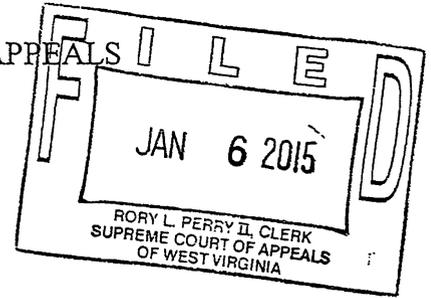


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
DOCKET NO: 14-0890



JULIA SURBAUGH,  
Petitioner

vs.

Appeal from final order  
of the Circuit Court of Webster  
County (10-F-14)

STATE OF WEST VIRGINIA  
Respondent

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**PETITIONER'S BRIEF**

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA  
Plaintiff Below, Respondent

vs.

Supreme Court No. 14-0890  
Webster Co No: 10-F-14

JULIA SURBAUGH  
Defendant Below, Petitioner

**PETITIONER'S BRIEF**

Comes now Petitioner Julia Surbaugh, by counsel Christopher G. Moffatt, who files her Petitioner's Brief, and in support of same asserts as follows:

**ASSIGNMENT OF ERRORS**

- 1. The Circuit Court erred by failing to grant Petitioner's Motion for Judgement of Acquittal where the state failed to prove the corpus delicti of the crime charged.**
- 2. The Circuit Court erred by denying Petitioner's Motion in Liminie to limit the testimony of Dr. Hamada Mahmoud under Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 113 S.Ct. 2786, 125 L.ED. 2D 469 (1993); State v. Leep, 212 W.Va 57, 569 S.E.2d 133 (2002); and Harris v. CSX Transportation, Inc., Slip Op. No. 12-1135**
- 3. The Circuit Court erred by denying the Petitioner's Motion in Liminie to prohibit testimony of experts on the basis of possibility, and in allowing the state's pathologist to testify to opinions based upon possibility.**
- 4. The Circuit Court erred by denying Petitioner's Motion to Dismiss Indictment based upon destruction of evidence by the state.**
- 5. The Circuit Court erred by denying Petitioner's Motion for Judgement of**

**Acquittal where insufficient evidence supported the jury's verdict and where the jury improperly resolved evidentiary conflicts in regard to the victim's location when shot, resulting in a miscarriage of justice.**

- 6. The Circuit Court erred by denying Petitioner's Jury Instruction No. 7.**
- 7. The Circuit Court erred by denying Petitioner's Jury Instruction No 8.**
- 8. The Circuit Court erred by denying Petitioner's Jury Instruction No. 5.**
- 9. The Circuit Court erred by denying Petitioner's Jury Verdict Form.**
- 10. The Circuit Court erred by admitting Petitioner's statements.**

### **STATEMENT OF THE CASE**

This is an appeal to a first degree murder conviction of Petitioner. Ms. Surbaugh was previously convicted of first degree murder by order entered by the Circuit Court of Webster County on June 4, 2010. Her conviction was overturned on appeal. Petitioner was retried and again convicted of first degree murder on the 6<sup>th</sup> day of March, 2014. Petitioner appeals her subsequent conviction.

Petitioner is a bright woman, holding both an undergraduate and graduate degrees from WVU, (**Appendix page 372, Transcript, page 1381**), and was formerly employed as a Research Evaluation Coordinator for the Governor's Cabinet on Children and Families, (**Appendix page 372, Transcript, page 1382**). She was married to the alleged victim Michael Surbaugh, a man twice arrested for drug possession, and a man forced to resign his position as a school teacher. Michael Surbaugh was cheating on his wife, (**Appendix page 375, Transcript, page 1393**), had become increasingly abusive, was drinking excessively, (**Appendix page 374, Transcript 1392**) and as a result of same he and Petitioner had resolved to separate, (**Appendix page 375,**

**Transcript 1393.)** Conflicts in the marriage continued, Petitioner became aware that her husband might be charged with a felony gun charge and she told him she would try to facilitate the filing of charges against him, and if charged, would inform school personnel. (**Appendix page 385, Transcript. Pages 1434 through 1437.**)

At trial the Petitioner testified that the next morning, August 6, 2009, Michael Surbaugh was found by her sitting on his bed crying. He asked Petitioner to get in bed with him, she did, she lay there with him for a time, when her husband grabbed a gun, put it to Petitioner's face, cocked it, and told her "You're not going to destroy me." (**Appendix page 386, Transcript, pages 1439 to 1440.**) Petitioner testified that she and her husband in effect wrestled over the gun, she grabbed it and shot her husband in the face. (**Appendix page 386, Transcript, pages 1439 to 1440.**) Immediately thereafter Petitioner froze, her husband took the gun from her, she thought she was going to die, she slid down, covered her head, and then heard the gun go off again. Her husband had shot himself and said to her "Why am I not dead?" (**Appendix page 387, Transcript, pages, 1441-1442.**) Michael Surbaugh then told Petitioner to get him a doctor and went into the bathroom to wash up. (**Appendix page, 387, Transcript page 1441.**) Petitioner testified she then called 911 and upon direct questioning stated that she shot her husband to protect herself, fearing that he was going to kill her. (**Transcript, pages, 1441-1442.**)

Michael Surbaugh remained conscious for a considerable period of time, (**appendix page 229, Transcript page 810,**) walked into the bathroom to clean himself, called his girlfriend, sat in a chair at the end of his driveway, spoke to various people including emergency medical personnel, law enforcement, and hospital employees. Indeed he showed no signs of life threatening distress until after he was immobilized and intubated. Eventually he died. All expert

testimony at trial opined that the gun shot wounds, standing alone, did not kill Michael Surbaugh. (Appendix pages 238, 358, 370 Transcript pages 847, 1327, 1373). Substantial evidence was presented establishing that improper medical treatment was the direct cause of his death, specifically, excessive administration of IV fluids which caused a fatal pulmonary edema. (Appendix pages 357-358, 369, Transcript pages 1324-1326, 1370-1371), The state's pathologist suggested an air embolism, a condition that could have been directly attributable to the gun shot wounds, *possibly* was the cause of death, though his testimony was inherently unreliable. (Appendix 229-231, Transcript pages 811-819)

During the twelve days of trial the state put on evidence attempting to establish that Petitioner did not shoot her husband in self defense, but instead shot him while he lay sleeping. Because the state improperly disposed of essential physical evidence---bed linens, evidence that would have likely bolstered Petitioner's version of events with appropriate testing, Petitioner was denied fundamental constitutional protections.

#### SUMMARY ARGUMENT

Multiple error occurred throughout Petitioner's trial below requiring reversal and a new trial. The State of West Virginia failed to prove the corpus delicti of the crime charged, murder, by failing to prove the gun shots from Petitioner killed the decedent. All expert testimony agreed the gun shot wounds were not, by themselves, lethal. Extensive evidence was received establishing improper medical care killed Michael Surbaugh, thereby breaking the "chain of natural causes." It was error for the circuit court therefore, to deny Petitioner's motion for judgement of acquittal and this court should so find.

The circuit court further erred by denying Petitioner's motion in limine designed to

limit the testimony of the state's pathologist, Dr. Hamada Mahmoud. The circuit court allowed Mahmoud to testify regarding the possibility of an air embolism causing the death of decedent where the doctor had performed none of the standard recognized tests to determine same, had conducted no research on the issue, and had no scientific basis for his opinion. An air embolism, if it occurred, would have been within the "chain of natural causes" vis-a-vis the gun shot wounds. The doctor's opinion was wholly unreliable and it was error, therefore, to admit same and not grant Petitioner's motion.

The circuit court again erred when it denied Petitioner's motion in limine to deny expert's from testifying as to "possibility," and in particular by allowing the state's pathologist to testify as to the "possibility" of an air embolism causing the decedent's death. Court's favor certainty over possibility as to expert testimony, and Dr. Mahmoud's testimony served no purpose other than to confuse the jury.

Additional error was caused by the circuit court when it failed to grant Petitioner's motion to dismiss indictment based upon destruction of evidence by the state. Bed linens were destroyed by the Webster County sheriff's office. If preserved the bed linen's would have proven, after proper scientific testing, where the gun shots occurred in relation to the bedroom and the decedent. The testing would have proved Petitioner acted in self defense. The circuit court incorrectly believed that photographs of the bed linens were an adequate substitute, and that the bed linens were in the end of no real consequence. By so ruling the circuit court effectively gutted a substantial defense.

Significant error was also created when the circuit court denied Petitioner's motion for judgement of acquittal where insufficient evidence supported the jury's verdict and where the

jury improperly resolved evidentiary conflicts. The court gave the correct instruction, the jury simply ignored it.

Error as to other jury instructions did occur, however. The circuit court improperly denied Petitioner's Jury Instruction No. 7, which would have properly instructed the jury that medical opinion testimony based on possibility of a causal relationship between an injury and subsequent death is not sufficient, standing alone, to establish the causal relationship. This instruction was particularly necessary in light of the circuit court previously allowing possibility testimony. The circuit court erred by denying Petitioner's jury instruction No. 8, which would have properly instructed the jury that where there is contradictory evidence regarding the cause of death the jury could consider such contradiction as an element creating a reasonable doubt. And the circuit court erred by denying Jury Instruction No. 5, which would have properly instructed the jury that it could consider the decedent's mental abuse of Petitioner in considering her state of mind in regard to her assertion of self-defense.

Finally, the circuit court erred by allowing the introduction into evidence of statements made by decedent when she was under the influence of xanax, when she had been told she was not a subject in a criminal investigation, and where she, therefore, did not knowingly waive her Miranda protections, and by rejecting Petitioner's jury verdict form and by utilizing a form that in effect encouraged the jury not to consider self defense in its deliberations.

Petitioner believes any one error summarized above is sufficient to overturn the jury's verdict and grant her a new trial, and she prays that this court so find.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner requests oral argument in this case. Petitioner asserts that the lower court

erred in its application of existing law but requests argument pursuant to Rule 20 because of the number of errors assigned. Petitioner also believes the case should be subject of a full opinion.

## JURISDICTION

The Circuit Court of Webster County had jurisdiction over this matter pursuant to Article VII, Section 6 of the West Virginia Constitution, and Section 51-2-2 of West Virginia Code. This Court's jurisdiction is invoked under Article VIII, Section 3 of West Virginia Constitution, Section 51-1-3 of West Virginia Code, and Rule 1 of the West Virginia Rules of Appellate Procedure..

## ARGUMENT

**1. The Circuit Court erred by failing to grant Petitioner's Motion for Judgement of Acquittal where the state failed to prove the corpus delicti of the crime charged.**

The State of West Virginia failed to prove beyond a reasonable doubt Petitioner murdered the alleged victim Michael Surbaugh in that the state failed to prove any wound inflicted upon Michael Surbaugh by Petitioner caused his death. It is undisputed that shots fired by petitioner struck Michael Surbaugh. Petitioner contends she fired a hand gun at the alleged victim from the foot of the bed in self defense in response to her husband pointing a gun at her head and threatening her. The origin of a third-gun shot wound is disputed in the record, whether petitioner caused the wound or the wound was self inflicted. In any case there is no dispute that the gun shot wounds---standing alone---did not kill Michael Surbaugh. Michael Surbaugh was conscious and talking well after he received his injuries. While he did receive three gunshot

wounds to the head, the wounds did not end his life. On this point all medical experts at trial who addressed the issue agreed.

Michael Surbaugh was killed by improper medical care, specifically, the administration of an excessive amount of IV fluid.

The seminal case on the causation of death in West Virginia is State v Durham, 156 W.Va. 509, 195 S.E.2d 144 (1975). In Durham the court held “(a) defendant may be held criminally responsible where he inflicts upon another a wound resulting in death, even though the cause of death is related to the proper treatment of the wound or related to such treatment or effect of a pre-existing physical disability of the victim.” Syl. pt. 3, State v Durham, 156 W.Va. 509, 195 S.E.2d 144 (1975). And while the corpus delicti may be “properly proved by sufficient evidence showing that the initial wound caused the death *indirectly* (emphasis added) through a chain of natural causes” Syl. Pt.2 Id, the chain of natural causes is broken unless the “cause of death is related to the *proper* (emphasis added) treatment of the wound.” Syl. pt. 3.

In Durham the victim was shot by his wife and there was “little direct evidence that the flight of the bullet....was the immediate cause of.....death.” 156 W.Va. At 519, 195 S.E.2d at 150. The direct cause of death was the victim's fatty liver condition which may have been accelerated or triggered by the administration of anesthesia or by the trauma of the wound. 156 W.Va. At 519, 195 S.E.2d at 151. Surgery was performed, anesthesia was administered, and uncontroverted testimony at trial provided that all medical interventions were “normal and necessary.” 156 W.Va. At 512, 195 S.E.2d at 146. The jury found that the corpus delicti was proved, and this court, with the absence of improper medical care, agreed. Sufficient evidence existed in the record establishing that the victim's wound caused death *indirectly* through a chain

of natural causes unbroken by *improper* medical care.

In the present case there is no pre-existing medical condition that may have contributed to Michael Surbaugh's death, the issue is whether he received proper medical care after he received his wounds, and if not, whether the improper care broke the chain of natural causes. Nearly uncontroverted evidence at trial established that Michael Surbaugh received improper medical care, and the only reliable evidence admitted into the record established the improper medical care clearly broke the chain of natural causes. Improper medical care killed Michael Surbaugh.

Indeed, the medical treatment of Michael Surbaugh on the morning of August 6, 2009 is the critical issue. Substantial evidence was received at trial establishing that the alleged victim was subjected to unnecessary immobilization, unnecessary and potentially counterproductive intubation, and excessive administration of IV fluids. (**Appendix page 368, Transcript pages 1368-1369**). Dr. Mahmoud expressed no opinion on that issue. Dr. Miller, the emergency room physician for Michael Surbaugh predictably offered an opinion that treatment was necessary, and also testified that the immobilization and intubation were required by Healthnet and that the proper amount of IV fluid to be administered to a person decedent's size was 2000mL. All other testimony challenged the medial care administered. (**Appendix pages 167-177, Transcript pages 562-601.**)

Dr. David Hinchmen, an emergency room physician at Cabell Huntington Hospital with extensive experience with Healthnet, and Deb Daniels, a registered nurse employed by WVU hospital with 18 years of experience with Healthnet, testified that Healthnet does not require intubation and immobilization, contrary to Dr. Miller's opinion, and in fact, discourages

immobilization if there is a need for neurological evaluation, as there was in this case.(Appendix pages 297-298,368, Transcript pages 1084, 1085, 1368-1369) In addition substantial evidence was received establishing that Michael Surbaugh received not 2000mL of IV fluid, the amount Dr. Miller said was proper, but a whopping 3500ml, including testimony from Webster Memorial Hospital emergency room nurse Jeanie Clauser that Michael Surbaugh received up to four liters of IV fluids, and testimony from Healthnet nurse Deb Daniels that the report received from the Webster County ambulance crew indicated that Michael Surbaugh received 3500mL of fluid prior to his transfer to Healthnet personnel.(Appendix Pages 299, 320-331 Transcript pages 1090, 1171-1218).

The excessive administration of IV fluids is significant. While the state's pathologist, Dr. Hamada Mahmoud, offered inherently unreliable testimony as more fully argued in the second assigned error below, that, in his opinion, to a reasonable degree of medical *possibility* the immediate cause of death was an air embolism, a condition that arguably qualifies as a "natural cause" vis-a-vis the gun shot wounds, Dr. Cyril Wecht, a renowned expert in the field of forensic pathology, and Dr. David Hinchmen, both testified that, in their opinion, to a reasonable degree of medical *certainty*, death was the direct result of a pulmonary edema, a pulmonary edema caused by unnecessary immobilization of the patient, unnecessary intubation, and excessive administration of IV fluids.

In the end it is the state's burden. The state was obligated to prove beyond a reasonable doubt the corpus delicti, that the gun shot wounds suffered by Michael Surbaugh, killed him. The state did not meet its burden and the Circuit Court committed clear error by not granting Petitioner's motion for judgement of acquittal. It is clear from all reliable and admissible

evidence received that Michael Surbaugh's death was caused by improper medical care, improper medical care that broke the chain of natural causes. Petitioner's conviction should be overturned and a new trial granted.

**2. The Circuit Court erred by denying Petitioner's Motion in Liminie to limit the testimony of Dr. Hamada Mahmoud under Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 113 S.Ct. 2786, 125 L.ED. 2D 469 (1993); State v. Leep, 212 W.Va 57, 569 S.E.2d 133 (2002); and Harris v. CSX Transportation, Inc., Slip Op. No. 12-1135**

A court's obligations as to the admissibility of scientific evidence at trial is found in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.ED 2D 469 (1993), **State v. Leep**, 212 W.Va 57, 569 S.E.2d 133 (2002); and **Harris v. CSX Transportation, Inc.**, Slip Op. No. 12-1135. This court has held that West Virginia Rule of Evidence 702 is “virtually identical to the corresponding Federal Rule of Evidence 702,” **State v. Leep**, 212 W.Va 57, 569 S.E.2d 133 (2002), and has followed the federal interpretations of that rule regarding admissibility of scientific evidence starting with **Daubert v. Merrell Dow Pharmaceuticals, Inc.** 509 U.S. 579, 113 S.Ct. 2786, 125 L.ED. 2D 469 (1993).

Petitioner's trial counsel below filed a motion in liminie designed to restrict the state's pathologist from offering his opinion at trial regarding the possibility of an air embolism. Counsel's motion in effect argued that the testimony should not be admitted because it lacked a scientific basis and was therefore unreliable. The Circuit Court denied his motion creating clear error.

Daubert/Leep requires the trial court to initially determine whether the evidence proffered “deals with 'scientific knowledge.’” Syl. pt. 3 Leep. “It is the Circuit Court's responsibility initially to determine whether the expert's proposed testimony amounts to

'scientific knowledge' and, in doing so, to analyze not what the experts say, but what basis they have for saying it.” Id. When scientific evidence is proffered, a Circuit Court in its 'gatekeeper’ role under Daubert.....must engage in a two part analysis in regard to the expert testimony. First the Circuit Court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the Circuit Court must ensure that the scientific testimony is relevant to the task at hand.” Syl. pt. 4, Leep.

The first prong of the two prong test of admissibility of scientific testimony is generally referred to as the “reliability” prong, the second as the “relevancy” prong. The trial court, as the “gatekeeper” must first determine the issue of reliability of the scientific testimony before ever reaching the relevancy prong. Id. This court recently explained the application of the reliability prong in Syl. Pt. 2 of Harris v. CSX Transportation, Inc., No. 12-1135, Slip Op. (W.Va. Nov. 13, 2013).

**“When a trial court is called upon to determine the admissibility of scientific expert testimony, in deciding the “reliability” prong of admissibility the focus of the trial court's inquiry is limited to determining whether the expert employed a methodology that is recognized in the scientific community for rendering an opinion on the subject under consideration. If the methodology is recognized in the scientific community, the court should then determine whether the expert correctly applied the methodology to render his opinion. If these two factors are satisfied, and the testimony has been found to be relevant, and the expert is qualified, the expert may testify at trial.”**

As to his opinion that there was a *possibility* that Michael Surbaugh died from an air embolism, the state's pathologist clearly had no scientific basis. Dr. Mahmoud conducted no tests

with the design of determining whether an air embolism occurred and if so, whether that embolism caused Michael Surbaugh's death. Several well recognized and established methodologies exist: insertion of a syringe filled with water into the right ventricle, a chest x-ray, tying off the arteries and veins and reopening them after submerging the heart in water; seeing if the heart will float in water; puncturing the heart after the pericardium is filled with water; a pyrogallol test; and puncturing the inferior vena cava under water. Dr. Mahmoud conceded he performed none of these tests, nor did he engage in any research into clinical indications of air embolism, nor did he review all relevant medical records in the case. He did, however, perform an autopsy test for other purposes that arguably shed light on whether there was an air embolism. Dr. Mahmoud dissected the heart and in so doing found no frothy blood in the left ventricle, evidence that there was *no* air embolism.

The first stage of the reliability prong for admissibility requires the court to determine whether the state's pathologist employed a methodology that is recognized in the scientific community for rendering an opinion on the subject under consideration: air embolism as the cause of death of Michael Surbaugh. The testimony of Dr. Mahmoud did not pass the gateway entrance test and its admission constitutes reversible error. "Evidence which is no more than speculation is not admissible under Rule 702." **State v. LaRock, 196 W.Va. 294, 307, 470 S.E.2d 613, 626 (1996).**

The opinion testimony of the state's pathologist regarding an air embolism was improperly admitted under Harris. The testimony failed to meet the "reliability" prong of admissibility on Syl. pt. 2. The evidence of record is uncontroverted that the methodology recognized in the forensic pathology community for rendering an opinion on air embolism as a

cause 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). (Mechanism-of-death opinions are based on the factual mix of autopsy findings, circumstantial data, and the observations of treating medical personnel. Unlike, say, the opinion of lethal concussion, for which the autopsy provides exclusionary data, *the opinion of venous air embolism relies on positive findings at autopsy.*” {Emphasis added.})

The methodology recognized by the scientific community was not applied at all by the state's pathologist, let alone correctly. Neither of the two factors in Harris were satisfied. Dr. Mahmoud was not qualified to testify at trial as an expert rendering an opinion on air embolism as a cause of death. The Circuit Court's allowing such testimony over petitioner's objections at trial constitutes reversible error justifying a new trial, and this court should so find.

**3. The Circuit Court erred by denying the Petitioner's Motion in Liminie to prohibit testimony of experts on the basis of possibility, and in allowing the state's pathologist to testify to opinions based upon possibility.**

The Circuit Court erred in denying the Petitioner's motion in liminie to prohibit medical opinion testimony based upon possibilities and allowing the state's pathologist to offer opinions based upon a “reasonable degree of medical *possibility*.” In **State v. LaRock, 196 W.Va 294, 470 S.E.2d 613 (1996)**, this court upheld the trial court's exclusion of an expert's testimony which was proffered on the basis of a *possibility* that the defendant in that case had been suffering from a mental condition at the time of the crime. The LaRock court noted:

**“To be clear, expert testimony in the area of mental competency and mental**

responsibility is likely to help the jury and, hence, if sanctioned by the trial court, is admissible in evidence. We regularly uphold admissibility of such expert testimony based upon a trial judge's belief that the evidence would help the jurors. On the other hand, we have suggested that evidence which is no more than speculation is not admissible under Rule 702.”

196 W.Va. At 307, 470 S.E.2d at 626.

The opinion testimony of the state's pathologist at the trial below as to *possibilities*, as in LaRock, “failed to provide a factual predicate for the jury, presumably inexperienced in evaluating” medical issues. *Id.* As such Dr. Mahmoud's testimony, as was the case of the expert's testimony in LaRock, was “utterly confusing to the jury” and should have been excluded under Rule 403 of the West Virginia Rules of Evidence, testimony, as demonstrated above, that was pure speculation and lacking even a scintilla of scientific basis.

Courts that have considered the question have generally excluded expert opinion testimony based on *possibility* in criminal trials. See, e.g., *Spruill v. Commonwealth*, 221 Va. 475, 271 S.E.2d 419 (1980) (A medical opinion based on a 'possibility' is irrelevant, purely speculative and, hence, inadmissible. In order for such testimony to become relevant, it must be brought out of the realm of speculation and into the realm of reasonable 'probabilities' and not 'possibilities.’”) *Hubbard v. Com.*, 243 Va. 1, 413 S.E.2d 875 (1992); *People v. Bethune*, 484 N.Y.S 2d 577, 584, 105 A.D.2d 262 (N.Y.A.D.2 Dept., 1984) (“It is, of course, well settled that expert opinions which are—“contingent, speculative, or merely ‘possible’ lack probative force and are, therefore, inadmissible.”); *State v. Moreland*, 50 Ohio St.3d 58, 552 N.E.2d 894 (Ohio, 1990); *State v. Holt*, 17 Ohio St.2d 81, 85, 246 N.E.2d 365, 367 (1969) (“where the testimony of medical doctors is required to establish a direct casual relationship between an injury and

ensuing disability, the witness must connect the two with reasonable medical certainty. Probability, and not possibility, is required.”)

The Circuit Court's allowing of such testimony over the Petitioner's objection constitutes reversible error justifying a new trial, and this court should so find.

**4. The Circuit Court erred by denying Petitioner's Motion to Dismiss Indictment based upon destruction of evidence by the state.**

Defendant moved to dismiss the indictment by motion served on January 7, 2014. The primary basis of that motion was the state's destruction of bed linens seized by Webster County sheriff's deputies on August 6, 2009. The standard of review on this issue in this state was established in *Syl. pt. 2 of State v Osakalumi*, 194 W.Va. 758, 461 S.E.2d 504 (1995):

**“When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the state at the time of the defendant's request for it, would have been subject to disclosure under West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the state had a duty to preserve the material; and (3) if the state did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the state's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value of reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.”**

In this case, the Circuit Court found in its pretrial order that the bed linens were in the possession of the state at the time of the first trial but were not used and that the state did have a

duty to preserve the bed linens. The state destroyed the bed linens after the first trial. The evidence of record indicates that the bed linens were destroyed without consideration of whether the case was on appeal---despite the virtual certainty that any case resulting in a first degree murder conviction would be appealed. The Circuit Court denied the motion to dismiss on the stated basis of finding no bad faith on the state's part and the availability of "other evidence to the defendant related to the sheets, including photographs of same."

The Circuit Court erred in not finding that the state was negligent in its failure to preserve the bed linens, and in not considering the degree of negligence involved. A fair reading of the Circuit Court's pretrial order makes clear that the state's negligence was never a factor in the Circuit Court's consideration, the court referencing a lack of bad faith only. The Osakalumi test clearly provides for the consideration of negligence and its degree. Additionally, the Circuit Court erred by significantly depreciating the value of the bed linens to Petitioner's defense, and overvaluing that of the alleged substitute evidence----photographs of the bed linens. The circuit court's finding that "the missing sheets were not of great importance or evidentiary value" is simply wrong and clear error.

The bed linens were extremely probative, their importance to the defense cannot be underestimated. The keystone of the state's case, the linchpin to their theory, was that Michael Surbaugh was lying asleep in the bed when Petitioner came into the room, leaned over the bed, and shot him in the right ear, with the gun in close proximity to the bed and pointed down at the bed. Petitioner adamantly maintains that she shot Michael Surbaugh after he pointed the gun to her face, threatened her, and after an ensuing struggle. As defense expert Andrew Wheeler testified, two independent tests could have been performed on the bed linens, had they not been

destroyed, that could have shown by patterning of residual discharge materials where the gun was when it was fired. The bed linens could have conclusively proven, therefore, that the state's theory was wrong and that when Petitioner testified she was acting in self defense---- she in fact was.

The destroyed evidence was not only extremely probative on the most relevant and material factual issue in dispute in the trial, therefore, but there was no evidence available of a truly secondary or substitute nature. In this case, there is not an issue regarding the reliability of any available secondary or substitute evidence. And that is because there simply is not any. The Circuit Court mistakenly considered in its pretrial order that the crime scene photographs constituted secondary or substitute evidence. No chemical tests for residue patterns could be made on photographs. The photographs of the crime scene are not of the same nature as the sheets and pillowcases themselves and provide no method by which the Petitioner could develop any evidence as to the position of the gun when it was discharged. In short, in this case, the state, as a result of the gross negligence of its agents, destroyed the single item of evidence that could be tested to disprove the central evidentiary assertion of the state's case, for which there was no substitute or secondary evidence available to Petitioner. As such, Petitioner was denied a fair trial and due process under **W.Va. Const. Art. III, Sections 10 and 14** and the corresponding provisions of the United States Constitution, and her conviction should be overturned and a new trial granted as a consequence.

**5. The Circuit Court erred by denying Petitioner's Motion for Judgement of Acquittal where insufficient evidence supported the jury's verdict and where the jury improperly resolved evidentiary conflicts in regard to the victim's location when shot, resulting in a miscarriage of justice.**

This Court may order a new trial where a jury's verdict is not sustained by sufficient evidence or is contrary to law. In this case, the jury was clearly wrong in resolving evidentiary conflicts regarding the location of Mike Surbaugh at the time he received a wound to his right ear and head such that its verdict resulted in a miscarriage of justice.

In this case, Deputy Rick Clayton clearly and unequivocally testified that the only evidence which the State had that Mike Surbaugh was lying in bed when shot was his statements on the morning of August 6, 2009. Deputy Clayton testified before the Grand Jury that Dr. Hamada Mahmoud told him that the autopsy results indicated the same, but Dr. Mahmoud testified at trial that he never made such a statement. Deputy Clayton, at trial, indicated that his testimony before the Grand Jury had been incorrect. **(Appendix pages 275-296) Transcripts pages 995-1078)** Defense expert Andrew Wheeler testified that the physical evidence of the broken glass shown in photographs, and blood spatter shown in photographs were "consistent" with either the State's theory or Defendant's account of events. Andrew Wheeler also indicated that "consistent" meant a mere possibility, i.e., an interpretation consistent with either guilt or innocence was possible from the photographs, but neither was more probable than not. This critical issue could have been determined with exactitude by tests which could have been conducted on the bed linens, had the bed linens not been destroyed prior to trial by the State.

At best, the evidence on this critical issue in the case must be construed as "permitting either of two conclusions – one of innocence, the other of guilt." *State v. Maynard*, 183 W. Va. 1, 8, 393 S.E.2d 221, 228 (1990). While the Court in this case properly instructed the jury in regard to resolving conflicting evidence and inferences, it is clear – especially when

the destruction of the bed linens is also considered – that the jury disregarded the Court's instructions and returned a verdict of guilt based upon insufficient evidence resulting in a miscarriage of justice. This Court should, therefore set aside the verdict and order a new trial in this matter.

**6. The Circuit Court erred by denying Petitioner's Jury Instruction No. 7.**

The Court refused, over Defendant's objection, Defendant's Requested Jury Instruction No. 7 which would have properly instructed the jury that medical opinion testimony based upon possibility of a causal relationship between an injury and subsequent death is not sufficient standing alone to establish the causal relationship. 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 [10] [a], p. 7-79 (2012). The reversible error committed by refusing this instruction compounded the Court's error in regard to allowing unreliable expert testimony based upon mere speculation or possibility and the State's failure to establish the corpus delicti as set forth above. Consequently, the Court should set aside the jury's verdict and grant a new trial in this matter.

**7. The Circuit Court erred by denying Petitioner's Jury Instruction No 8.**

The Court refused, over Defendant's objection, Defendant's Requested Jury Instruction No. 8, based upon an instruction approved by the Supreme Court of Appeals in State v. Durham, 156 W.Va. 509, 195 S.E. 2d 144 (1973), which would have properly instructed the jury that where there is contradictory evidence regarding the cause of the death of Michael Surbaugh that the jury could consider such contradiction as an element creating a reasonable doubt as to the cause of death. The reversible error committed by refusing this instruction compounded the Court's error in regard to allowing unreliable expert testimony based upon mere

speculation or possibility and the State's failure to establish the corpus delicti as set forth above. Consequently, the Court should set aside the jury's verdict and grant a new trial in this matter.

**8. The Circuit Court erred by denying Petitioner's Jury Instruction No. 5.**

The Court improperly refused, over Defendant's objection, Defendant's Requested Jury Instruction No. 5, based upon State v. Harden, 223 W.Va. 796 (2009); State v. Stewart, 228 W.Va. 40, 719 S.E. 2d 876 (2011), which would have properly instructed the jury that it could consider Mike Surbaugh's mental abuse of Julia Surbaugh in considering her state of mind in regard to her assertion of self-defense. Consequently, the Court should set aside the jury's verdict and grant a new trial in this matter.

**9. The Circuit Court erred by denying Petitioner's Jury Verdict Form.**

For reasons appearing of record, the Court improperly refused Defendant's Requested Jury Verdict Form to the prejudice of the Defendant. (**Appendix pages 450-451, Transcript, pages 1696-1697.**) The jury form eventually utilized by the court in effect encouraged the jury to not consider self-defense in their deliberation, to the extreme prejudice of Petitioner. Consequently, the Court should set aside the jury's verdict and grant a new trial in this matter.

**10. The Circuit Court erred by admitting Petitioner's statements.**

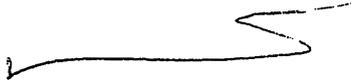
For reasons appearing of record, the Court improperly admitted statements made by the Defendant to law enforcement personnel on August 11, 2009, and August 12, 2009, to the prejudice of the Petitioner. Petitioner testified that she was under the influence of Xanax when she made her statements to law enforcement, and further that law enforcement told her she was not the subject of a criminal investigation, which was a lie. Petitioner did not, therefore, knowingly waive her Miranada protections. Consequently, the Court should set aside the jury's

verdict and grant her a new trial in this matter.

CONCLUSION

Petitioner is a good woman, bright, educated, with no history of violence prior to the unfortunate events of August 6, 2009. Since that tragic day, a day when she was in fact a victim of domestic assault, Petitioner has lived a nightmare existence. She has twice been convicted of first degree murder, twice as a result of seriously flawed criminal trials. Multiple errors occurred in her second trial, any one of which taken separately resulted in the denial of a fair trial to her. Taken as a whole it is clear a serious miscarriage of justice occurred. Petitioner prays that her conviction be overturned and that she yet again be granted a new trial.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Christopher G. Moffatt, counsel for Petitioner do hereby certify that I have served a true and exact copy of the foregoing PETITIONER'S BRIEF upon the following by Regular United States Mail in a properly addressed and stamped envelope this the 6th day of July 2015, to their addresses as follows:

CHRISTOPHER DODRILL  
ASSISTANT ATTORNEY GENERAL  
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\_\_\_\_\_  
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