

IN THE CIRCUIT COURT OF McDOWELL COUNTY WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

Case No. 05-F-157-S

CHARLES JASON LIVELY,

DEFENDANT

**UNOPPOSED MOTION FOR VACATUR OF CONVICTIONS
AND MOTION FOR NEW TRIAL**

Comes now the Defendant, Charles Jason Lively by his Counsel Melissa Giggenbach of the West Virginia Innocence Project, and moves this Honorable Court, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure and *State v. Frazier*, 253 S.E. 2d 534 (W.Va. 1979), to grant Mr. Lively's "Unopposed Motion for Vacatur of Convictions and Motion for New Trial" on the basis of newly discovered evidence.

Counsel asserts the following in support of the motion:

1. In 2007, Mr. Lively was convicted after trial by jury of first-degree murder by arson of Dr. Ebb K. Whitely and sentenced to a term of life imprisonment with the possibility of parole. Additionally, Mr. Lively was convicted of petit larceny and was sentenced to one year in prison.
2. New and material evidence now necessitates the vacatur of Mr. Lively's convictions, Mr. Lively's immediate release from prison, and the granting of a new trial.
3. The new and material evidence includes opinions by State-retained experts challenging the cause determination of the fire as incendiary, as well as the accuracy of forensic testimony at trial. *See* Report of Dr. Craig Beyler, May 31, 2012; Report of Dr. Glen Jackson dated May 29, 2019; Second Report of Dr. Glen Jackson dated January 3, 2020 (attached as Exhibits A, B, and C,

respectively).

4. Additionally, then-McDowell County Prosecuting Attorney Sid Bell has attested that the newly-discovered evidence sufficiently compromises the integrity of Mr. Lively's conviction such that a new trial is appropriate. *See* Sworn Affidavit of Sid Bell dated December 14, 2018 attached as Exhibit D; Second Sworn Affidavit of Sid Bell dated January 9, 2020 attached as Exhibit E.
5. The new and material evidence meets all five Frazier factors required to warrant a new trial. State v. Frazier, 253 S.E. 2d 534 (W.Va. 1979). Specifically, as the reports and affidavits make clear, the report from Dr. Beyler was obtained by then-prosecuting attorney Bell post-trial and in advance of the state habeas evidentiary hearing February 20, 2013. The two reports from Dr. Jackson were obtained by the state in 2019 and 2020. The affidavits in support of Mr. Lively's innocence by then-prosecutor Bell were signed in 2018 and 2020. All evidence was obtained after Mr. Lively's trial during the post-conviction process as Mr. Lively was vigorously contesting his conviction. The newly discovered evidence, as contained in the reports and affidavits, proves that the fire that killed Dr. Whitely was not incendiary and thus is new and material. The new evidence, coupled with the affidavits signed by then-prosecutor Bell attesting to his belief in Mr. Lively's innocence, will produce an opposite result at trial, as it proves definitively that no arson occurred and that the prior prosecuting attorney would not have pursued conviction. This newly discovered evidence does not merely impeach a witness at trial, but it demonstrates that, in fact, no crime occurred.
6. Counsel for Mr. Lively has met and conferred with the current McDowell County Prosecutor, Emily Miller, who does not oppose this motion and agrees to file a response, if any, within 14 days of this filing.

Mr. Lively prays that this Honorable Court immediately vacate both the conviction for first degree murder and for petit larceny, release Mr. Lively from prison, and schedule the matter for a new trial.

Charles Jason Lively,
By Counsel

/S/ Melissa Giggenbach

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CERTIFICATE OF SERVICE

I, Melissa Giggenbach, Counsel for Charles Jason Lively, do hereby certify that I have made service of the foregoing **UNOPPOSED MOTION FOR VACATUR OF CONVICTIONS AND NEW TRIAL** upon the State of West Virginia via electronic transmission and facsimile transmission, as follows this 14th day of August, 2020:

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