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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FILED

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CIVIL ACTION NO. 06-C-093  
ADELL J. HANLON  
JUDGE  
CIRCUIT CLERK  
CABELL WV

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Bragg  
J. Husted  
-R. Perry

STATE OF WEST VIRGINIA,  
MARK DAMRON,  
Petitioner,

vs.

WILLIAM HAINES, Warden  
Huttonsville Correctional Facility,  
Respondent.

FINAL ORDER

On May 21, 2007, came the petitioner, Mark Damron, in person and by counsel, Steve Bragg, and also came the respondent Warden, William Haines, by the State of West Virginia by F. Jane Husted, Assistant Prosecuting Attorney of Cabell County, West Virginia, pursuant to this matter coming before the Court for a final post-conviction habeas corpus hearing.

On this date, the Court considered the post-conviction habeas corpus petition and supplemental pleadings, submitted to this Court by the petitioner pursuant to W. Va. Code 53-4A-1, et seq. The court also considered the records and exhibits attached to said petition, the official records of petitioner's conviction, any prior habeas corpus petitions, the answer and Memorandum of Law with its attendant exhibits filed by the respondent and the testimony presented at this hearing.

Petitioner seeks relief from his incarceration as a result of the sentence of incarceration he received in the Circuit Court of Cabell County, West Virginia, *State of West Virginia v. Mark Damron*, Indictment No. 03-F-215.

PROCEDURAL SUMMARY

Petitioner was indicted on the 19<sup>th</sup> day of September, 2003 for Count 1 and 2, First Degree Arson; Count 3 and 4, Second Degree Arson; Count 5 and 6, Attempted First Degree Murder and Count 7, Breaking and Entering as contained in Indictment No. 03-F-215. On October 3, 2003 Kent Bryson was appointed to represent the Petitioner and on December 5, 2003, the Petitioner was granted a \$25,000.00 bond with home incarceration. Said home incarceration was revoked on May 21, 2004 and his bond increased to \$75,000.00. On October 4, 2004, the

Bond was revoked as the defendant was charged with committing a new crime.

On November 22, 2004, the Petitioner requested new counsel and John Laishley was appointed to represent him.

This matter came on for trial on February 28, 2005 and on March 1, 2005 the jury returned a verdict of guilty on Count 2 of First Degree Arson and on Count 4, Second Degree Arson.

After trial, Mark Damron moved to set aside one or both counts of Arson on the grounds that he could not be convicted of both charges. In addition, defense counsel filed a motion for a new trial. The Court took up this issue of the verdicts and the motion for a new trial at Mr. Damron's sentencing hearing held on May 26, 2005. The Court denied Mr. Damron's motion to set aside the verdicts as well as the motion for a new trial.

On May 26, 2005, the Petitioner was sentenced to 20 years on Count 2 and 10 years on Count 4, said sentences to run consecutively.

The Petitioner, by counsel, Doug Reynolds, filed an appeal on November 7, 2005; this appeal was refused on January 19, 2006.

The Petitioner filed this habeas corpus petition in the Circuit Court of Cabell County on February 9, 2006 and Steve Bragg was appointed to represent him therein.

The Court incorporates by reference the entire transcript and record of this case as filed previously with the West Virginia Supreme Court of Appeals.

*LOSH V. MCKENZIE*

*Losh v. McKenzie*, 277 S.E.2d 606 (1981) sets forth a checklist of possible errors and what issues an omnibus post conviction habeas corpus petition can address. It states the statute contemplates that every person convicted of a crime shall have the opportunity to apply for an appeal to the Supreme Court of Appeals, and one omnibus post conviction habeas corpus hearing (hereinafter called habeas) at which he may raise any collateral issues which have not previously been fully and fairly litigated. Code 53-4A-1 et seq.

However, a habeas petition is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed. *St. ex rel Azeez v. Mangum*, 195 W.Va. 163, 465 S.E.2d 163 (1995), citing *State ex rel McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979),

cert. denied, 164 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983).

For example, it was held in *State ex rel Boso v. Hedrick*, 182 W.Va. 701, 391 S.E.2d 614 (1990) that the court's rulings on the state's opening argument; the giving of an instruction; the denial of the defendant's motion for severance of the counts in the indictment; the granting of the State's motion in limine; and the refusal to strike for cause members of the juror venire were all trial errors not involving constitutional dimensions. *Id* at 6.

West Virginia Code 53-4A-1(a) provides:

(a) Any person convicted of a crime and incarcerated under sentence of imprisonment therefore who contends that said conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error ... may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, ... if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence.

(b) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

(c) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver. When any such contention or contentions and grounds could have been advanced by the petitioner before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition ... but were not in fact so advanced, there shall be a rebuttable presumption that the petitioner intelligently and knowingly failed to advance such contention or contentions and grounds.

*Morrison v. Holland*, 177 W.Va. 297, 352 S.E.2d 46, 49 (1986) states that errors not raised at trial and therefore not subject to appellate review

(absent plain error) are even less cognizable in habeas corpus.

Consequently, Petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition, as there is a presumption of regularity of court proceedings until the contrary appears. *State ex rel Scott v. Boles*, 150 W.Va. 453, 147 S.E.2d 502 (1965).

The Petitioner and his counsel filed a memorandum of law in support of the following grounds in all petitions.

#### GROUNDS ALLEGED and ARGUMENT THEREON

The Petitioner alleges in his original pro se petition for relief dated February 9, 2006 the following allegations:

**1. Violations of the Miranda warnings.**

The Court will address this allegation in detail in the findings of the Amended Petition.

**2. Violations of the confrontation clause.**

The Court will address this allegation in detail in the findings of the Amended Petition.

**3. Violations of the double jeopardy clause.**

The Court will address this allegation in detail in the findings of the Amended Petition.

**4. Ineffective assistance of counsel.**

The Court will address this allegation in detail in the findings of the Amended Petition.

Petitioner, by Counsel, filed an amended petition and a signed Losh checklist of asserted errors. The following grounds (which will be designated with the addition of the letter L for Losh) have been alleged in the Losh checklist:

**1L. Defects in the indictment.** As there are no grounds given for this allegation other than the Petitioner's allegation of double jeopardy, the Court finds no merit in said allegation.

**2L. Constitutional errors in evidentiary rulings.** As there are no grounds given for this allegation other than the Petitioner's allegation of double jeopardy and that he disagreed with the ruling of the suppression hearing, the Court finds no merit in said allegation.

3L. **Instructions to the jury.** As there are no grounds given for this allegation other than the Petitioner's allegation of double jeopardy, the Court finds no merit in said allegation.

4L. **Failure of counsel to take an appeal.** Counsel did take an appeal and it was refused, therefore, the Court finds no merit in this allegation. However, with reference to the Petitioner's oral argument in court that his trial counsel should have filed an appeal of the suppression hearing, the Court finds no merit in this allegation.

5L. **Consecutive sentences for same transaction.** As there are no grounds given for this allegation other than the Petitioner's allegation of double jeopardy, the Court finds no merit in said allegation and will address this issue in the findings given to the amended petition hereinafter.

6L. **Coerced confessions.** As there are no grounds given for this allegation, the Court finds no merit in said allegation.

7L. **Suppression of helpful evidence by prosecutor.** As there are no grounds given for this allegation, the Court finds no merit in said allegation.

8L. **Ineffective assistance of counsel.** The Court shall rule with respect to this allegation in detail in the findings given to the amended petition hereinafter.

9L. **Double jeopardy.**

The Court shall rule with respect to this allegation in detail in the findings given to the amended petition hereinafter.

10L. **Irregularities in arrest.** As there are no grounds given for this allegation, the Court finds no merit in said allegation.

11L. **Refusal to subpoena witnesses.** The Court finds no merit in this allegation.

12L. **Sufficiency of evidence.** As there are no grounds given for this allegation other than the Petitioner's double jeopardy argument, the Court finds no merit in said allegation.

13L. **Improper communications between prosecutor or witnesses and jury.** As there are no grounds given for this allegation, the Court finds no merit in said allegation.

14L. **Severer sentence than expected.** As there are no grounds given for

this allegation other than the Petitioner's allegation of double jeopardy, the Court finds no merit in said allegation.

15L. **Excessive sentence.** As there are no grounds given for this allegation other than the Petitioner's allegation of double jeopardy, the Court finds no merit in said allegation.

The following grounds (which will be designated with the addition of the letter A for Amended) were alleged in the Amended Petition filed by counsel:

1A. That the admission into evidence of Mr. Damron's statements to Deputy Fire Marshal Steve Ellis violated the Petitioner's Fifth Amendment rights under the United States and West Virginia Constitutions. Specifically, the Petitioner contends:

1. That Petitioner was subjected to custodial interrogation by Fire Marshal Steve Ellis;
2. That no reasonable person in the Petitioner's circumstance would feel free to leave;
3. That Petitioner's right to counsel attached during the custodial interrogation;
4. That Deputy Fire Marshal Ellis did not have a weapon was contrary to all testimony;
5. That Deputy Fire Marshal Ellis was acting in conjunction with Fire Marshal Devin Palmer, who had arrest powers.

There was a suppression hearing held on January 21, 2005 and the Court found no merit in any of the allegations contained in the motion to suppress.

After a careful review of the trial transcript and the suppression hearing testimony and the evidence given on today's date by Mr. Laishley, the Court finds that said decision to deny the suppression motion was correct.

Petitioner acknowledges that unless there is a custodial interrogation, the *Miranda* Warnings need not be given. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Therefore, the crucial issues that must be discussed to determine if the Petitioner's rights were violated are (1) was the Petitioner in custody and (2) was he subject to interrogation.

As the Petitioner points out in his petition, in *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140 (2004) the Court set forth a two part test to

examine the custodial nature of the questioning. First, the Court should look at the circumstances surrounding the questioning. Second, the Court should inquire if a reasonable person would have felt free to leave. Prior to *Yarborough*, the West Virginia Supreme Court addressed the nature of questioning by setting forth the following four factors to be considered: 1.) location of questioning; 2) nature of questioning; 3) questions as related to the offense; 4) use or absence of physical force. *State v. Preece*, 383 S.E. 2d 815 (1989).

The Court agrees with the Respondent's contention that the testimony clearly showed that Deputy Fire Marshall Steve Ellis did not have the authority to arrest, although Assistant State Fire Marshal Devin T. Palmer did, and he was in fireman's clothing when he shouted at the Petitioner to stop. He had just seen the Petitioner leaving the same building that he had just been in, where a new fire was lit and burning. His questioning was entirely consistent with that of an ordinary citizen concerned for his own safety inquiring of a person running from the scene as to his intentions. He did not use physical force to subdue or stop the Petitioner and his only questions, related to the new fire that he just seen burning. It was a question for the Court as to whether the Petitioner would have felt that he was free to leave under the totality of the circumstances, and the Court found that the Petitioner would not have believed himself to be under arrest. If the Petitioner felt that he was not free to leave, it would have a result of his own guilty conscious, not because of any act or words of the Deputy.

The Court does find that it appears that there was some inconsistency in the statement that Mr. Ellis did not have a firearm, as Mr. Ellis testified at trial that he was authorized to carry a firearm. However, the Petitioner testified that he never saw one. In light of this testimony, the Court does find that any error in the order reflecting that Mr. Ellis did not carry a gun was harmless. As it was not used against the Petitioner, the outcome of the suppression hearing would have been the same.

Therefore, the Court finds that this was not a custodial interrogation and not subject to the Miranda warnings.

Petitioner cites *Rhode Island v. Innis*, 446 W.S. 291, 100 S.Ct. 1682 (1980) concerning the issue of interrogation and the last sentence of their

quote is illuminating. "But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on part of police officers that they should have known were reasonable likely to elicit an incriminating response." *Id* at 302. Surely the words of Deputy Ellis were not likely to elicit an incriminating response to the original fire, but were merely an attempt to determine the situation concerning the new fire.

Finally, even if there was any error, it would be harmless in light of the fact that he was arrested moments later, given his Miranda warnings and still gave an inculpatory statement.

Therefore, the Court finds no merit in this allegation.

B. That admitting the hearsay identification of the Petitioner violated the Petitioner's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, Article III, Section XIV of the West Virginia Constitution. Specifically, the Petitioner contends:

1. That the Petitioner's right to confront witnesses against him was violated when the report of Officer Sexton containing identification testimony allegedly given by Mike Smith was admitted into evidence.
2. That the Prosecution repeatedly tried to get this identification testimony admitted into evidence.
3. The state used this identification testimony in its closing argument.

The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354 (2004).

Confrontation cases require the Court to determine which police "interrogations" produce statements that fall within this prohibition. In *Davis v. Washington*, 547 U.S. 125 S.Ct. 2266, 165 L.Ed.2d 224 (2006), (June 19, 2006) consolidated with *Hammon v. Indiana* (June 19, 2006), the Court further clarified the meaning of "testimonial statements vs. nontestimonial".

In *Davis*, a 911 operator ascertained from Michelle McCottry that she had been assaulted by her former boyfriend, petitioner Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a

domestic no-contact order, but the court admitted the 911 recording despite Davis's objection, which he based on the Sixth Amendment's Confrontation Clause. He was convicted. The Washington Court of Appeals affirmed, as did the State Supreme Court, which concluded that, inter alia, the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial.

Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial, it suffices to hold that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at Pp. 6-7.

The question in *Davis* was whether, objectively considered, the interrogation during the 911 call produced testimonial statements. "In contrast to *Crawford*, where the interrogation took place at a police station and was directed solely at establishing a past crime, a 911 call is ordinarily designed primarily to describe current circumstances requiring police assistance. The difference is apparent here. McCottry was speaking of events as they were actually happening, while *Crawford's* interrogation took place hours after the events occurred. Moreover, McCottry was facing an ongoing emergency. Further, the statements elicited were necessary to enable the police to resolve the present emergency rather than simply to learn what had happened in the past. Finally, the difference in the level of formality is striking. *Crawford* calmly answered questions at a station house, with an officer-interrogator taping and taking notes, while McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even safe. Thus, the circumstances of her interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency. She was not acting as a witness or testifying. *Id.* at Pp. 11-14.

The Court agrees with the Respondent's contention that it was obvious from the facts of this case that the statement taken from a Mr. Smith was taken by Officer Sexton during his initial arrival at the fire scene and in his attempts to determine what had happened.

It was an extremely dangerous situation as the entire building was engulfed in flames and the officer was certainly faced with an on-going emergency. He did not know if there were residents in any of the apartments or in the businesses. In his attempts to ascertain these facts and any others that might assist the on going battle against the blaze, he questioned the on lookers. Mr. Smith indicated that he saw a man with a scar on his forehead and wearing a dark hooded sweatshirt kick in the door of the building shortly

before the fire started. Therefore, per the language of *Davis*, the statement included in his report and given to Officer Compton was not testimonial in nature and therefore not subject to the strictures of *Crawford*.

Furthermore, the State attempted to have Mr. Smith present at trial, a subpoena was issued for him, but by the time the trial was heard, over one year and six months after the fire, he was not to be found.

The Trial Court allowed the incident report of Officer Compton into evidence under the business record exception to the hearsay rule and the Petitioner contends that *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), should bar this evidence. In *Mechling*, the Court follows the holding of *Crawford* and makes it clear that the business record exception can no longer be used to get into evidence that which should be barred by the Confrontation Clause. However, this presupposes that the evidence was testimonial in nature and Respondent has established that it was not.

Furthermore, even if this was the wrong basis under which to admit this evidence, the Court has firmly established that regardless of any fallacy in the admission of evidence, if there exists any legal grounds for said admission, it is not error. "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

Therefore, the Court finds there was no error in admitting said evidence or in the Prosecutor commenting thereon in his closing argument.

C. That the conviction for First and Second Degree Arson, and sentences of 20 years and 10 years, consecutively, violate the Double Jeopardy Clause of the 5<sup>th</sup> Amendment to the United States Constitution and Article III, Section V of the West Virginia Constitution by subjecting the Petitioner to multiple punishments for the same offense. Specifically, the Petitioner contends:

1. That Second Degree Arson is a lesser included offense of First Degree Arson.
2. That Second Degree Arson contains no elements different from those elements in First Degree Arson.

The West Virginia Supreme Court has set forth the protections afforded by the double jeopardy clauses of the United States and West Virginia Constitutions in syllabus points one and two of *State v. Gill*, 416 S.E.2d 253 (1992):

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. Syllabus Point 1, *Conner v. Griffith*, 238 S.E.2d 529 (1977). 187 W.Va. at 138, 416 S.E.2d at 255.

We have settled rules to determine whether the protection against double jeopardy has been violated. In examining double jeopardy issues in the context of multiple punishments imposed after a single trial, we look to the legislative intent as to punishment in the manner set forth in *Gill*:

In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof that the other does not. Syl. Pt. 8, in part, *Gill*, 187 W.Va. at 138, 416 S.E.2d at 255.

As stated in *Gill*, if the Court finds no clear legislative intent to define a separate and distinct offense with additional punishment, they turn to the analysis first required by *Blockburger v. United States*, 284 U.S. 299 (1932), and consistently applied by this Court as an appropriate analysis under West Virginia's constitutional prohibition against double jeopardy as well as the federal prohibition found in the Fifth Amendment to the Constitution of the United States: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

However, in several subsequent cases, the Supreme Court recognized that the *Blockburger* test is one of statutory construction and should not control statutes in which Congress has made its intent clear. In *Garrett v. United States*, 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L. Ed. 2d 764, 771 (1985), the Supreme Court announced: "Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine

whether the legislature-in this case Congress-intended that each violation be a separate offense."

In *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983), the court addressed a defendant's contention that his convictions for possession with intent to deliver cocaine and possession with intent to deliver LSD related to the same transaction and could not be punished separately. The defendant maintained that under *State v. Barnett*, 168 W.Va. 361, 284 S.E.2d 622 (1981), simultaneous delivery of two controlled substances to the same person is one offense for purposes of the double jeopardy clause. In *Zaccagnini*, however, this Court distinguished *Barnett* and explained that the *Barnett* scenario involved "simultaneous delivery of two controlled substances that violated the same statutory provision and carried the same penalty." 172 W.Va. at 499, 308 S.E.2d at 139. By contrast, *Zaccagnini* presented the Court with a situation in which the defendant had violated two statutory provisions requiring different evidence to sustain a conviction. *Id.* at 500, 308 S.E.2d at 140. The Court determined that possession with intent to deliver a narcotic drug was a separate and distinct offense from that of possession with intent to deliver another controlled substance, and concluded that an offender could be separately punished for each without violating double jeopardy principles "because there is embodied within the penalty provision, W.Va. Code, 60A-4-401(a)(i), a separate definitional provision: 'a controlled substance . . . which is a narcotic drug.'" *Id.* at 502, 308 S.E.2d at 142. The Court summarized as follows in syllabus point eight of *Zaccagnini*: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." See also *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932).

If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.

The focus in this case thus becomes did the legislature intend that each violation be a separate offense. The Court finds that this answer is overwhelmingly in the affirmative.

In short, West Virginia Code 61-3-1, First Degree Arson, provides for the intentional burning of a dwelling whereas Section 61-3-2, Second Degree Arson, provides for the intentional burning of any other building not classified in section 1 as a dwelling. Petitioner alleges that *State v. Mullins*, 383 S.E.2d 47 (1989) stands for the proposition that the Supreme Court has determined that Second Degree Arson is a lesser included offense of First Degree Arson. However, in *Mullins*, the defendant was charged only with First Degree Arson, unlike in the present case and what the court says is as follows:

The appellants in this case, however, were not entitled to a lesser included offense instruction, and the circuit court had no duty to give such an instruction even though defense counsel failed to offer one. We have held that "[w]here there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982). See *State v. Thompson*, 176 W.Va. 300, 308, 342 S.E.2d 268, 276 (1986) and *State v. Ruddle*, 170 W.Va. 669, 671, 295 S.E.2d 909, 911 (1982). See also syl. pt. 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985). As stated in section III of this opinion, the evidence in this case established first degree arson. There is no insufficiency on the necessary elements of the greater offense, first degree arson in this case, which are different from those of the lesser included offense, second degree arson. There was no evidence presented at trial that sought to prove that the burned building was not a dwelling. Moreover, as stated previously in this opinion, the evidence overwhelmingly supported the first degree arson conviction because of the apartment units located within the burned building.

Thus, there is no evidentiary dispute on the elements of the greater or lesser included offense. The appellants deny committing the offense at all and claim to have been somewhere else when the burning occurred. Pp 421.

Therefore, the Court finds no merit in this allegation.

D. That the Petitioner did not receive constitutionally effective assistance of counsel. Specifically, the Petitioner contends:

1. That counsel for the Petitioner did not conduct an adequate investigation into evidence that Petitioner believed crucial to his defense.
2. That counsel for the Petitioner held a suppression hearing without having legible documents, then refused to request a new suppression hearing or a reconsideration after receiving legible documents.
3. That counsel for the Petitioner failed to subpoena Deputy Fire Marshal Devin Palmer to the suppression hearing.
4. That counsel for the Petitioner failed to object to the text of the State's order that was entered after the suppression hearing.

Petitioner claims that the Order that was entered was different from what the Court's ruling was regarding the pre-trial hearing.

Claims of ineffective assistance of counsel are not to be made lightly. *Tucker v. Holland*, 174 W.Va. 409, 327 S.E.2d 388 (1985).

In syllabus points 19 and 21 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), we established the following standards for determining ineffective assistance of counsel:

In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, court should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.

The Court reiterated in *State ex rel. Edgell v. Painter* 206 W. Va. 168, 522 S.E.2d 636 (1999), the standard to be used by the Court for ineffective assistance of counsel:

In syllabus point 5 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), Justice Cleckley articulated the test used to evaluate a claim of ineffective assistance of counsel. *State v. Miller* held:

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

The *Miller* decision further noted:

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. *Syl. Pt. 6, Miller*.

Justice Cleckley later clarified in syllabus point 5 of *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995), that 'in deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), but may dispose of such a claim based

solely on a petitioner's failure to meet either prong of the test.' The decision in *Legursky* crystallized two other important observations:

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.

In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, this Court will not view counsel's conduct through the lens of hindsight. Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices. *Syl. Pts. 3 & 4, Legursky.*

It is thus well established that a petitioner who seeks release from imprisonment by habeas corpus on the ground of ineffective assistance of counsel has the burden of proving by a preponderance of the evidence the charge made. *Carrico v. Griffith*, 165 W. Va. 812, 272 S.E.2d 235 (1980); *State v. Thomas, supra*; *State ex rel. Scott v. Boles*, 150 W. Va. 453, 147 S.E.2d 486 (1966); *State ex rel. Owens v. King*, 149 W. Va. 637, 142 S.E.2d 880 (1965).

The Court finds that the evidence in this record is sufficient to defeat this allegation.

Mr. Laishley is an experienced criminal trial lawyer having handled several murder trials and numerous less serious offenses.

Petitioner asserts that Mr. Laishley was ineffective in that he did not obtain a video tape taken by a local television station or pictures of what the Petitioner was wearing the night of the crime.

Mr. Bragg, counsel for the Petitioner informed the Court, upon inquiry, that he had called the television station and they informed him that they had no such video tape. The parties were unable to verify whether there was any picture taken of the defendant that would have been helpful. Even if there had been a booking photo, it may or may not have shown the Petitioner wearing a hooded sweatshirt. Even if it had shown the Petitioner without said sweatshirt, it would not have been positive proof that he was not wearing one

that night as the jail or police may have taken it off for the photo. In light of this testimony and the uncertainty of the value of the photo if one existed, the Court finds no merit in this allegation.

Petitioner alleges that counsel for the Petitioner held a suppression hearing without having legible documents, namely the statement of Assistant State Fire Marshal Devin T. Palmer and did not subpoena him to the suppression hearing. He then refused to request a new suppression hearing or a reconsideration hearing after receiving legible documents.

Counsel testified that he was aware of the statement of Mr. Palmer and did not believe that his testimony could help the Petitioner at the suppression hearing. Trial Counsel testified that to his knowledge, he did issue a subpoena for Mr. Devlin, but that he was working out of state and he was unable to secure his presence at the suppression hearing or at trial. Further, that it appeared from his statement that his testimony would only have served to bolster that of Deputy Ellis.

Therefore, the Court finds no merit in this allegation.

That counsel for the Petitioner failed to object to the text of the State's order that was entered after the suppression hearing. Petitioner claims that the Order that was entered was different from what the Court's ruling was regarding the pre-trial hearing. Further, the Petitioner testified that he believed there were two different orders entered.

The Court examined the Court file and found that there was only one order and entered a copy of the clerk's docket sheet into evidence as Court's Exhibit No. 1.

The orders of the Court are reflected by the wording contained in the actual written opinion, not what is said from the bench. Therefore, if the Court made additional findings in its opinion order, there is no mistake or error and trial counsel would not have been expected to object to said order unless the findings therein were contrary to those given from the bench.

Therefore, the Court finds no merit in this allegation and the Court does not find any ineffective assistance of counsel in any regard in this trial. Trial Counsel secured for the defendant a not guilty verdict on all other counts in the indictment and in the Court's opinion, saved the Petitioner from

what would have probably amounted to a life sentence.

The Petitioner made no allegation of any Federal grounds in his memorandum and therefore, the Court makes no findings thereon.

With reference to any issues checked by the Petitioner on the Losh checklist and not briefed in any manner by the Petitioner, nor addressed on today's date by Petitioner, the Court does find that there is no merit to any of said grounds.

It is therefore the ORDER of this court that the petition for post-conviction habeas corpus relief is hereby denied.

WHEREFORE, the Court finds that the petitioner is entitled to no relief, and it is therefore ORDERED that the writ heretofore issued is discharged and held for naught, and that the petition herein be dismissed with prejudice from the docket of this court. The Clerk is directed to send a copy of this Order to petitioner and to Rory Perry, Clerk, Supreme Court of Appeals, State Capitol Building, Charleston, West Virginia 25305, for filing in the Supreme Court's habeas corpus archives. Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

Entered this 23 day of May, 2007

ORDER: *Dan O'Hanlon*  
DAN O'HANLON, CIRCUIT JUDGE

*F. Jane Mustard*  
F. Jane Mustard, State Bar# 1835  
Assistant Prosecuting Attorney  
Cabell County Prosecuting Attorney's Office  
Huntington, WV 25701

*Steve Bragg*  
Steve Bragg, State Bar# 9955  
COUNSEL FOR PETITIONER

ENTERED Circuit Court Civil Order Book  
No. 206 Page 641 this  
JUN 8 - 2007

STATE OF WEST VIRGINIA  
COUNTY OF CABELL  
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON 6-8-07 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS SEP 26 2007  
*Adell Chandler* CLERK  
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA