is material.

The new fire investigation science is material because it undermines any evidence that arson occurred and, therefore, could have affected the jury's judgment that murder by arson occurred.

To satisfy the third part of the test for newly discovered evidence, a petitioner must show that the new evidence is "material." *Frazier* 162 W. Va. at 938, 253 S.E.2d at 537; *Stewart*, 161 W. Va. at 132, 239 S.E.2d at 782. This Court has looked to the *Brady v. Maryland*, 373 U.S. 83 (1963), line of cases to define materiality. See *Matter of Investigation of W. Virginia State Police Crime Lab., Serology Div.*, 190 W. Va. 321, 325, 438 S.E.2d 501, 505 (1993). In *Giglio v. United States*, 405 U.S. 150 (1972), a *Brady* case, the United States Supreme Court defined materiality as evidence that "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154.

In this case, experts determined that the prosecution's witnesses who testified at Mr. Anstey's trial "did not follow the scientific method in connection with their investigation of the trailer fire," (A.R. 2546, Hurst Aff. at ¶ 8), and instead followed outdated methods—now known to be "mythology"—"that had permeated the fire investigation community for years prior to the time of their investigation and testimony." (A.R. 2563, Goodson Aff. at ¶¶ 11, 20.) Applying current fire investigation science, these experts found no basis to conclude that arson caused the trailer fire. (A.R. 2545, Hurst Aff. at ¶ 4, 11; A.R. 2570, Goodson Aff. at ¶ 30.) Knowing that the prosecution's testimony was based on myth rather than science, and further learning that an investigation relying on current scientific standards does not indicate arson, "could . . . have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. Therefore, modern fire investigation science is material because it could have affected the judgment of the jury.

b. The new fire investigation science is not merely cumulative.

The newly discovered evidence—new fire investigation science—is not merely cumulative. The newly discovered evidence is of a different kind than the evidence produced at trial. It does not dispute the prosecution’s theory using the same basic techniques. Instead, it introduces new, nationally recognized scientific standards. These standards supplant what was, at trial, a debate between two sides that both relied on mythology and intuition. The newly discovered evidence is also on a different issue than the evidence produced at trial. It does not speak to the cause and origin of the trailer fire. Instead, it debunks the validity of the underlying techniques used to investigate the fire. The newly discovered evidence is not superfluous, and not cumulative.

To satisfy the third prong of the test for newly discovered evidence, a petitioner must show that the new evidence is “not merely cumulative.” *Frazier* 162 W. Va. at 938, 253 S.E.2d at 537; *Stewart*, 161 W. Va. at 132, 239 S.E.2d at 782. “[C]umulative evidence is additional evidence of the same kind to the same point.” *Frazier* 162 W. Va. at 938, 253 S.E.2d at 537. This Court has explained, “The fact that the issue . . . had been raised and made the subject of evidence by the defense does not automatically render any further evidence on the issue . . . cumulative.” *State v. O’Donnell*, 189 W. Va. 628, 633, 433 S.E.2d 566, 571 (1993). “The essence of cumulative evidence is the superfluosity of the evidence.” *Id.* Evidence that is of a different kind or on a different issue is not “superfluous[]” and not “cumulative.” *Id.*

Evidence invalidating the investigative techniques used to convict Mr. Anstey cannot plausibly be considered “superfluous[].” *Id.* Mr. Anstey’s conviction was wholly dependent on a finding that arson occurred. This finding stemmed from arson investigation techniques that have since been debunked. The introduction of new fire

investigation science is not superfluous evidence, but calls into question *the key premise* of Mr. Anstey’s conviction—the conclusion that the fire was intentionally set.

The Circuit Court cited *State v. Davis*, 217 W. Va. 93, 616 S.E.2d 89 (2004), to support its conclusion that the newly discovered evidence in this case is cumulative. (A.R. 2843.) *Davis*, however, is not analogous to the case *sub judice*, and Chief Justice Workman’s opinion in *O’Donnell* is much more instructive.

The petitioner in *Davis* was convicted of killing her daughter and attempting to kill her son. At trial, the evidence against her tended to show that she poisoned the children, but the evidence she presented pointed to alternative theories for how deadly toxins got into her children’s systems. The purportedly new evidence presented in the habeas consisted of additional test results that were duplicative of the test results presented to the jury. *See Davis*, 217 W. Va. at 102–04, 616 S.E.2d at 98–100. Explaining the cumulative nature of the petitioner’s evidence, the Court pointed out that each piece of new evidence was simply another, equally reliable test showing the same results that were admitted at trial. *Id.*⁶ The purportedly new evidence was therefore considered superfluous.

The new tests offered as newly discovered evidence in *Davis* were so similar to the old tests used at trial that *Davis* is easily factually distinguishable from Mr. Anstey’s case. Unlike the petitioner in *Davis*, Mr. Anstey is offering evidence that debunks the testing methods used by both parties at his trial, and it undermines the existence of a crime—

⁶ Specifically: (1) “[t]he spectrographic results would have shown that the caffeine level was lower in Tegan’s tissue than in her bodily fluids, but that point was presented to the jury in the toxicology report”; (2) “[w]hile the tissue slides might have shown that Tegan suffered from brain swelling or edema and fatty deposits in the liver, these points were plainly and extensively developed by the appellant’s expert witnesses at trial”; and (3) test results showing Seth may have had an HGH deficiency would have duplicated expert testimony that Seth may have had HGH deficiency.

arson.

O'Donnell is more comparable to Mr. Anstey's case. The petitioner in *O'Donnell* was convicted of sexual assault of a spouse and aiding and abetting sexual assault. At trial, the petitioner claimed his wife consented and introduced evidence of the victim's prior sexual conduct with third parties. The new evidence was a letter the victim wrote to the petitioner stating that she had consented to the sexual encounter.

The new evidence in *O'Donnell* was noncumulative because it was "dramatically different, both in quality and character." *O'Donnell*, 189 W. Va. at 633, 433 S.E.2d at 571. The new evidence debunked the victim's initial allegation and undermined the entire basis for believing a crime (sexual assault) occurred. Similarly, the new evidence in Mr. Anstey's case is also of a different kind because it is dramatically different in quality and character than the testimony at his trial. (See A.R. 2563, Goodson Aff. at ¶¶ 11, 20.) The new evidence in Mr. Anstey's case discredits the experts' investigative techniques and undermines the entire basis for believing that a crime occurred.

The new evidence in Mr. Anstey's case is noncumulative for an additional reason. Unlike in *O'Donnell*, where the new and old evidence was all on the issue of consent, the new evidence in Mr. Anstey's case is on a different issue. The debate at Mr. Anstey's trial was whether old investigation techniques suggested arson. The new evidence exposes the invalidity of these techniques. (See A.R. 2545, Hurst Aff. at ¶¶ 4,11; A.R. 2570, Goodson Aff. at ¶ 30.) Therefore, the new evidence in Mr. Anstey's case is both of a different kind and on a different issue than the evidence presented at his trial, and it is not merely cumulative.

The Circuit Court also explained that NFPA 921 was not compulsory, suggesting that the new fire science is merely cumulative evidence. (A.R. 2842.) This conclusion is

irrelevant for two reasons.

First, there is no requirement that NFPA 921 must be compulsory to constitute noncumulative, newly discovered evidence sufficient to warrant a new trial. Failing to follow NFPA 921 “renders scientifically invalid results.” (A.R. 2546, Hurst Aff. at ¶¶ 7, 10.) Mr. Anstey has presented new evidence that the techniques at the time of his trial were scientifically invalid, and that an investigation using modern science would not conclude that arson occurred. (See A.R. 2547, Hurst Aff. at ¶¶ 11, 33; A.R. 2570, Goodson Aff. at ¶ 30.) Whether the new, scientific, and accurate techniques are compulsory is of no consequence.

Second, and more significantly, NFPA 921 *is the standard of care for fire investigation*. The United States Department of Justice and National Institute of Justice have made NFPA’s status as the standard of care abundantly clear, explaining that “NFPA 921 . . . has become a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires.” United States Department of Justice, *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel* 6 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181584.pdf>. Fire investigation experts have explained NFPA’s status as the “recognized guide to fire investigation” and the “standard of care.” (A.R. 2546, Hurst Aff. at ¶ 5; A.R. 2564, Goodson Aff. at ¶ 14.) Finally, courts across the country have recognized NFPA 921 as the standard of care for fire investigations. See *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707, 725 (W.D. Va. 2004) (“Many courts have recognized NFPA 921 as a peer reviewed and generally accepted standard in the fire investigation community.”).⁷ Mr. Anstey has presented evidence that

⁷ See also, e.g., *United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1341 (11th Cir. 2013) (describing NFPA 921 as “a peer reviewed fire investigation guide that is the industry standard for

the experts who testified at his trial failed to follow the protocols now comprising the standard of care in fire investigation science.

The Circuit Court makes much of the fact that NFPA 921 allows for deviations. (A.R. 2843.) It entirely ignores NFPA 921's requirements that deviations from NFPA 921 be properly justified, and that the scientific method be used in every case. *See* NFPA 921 § 1.3 (2011); *Travelers Cas. Ins. Co. of Am. ex rel. Palumbo v. Volunteers of Am. Ky., Inc.*, No. 5:10-301-KKC, 2012 WL 3610250 (E.D. Ky. Aug. 21, 2012), at *2 (explaining that NFPA 921 requires deviations from its procedures to be justified and requires that the scientific method be used in every case); *Barr v. Farm Bureau Gen. Ins. Co.*, 806 N.W.2d 531, 460 (Mich. Ct. App. 2011) (similar). In this case, not only did the experts who testified at trial fail to justify (or even mention) their deviation from NFPA 921, but also they utterly failed to apply the scientific method, relying instead on mythology.

In short, whether NFPA is compulsory or non-compulsory is irrelevant; it is the standard of care, and it debunks the arson investigation techniques used to convict Mr. Anstey of murder. Therefore, modern fire investigation science, embodied in NFPA 921, is not merely cumulative because it is not superfluous. It is both of a different kind and on a different issue than the evidence presented at trial.

fire investigation"); *Indiana Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 849-50 (N.D. Ohio 2004) ("NFPA-921 is a recognized guide for assessing the reliability of expert testimony in fire investigations."); *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 653 (D. Kan. 2003) ("The 'gold standard' for fire investigations is codified in NFPA 921, and its testing methodologies are well known in the fire investigation community and familiar to the courts."); *Royal Ins. Co. of Am. v. Joseph Daniel Canst, Inc.*, 208 F. Supp. 2d 423, 426 (S.D.N.Y. 2002) ("The NFPA 921 sets forth professional standards for fire and explosion investigations."); *Travelers Prop & Cas. Corp. v. Gen. Elec. Co.*, 150 F. Supp. 2d 360, 366 (D. Conn. 2001) (describing NFPA 921 as "a peer reviewed and generally accepted standard in the fire investigation community"); *People v. Watson*, No. 307741, 2013 WL 6508833 (Mich. Ct. App. Dec. 12, 2013); *People v. Jackson*, No. 272776, 2008 WL 2037805, (Mich. Ct. App. May 13, 2008).

4. The new fire investigation science would produce a different result at a new trial.

The Circuit Court erred in holding that newly discovered evidence would not likely produce a different result at a new trial. The new fire investigation science undermines the theory that arson even occurred.

To satisfy the fourth prong of the test for newly discovered evidence, a petitioner must show that the new evidence “ought to produce an opposite result at a second trial on the merits.” *Frazier* 162 W. Va. at 938, 253 S.E.2d at 537; *Stewart*, 161 W. Va. at 132, 239 S.E.2d at 782. In evaluating this prong, courts should assess “the new evidence in light of the entire record.” *Stewart*, 161 W. Va. at 133, 239 S.E.2d at 783.

The new evidence in Mr. Anstey’s case should produce a different result at a new trial because it eliminates any basis to believe arson occurred, and, without any evidence that the fire was intentionally set, the circumstantial evidence alone would not have been enough to convict Mr. Anstey of murder by arson. *See Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 326, 352 S.E.2d 73, 76 (1986) (noting that circumstantial evidence is not sufficient to find that someone committed arson).

a. The new fire investigation science shows that the techniques used to investigate the fire were egregiously flawed and that there is no reason to believe that the fire was intentionally set.

The arson investigators at Mr. Anstey’s trial used discredited techniques, undermining the validity of their conclusions.

i. There is no reason to believe that the fire had two origin points.

The prosecution argued that two separate fires were intentionally set: one that was started by rigging the kitchen toaster and another that was started in Ms. Donollo’s

bedroom. (A.R. 1147, 1246, 1407, 1419, 1150, 1255, 1410–11.) The State used this multiple origin theory as conclusive evidence of arson. (A.R. 1147.) The prosecution concluded that there were two points of origin based on several observations that are now known to be unreliable indicators of arson. The experts cited a “V” burn pattern on the kitchen wall behind the toaster, as well as patterns, a saddle mark, and beading on the toaster to suggest that the toaster was one point of origin. (A.R. 1252, 1429, 1462, 1424, 1431.) The experts cited the discoloration of the linoleum surrounding the vent in Ms. Donollo’s bedroom to suggest that her bedroom was another point of origin. (A.R. 1177, 1497–98, 1523.)

These conclusions do not withstand the scientific scrutiny demanded by NFPA 921. First, although the State alleged that the “V” patterns on the walls suggested that the fire started nearby, it is now understood that “V” patterns indicate no such thing. “Empirical studies have demonstrated that a ‘V’ pattern simply indicates that something close to the wall burned.” (A.R. 2551, Hurst Aff. at ¶ 20.) According to the most up-to-date scientific research, the “V” pattern does not suggest that the area near the toaster was a point of origin. “The conclusion that the origin of the fire was the kitchen counter near the toaster is, therefore, not scientifically supported.” (*Id.*)

Second, the State alleged that patterns inside the toaster’s cover suggested the power cord had been stuffed inside the toaster—rigging it to start a fire. “There is no evidence beyond Mr. Franck’s opinion-based assertion, however, in support of the conclusion that the cord was stuffed up inside the toaster.” (*Id.* at ¶ 22.) “[T]he conclusion that the black marks inside the toaster cover were caused by stuffing the power cord inside the toaster has no basis in fact,” was not tested by the methods required by NFPA 921, and “is therefore scientifically unsupported.” (*Id.* at ¶ 23.)

Third, the State alleged that saddle marks on the toaster's power cord suggested that it was stuffed inside the toaster. However, "the conclusion that the saddle marks could have originated from the cord being stuffed inside the toaster was an unsupported hypothesis." (*Id.* at ¶ 24.) The NFPA 921 requires scientific testing of such a hypothesis.

There is no evidence to suggest that the toaster's cord had been stuffed inside the toaster. As Dr. Hurst explains, "neither of the fire department officials who first identified and seized the toaster at the scene made any mention of the cord being inside the toaster" even though "such an observation would have been unusual and worthy of noting and photographing." (A.R. 2551, Hurst Aff. at ¶ 22.)

Fourth, the hypothesis that the beading at the end of the toaster's wires was the result of the wires short-circuiting similarly has no basis in fact. (A.R. 2552, Hurst Aff. at ¶ 27.) Again, NFPA 921 requires scientific testing of such a hypothesis.

Fifth, the State's theory that the discolored linoleum indicated that a second fire was intentionally set in Ms. Donollo's bedroom was yet another untested hypothesis. (A.R. 2553, Hurst Aff. at ¶¶ 28–30.) It was not a conclusion based on the scientific procedures mandated by NFPA 921. "[T]he record provides no evidence of a fire in bedroom #2." (*Id.* at 30 (referring to Ms. Donollo's bedroom).)

ii. There is no reason to believe that the toaster could have been rigged to start a fire.

There is new evidence indicating that it would have been virtually impossible for someone to manipulate the toaster to short-circuit and cause a fire without an extensive knowledge of its mechanics. Specifically, Dr. Kenneth Huggins explains that the toaster at issue was "designed with an eye toward disposability rather than fixability, and because of this design, it was increasingly difficult to disassemble and reassemble toasters of this

vintage.” (A.R. 2541, Huggins Aff. at ¶ 10.) “[T]he manipulation of the inner workings of the toaster would be difficult absent an extensive knowledge of toasters,” specifically knowledge of their “anatomy, dynamics, and mechanics.” (A.R. 2542, Huggins Aff. at ¶¶ 12, 16.)

Not only does modern fire investigation science show that there is a complete lack of verifiable evidence that the fire even started near the toaster, but also there is evidence that it would have been virtually impossible for Mr. Anstey to rig the toaster to start a fire.

iii. There is no reason to believe that the hallway smoke detector had been disabled.

Finally, the State argued that the smoke detector did not sound the night of the fire because the electrical breaker connected to it had been turned off. (A.R. 1448–51.) However, Mr. Franck failed to conduct the engineering analysis necessary to reach a scientifically valid conclusion about the smoke detector. (See A.R. 2567–68, Goodson Aff. at ¶¶ 21–24.) He also ignored evidence that a firefighter flipped the breaker off after the fire. (A.R. 1099.)

Because there is no reason to believe that the fire had two origin points, or that Mr. Anstey could have rigged the toaster to start a fire, or that the hallway smoke detector had been disabled, a jury would have no reason to believe the fire was intentionally set. At most, they might conclude that the cause of the fire could not be determined. (See A.R. 2554, Hurst Aff. at ¶ 33).

b. Because there is no evidence of arson, there is no reason to believe any crime occurred.

It is axiomatic that Mr. Anstey could not have committed murder by arson if no arson occurred. The newly discovered evidence undermines the evidence of arson.

Without evidence of arson, it is likely that the prosecution would not have the probable cause required to charge Mr. Anstey with murder, and it is almost certain that a jury would have a reasonable doubt as to his guilt. *See* W. Va. R. Crim. P. 3; W. Va. R. Prof'l Conduct 3.8(a).

c. The circumstantial evidence the Circuit Court cites is insufficient to even find probable cause for arson, let alone to find beyond a reasonable doubt that arson was committed.

The Circuit Court relied on circumstantial evidence against Mr. Anstey. (A.R. 2846.) However, this circumstantial evidence is largely irrelevant because there is simply no reason to believe any crime occurred. *See Hayseeds, Inc.*, 177 W. Va. 323, 352 S.E.2d 73. Therefore, the Circuit Court erred in holding that the new evidence would not be likely to produce a different result at a new trial. The new evidence undermines any basis for believing that arson caused the trailer fire or believing that any crime occurred.

5. The new fire investigation science is not merely impeachment evidence.

The Circuit Court erred in holding that the sole object of the new fire investigation science is to impeach or discredit the prosecution's witnesses.⁸ A "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." *Frazier* 162 W. Va. at 938, 253 S.E.2d at 537 (emphasis added). The new evidence in this case is not impeachment evidence. The new evidence indicates that the State's experts' testimony was so fundamentally flawed that, upon retrial, it would

⁸ As argued in section I.B.6, the Circuit Court also erred in holding that Mr. Anstey was required to show that the new evidence was not impeachment evidence. *See Stewart*, 161 W. Va. at 133, 239 S.E.2d at 783.

simply be inadmissible.⁹ Therefore, the Circuit Court erred in holding that this evidence is solely for impeachment purposes.

6. Even if this Court finds that the new fire investigation science is impeachment evidence, a new trial should be granted because the impeachment “goes to the key prosecution witness.”

The Circuit Court also erred in failing to acknowledge that even if the newly discovered evidence is impeachment evidence, it is the sort of impeachment evidence that warrants a new trial. (See A.R. 2844–45, 2848.)

As noted above, this Court “strenuously disapprove[s] any interpretation of these ‘five rules’ to the effect that a new trial will never be warranted if the newly-discovered evidence merely impeaches a witness.” *Stewart*, 161 W. Va. at 133, 239 S.E.2d at 783. This Court’s rule is that “if the first four rules are satisfied in cases involving after-discovered impeachment evidence where the impeachment goes to the key prosecution witness, then a new trial should be granted.” *Id.*¹⁰

An appellate court in Maryland recently distinguished between the sort of impeachment evidence that does not warrant a new trial (“merely impeaching” evidence) and the sort of evidence that, although it may serve partly to impeach, warrants a new trial (“coincidentally impeaching” evidence). *Ward v. State*, 108 A.3d 507, 520 (Md. Ct. Spec. App. 2015).

⁹ A more complete explanation for why this evidence would be inadmissible is below in section I.C.

¹⁰ See also *State v. Kennedy*, 205 W. Va. 224, 235, 517 S.E.2d 457, 468 (1999), overruled on other grounds by *State v. Mechling*, 219 W. Va. 366, 372, 633 S.E.2d 311, 317 (2006); *Fluharty v. Wimbush*, 172 W. Va. 134, 138, 304 S.E.2d 39, 43 (1983); *State v. Nicholson*, 170 W. Va. 701, 703, 296 S.E.2d 342, 345 (1982) (“[U]nder certain circumstances, newly discovered evidence consisting solely of impeachment evidence may be sufficient to warrant a new trial if all the other elements are met.”).

On the one hand, “merely impeaching” evidence impeaches a witness regarding a “peripheral contradiction” and is *not* evidence about “the core question of guilt or innocence.” *Ward*, 108 A.3d at 520. “[C]oincidentally impeaching” evidence, on the other hand, is “evidence attacking the merits of inculpatory testimony” which shows, for example, that “the State’s witness had actually testified falsely on the core merits of the case under review” and is “directly exculpatory evidence on the merits.” *Id.* The court made clear that such evidence “‘should not be dismissed as merely impeaching,’ even if it happens to be ‘coincidentally impeaching.’” *Id.* (emphasis added).¹¹

The new scientific evidence in this case is precisely the kind of coincidentally impeaching evidence contemplated by cases like *Stewart* and *Ward*. The seismic shift in how fires are investigated replaced mythology with the scientific method. “[T]his science has fundamentally changed in ways which now permits a defense which was previously foreclosed by the limits of human knowledge, a defense disputing the incendiary origins of this fire.” *Han Tak Lee v. Tennis*, Civil No. 4:08–CV–1972, 2014 WL 3894306, at *18 (M.D. Pa. June 13, 2014). The new fire investigation science is not solely for impeachment because it does not simply question peripheral issues like a witness’s credibility. The new science is directly exculpatory on the merits because it shakes to the core the basis of the testimony presented by *both* sides’ experts.¹² It is crucial to note that all of the experts

¹¹ Many courts other than those in West Virginia and Maryland have also held that newly discovered impeachment evidence can suffice to warrant a new trial. *See, e.g., State v. Plude*, 750 N.W.2d 42 (Wis. 2008); *State v. Abi-Sarkis*, 535 N.E.2d 745 (Ohio Ct. App. 1988); *State v. Strahl*, 768 N.W.2d 546 (S.D. 2009); *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005); *United States v. Davis*, 960 F.2d 820 (9th Cir. 1992); *United States v. Fried*, 486 F.2d 201 (2d Cir. 1973); *United States v. Atkinson*, 429 F. Supp. 880 (E.D.N.C. 1977); *People v. Gantt*, 786 N.Y.S.2d 492 (N.Y. 2004).

¹² Or, to make an historical analogy, to say that a new scientific method for investigating fires merely impeaches the work of experts who investigated fires using older techniques based on mythology is like saying that the scientific work of Copernicus, Galileo, and Newton showing the earth rotates around the sun merely impeaches Ptolemy’s geocentrism. Perhaps Galileo and Newton’s work could be used to impeach someone espousing Ptolemy’s views, but their scientific

who testified—indeed, nearly all fire investigation experts in 1994—used the same flawed investigation techniques. The new evidence exposes the unreliability of those techniques. As in *Ward*, the importance of the new scientific evidence “cannot be overstated.” *Ward*, 108 A.3d at 520.

Therefore, the new scientific evidence cannot be dismissed as merely impeaching; if anything, it is the sort of coincidentally impeaching evidence that, according to *Stewart*, warrants a new trial. *Stewart*, 161 W. Va. at 133, 239 S.E.2d at 783.

New fire investigation science is like DNA evidence: it is a new scientific tool that gives courts greater insight into the facts of criminal cases—in this case, whether any crime occurred. Courts should embrace these new scientific tools. This Court should grant Mr. Anstey a new trial based on the new fire investigation science that undermines the conclusion that an arson even occurred.

C. Due Process demands that this Court grant Mr. Anstey a new trial.

Mr. Anstey’s due process rights were violated because he was convicted based on evidence that does not meet a minimum threshold of reliability.

The United States and West Virginia Constitutions guarantee due process of law. U.S. Const. amend. XIV, § 1; W. Va. Const. art III, § 10; *see also Grimes v. Plumley*, No. 12-1425, 2013 WL 5967042, at *11 (W. Va. Nov. 8, 2013). West Virginia’s habeas corpus statute ensures that a prisoner’s due process rights are protected. W. Va. Code § 53-4A-1 *et seq.* (2014); *see also Markley v. Coleman*, 215 W. Va. 729, 601 S.E.2d 49, 52 (2004).

A defendant in an arson case is entitled to a new trial on the basis of a due process

works does much more than merely impeach geocentrism: it utterly eliminates any basis for believing in geocentrism, and replaces mythology with real science.

violation if “applying principles from new developments in fire science—shows that the fire expert testimony [at trial] was . . . fundamentally unreliable.” *Han Tak Lee v. Glunt*, 667 F.3d 397, 407–08 (3d Cir. 2012).

More generally, several courts, including the United States Supreme Court, have held that evidence must satisfy a minimum standard of reliability before it may constitutionally be used against a defendant.¹³ Admitting false and incorrect expert opinions unfairly prejudices the trial’s outcome because the jury may think, “[T]his is ‘science,’ a professional’s judgment . . . and give more credence to the testimony than it may deserve.” *United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass 1999); *see also United States v. Hebshie*, 754 F. Supp. 2d 89, 113 (D. Mass 2010).

There is no credible expert today in the relevant scientific community who would defend the egregiously flawed, myth-based investigative techniques presented by the experts at Mr. Anstey’s trial. For the last two decades, the State has imprisoned Mr. Anstey after obtaining his conviction with unreliable arson expert testimony that violates his due process rights. *Han Tak Lee*, 667 F.3d at 407–08. Therefore, in order to vindicate his due process rights, Mr. Anstey is entitled to a new trial.

D. The arson investigation techniques presented at Mr. Anstey’s trial would not be admissible today.

The arson investigation techniques used to convict Mr. Anstey in 1994 would not be admissible today. Since Mr. Anstey’s trial, arson investigation has moved from a

¹³ *See, e.g., United States v. Scheffer*, 523 U.S. 303, 309–12 (1998); *McDaniel v. Brown*, 558 U.S. 120, 135–36 (2010); *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007); *Coogan v. McCaughtry*, 958 F.2d 793, 801 (7th Cir. 1992); *United States v. Young*, 17 F.3d 1201, 1203–04 (9th Cir. 1994) (“A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness.”); *Souliotes v. Grounds*, No. 1:06-CV-00667, 2013 WL 875952 (E.D. Cal. Mar. 7, 2013) (applying *Young* to expert arson testimony that was subsequently discredited by new fire science).

technique (or mythology) to become scientific. Fire investigation science is consequently subject to the reliability standards of *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), which adopted the United States Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). If this Court finds that fire investigation science is technical rather than scientific, it should adopt the United States Supreme Court's opinion in *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999) and subject technical evidence to the same reliability testing as scientific evidence. Whether the reliability testing is conducted under *Daubert/Wilt* or *Kumho*, the arson myths relied on by the experts who testified at Mr. Anstey's trial would be inadmissible today.

1. Fire investigation science is scientific evidence, not technical evidence, and is therefore subject to Daubert/Wilt.

The Circuit Court erred in finding that fire investigation science is technical, not scientific, evidence. Fire investigation science is subject to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993).

There is no West Virginia case declaring that fire investigation science is technical evidence. The Circuit Court's argument for why fire investigation science is technical is unpersuasive. The Circuit Court points out that old, outdated arson investigation techniques are not scientific. The court says, "Clearly, the Petitioner cannot effectively and persuasively argue on the 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." (A.R. 2853.)

No one is arguing that the basis of the State's experts' testimony was scientific. That argument would indeed defy logic and common sense, given that those experts

conducted no scientific testing whatsoever and relied on methods now understood to be “mythology” and “scientifically unsound.” (A.R. 2563, Goodson Aff. at ¶ 11.)

Rather, Mr. Anstey argued, and continues to argue, that *current* fire investigation is scientific. Current fire investigation science is governed by the scientific principles of NFPA 921 and the scientific method. The United States Department of Justice validated NFPA 921 and the scientific methods it establishes as the standard of care sixteen years after Mr. Anstey’s conviction. Any purported fire investigator must be held to scientific principles in the recent editions of NFPA 921. NFPA 921 (2011 ed.); *see also* Comm. on Identifying the Needs of the Forensic Sciences Community, Nat’l Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (standing for the principle that forensic evidence generally must be supported by a scientific basis).

Because there are scientific standards that fire investigators must follow, fire investigation scientific evidence is subject to *Daubert/Wilt* analysis. *Compare United States v. Aman*, 748 F. Supp. 2d 531, 536 (E.D. Va. 2010) (holding that NFPA 921 methodology is sufficiently reliable to withstand *Daubert* scrutiny), *with United States v. Herbshie*, 754 F. Supp. 2d 89, 93 (D. Mass. 2010) (holding that failure to bring a *Daubert* challenge to unreliable arson investigation techniques constitutes ineffective assistance of counsel).¹⁴

¹⁴ Indeed, there is no shortage of authority for the proposition that fire experts are subject to *Daubert* scrutiny. *See, e.g., United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1342 (11th Cir. 2013); *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000); *Michigan Millers Mutual Insurance Corporation v. Benfield*, 140 F.3d 915, 920 (11th Cir. 1998); *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1040 (N.D. Ohio 2002). In fact, a searching inquiry into a proffered expert opinion is particularly important in the realm of arson science because improvements in methods employed by arson scientists over the past twenty years have exposed the flaws of previous methods. *See, e.g., Albrecht v. Horn*, 314 F. Supp. 2d 451, 464 (E.D. Pa. 2004), *vacated and remanded on other grounds*, 485 F.3d 103 (3d Cir. 2007) (“Petitioner has convincingly

2. Even if this Court considers fire science to be technical evidence, it should adopt *Kumho Tire* and apply the *Daubert/Wilt* analysis to technical evidence, including fire investigation science.

Should this Court reject the argument that modern fire investigation is scientific rather than technical, Mr. Anstey urges this Court to reconsider its decision not to adopt *Kumho Tire*. See *W. Va. Div. of Highways v. Butler*, 205 W. Va. 146, 151 n.4, 516 S.E.2d 769, 774 n.4 (1999). *Kumho Tire* applied the *Daubert* standard to expert testimony based on technical and other specialized knowledge.

This Court declined to adopt *Kumho Tire* only a few months after the United States Supreme Court decided that case. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 137 (1999) (decided March 29, 1999); *Butler*, 615 S.E.2d at 769 (decided June 15, 1999). In the last sixteen years, eighteen of the twenty-two states that have adopted *Daubert* have also adopted *Kumho Tire*, including neighboring states like Ohio, Kentucky, Tennessee, and Delaware.¹⁵

More importantly, the United States Supreme Court's rationale for applying *Daubert* to technical or other specialized knowledge is compelling. First, the United States Supreme Court notes that Federal Rule of Evidence 702 makes no distinction

shown that the fire science evidence presented by the Commonwealth at his trial has since been discredited.”); see also David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, *The New Yorker*, Sept. 7, 2009, at 63, available at <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire> (describing the wrongful conviction and 2004 execution of Cameron Todd Willingham, whose conviction rested on myths about fire behavior that pervaded the fire investigation profession for many years up to and following the release of NFPA 921). As a result of these changes in the scientific consensus in this field, it is especially necessary to hold *Daubert* hearings in arson cases to exclude so-called expert testimony that either ignores or misapplies the well-established standards of NFPA 921.

¹⁵ See, e.g., *State v. Rangel*, 747 N.E.2d 291, 299 (Ohio Ct. App. 2000); *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); *Brown v. Crown Equipment Corp.*, 181 S.W.3d 268, 274 (Tenn. 2005); *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999); Eric Helland & Jonathan Klick, *Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States*, 20 Sp. Ct. Econ. Rev. 1, 6–9 (2012).

between scientific knowledge and technical or other specialized knowledge. *Kumho Tire*, 526 U.S. at 147. Although West Virginia Rule of Evidence 702 is a modified version of the federal rule, it also treats scientific and technical evidence similarly. Like the federal rule, it says, “If *scientific, technical, or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” W. Va. R. Evid. 702 (emphasis added). Second, the United States Supreme Court points out that the evidentiary rational underlying *Daubert* (granting latitude to experts) applies equally to technical experts. *Kumho Tire*, 526 U.S. at 148.

Third, the United States Supreme Court notes that “it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge. There is no clear line that divides the one from the others.” *Kumho Tire*, 526 U.S. at 148.

Finally, the United States Supreme Court pointed out, “Experts of all kinds tie observations to conclusions through the use of . . . general truths derived from . . . specialized experience. . . . The trial judge’s effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate . . . whether the testimony reflects scientific, technical, or other specialized knowledge.” *Kumho Tire*, 526 U.S. at 148–49 (internal quotations omitted).

Eighteen of the twenty-two states that have accepted *Daubert* have agreed with the Supreme Court’s reasoning in *Kumho Tire* since this Court declined to adopt *Kumho Tire*

in *Butler*. Mr. Anstey's case is a perfect example of why this Court should extend *Daubert* analysis to expert testimony based on technical or other specialized knowledge.

3. The arson science presented at Mr. Anstey's trial does not satisfy the requirements of *Daubert/Wilt/Kumho Tire*.

Applying the *Daubert/Wilt/Kumho Tire* standards to the expert testimony presented in Mr. Anstey's case makes clear that this evidence would be inadmissible today. Whether the Court analyzes modern fire investigation as scientific and relies on *Daubert/Wilt* or adopts *Kumho Tire* and analyzes the evidence as technical, the evidence presented at Mr. Anstey's 1994 trial would be inadmissible.

Under *Wilt* and West Virginia Rule of Evidence 702, it is the obligation of West Virginia courts to serve as gatekeepers against unreliable and unscientific evidence. To fulfill this role, the court must conduct an inquiry into the experts' credentials and conclusions, their methods and analyses, and the application of these methods to the case at hand. The proponent of the expert testimony bears the burden of establishing that the contested testimony is sufficiently reliable to be admissible. *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987).

The NFPA 921 is the appropriate standard to use in determining whether a fire investigator's expert opinion is admissible because it is the authoritative guide for fire investigations. See *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054, 1057–58 (8th Cir. 2005) (concluding that plaintiff's expert opinions did not reliably follow NFPA 921 and were therefore inadmissible). Expert fire investigator opinions are admissible only if they properly apply the principles and methods of fire investigations set forth in NFPA 921. See *id.* Deviations from the methodology of NFPA 921 must be

properly justified. *See Barr*, 806 N.W.2d at 533 (“NFPA 921 also states in § 1.3 that deviations from its procedures are not necessarily wrong, but need to be justified.”). Experts must explicitly state their consistent and active reliance on NFPA 921. *See Werth v. Hill-Rom, Inc.*, 856 F. Supp. 2d 1051, 1060 (D. Minn. 2012) (noting that “experts’ failure to disclose their reliance on NFPA 921 . . . would alone justify excluding their opinion”). The NFPA requires investigators to follow the scientific method. (*See* A.R. 2565, Goodson Aff. at ¶ 18 (explaining that the NFPA 921 incorporates the scientific method)). A proper, thorough, and documented application of NFPA 921 and the scientific method, which it incorporates, is required to satisfy *Daubert/Wilt*.

The experts who testified at Mr. Anstey’s trial could not have documented their application of NFPA 921 because they utterly failed to apply NFPA 921. Mr. Goodson stated, “It is clear based upon my review of the transcripts of the State’s . . . witnesses that they did not follow the scientific method in connection with their investigation of the trailer fire.” (A.R. 2567, Goodson Aff. at ¶ 20.) Mr. Goodson further explained that, “Rather, the State’s experts relied upon outdated methods that had permeated the fire investigation community for years[.] . . . [T]hose methods are no longer accepted within the fire investigation community today.” *Id.* Similarly, Dr. Hurst opined, “The State’s experts utterly failed to follow the scientific method. Failure to follow the scientific method when conducting a fire investigation renders scientifically invalid results.” (A.R. 2562, Hurst Aff. at ¶ 10.)

Therefore, because their investigation in no way followed NFPA 921 or the scientific method, the testimony of all the trial experts would be deemed inadmissible under the standards of *Daubert/Wilt* and/or *Kumho Tire*.

II. THE CIRCUIT COURT ERRED IN FAILING TO GRANT MR. ANSTEY A HEARING

By not holding an omnibus post-conviction habeas corpus hearing, the Circuit Court denied Mr. Anstey the chance to develop the record on new scientific discoveries. A hearing is particularly important in this case because West Virginia courts have not previously discussed the new scientific standards for forensic fire investigation. The Circuit Court's denial of an omnibus hearing is a mixed question of law and fact. This Court is reviewing both whether the Circuit Court correctly answered factual questions, and reviewing the legal question of whether the facts created probable cause to believe Mr. Anstey is entitled to relief. The clearly erroneous standard applies to the factual issues and the *de novo* standard applies to the legal issues. *Mathena v. Haines*, 219 W. Va. 417, 421, 633 S.E.2d 771, 772 (2006).

A. Mr. Anstey is entitled to an omnibus post-conviction habeas corpus hearing because there is probable cause to believe that he would be entitled to relief.

Mr. Anstey's habeas petition and attached affidavits show *at least* probable cause to believe he satisfies the test for newly discovered evidence and is entitled to relief.

To be entitled to habeas relief, Mr. Anstey must show that he has presented newly discovered evidence by meeting the four mandatory prongs of the *Frazier/Stewart* test. To be entitled to a hearing, Mr. Anstey must show that there is probable cause—that is, reasonable grounds to believe—that he can meet this standard. *See* W. Va. Code, § 53-4A-1 (2014) (“If it appears to the court from said petition, affidavits, exhibits, records and other documentary evidence attached thereto . . . that there is probable cause to believe

that the petitioner may be entitled to some relief . . . the court shall promptly hold a hearing and/or take evidence.”).¹⁶

Neither the Legislature nor this Court has defined the “probable cause” standard in the specific context of whether a petitioner is entitled to habeas relief. This Court should look to its definition of probable cause in different contexts for guidance. This Court has defined probable cause as “reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.” *State v. Lilly*, 194 W. Va. 595, 602 n.10, 461 S.E.2d 101, 108 n.10 (1995). It has clarified that this standard “does not depend solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances.” *Id.* at 108.

Because Mr. Anstey’s habeas petition demonstrated probable cause that he would be entitled to relief, the Circuit Court erroneously denied his request for an omnibus hearing. Mr. Anstey’s petition, affidavits, and record show that there is new evidence indicating Mr. Anstey was wrongfully convicted. The petition and affidavits undermine the conclusion that arson caused the trailer fire. (*See* A.R. 2567–70, Goodson Aff. at ¶¶ 20, 23, 26, 27, 30, 33.) This evidence is all the more persuasive in light of the fact that courts all over the country are overturning convictions based on similar evidence. *See, e.g., Han Tak Lee v. Tennis*, Civil No. 4:08–CV–1972, 2014 WL 3894306, at *19 (M.D. Pa. June 13, 2014) (overturning a conviction based on new fire science); *After 42 Years in Jail, Conviction Overturned in Case of Deadly Fire*, PBS NewsHour (Apr. 3, 2013, 12:00 AM), http://www.pbs.org/newshour/bb/law-jan-june13-prisoner_04-03/ (discussing an Arizona case where the court overturned a conviction based on new fire

¹⁶ The statute also requires that the grounds advanced have not been previously and finally adjudicated or waived. *See* W. Va. Code, § 53-4A-1 (2014).

science); Gretchen Gavett, *New Fire Science Helps Overturn Michigan Man's Murder Conviction*, PBS Frontline (June 8, 2012, 5:09 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/death-by-fire/new-fire-science-helps-overturn-michigan-mans-murder-conviction/> (discussing a Michigan case where the court overturned a conviction based on new fire science and similar cases in Illinois and Texas).

There is probable cause that Mr. Anstey's new evidence would meet the *Fraizer/Stewart* prongs and justify overturning his conviction. Therefore, Mr. Anstey is, at the very least, entitled to an omnibus hearing.

B. In violation of rule 9(a), the Circuit Court did not include findings of fact to explain why an evidentiary hearing is unnecessary.

To properly deny Mr. Anstey a hearing, the Circuit Court needed to state specific findings of fact and conclusions of law explaining why a hearing was unnecessary.

Rule 9(a) of the Rules Governing Post-Conviction Habeas Corpus states, "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." W. Va. Habeas R. 9(a).

The Circuit Court failed to explain why a further investigation was not needed. The Circuit Court said only, "The Petition and the 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." (A.R. 2839.) This cursory statement is a far cry from the specific findings and conclusions that Rule 9(a) requires.

The Circuit Court failed to give specific reasons why a hearing was unnecessary. It is unlikely that the Court could have given convincing reasons because a hearing is

necessary to fully develop the new scientific evidence Mr. Anstey has presented in his petition and affidavits.

C. A hearing is particularly appropriate in Mr. Anstey's case because complicated scientific evidence is at issue, and this evidence should be adversarially tested.

By denying Mr. Anstey a hearing, the Circuit Court has foreclosed his only chance to have a full and fair hearing on the complicated scientific issues he raised in his petition. The shift from mythology-based investigation techniques to scientific standards demands a deeper inquiry into the reliability of the evidence used to convict Mr. Anstey; an omnibus hearing is necessary to make this inquiry.

This Court has emphasized the value of the omnibus hearing to fully and fairly develop the factual contentions of the petition. It has described the omnibus hearing as the place for the petitioner to "raise any collateral issues which have not previously been fully and fairly litigated." *Losh v. McKenzie*, 166 W. Va. 762, 764, 277 S.E.2d 606, 609 (1981); see also *State ex rel. Farmer v. Trent*, 206 W. Va. 231, 235, 523 S.E.2d 547, 551 (1991) (citing *Gibson v. Dale*, 173 W. Va. 681, 689, 319 S.E.2d 806, 814 (1984)).

Mr. Anstey's case involves an issue that makes a hearing particularly necessary: new scientific developments that have not been previously discussed in West Virginia courts. Mr. Anstey did not receive a hearing on his first habeas petition either, meaning that he has never had a hearing on any collateral issues.

In denying Mr. Anstey's petition, the Circuit Court contended that it knew the relevant facts because it presided over Mr. Anstey's trial. (A.R. 2846.) However, there is critical new evidence, and the scientific and factual issues in Mr. Anstey's petition are of

a completely different kind than what was argued at trial. The 1994 trial cannot replace the full and fair development of the evidence Mr. Anstey raised in his habeas petition.

The affidavits alone are not sufficient to explain the revolution in fire science. Other testimony is necessary to flesh out the scientific developments and their relevance to Mr. Anstey's case. The shift from mythological arson investigation techniques to fire science cannot be understood on the affidavits alone. Therefore, West Virginia law entitles Mr. Anstey to an omnibus hearing to fully and fairly develop the new scientific evidence raised in his petition and the legal consequences of that new science.

CONCLUSION

For the reasons above, Mr. Samuel Anstey respectfully requests that this Court reverse the Circuit Court's denial of his Petition for Writ of Habeas Corpus and grant the Petition, vacating his conviction and ordering a new trial. In the alternative, Mr. Anstey requests that this Court reverse the Circuit Court's denial of a hearing and order the Circuit Court to hold an omnibus evidentiary hearing on the issue presented herein.

Signed Valena E. Beety ^(amb)
Valena E. Beety (WV Bar #11907)

Signed Wiley Newbold ^(amb)
Wiley Newbold (WV Bar #7757)

Signed William I. Burner
William I. Burner, Rule 10 Certified Law Student

Signed Ashley M. Hawkins
Ashley M. Hawkins, Rule 10 Certified Law Student

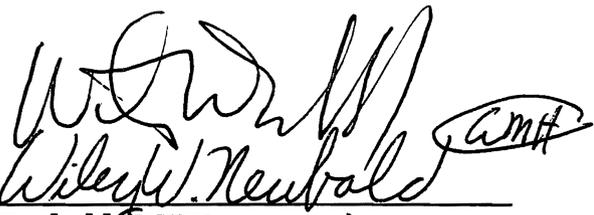
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Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I, Wiley W. Newbold, hereby certify that on the 22nd day of April, 2015, a true and accurate copy of the foregoing **Petitioner's Brief** was hand delivered to counsel of record for the Respondent at the following address:

Derek A. Knopp
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