

Supplement 1

Julia Surbaugh
51198-2/D-8a
Lakin Correctional Center for Women
11264 Ohio River Road
West Columbia, WV 25287

APR 30 2015

April 21, 2015

The Honorable Margaret L. Workman, Chief Justice

✓ The Honorable Robin J. Davis, Justice

The Honorable Menis E. Ketchum, Justice

The Honorable Brent D. Benjamin, Justice

The Honorable Allen H. Loughry II, Justice

The Honorable Rory L. Perry, Clerk

West Virginia Supreme Court of Appeals

1900 Kanawha Boulevard East

Charleston, WV 25301

Dear West Virginia Supreme Court of Appeals:

I received on April 6, 2015 the copy of the Petitioner's Brief submitted in my name by Christopher G. Moffatt to The West Virginia Supreme Court of Appeals January 6, 2015 – Docket No. 14-0890 - having had to file a complaint with the Office of Disciplinary Counsel¹ to receive a copy of such. As stated in the complaint, ***I have not had input into the appeal and have a right to do so. I wish to have the brief submitted in my name amended due to omission of trial error preserved by objection and verified by transcripts and due to its lack of substantiating citations from the record and argument of law for the error presented. I respectfully present error/facts not addressed in the brief in this letter to substantiate my reasons for this action.*** I am not maligning Mr. Moffatt across the board. He is to my understanding a sole practitioner who in his own words is in court every day. To be assigned to pen a direct appeal that has 4500+ pages of transcripts in addition to the court record is a time consuming task. Nevertheless I have the right to appellate review of trial error and to have said error preserved future appeal if needed.

The second trial was not just a re-plowing of the field. Second trial counsel, Dan L. Hardway, brought forth ***new forensic and medical evidence.*** Appendices designated to specific items described are attached containing transcript pages and other documents supporting claims cited in this letter.

Blood Spatter Analysis Not Included In Petitioner's Brief

¹ ODC I.D. No. 15-060128

The most grievous omission from Petitioner's brief is the lack of error pertaining to the position of my husband during the shooting based upon *new evidence in the second trial – blood spatter analysis of the high velocity impact spatter from a firearm on the ceiling* of the bedroom where the shooting occurred. *This analysis places the base of my husband's left ear 32 inches from the ceiling when the shot occurred creating the spatter.* With an eight foot ceiling, that's over five feet from the floor. The combination of the blood spatter analysis, bullet trajectories and ear witness testimony come to only one conclusion – my husband was vertical when the first shot was fired, not lying down in bed as he stated to law enforcement. This brings to question the sufficiency of evidence concerning premeditation as well as whether the State proved beyond a reasonable doubt that I did not shoot in self-defense. Per the lead investigator, Deputy Richard Clayton, the only evidence of my husband lying down in bed asleep at the time of the shooting is his own uncrossed words (pg. 1040 JT 2014) now contradicted through forensic evidence. Please note:

1. On August 6, 2009 my husband sustained three gunshot wounds to the head. Two wounds - with almost identical trajectories- were to the left cheek and exited at the base of his left ear. One near contact (or contact²) wound was to the right side of the head and did not exit, (pg. 792-93 JT 2014).
2. On August 6, 2009 a Webster County Sheriff Deputy photographed the ceiling of the bedroom identifying the presence of blood spatter (pg. 1015 JT 2014). Then on August 12, 2009, a member of the West Virginia Crime Scene Team photographed the same ceiling again identifying the presence of blood spatter (pg. 660 JT 2014). ***Neither law enforcement agency had the spatter on the ceiling analyzed.***
3. Defense counsel for the second trial had the spatter analyzed. Mr. Andrew Wheeler³, who teaches Forensics at WVU Tech⁴ traveled to the bedroom twice to gather data, created a grid on the ceiling, photographed such and then analysis the blood spatter (pg. 1736-43 JT 2014).
4. The blood on the ceiling was in a cone shaped pattern, had spatter less than 1 millimeter in diameter and with additional identifiers was found by Mr. Wheeler to be high velocity impact blood spatter from a firearm (pg. 1742-43 JT 2014).

² Contact cannot be ruled out due to the shot went through the helix (upper flap) of the ear. This was testified to by Andrew Wheeler (pg. 1800 JT 2014) as well as Dr. Mahmoud (pg. 797 JT 2014). Also, Deputy Clayton testified Dr. Mahmoud stated it was "very very close" (pg. 1025 JT 2014).

³ The entirety of Mr. Wheeler's testimony is included in Appendix A.

⁴ Two of his former students are employed in the WV State Police Crime Lab.(pg. 1720 JT 2014).

5. The only high velocity impact blood spatter from a firearm found was on the ceiling of the bedroom (pg. 1811 JT 2014). Mr. Wheeler looked in the bedroom and at all of the crime scene photos. None of the other blood spatter has the characteristics of high velocity impact spatter from a firearm (pg. 1811-1812 JT 2014).

6. ***The State referred to all blood spatter on other surfaces - such as the bottom of a book shelf - as high velocity impact spatter from a firearm, but the diameter of the drops were too large to be such.*** This caused the expert witness to correct the State as to the blood spatter on the bottom of the bookshelf. Specifically that the spatter pattern on the bottom of the shelf was "inconsistent with gunshot spatter" (pg. 1821-22 JT 2014). That the State was using incomplete scenarios as to the blood spatter was preserved by objection (pg. 1818 JT 2014).

7. Mr. Wheeler stated the wound causing the high velocity impact spatter from a firearm on the bedroom ceiling was 89" from the closet, 17" from the wall, and 32" from the ceiling – therefore over five feet from the floor (pg. 1748-49, JT 210). This was based upon a mathematical formula composed of trigonometry and geometry that was derived from the cone shaped spatter pattern on the ceiling, - the point of convergence pattern (pg. 1744-45 JT 2014) which is the origin of the blood spatter ergo the location of the wound (pg. 1752-54 JT 2014).

8. Mr. Wheeler also testified the high velocity impact spatter from a firearm pattern on the ceiling would have been **consistent with the two left cheek wounds that exited at the base of the left ear. The right side of the head near contact (or contact) wound is not consistent** with the high velocity impact spatter from a firearm pattern due to a wound of that nature; the energy would go into the wound tract. Mr. Wheeler also testified my husband would have had to have been facing across the bed in order for the base of his left ear to make the ceiling pattern (pg. 1757 JT 2014).

9. Mr. Wheeler testified, "I would say that to a reasonable degree of scientific certainty he was not lying in bed when this blood spatter pattern was created (pg. 1763 JT 2014).

10. Therefore my husband was facing across the bed and the base of his left ear was over five feet from the floor. My husband's statement that he was in bed lying down cannot be substantiated by the blood spatter analysis if the two left cheek shots were the first fired as the facts below indicate.

11. It is agreed that the two left cheek shots had almost identical trajectories leading State's ME, Dr. Mahmoud to say in response to the question, "In fact, the wounds are almost identical, aren't they?"

A. "Yes. I mean, you look at them, just commonsense, not making – maybe some experts can deny that, and I'll respect that. But it seem like they both coming in almost same direction, same trajectory, same direction, and same exit. So probably it came within, in the same sequence of each other. But the other one* is completely different. Which one was first, which one was second; I cannot tell you" (pg. 835 JT 2014).

*(Dr. Mahmoud is referring to the two left cheek shots versus the right side of the head contact or near contact shot. He has testified extensively as to not knowing the sequence of the shots. (pg. 834 JT 2014).

Dr. Mahmoud also felt there had to be something wrong with the bullets or the gun in order for the right side of the head wound not to have enter the cranial cavity (pg. 850 JT 2014).

12. Neighbor Leon Adamy has consistently (two trials) and unequivocally testified he heard two shots followed by groans and then a pause, finally a third shot creating a cadence of "bang bang bang" (pg. 252 JT 2014). Again it is common sense that the two wounds almost identical in trajectory were the two fired closest together therefore the first two shots fired.

13. The blood spatter analysis from the ceiling pattern⁵ was not contested by the State through cross examination nor through introduction of a State's expert witness testifying to contest Mr. Wheeler's findings concerning the ceiling gun spatter. In fact, the State agreed with Mr. Wheeler's conclusion about how far he (Mr. Surbaugh) was from the ceiling in his closing (pg. 1891 JT 2014). The State did question the sequence of shots saying that the first shot was with Mr. Surbaugh lying down on the bed, the second he had risen up, and the third, maybe he did rise up to where Mr. Wheeler says he did (pg. 1891 JT 2014). This scenario is not supported by the forensic analysis of the blood spatter.

14. When questioned about the state's scenario of Mr. Surbaugh being in three difference positions starting with lying on the bed, Mr. Wheeler states:

⁵ The State crossed Mr. Wheeler heavily on other aspects of his testimony, but not one query questioning the analysis that determined the spatter on the ceiling was high impact spatter from a firearm or the calculations establishing the wound causing the spatter on the ceiling was 32" from the ceiling.

A. ... And I'm going to say it's inconsistent because we have two wounds that are parallel to one another and within one-quarter inch. And what you're suggesting is that one of the shots was 18 inches above the bed. And then the shooter shot a second shot and now the individual is 36 inches off the bed, and that the shooter adjusted and kept the gun in the same parallel orientation struck a moving target within a quarter inch, they traveled together along the same trajectories and that these were two separate instances. And I'm going to say your theory of it passing through his cheek and hitting the glass, I, I don't know what to say (pg. 1824-25).

Mr. Adamy's ear witness testimony puts the two left cheek shots as the first shots fired. The high velocity impact spatter from a firearm on the ceiling is the result of the two left cheek wounds due to the idea that my husband and I could move and get back into a position to create the same trajectory is highly unlikely. My husband was vertical when the first shots were fired. The only evidence otherwise is his own words, now cast into doubt by forensic evidence. This brings to question the of sufficiency of evidence of premeditation and consequently whether the State proved beyond a reasonable doubt that I shot in self-defense based upon high velocity gun spatter on the ceiling of the bedroom. I believe I have the right to have appellate review of a comprehensive not cursory assignment of error concerning the above.

The State's continued use of the phrase "blood spatter" and not distinguishing between the other spatter and the high velocity impact spatter from a firearm located only on the ceiling was confusing if not misleading to the jury. The State's familiarity with blood spatter analysis is also a question as he confused the area in illustrations depicting where the exit wound creating the impact spatter on the ceiling with the point of fire (pg. 1791 JT 2014).

New Evidence Concerning My Husband's Testimonial Statement Not Included In Petitioner's Brief
Regarding the admissibility of my husband's statements, I am well aware that this Honorable Court found they were admissible in the first opinion. ***This Honorable Court did so without the blood spatter evidence above which calls in question the trustworthiness of my husband's statements, and also was made under a misrepresentation by the prosecutor that an emergent situation existed.*** Specifically with regard to the argument based on Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). put forth in the first appeal, this Honorable Court was told an emergent situation existed therefore my husband's statement at the hospital was non-testimonial. This was based on the

prosecutor's stance⁶ that law enforcement, medical personnel, the community and especially the Surbaugh's young children were in danger because the gun had not been found and there was an ongoing emergency (pg. 11 State's Response Brief, docket No. 11-0561, Appendix D-1). At oral argument, it was established that the gun had been found prior to Deputy Vandevender taking my husband's statement at the hospital (pg. 226 PT 2014), but this Honorable Court still, based upon the prosecutor's response brief, believed an emergent situation existed:

"The statement made by Mr. Surbaugh directly to law enforcement is likewise non-testimonial. Again, at the time of this statement, it was still unclear to the officers whether they were dealing with a deliberate shooting by another person who could pose a continuing threat or a suicide attempt. The situation was clearly an emergency," State v. Surbaugh, 230 W. Va. 212; 737 SE2d 240737 S.E.2d 240 (2012).

At the February 12, 2014 pretrial hearing, lead investigator, Deputy Richard Clayton testified when questioned about the morning of August 6, 2009 (the shooting and ***whether there was an emergency***):

Q. So no one else had seen the gun, and at that point you all weren't continued to be worried about the fact that there was a gun somewhere --

A. Well --

Q. -- in the house?

A. -- ***Mr. Surbaugh was in the ambulance. And at this point, at this point we still think of Julie as a victim. So we weren't really concerned*** (pg. 229 PT 2014).

The above questions if the State misrepresented the facts concerning an ongoing emergency in its first response brief and whether that makes a difference in this Honorable Court's ruling concerning my husband's recorded statement at the hospital.

It should also be noted that Deb White, the neighbor who stayed with my husband outside after the shooting relaying his requests for two cell phones, shorts, glasses, and Copenhagen, in the second trial stated when my husband told law enforcement, "*The bitch shot me*", she made the comment to Corporal Loughridge:

"...I went over to him (Cpl. Loughridge) and said, "The whole time he talked to me he didn't say anything, but now he's saying Julie shot him, and he never said that to me."" (pg. 342 JT 2014).

It must also be remembered that Cpl. Loughridge (who testified in 2010 that he found the gun immediately upon entering the residence which was prior to my husband leaving in the ambulance (pg. 51-52 PT2010 App. D-2) sent Deputy Vandevender to the hospital to get my husband's statement (pg.

⁶ The prosecutor wrote the State's Response Brief in the first appeal.

722 JT 2014. Deputy Vandevender's questions were in the past tense (recorded statement at the hospital) and my husband asked to speak to law enforcement (pg. 567 JT2014)

My husband spent almost 10 minutes with Deb White and didn't say anything about me shooting him. He then did not say anything about lying in bed until he reached the hospital. In my husband's statement at the hospital he stated he didn't know who shot him. This contradicted his earlier words of, "the bitch shot me". His accusations came in escalating occurrences and now are contradicted by the blood spatter analysis. ^I Respectfully submit your holding was made under a misrepresentation of the emergent situation. I have the right to have this represented to and reviewed by this Honorable Court based upon the new evidence from the second trial.

For the second trial, the prosecutor put forth that Deputy Vandevender did not know the gun had been found at the time he took the statement from my husband at the hospital (pg. 978 JT 2014). Accordingly Deputy Vandevender testified he didn't know the gun had been found when he took the statement from my husband. *In his police report*, Dep. Vandevender states:

"...You said that all the officers began searching for the gun and it was found in a basket by the front door, and what appeared to be blood. Deputy Clayton was the lead investigator, and took the revolver in his possession, at which point Trooper Loughridge left to go to his office to retrieve a gun residue kit, and you went to the Webster County Memorial Hospital to meet the ambulance," (pg. 978 JT 2014).

The gun was found prior to Deputy Vandevender's leaving for the hospital. These are facts that I have a right to appellate review that Mr. Moffatt did not mention in his brief.

Rebuttal Testimony of Deputy Clayton Not Substantiated by

Previous Testimony and Statements Was Not Included In Petitioner's Brief

A major reason for the second conviction was due to **categorically false rebuttal testimony** by the lead investigator, Deputy Richard Clayton. The question pertained to my demonstration of the shooting at the first trial compared to the second trial. ***(Deputy Clayton testified from memory, I provide the transcripts below to prove his memory was incorrect:)***

Deputy Clayton's rebuttal testimony:

Q. And did she show how she had the gun?

A. Yes. At first she had the gun with both hands like this, and then she pulled it downward.

Q. And I think some of the jurors cant' see, so if you could just turn around and just show them how she was holding the gun?
A. First it was like this, and then she pulled it down in her **right hand**.

Q. In her right hand?

A Yes

Q. Like that and then shot the shots?

A Yes

Q And did she ever say anything about having her right hand caught in her robe?

A. No. She didn't say that at any time during that demonstration or in any prior statements either (pg. 1655-57 JT 2014).

My second statement prior to being arrested says:

*"this hand should not have any kind of residue – you're **right hand**? – Right here, and I am right handed," (pg. 22-23 2nd Statement, App. D-3-4) and "I mean this hand was always curled into, you know, some _____," (pg. 25 Julie Surbaugh's 2nd Statement, App. D-5). And Deputy Vandevender (who took my second statement) when asked what hand she (me) was referring to when saying there would be no gunshot residue (due to hand in something) stated, "I believe she said her right hand wouldn't – The best I remember", (pg. 434 JT 2010).*

As far as what hand I held the gun in, please note the following testimony from the first trial:

Q. ... Now, how did you hold the gun? Did you hold it out or did you ---

A. No,

Q. Okay. You had it like this?

A. No. I had it like this.

Q. Okay. Show me.

A. Like that. (pg. 821 JT 2010)

I did not hold the gun out. The prosecutor in his closing statement at the first trial summarized:

"Did you see her hold that gun: Some of you, I'm sure, have shot pistols before. She's shot pistols before. She knows how to hold a gun. And she held the gun like this; that's ridiculous." (pg. 908 JT 2010).

I did not hold the gun out. Deputy Clayton's memory is not substantiated by previous testimony and statements. I would like to see this error developed based on Rule 403:

West Virginia Rule of Evidence 403 is identical to Rule 403 of the

Federal Rules of Evidence and provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I referred Mr. Moffatt to Chief Justice Workman's dissent in *State v. Collins* 186 W. Va. 1; 409 SE2d 181409 S.E.2d 181; 1990 W Va LEXIS 2801990 W. Va. LEXIS 280 (1990) where she expounds upon impeachment of a defendant.

***Dr. Hamada Mahmoud Allowed to Testify to a Possibility of the Mechanism of Death
Petitioner's Brief Does Not Include Needed Citations Nor All Facts***

Dr. Hamada Mahmoud, then the Deputy Chief medical Examiner who since has been released from said position after a two year improvement period for problems with autopsy timeliness and accuracy (pg. 872-73 JT 2014) was allowed to testify to the possibility of an air embolism as the mechanism of death⁷ (pg. 545 JT 2014). A "possibility" being testified to by an expert does not satisfy the threshold required by Rule 702, Rule 703, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 St. CT. 2786, 125 L. Ed. 2d 469 (1993); *State v. Leep*, 212 W. Va. 57, 569 S.E.2d 133 (2002); nor *Harris v. CSX Transportation, Inc.*, No. 12-1135, Slip Op. (W.Va. Nov. 13, 2013). Mr. Moffatt seems to have used defense counsel's post-conviction motion for a new trial (denied by the May 19, 2014 post-conviction hearing order) as the basis for his argument in Petitioner's brief. At no time does he reference a pretrial or jury trial transcript page as support of factual basis for error. By not doing so, he fails to develop a major component of the problem.

The *Daubert/702* analysis of reliability is based not upon the results of the scientific experiment, but was the proper procedure as determined by the larger scientific community followed in the experiment. This is accomplished by asking two questions: 1) Is there a methodology recognized in the greater scientific community, and if so, 2) did the expert apply the methodology to render his opinion? To answer these two questions, I look to Dr. Mahmoud's autopsy report.

Dr. Mahmoud's as a medical examiner had a two prong investigation to satisfy with his autopsy: 1) to provide observational data in the form of bullet trajectory, number and placement of wounds, weight of internal organs, etc. and 2) scientific data as to the cause of death and the mechanism (or organic pathway) of death.

⁷ Mechanism of death as used in this proceeding was the organic pathway of the cause of death.

As to the observational data, Dr. Mahmoud corrects the weight of my husband's left lung four years after the release of the autopsy report January 19, 2010 (pg. 514 JT 2014)⁸. His observational data of my husband's heart, specifically that it was unremarkable (pg. 861-62 JT 2014 reading from his autopsy report) disproved an air embolism. Through normal autopsy procedure, Dr. Mahmoud dissected the left ventricle of the heart. If an air embolism occurred, there would be frothy pink bubbles in the left ventricle.

As to the scientific data, he did not collect any. His autopsy report lists cause of death as gunshot wounds with mechanism of death as a possibility of air embolism. He admitted at the first trial he did no testing to confirm the air embolism. It was established in the second pretrial that it is recognized in the forensic pathology community for rendering an opinion on air embolism as a mechanism of death is both the demonstration of the route of ingress of the emboli and "positive findings at autopsy", Vernard Adams and Claude Guidi, Venous Air Embolism in Homicidal Blunt Impact Head Trauma, AM. J. Forensic Med. & Pathology, 322 at 326 (2001)⁹. There were no positive findings at autopsy as no testing was done. There was no demonstration of the route of ingress of the emboli as Dr. Mahmoud's air embolism was based upon the fracture to the maxillary sinus (pg. 522 JT 2014). A positive pressure gradient and a source of air are required to demonstrate the route of ingress of the emboli (pg. 26-29 PT 2014). The maxillary sinus does not provide the route of the emboli, because they are served by systemic veins that collapse upon themselves when breached. (That's why we don't bleed to death every time we sustain a cut – the skin has systemic veins.) The Dural sinus inside the cranial vault is served by veins that do not collapse on themselves therefore a gunshot wound to the Dural sinus can cause an air embolism. A gunshot wound to the maxillary sinus cannot (pg. 1330-32 JT 2014).

Additionally please note the following:

1. Two motions in Limine were filed by defense counsel January 7, 2014 to 1) Limit the testimony of Dr. Mahmoud under the above referenced case law, and 2) to prohibit the testimony of experts based upon possibility.
2. The matter was taken up at pretrial hearing, February 12, 2014.

⁸ (It must be noted that Dr. Mahmoud 4 years after issuing his autopsy report corrects the weight of the left lung from 240 grams to 1160 grams (pg. 514 JT 2014). Had Dr. Spitz been provided the correct weight of both lungs (both now weighing over 1000 grams) he would have investigated pulmonary edema (see Appendix E for a draft assignment of error preserved below by motion to prohibit reference to Dr. Spitz)).

⁹ Established as an authoritative treatise through testimony of Dr, Cyril Wecht, ME, pg. 30 PT2014.

3. Despite the evidence proffered by the defense, Mr. Vandevender, the prosecutor, did not feel that Dr. Mahmoud's testimony was necessary, (pg. 43 PT 2014) forcing a *Daubert* hearing during trial (pg. 507 JT 2014).

4. Dr. Mahmoud testified, "So all under name suspicious or possibly or probably" – interchanging possible and probable (pg. 886 JT 2014).

5. Mr. Vandevender argued concerning the testing requirements of *Daubert*:

Mr. Vandevender: ... Under Daubert, the question is regarding whether or not the tests were scientifically accepted.

The Court: That's right.

Mr. Vandevender: Now, it's not regarding whether or not scientific test were performed or not. . . ." (pg. 268 PT 2014).

Also on page 268, Mr. Vandevender puts forth the argument he uses throughout the trial:

"There's been two separate experts for the defense, and they have come up with two different conclusions as to the ... mechanism of death."

6. Mr. Vandevender in his cross of Dr. Wecht in pretrial establishes the book that Dr. Spitz is co-editor of, *The Medicolegal Death Investigation*" as an authoritative treatise. He then refers to the section on air embolism asking:

Mr. Vandevender reading from Dr. Spitz's book page 526:

Q. ..." In addition to the usual sources and mechanisms of air embolism, open head trauma and exposure of Dural sinuses may cause the presence of air in the right side of the heart." Do you agree with that?

Dr. Wecht:

A. Well, yes. See, that gets back to what I said, sir, Dural sinuses, that refers to the sinuses beneath the Dural mater, and that get back to the point that I was making about, there having to be, you know, a substantial wound that would open up the cranial vault in large fashion (pg. 533-34).

7. In addition the Court states:

The Court: Well, and Dr. Wecht even said that it was possible to have an air embolism caused from an open head wound to the sinus cavity; that was his testimony, (pg. 270-71 PT 2014).

The problem with the above is that Mr. Surbaugh's maxillary sinus was fractured, not the Dural sinus. The bullet did not penetrate the cranial (or Dural) cavity (pg. 533-36 JT 2014). A fracture of the

maxillary sinus does not cause an air embolism. It has to be a fracture of the Dural sinus to cause an air embolism from a gunshot wound to the head.

8. At the Daubert hearing held during trial (pg. 507 JT 2014), in the Court's ruling, ***the words possibility and probability are used interchangeably*** (pg. 545 JT 2014). Black's Law Dictionary¹⁰ defines:

- *Reasonable medical probability: In proving the cause of an injury, a standard requiring a showing that the injury was more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought. Also termed reasonable medical certainty.*
- *Possibility: an event that may or may not happen.*

With the greatest respect for the positions Judge Facemire and Mr. Vandevender hold within the greatest legal system in the world, it is evident that there are questions as to the level of understanding of the physiology and science being addressed. It must also be noted that in the second (again occurring during trial) Daubert hearing concerning defense expert Andrew Wheeler, it is admitted by the Court to not having read *Harris v. CSX Transportation, Inc.*, No. 12-1135, Slip Op. (W.Va. Nov. 13, 2013) until the Wheeler hearing (pg. 1731-32 JT 2014) even though it was referenced by the defense in the motion in limine and in counsel's argument at pre-trial (pg. 265 PT 2014). The above needs to be included in the argument concerning Dr. Mahmoud's testifying to the possibility of an air embolism especially since in *Harris*, Justice Davis states the following:

Not only does a trial court have the discretion to exclude an expert from presenting an opinion that is not sufficiently tied to reliable data, but "when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert . . . mandates the exclusion of that unreliable opinion testimony." *Amorgianos v. Nat'l RR Passenger Co.*, 303 F.3d 256, 266 (2d Cir. 2002). As Justice Cleckley explained in *Gentry*, "nothing in the Rules [of Evidence] appears to have been intended to permit experts to speculate in fashions unsupported by . . . the uncontroverted evidence." 195 W. Va. at 527, 466 S.E.2d at 186 (quoting *Newman v. Hy-Way Heat Systems, Inc.*, 789 F.2d 269, 270 (4th Cir. 1986)). Critically, neither the petitioner nor the majority ever directly addressed the exigent flaws identified by the trial court with regard to the proffered expert testimony.

The above is the logic that Justice Davis followed in *Harris* and should have been followed with regard to Dr. Mahmoud's testimony.

This problem was exacerbated by Dr. Mahmoud's adamant rant that it was an air embolism (pg. 901 JT 2014) and that he died from the gunshot wound (pg. 903 JT 2014).

¹⁰ Black's Law Dictionary, Seventh Edition, Bryan A. Garner, Editor in Chief, West Group, St. Paul, Minn., 1999.

Defense Not Allowed to Cross-Examine Two Witnesses As To Their Financial Interest in the Outcome of the Trial

One of the objections preserving error at trial concerned two witnesses not being allowed to be cross-examined by defense counsel as to their financial interest (\$220,000) in the outcome of the trial. Although provided to Mr. Moffatt, it is not in Petitioner's brief.

Pattern of Misconduct by the State: Non-disclosure of criminal complaint that was motive, destruction of evidence, testifying contrary to police reports . . .

My husband was under the care of licensed psychologist, Michael Morrello from approximately the first of June 2009 (pg. 742 JT 2014) until the Tuesday before his death (pg. 466-68 JT 2014) where he was reported to have slurred and slow actions and speech (pg. 468 JT 2014). Mr. Morrello while testifying he didn't believe my husband was suicidal because he had hope – a vision for the future - that was verbalized by his plans to move to another county with his girlfriend (pg. 742-45 JT 2014) and continue his teaching career (pg. 748 2014). Mr. Morrello also testified that there was something “undiagnosed” with my husband (pg.746 JT 2014). The last time Mr. Morrell spoke with my husband was Tuesday, August 4, 2009. My husband found out about a criminal complaint containing a gun charge on Wednesday evening, August 5, 2009 (pg. 10, Julie Surbaugh's 2nd Statement, App. D-7). The shooting occurred the morning of August 6, 2009. Finding out about the criminal complaint – especially if he believed it was a Safe Schools gun charge, a felony that would take his teaching license – would have provided motive for my husband's actions. The State must have thought so too as the prosecutor did not disclose the criminal complaint to first or second trial counsel.

The second trial raised questions through pretrial motions and objections as to a pattern of misconduct by the State. The first matter of misconduct concerned the bias of the prosecutor not disclosing a criminal complaint that is ***new evidence of motive for my husband's actions***. It was new evidence of a criminal complaint filed against my husband August 5, 2009 the day before the shooting (pg. 72-76 PT 2014). ***It was new evidence because the prosecutor, Dwayne Vandevender did not disclose the criminal complaint in the discovery process for the 1st or 2nd trail*** (pg. 246 and 253 PT 2014). Second trial counsel found the criminal complaint in the Magistrate Court file in May 2103 (pg. 246 PT2014 and App. D-6). The criminal complaint contained a gun charge that my husband believed would be career ending and that he had worried about since May (pg. 1595 JT 2014). In my second pre-arrest statement (pg. 10 App. D-7) I say that he knew he had been charged with the gun and that was a precursor to the

fight we had that resulted in the shooting. Mr. Morrello testified that my husband had been worried about the possible gun charge (pg. 748 JT 2014). John Estep, my husband's teacher's union representative (AFT) testified he was worried about keeping his teaching certificate (pg. 1589 JT 2014). Please note (*taken from draft Statement of Case submitted to Mr. Moffatt in October 2014*):

1. Mr. Surbaugh was found to have 34 pills, pot, alcohol, and a loaded gun on school property while students were present (pg. 1132-33 JT 2014). He was charged by citation for "marijuana less than 15 grams" as Dwayne Vandevender (Webster County Prosecutor) stated not to charge Mr. Surbaugh with the pills, alcohol and pistol (see Action Taken Report App. D-8). It was found to be Mr. Surbaugh's second possession. The first charge of "controlled substance" was in The Monongahela National Forest where the Forest Service Officer testified he was:

"suspicious to whether or not he was a low-level dealer or a frequent user of marijuana," (pg. 1164 JT 2014).

2. Mr. Surbaugh lost his Webster County teaching job due to public outrage over the loaded gun on school property. AFT Union Representative, John Estep, testified my husband was working to keep his teaching license so he could teach in other counties (pg. 1589 JT 2014). A charge concerning a loaded gun on school property would make obtaining a teaching position very hard to achieve even if he retained his teaching certificate (pg. 1595 JT 2014).

3. Mr. Surbaugh refused a plea at a July 10, 2009 magistrate court hearing for 6 months home confinement on the simple possession charge (pg. 1396 JT 2014). At some point after this hearing, it was decided to amend the charge to second possession and **a new charge concerning the loaded gun was added** (pg. 79 PT 2014). The arresting trooper filed a criminal complaint for such August 5, 2009 in Webster County Magistrate Court (see criminal complaint App. D-6). The shooting occurred August 6, 2009. I stated my husband knew about the gun charge and was one of the reasons the fight started in a statement prior to my arrest (see second statement page 10 App. D-7).

4. The prosecutor did not disclose the August 5th criminal complaint to either the first or second trial counsel (pg. 246 and pg. 62-66 PT 2014). Both first and second trial

counsels had asked Dwayne Vandevender (who had an open file review in response to discovery requests) about the possible gun charge – mentioning Safe Schools but using broader terminology as well. Mr. Vandevender stated unequivocally that Mr. Surbaugh had not been charged under the Safe Schools Act. When second trial counsel found the August 5th criminal complaint at Magistrate Court, and confronted Mr. Vandevender, he said counsels had asked the wrong question (pg. 246-47 2014).

5. At the pretrial hearing Judge Facemire found Prosecutor Dwayne Vandevender did not disclose the criminal complaint (pg. 253 PT 2014). The Magistrate who signed the criminal complaint testified he would have put the complaint on his assistant's desk or counter (pg. 105 PT 2014). As a defendant, I was taken in the back way to the Magistrate Court courtroom (pg. 694 and 1032-33 JT 2014). Any defendant taken by law enforcement via the back way to the courtroom would pass this counter and could read a criminal complaint laying on such and tell my husband.

It should be noted that the prosecutor, Dwayne Vandevender in the State's Response Brief in the first appeal summed up all of the above up by stating, "Michael Surbaugh lost his teaching job in Webster County because he was caught with marijuana on school property. . ." (pg. 1 State's Response Brief for the first appeal App. D-9). ***That understatement is a misrepresentation of the facts.***

The second in the pattern of misconduct is the testimony of Deputies Clayton and Vandevender contrary to their police reports as to the fact that they both were aware Trooper Jordan was getting an arrest warrant (pg. 217-20 PT 2014). Deputy Clayton also had to admit his testimony to the Grand Jury was incorrect. Please note (pg. 1030 JT 2014):

Q. And, let me see you also testified in front to f the grand jury that Dr. Mahmoud told you that he was definitely lying in bed when all three of the shots were fired at him?

A. If I testified to that, I was incorrect because I don't' believe Dr. Mahmoud eve did - he was unable to say how he was laying.

Q. On January 12th (2010a) you testified in response to a question from Mr. Vandevender, "Was he able to give you an opinion as to whether or

not these shots were fired while Mr. Surbaugh was up and moving around”, and you responded, “In his, in his opinion he said that the, that the shots were fired as he was lying in bed. The he”, and a grand juror ask, “All three of the:, and you answered “Yes”?

Third in a pattern of misconduct (included in Mr. Moffatt’s Petitioner’s brief but not well cited) was the destruction of evidence by the state. Specifically, the bed sheets were admittedly destroyed after the first trial (pg. ⁹⁵²⁻⁵⁶ JT 2014), but also, my robe (pg. 84-85 and 109-11 PT 2014) and other items of clothes testified to being collected were not available. (pg. 454 JT 2010). The destruction of the bed sheets was addressed by a defense motion filed January 7, 2014 and taken up at pretrial February 12, 2014. Defense counsel argued that the sheets were material evidence of probative value having Mr. Wheeler testify that there were two tests. The sodium rhodizonate chemical test which through the lead pattern/concentration on the sheets would show the approximate distance of the gun from the bed and a modified Greiss test that would have told the nitrate concentration (pg. 117-18 PT 2014). The State argued that the sheets had little evidentiary value and what little there was preserved by the photographs (pg. 250 PT 2014). The lower court ruled the “missing evidence was not of great importance” (pg. 255 PT 2014). The State’s theory of the case is that all three shots were fired at the head of the bed. My testimony is that all three shots were fired at the foot of the bed. The sodium rhodizonate and Greiss tests – even with cross transference due to the manner in which the bed clothes had been collected (pg. 122-23 PT 2014) – would have shown where the gun was fired. Deputy Clayton referenced the blood on the bed sheets as evidence of premeditation (pg. 1040-41 JT 2014). The State used the photographs of the bloody sheets heavily in cross of Mr. Wheeler. There were no sheets, robe, other blood covered items, nor the broken glass that was featured in the State’s theory of the case in evidence to be tested.

Petitioner’s Brief Did Not Include Webster Count Memorial Hospital ER Attending Physician Leaving The Patient Unattended and Prescribing Medicine Via Telephone.

Webster County Memorial Hospital ER nurse, Jeanie Clouser, RN came forward at the second trial to testify that ER attending physician ***Dr. Jamie Miller provided a standard of care that was below an acceptable level*** (pg. 1195-96 JT 2014). The following was adduced at trial concerning Mr. Surbaugh’s cause of death:

1. The three gunshot wounds did not cause the pathological (or organic) cause of death. The gunshot wounds in and of themselves were not fatal; this was the opinion of Dr. Wecht, ME (pg. 1327 JT 2014),

Dr. Hinchman, ER and Trauma Specialist Cabell Huntington Hospital (pg. JT 2014) and State's Medical Examiner, Dr. Hamada Mahmoud (pg. 845-47 JT 2104).

2. Dr. Hinchman testified Mr. Surbaugh's treatment at Webster County Memorial Hospital was unnecessary and improper going so far to say, "it can be harmful in some situations. And I think it probably was in this situation," (pg. 1367-69 JT 2014). Deb Daniels, RN attending nurse on the Health Net helicopter testified it was not required to have a patient intubated that many patients flew conscious (pg. 1084-85 JT 2014).

3. Dr. Wecht testified that the "terminal event of his heart stopping was a result of the lungs flooding before the heart stopped" (pg. 1325 JT 2014), and Dr. Hinchman testified, "Well, I think the pulmonary edema came first" (pg. 1371 JT 2104).

4. Mr. Surbaugh's lungs weighed 2 ½ times normal weight at autopsy (pg. 514 and pg. 1326 JT2014) and were described as "Markedly congested and edematous" on page six of the autopsy report (pg. 1326 JT 2014).

5. Dr. Wecht (pg. 1357 JT2014) and Dr. Hinchman (pg. 1370 JT 2014) both testified to medical certainty that Mr. Surbaugh died of a pulmonary edema.

6. The pulmonary edema was attributed to Mr. Surbaugh receiving 3 ½ liters (bags) of IV fluid in less than four (4) hours at a high pressure the morning of August 6, 2009 (pg. 1090 JT 2014).

7. Dr. Miller refused a request by Webster County memorial Hospital transport nurse to lower the IV pressure (pg. 634-35 JT 2014).

8. Jeanie Clouser testified attending ER physician Dr. Jamie Miller left the patient after the intubation going to his hospital office with two pharmaceutical representatives and a medical student. She called Dr. Miller three times about Mr. Surbaugh's blood pressure, and he prescribed medication via the telephone as opposed to return to examine the patient (pg. 1195-96 JT 2014).

The improper and unnecessary treatment of intubation was negligent. It rose to gross medical negligence when Dr. Miller prescribed blood pressure lowering medicine from his office via telephone while he conversed with a medical student and two pharmaceutical representatives. Were it not for this improper and unnecessary treatment, and lack of personal attention from the doctor, Michael Surbaugh would not have died. This was an intervening cause which broke the natural chain of events.

In addition, defendant's jury instructions below were refused:

Defendant's Requested Jury Instruction No. 7 (Refused)(Vol. ? Pg. 937-38 JT 2014) that would have mitigated Dr. Mahmoud testifying to a possibility:

"Medical opinion testimony as to the possibility as to the causal relationship between an injury and subsequent death is not sufficient standing alone to establish the causal relationship between an injury and a subsequent death without corroboration of the medical opinion testimony from other evidence. Pygman v. Heldon, 148 W.Va. 281, 134 S.E.2d 717 (1964); Cleckley, Handbook on Evidence for West Virginia Lawyers, Vol. 2 702.02 702.02 (10) (a), p. 779 (2012)."

And an additional jury instruction that would have instructed more completely concerning intervening cause:

Defendant's Requested Jury Instruction No. 8 (Refused)(Vol. ? (pg.937-41 JT 2014). The Court instructs the jury that where the State and the Defendant have introduced expert medical testimony as to the cause of the death of Michael Surbaugh, and such medical testimony is either in whole or in part contradictory on the material element as to whether or not any gunshot wound contributed to and caused the death of Michael Surbaugh, such contradiction may be considered by the jury as an element creating a reasonable doubt as to the cause of death; and if the jury believe from all the evidence in this case that medical testimony is in whole or in part contradictory on this material element they may consider this contradiction in regard to whether or not the State has proved the manner and means by which the death was caused and if they further believe that as a result thereof the State has failed to prove beyond a reasonable doubt that any alleged act of Julia Surbaugh caused the death of Michael Surbaugh, they should find Julia Surbaugh not guilty. State v. Durham, 156 W.Va. 509, 195 S.E.2d 144 (1973).

Conclusion

I'm not a lawyer. These are just factual discrepancies I have found and believe I have the right to at least discuss such with counsel. I have a research background. In fact it is my position as Research and Evaluation Coordinator with the Governor's Cabinet on Children and Families and the subsequent research I did on child abuse and neglect that had me afraid of unsupervised visitation, and I therefore stayed in the marriage. My husband's first wife had the police at her house because of drunken violence, and she had a protective order. She asked for supervised visitation in the divorce and did not get any supervision (pg. 1404 JT 2014). When the shooting occurred, I realized how wrong I'd been to stay, and ended up lying about the two shots I fired in self-defense because of a child hood trauma from my own alcoholic father (pg. 1380 JT 2014).

I do not know what to do. I need advice of counsel. I do not want to precede pro se. Justice Sutherland puts it best in Powell v. Alabama, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527 (1932) stating:

“the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.”

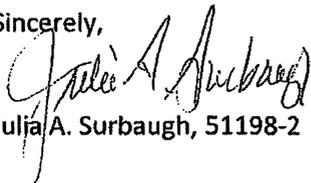
I hesitate to ask to have the appeal dismissed. Not only has the Petitioner’s brief been submitted, but the State’s response brief as well. In the State’s response brief (pg. 7), it references the Court’s use of possibility and probably analogously and is ok with such. I believe that is in my favor, so I don’t think I want the appeal dismissed. I am trained in research not law or Court rules. I will gladly provide assignments of error, even a statement of case, table of authorities, etc. to a Public Defender Service of your choice to be fact checked and edited before submission

I lied about the two shots I shot in self-defense in pre-arrest statements. Deputy Clayton had to admit his sworn testimony to the Grand Jury was not correct (pg. 1037 JT 2014). He had to admit to the same concerning a sworn affidavit (pg. 1035 JT 2014). Deputy Clayton then took the stand as a rebuttal witness and testified from memory to facts that are contradicted by testimony from the first trial and my statement (pg. 1655-57 JT 2014, pg. 434, 821, 908 JT 2010, and pg. 23-25 2nd statement – see appendix D) . The prosecutor with-held evidence of a motive for my husband’s actions, the bias of which was never addressed (pg. 253 PT 2014). Both Deputy Clayton and Deputy Vandevender testified contrary to their police reports (pg. 217 PT 2014 and pg. 978 JT 2014 respectively). The State’s ME testified to not understanding the difference between homicide and murder (pg. 880 JT 2014).

The forensic evidence of the high velocity blood spatter on the ceiling puts my husband as the aggressor. The attending physician provided medical care below the standard required resulting in an intervening cause. The jury was confused by incorrect instructions and incorrect terminology used by the State. I have the right to have these instances presented for appellate review. I have the right to have error preserved. I submit this with the utmost respect.

Thank you in advance for your time and attention to this matter.

Sincerely,



Julia A. Surbaugh, 51198-2

VERIFICATION

I, Julia A. Surbaugh, hereby verify that the facts and allegations stated in the foregoing documents are made in good faith, and are true and accurate to the best of my knowledge and belief.

Julia A. Surbaugh

IN THE STAT OF WEST VIRGINIA }

COUNTY OF MASON-----} to wit;

Taken, sworn, and subscribed to before me on this 21st day, the month of April, 2015.

Notary Public Lora Long

My Commission expires: 08 Oct 2018

