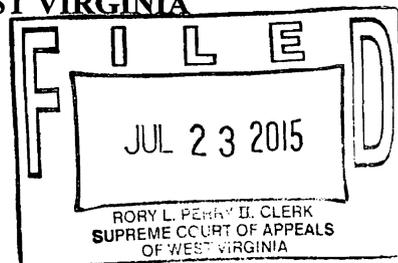


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0067



SAMUEL ANSTEY,

*Petitioner Below,
Petitioner,*

v.

DAVID BALLARD, Warden,
Mt. Olive Correctional Complex

*Respondent Below,
Respondent.*

RESPONDENT'S BRIEF

**PATRICK MORRISEY
ATTORNEY GENERAL**

**DEREK A. KNOPP
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12294
Email: derek.a.knopp@wvago.gov
*Counsel for Respondent***

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STATEMENT OF THE CASE

On May 11, 1994, an indictment was returned in the Circuit Court of Fayette County, West Virginia, charging Samuel Anstey (“Petitioner”) with one count of murder and one count of first degree arson. (App. at 2823.) The charges related to Petitioner intentionally starting a fire in a residential trailer in which he lived with his grandmother, Marie Donollo, on February 8, 1994. (*Id.*) Petitioner and his grandmother were the only two people living in the trailer, and the charges alleged that Petitioner started the fire for the purpose of killing his grandmother. (*Id.*) The State subsequently proceeded to trial only on the murder charge. (*Id.* at 1574.) On September 8, 1995, after an eleven day jury trial Petitioner was found guilty of first degree murder without a recommendation of mercy. (*Id.* at 2457, 2832.) On September 8, 2014, the circuit court sentenced Petitioner to life without mercy. (*Id.* at 2832.)

On May 12, 2014, Petitioner filed the Petition for Writ of Habeas Corpus that is the subject of the instant appeal in the Circuit Court of Fayette County. (*Id.* at 2464-2602.) Petitioner alleged in this Petition that newly discovered evidence demonstrates that fire expert testimony relied upon at trial by the State was fundamentally unreliable, requiring his underlying conviction be vacated and entitling him to a new trial. (*Id.*) Petitioner’s habeas claim relied principally on NFPA 921, Guide for Fire and Explosion Investigations, issued by the National Fire Protection Association as well as the affidavits of expert witnesses regarding the issue. (*Id.* at 2544-76.)

During Petitioner’s 1994 trial, the fire chief of the Oak Hill Fire Department, Delbert Cordle, testified that he arrived at the scene of the burning trailer at 4:51 a.m. finding Petitioner screaming that his grandmother was still in the bedroom. (*Id.* at 750-51.) Cordle testified that at that time he could see fire in the kitchen and that as far as he could tell it was contained in one room. (*Id.* at 751-52.) Cordle and another individual broke out the window outside of Donello’s bedroom, removed her from the

burning trailer, and began administering CPR. (*Id.* at 755-56.) Despite the efforts to save Donollo, she died on February 12, 1994, at the age of 81 as a result of hypoxic encephalopathy, a lack of oxygen to the brain. (*Id.* at 2824.) Cordle testified that the back door, which was nearest to Donollo's bedroom, was locked. (*Id.* at 757.) After extinguishing the fire, Cordle turned the investigation over to the "investigating squad." (*Id.* at 759.)

Fire Investigator Robert Begley testified that when he entered the house he observed that most of the fire damage was from the countertop area up toward the ceiling. (*Id.* at 1095.) As Begley walked in Petitioner's room he did not notice any smoke damage or heat damage of any kind. (*Id.* at 1099.) Begley also noticed that there was a towel located at the top of the doorway in Petitioner's room leading out into the hallway and that there was also some weather stripping down the sides of the door. (*Id.* at 1099-1100.) As Begley examined the kitchen in the trailer he testified that he found a toaster with what looked like to be two sheets of aluminum foil placed over top of it, its crumb tray removed, and its plunger mechanism in the down position. (*Id.* at 1104-07.) Assistant State Fire Marshall Roger York testified that his "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." (*Id.* at 1243.) York testified that the toaster covered in aluminum foil appeared to be connected to an electrical receptacle, and fire damage was heavy in the area near the toaster. (*Id.* at 1244-46.)

Harold Franck, a forensic engineer, testified that the fire and material falling on the toaster could not have caused the toaster plunger to be in the down position. (*Id.* at 1421-22.) Franck additionally testified that he 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.* at 1422-1423.)

Aside from the kitchen, State experts also concluded that a separate fire began in Donollo's bedroom. (*Id.* at 1150, 1247-1250, 1411-12.) Franck testified that he noted a small fire on top of a heating register on the floor in Donollo's bedroom. (*Id.* at 1410.) Steve Cruikshank, Fayette County Fire Coordinator, testified that the fire in Donollo's bedroom could not have come from the original fire in the kitchen. (*Id.* at 1151.) When asked if anything struck him unusual about the condition of the trailer in regard to the fire, Cruikshank testified that investigators found a towel and material stuffed around Petitioner's door that would serve to keep smoke out of that particular room. (*Id.* at 1158.) The State's experts concluded that the fire was incendiary in nature and intentionally caused. (*Id.* at 1159-1160.)

Petitioner also presented expert witnesses at trial that concluded the fire was accidental in origin. Rodney Carney, a firefighter and fire investigator for the City of Beckley, Raleigh County, West Virginia, testified that the bread toaster could not have been the cause of the fire and that there was no evidence of a fire having started in Donollo's bedroom. (*Id.* at 1931 -35.) Tim May, a fire investigator and instructor who taught at the National Fire Academy in Emmitsburg, Maryland, also 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.* at 2118, 2134.) May testified that "[t]his fire shows nothing of a set fire. It is an accidental fire, no question whatsoever." (*Id.* at 2132.)

After considering the trial record, the Petition for Writ of Habeas Corpus, and the Respondent's Response and Petitioner's Reply, the Circuit Court of Fayette County entered an order on December 24, 2014, denying Petitioner's Petition for Writ of Habeas Corpus concluding that Petitioner failed to meet the test for newly discovered evidence as laid out in this Court's decision in *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979). (*Id.* at 2822-57.) Petitioner now appeals this order.

SUMMARY OF THE ARGUMENT

The Circuit Court of Fayette County properly ordered that the relief sought in Petitioner's Petition for Writ of Habeas Corpus be denied. Petitioner claims in his first assignment of error that the circuit court misapplied the rule governing newly discovered evidence and wrongly denied his habeas petition. Petitioner's claims in this regard must be rejected. First, the circuit court below properly concluded that Petitioner failed to satisfy the requirements in *State v. Frazier* for newly-discovered evidence because the object of Petitioner's alleged newly-discovered evidence, NFPA 921 and the affidavits of Petitioner's expert witnesses, would be to solely discredit or impeach the State's expert witnesses. Additionally, such evidence would not be such as ought to produce an opposite result at trial. Moreover, Petitioner cites no legal authority under West Virginia law for the proposition that NFPA 921 is a compulsory standard or that any deviation by an arson expert automatically invalidates that expert's opinion.

Petitioner claims in his second assignment of error that the circuit court erred in failing to grant him a hearing. Petitioner's claim in this regard must also be rejected because the decision of whether to conduct an evidentiary hearing is in large part left to the sound discretion of the circuit court. The circuit court properly considered the evidence Petitioner offered to support his habeas claims, and Petitioner fails to demonstrate what additional evidence was required for the circuit court to fully adjudicate his claims. Given the foregoing, Petitioner's claims on appeal must be rejected, and the order of the Circuit Court of Fayette County denying Petitioner habeas relief affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case as the dispositive issues have been decided. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision would be appropriate.

ARGUMENT

“In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review.” Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 418, 633 S.E.2d 771, 772 (2006). “We review 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.”

I. The Circuit Court Correctly Concluded That Petitioner Failed to Satisfy the Requirements for Newly-Discovered Evidence.

In *State v. Frazier*, this Court laid out the following standard for granting a new trial on the ground of newly-discovered evidence:

“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.”

Frazier, 162 W. Va. 935 (quoting Syl. Pt. 1, *Halstead v. Horton*, 38 W. Va. 727, 18 S.E. 953 (1894)). The circuit court below properly concluded below that the object of Petitioner’s alleged newly-discovered evidence, NFPA 921 and the affidavits of Petitioner’s expert witnesses, would be to discredit or impeach the State’s expert witnesses and additionally that such evidence would not be such as ought to produce an opposite result at trial. (*Id.* at 2844-48.) Accordingly, Petitioner does not meet the requirements of *Frazier*, and the circuit’s order denying Petitioner’s habeas petition must be affirmed.

First, the sole object of Petitioner’s alleged newly discovered evidence would be to discredit or impeach the State’s expert witnesses at trial. While Petitioner argues on appeal that the circuit court misapplied this portion of the rule, treating it as “mandatory,” such argument is of no moment as consideration of whether the evidence would be used to discredit or impeach a witness on the opposite side is certainly a proper consideration under the express language of *Frazier*. Moreover there is no indication from the circuit court’s order that it would have been inclined to grant relief but-for the “mandatory” nature of the fifth part of the *Frazier* test. The circuit court properly concluded that Petitioner’s experts’ testimony would go to the weight of the testimony of the State’s experts, not to its admissibility.

At the outset, NFPA 921 was issued in 1992—two years before the defendant's 1994 trial. Because NFPA 921 existed before the defendant's trial, Petitioner does not argue that NFPA 921 was not available at the time of the defendant's trial. Instead, Petitioner argues that NFPA 921 was not made a compulsory standard governing fire investigations until after his trial. Indeed, the State's primary arson expert, Harold Franck, testified that he is a member of the NFPA and has a complete set of its standards, including NFPA 921, and that NFPA 921 provides broad guidelines concerning fire investigation. (App. at 1527-28.) Petitioner relies on the Affidavit of his expert Mark Goodson for the proposition that NFPA 921 became a compulsory standard governing fire investigations in 2000. (App. at 2564-65.) However, and most importantly, Petitioner cites no legal authority under West Virginia law for the proposition that NFPA 921 is a compulsory standard or that any deviation by an arson expert automatically invalidates that expert's opinion. In fact, federal district courts have held that failure to comply with NFPA 921 does not automatically render an arson expert's testimony inadmissible.

For example, in *Schlesinger v. United States*, 898 F. Supp. 2d 489 (E.D.N.Y. 2012), the United State's District Court for the Eastern District of New York found that “[t]he decision not to follow the methodology set forth in NFPA 921, as well as other purported flaws in the [expert's] methodology— e.g., the failure to rule out other possible causes—goes to the weight of the evidence, not its admissibility.” *Schlesinger*, 898 F. Supp. 2d at 505. Moreover, the United States District Court for the Eastern District of Michigan found that “[w]here [the arson expert] deviated from NFPA 921, such deviation is not dispositive because NFPA 921 expressly provides that it contains only nonmandatory provisions; it merely sets guidelines and recommendations for fire investigations, not requirements.” *Jackson v. McQuiggin*, 10-12426, 2012 WL 5410993, at *6 (E.D. Mich. Nov. 6, 2012) aff'd, 553 F. App'x 575 (6th Cir. 2014)(quotation omitted). “Although [the expert’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.” *Id.* As noted by the United States District Court for the Eastern District of Michigan, NFPA 921, by its own terms, is not mandatory:

1.3 Application. This document is designed to produce a systematic, working framework or outline by which effective fire and explosion investigation and origin and cause analysis can be accomplished. It contains specific procedures to assist in the investigation of fires and explosions. These procedures represent the judgment developed from the NFPA consensus process system that if followed can improve the probability of reaching sound conclusions. **Deviations from these procedures, however, are not necessarily wrong or inferior** but need to be justified.

1.3.4 In addition, it is recognized that the extent of the fire investigator's assignment, time and resource limitations, or existing policies **may limit the degree** to which the recommendations or techniques in this document will be applied in a given investigation.

(App. at 2648-49.) As the circuit court persuasively explained in its order, “[t]he 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.” (App. at 2844.) Given the foregoing, the circuit court correctly concluded that the sole object of the new evidence presented by Petitioner would be to discredit or impeach the State’s expert witnesses and thus a new trial is unwarranted.

The circuit court also concluded in its order that Petitioner failed to satisfy the fourth factor of the *Frazier* test which requires that “the evidence must be such as ought to produce an opposite result at a second trial on the merits.” *Frazier*, 162 W. Va. 935; (App. at 2846.) The circuit court surveyed the overwhelming evidence supporting the jury’s unanimous guilty verdict in this regard. The court pointed out that Petitioner was the only person who lived in the trailer and indeed the only other person in the trailer the night of the fire other than his grandmother, the victim. (App. at 2846.) The physical evidence the State presented in regard to the manner the toaster was found (covered in foil, plunger depressed, and bread crumb tray removed) as well as the towels and weather stripping found around Petitioner’s door would be clearly “suspicious to any reasonable person without any further interpretation or opinion by any expert witness.” (*Id.* at 2846-47.) Moreover, in the event of Donollo’s death, Petitioner stood to gain sole control of Donollo’s CDs, containing more than four hundred thousand dollars. (*Id.* at 2847.) Moreover, Donollo, only six days prior to her death, expressed her desire to disinherit Petitioner. (*Id.*) Given the foregoing, the circuit court correctly concluded that had “Petitioner’s ‘new’ experts

testified at trial, the jury's verdict would have been the same." (*Id.*) Thus, the portion of the circuit court's order denying Petitioner's newly discovered evidence claim must be affirmed.¹

Petitioner also asserts in this assignment of error that his due process rights were violated because he was convicted based on unreliable evidence and that the arson investigation techniques used at his trial would not be admissible today under *Daubert/Wilt*. (Pet'r's Br. at 28-35.) The circuit court correctly disposed of these claims. First, the circuit court correctly noted that the testimony from the State's expert witnesses was "'technical,' not 'scientific' in nature." (App. at 2854.) This Court held in *Watson v. Inco Alloys Int'l, Inc.* that "[u]nless 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 v. Inco Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001). Furthermore, "[i]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." Syl. Pt. 6, in part, *Gentry*, 195 W. Va., 515. As the circuit court noted in its order, Petitioner pointed out in his habeas petition 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." (App. at 2853.) Even more explicitly, Petitioner stated that "[t]he State's experts did not use the scientific method to reach their conclusions regarding the cause and origin of the fire." (*Id.* at 2518.) Indeed, aligning with

¹ It is also relevant to note in regard to Petitioner's newly-discovered evidence claim that Petitioner claimed in his habeas petition below that his trial counsel was ineffective for failing to request a *Daubert* hearing regarding obviously unreliable scientific testimony. (App. at 2529-532.) Petitioner specifically asserted that Petitioner's *trial counsel* had access to the NFPA and other materials and that there were basic and accepted procedures and techniques in place *at the time* that were not followed. (*Id.*)

Petitioner's assertions in his Petition, the circuit court properly concluded that the State's experts' testimony was based on practical, common sense technical experience and does not qualify as scientific knowledge requiring the *Daubert/Wilt* analysis. (*Id.* at 2849-50.) Based on the foregoing, Petitioner's remaining two claims in his first assignment of error must be rejected and the circuit court affirmed.

II. The Circuit Court Properly Concluded That the Facts of the Case Were Sufficiently and Adequately Developed for the Court to Rule Upon Petitioner's Habeas Petition Without Further Testimony.

In its order denying Petitioner habeas relief the circuit court found the following:

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.

(App. at 2839.) A circuit court may adjudicate a habeas petition without holding a hearing. "A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief." Syl. Pt. 1, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973). Moreover, "the post-conviction habeas corpus statute leaves the decision of whether to conduct an evidentiary hearing . . . in large part to the sound discretion of the court before which the writ is made returnable." *Gibson v. Dale*, 173 W. Va. 681, 688, 319 S.E.2d 806, 813 (1984). As Petitioner asserts on appeal, "a hearing is required only '[i]f it appears to the court ... that there is probable cause to believe that the petitioner may be entitled to some relief and that the contention or contentions and grounds (in fact or law) advanced have not

been previously and finally adjudicated or waived.” *Gibson*, 173 W. Va., 688. However, “[e]ven in such circumstances, there is no requirement that a full evidentiary hearing be conducted. This statute requires only that ‘the court shall promptly hold a hearing *and/or* take evidence on the contention or contentions and grounds (in fact or law) advanced.’” *Id.* (emphasis added).

The circuit court in this case properly took evidence in regard to Petitioner’s newly-discovered evidence claim in the form of affidavits from Petitioner’s multiple experts. Petitioner generally asserts on appeal that the affidavits alone are not sufficient and that other testimony is necessary to explain the revolution in fire science, but Petitioner fails to explain what additional evidence the circuit court would need to fully address his newly-discovered evidence claim. Petitioner’s general assertions on appeal are insufficient to show that the circuit court abused its discretion in determining that the record was sufficiently developed in order to fully adjudicate his habeas petition. Accordingly, Petitioner’s claim in this regard must also be rejected.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Fayette County must be affirmed.

Respectfully submitted,

DAVID BALLARD, Warden
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

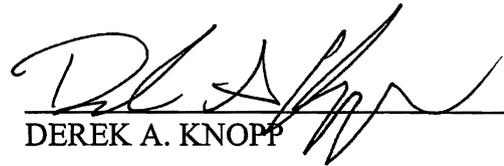
A handwritten signature in black ink, appearing to read 'Derek A. Knopp', written over a horizontal line.

DEREK A. KNOPP
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12294
Email: derek.a.knopp@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for the Respondent, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 23rd day of July, 2015, addressed as follows:

Valena E. Beety, Esq.
Wiley Newbold, Esq.
West Virginia Innocence Project at the
WVU College of Law Clinical Law Program
PO Box 6130
Morgantown, WV 26505


DEREK A. KNOPP