
NO. 34155

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

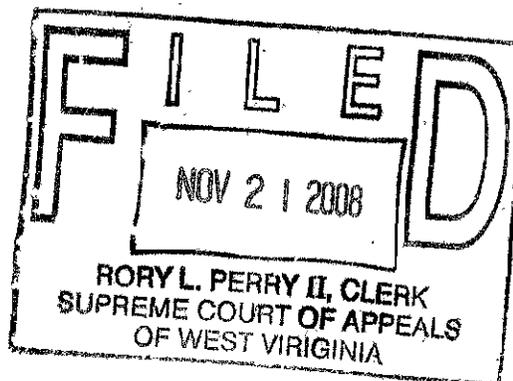
THOMAS McBRIDE, Warden,
Mt. Olive Correctional Complex,

Appellee,

v.

STATE OF WEST VIRGINIA
ex rel. DANA DECEMBER SMITH,

Appellant.



BRIEF OF APPELLEE
(As Corrected on November 21, 2008)

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APPELLEE'S BRIEF
(As Corrected on November 21, 2008¹)

I.

STATEMENT OF THE CASE

Dana December Smith, Appellant below (hereafter "Appellant"), appeals the September 17, 2007, order of the Circuit Court of Kanawha County (Walker, J.), denying his petition for post-conviction relief/Motion for New Trial based on newly discovered evidence.²

This success of Appellant's appeal hinges on the credibility of a single newly discovered witness, convicted serial killer Tommy Lynn Sells ("Sells"). Mr. Sells has admitted, denied, admitted again, and denied again that he had anything to do with the murders. Although Appellant argues that

¹After reading Appellant's Response Brief, counsel for Appellee has found several clerical errors, including one which is affirmatively misleading. Consequently, counsel hereby files a corrected version of the same document. All corrections are highlighted and underlined.

²It is not clear whether the Appellant has filed a Petition for Post-Conviction Relief or a Motion for a New Trial based on newly discovered evidence under Rule 33, W. Va. R. Crim. P.

the lower court failed to properly apply this Court's five-pronged legal test to the facts, the record does not bear him out. The lower court applied the correct legal standard; it simply found Appellant's only relevant witness lacked credibility. Thus, this appeal does not focus on questions of law: it focuses on facts already presented and rejected by the lower court.

II.

STATEMENT OF FACTS

On Saturday, September 7, 1991, at approximately 5:30 p.m., the Appellant murdered 63-year-old Margaret McClain and her 36-year-old daughter Pamela Castaneda by stabbing them to death. (Tr. 1668, 1703, 2519.) The murder occurred at Ms. McClain's home in Leewood, a small collection of homes at the forks of Cabin Creek, Kanawha County, West Virginia.

The Appellant stabbed Ms. McClain 14 times. Her injuries included a five-inch deep knife wound which punctured her lung and heart, and a wound to her abdomen piercing her liver. (Tr. 2551-52.) State Pathologist Irwin Sopher ("Sopher") found defensive wounds to her arms and hands. (Tr. 2557.) Ms. Castaneda's injuries included 15 stab wounds to her torso, abdomen, arms, forearms and hands. (Tr. 2519.) A stab wound to her shoulder blade penetrated seven inches, resulting in a two-inch tear to her right lung. (Tr. 2527.) Another wound nicked Ms. Castaneda's spleen causing her to bleed to death. (Tr. 2530.)

Two days later, Ms. McClain's son Robert discovered their bodies sometime between 5:00 and 5:30 p.m. (Tr. 1737, 1739.) His mother's body was lying in a pool of blood on her kitchen floor under her kitchen table. She was wearing a blue housecoat but was naked from the waist down. Robert found his sister's (Ms. Castaneda) body in the living room. Her neck and shoulders were

propped against a chair. (Tr. 1740.) She was also naked from the waist down. (Tr. 1740.) Sopher later found intact sperm in Ms. Castaneda's vagina.

Kanawha County Sheriff's Deputy John Johnson arrived at the McClain home at about a quarter after 6:00 p.m. (Tr. 1758.) He saw Ms. McClain lying on her back in a pool of blood. (Tr. 1761, 1777.) He found Ms. McClain's jeans and panties rolled up and stuffed under a sofa cushion. (Tr. 1792-93, 2023.) He also found a blood-stained, military green canteen lying on the dining room floor. (Tr. 1768.)

When these murders occurred the Appellant was living with friends Mary and Sam Walls in West Logan, West Virginia. (Tr. 2037, 2427-28.) He had a fondness for military clothing, often borrowing Sam Walls' clothes, and stolen cars. The day of the murder he "borrowed" the Walls' car. After killing Ms. McClain and Ms. Castanada, he stole their car.

The day of the murder, sometime between 12:00 and 1:00 p.m., Teddy Painter, news editor for the Logan Banner, spoke with the Appellant in Logan. (Tr. 2448.) The Appellant was wearing camouflage pants, an olive color t-shirt, boots, and a large black belt with a hunting knife attached. (Tr. 2448-49.)

Several witnesses placed the Appellant in Leewood at the time of the murder. Steve Pritt testified the Appellant arrived at his house at about 4:30 p.m. driving the Walls' car.³ (Tr. 2344-45.) The Appellant was wearing camouflage pants, military boots, a baseball hat and a pair of sunglasses. (Tr. 2346.) He had a knife in a leather sheath and a canteen hooked to a green, military belt. When Pritt jokingly accused the Appellant of being a narc, the Appellant took the knife out of its sheath

³The McClain home was a quarter mile from Mr. Pritt's house. (Tr. 2344.)

and waived it in Pritt's face. (Tr. 2349.) Pritt testified that knife blade was approximately eight to ten inches long. (Tr. 2349.)

The Appellant left the Pritt home sometime before 5:00 p.m., driving Mr. Walls' car towards the McClain home.⁴ (Tr. 2357.) As he left, Appellant told Mr. Pritt that he was "on a mission." (Tr. 2351.)

Cabin Creek Fire Chief Kenneth Russell saw the Appellant flip Mr. Walls' car into a ditch on Cabin Creek Road. (Tr. 2229.) Mr. Russell could not identify the driver, and was not asked to identify the car. A Uniform Traffic Accident Report prepared by State Trooper D.R. Kincaid noted that Mr. Russell called 911 at 4:45 p.m. (Tr. 2232-33.) Mr. Russell characterized the driver as out of control, cussing and carrying on. (Tr. 2229.)

Harold Brown testified that he picked up the driver of the wrecked car at the accident scene and drove him four miles to the forks at Leewood where he asked to be let out. (Tr. 2238.) Brown could not identify his passenger or describe what he was wearing, but stated that he was the same person who had driven Mr. Walls' car off the road.⁵ (Tr. 2235-36.) He was bleeding from his arm and back, and left a blood spot on the back of Brown's passenger seat. (Tr. 2239, 2243.) Brown did not see a canteen or a knife. (Tr. 2246.) His passenger did have a shell box, which he had taken out of his car before accepting a ride. He also took the box with him when he got out of the truck. Mr. Brown testified that the box was large enough to contain a knife and canteen. (Tr. 2247-50.)

⁴Mr. Pritt did not refer to a clock nor did he have a watch on the day the Appellant came to see him. He testified that the Appellant "could" have left at about 5:00 p.m. (Tr. 2356.)

⁵The Appellant does not dispute that he was driving the Walls' car that evening.

Trooper Kincaid arrived at the accident scene at about 5:35 p.m. (Tr. 2391.) By that time the Appellant had left the scene leaving Mr. Walls' car and pit bull behind. (Tr. 2393-94.)

Leewood resident Cathy Bragg testified that she was home with her daughters Saturday evening. (Tr. 2305.) She lived 12 houses from Ms. McClain. (Tr. 2305.) That evening she saw a man walking towards the McClain home wearing a camouflage shirt and pants, army boots, and a belt with a canteen and a knife attached. (Tr. 2306, 2318.) She could not recall the time, and could not identify the Appellant in a line-up.⁶ (Tr. 2308.) Leewood resident Ernest Jarrell testified that he saw a man dressed in camouflage walk by his house around the same time. The man was dressed in the same clothes described by Ms. Bragg. (Tr. 2321-22.) Mr. Jarrell could not pick the Appellant out of a line-up.

The last person to see the Ms. McClain or Ms. Castenada alive was next-door neighbor Dora Back.⁷ (Tr. 1345.) Ms. Back was home until 5:00 p.m. (Tr. 1347-48.) She spent the afternoon talking with Ms. McClain. (Tr. 1347.) At 5:00, her son, **Glen Opie Back**, came to pick her up. (Tr. 1348.) Before leaving, Mr. **Back** spoke briefly with Ms. Castaneda. (Tr. 1349.)

Before leaving, Ms. Back saw the victims' white Ford Taurus station wagon parked in its usual spot in their front yard. (Tr. 1350.) Ms. Back did not see the victims' car when she arrived

⁶The Appellant noted that Ms. Bragg had failed to mention the knife or the canteen in her September 11 statement. This issue was addressed during Ms. Bragg's cross-examination. (Tr. 2311.)

⁷Ms. Back testified by evidentiary video deposition as did her daughter, Rachel Britton.

home at 8:30 p.m.⁸ (Tr. 1351.) Although she was home all day Sunday and Monday, she did not see or hear from Ms. McClain or Ms. Castaneda.⁹

Ms. Back's daughter, Rachel Britton, testified that she arrived at her mother's house sometime between 5:40 and 6:00 p.m. (Tr. 1357, 1361.) Ms. McClain's car was not out front. (Tr. 1359.) She did not see or hear from either victims again. (Tr. 1360.)

In his brief to this Court, the Appellant states that Steve Pritt saw the victims in their front yard at 6:00 p.m. or sometime thereafter. (Appellant's Brief 6; Tr. 2360.) The defense fails to tell this Court the whole story. In a statement taken by the investigating officers September 12, Mr. Pritt claimed that he had left his house about 5:00 p.m.. (Tr. 2361.)

The following exchange occurred on re-direct:

Q: Again, are you certain about the time?

A: No, ma'am, I'm not.

Q: If I were to tell you that the defendant apparently had a car accident, or if the evidence was and the police report showed that the defendant had a car accident at approximately 4:45 p.m. on Cabin Creek Road in the K-car after he left your house, you wouldn't dispute that time, would you?

A: No. I didn't see the trooper go past where I was at before, I went down the road.

Q: So, the Trooper had already gone past where you were?

A: Yeah, he was probably – apparently still on up the road. I have no idea. I didn't see his car go by.

⁸Although it was their only means of transportation, neither Ms. McClain or Ms. Castaneda reported their car stolen.

⁹Veda Painter, accompanied her mother, Rosetta Jenkins, to the victims' home on Sunday at about 3:00 p.m. There was no reply when they knocked on their door. They could hear a dog barking inside. (Tr. 2389.)

Q: Okay. Or a trooper?

A: Yeah, a trooper.

Q: Okay. So I guess – so, are you saying then that you are not certain about when you saw the people in the yard, the McClains and Pam in the yard.

A: No. I said I cannot pinpoint it. You know, it was just after Dana left.¹⁰

(Tr. 2361-62.)

Defense counsel conceded that the Appellant stole Ms. McClain's white Ford Taurus Saturday evening. (Tr. 1685.) Patricia McComas Lee, Ms. McClain's daughter and Ms. Castaneda's sister, testified that the Taurus was the victims' only means of transportation. Had it been stolen while they were alive, they would have reported the theft to the police. (Tr. 1703.)

Ms. McClain's daughter, Paula Sydenstricker, was the first family member to go inside the house with the investigating officers. (Tr. 2501.) She noticed that the victims' television and VCR were missing. (Tr. 2502.) The cable, ordinarily attached to the VCR, was found lying on the floor. (Tr. 2501.) The officers found the remote to the VCR¹¹ inside the victims' home. **(Tr. 1829.)** Also missing was a Walkman headset, identified by Ms. Sydenstricker as belonging to Ms. Castaneda. When not using the headset, Ms. Castaneda kept it in her top dresser drawer. (Tr. 2502.) Further investigation revealed that a Cobra CB radio was also missing from the McClain home. (Tr. 1844, 2054-56.)

¹⁰This exchange occurred in front of the jury who were free to judge the witness's credibility.

¹¹The State produced a rent-to-own agreement covering the missing VCR signed by Ms. Castaneda on August 31, 1991, from the Marmet Rent to Own store. (Tr. 2060, 2495.)

The evening of the murders, the Appellant, driving the victims' white Taurus, arrived at Anita McKinney's home in Fosterville, Boone County.¹² (Tr. 2253-54.) He was wearing a camouflage shirt, and a pair of blue jeans. (Tr. 2256.) There was a box on the front passenger seat holding a VCR. (Tr. 2256.) The Appellant lied to Ms. McKinney, telling her that he was taking it in for repairs. (Tr. 2256.) Although she could not recall when he arrived, Ms. McKinney testified that they spoke for about 15 minutes. (Tr. 2254.) Just before the Appellant left, he asked Ms. McKinney what time it was. She told him it was 7:00. (Tr. 2254, 2257.)

The Appellant returned approximately an hour later. (Tr. 2257.) He and Ms. McKinney sat at her kitchen table and talked until sometime after 1:00 a.m. (Tr. 2260.) Sometime that evening she noticed that Appellant's lower left back was badly cut. (Tr. 2259.) He also had injured one of his wrists, and scraped one of his left knuckles. (Tr. 2259.) He again lied, telling Ms. McKinney that he had injured himself running through a briar patch. (Tr. 2259.) He also claimed that the white Taurus was his mother's car. (Tr. 2260.) The Appellant stayed the night, leaving Sunday morning about 10:00 a.m. (Tr. 2261.)

The Appellant arrived at Denise Morgan's home in Madison, Boone County, at 11:30 Sunday morning. (Tr. 2451.) Ms. Morgan knew the Appellant was staying with her boyfriend, Sam Walls'. (Tr. 2450.) He was dressed in a camouflage jacket, no shirt, blue jeans with a hole in the right knee, and black, fingerless gloves. (Tr. 2452.) Upon his arrival, he asked Ms. Morgan to hold onto a Walkman headset, a VCR, and a Cobra CB radio. The items were in the victims' car. (Tr. 4852.) Two days later the witness saw the victims' white Taurus on the news. She immediately connected

¹²Ms. McKinney had briefly met the Appellant before, and the Appellant had been to her house once before. (Tr. 2256.) Fosterville is a 32-minute drive from Ms. McClain's home.

it with the car the Appellant was driving. (Tr. 2452-53.) She notified her father, a deputy sheriff in Boone County. (Tr. 2454.) The investigating officers recovered the items from Ms. Morgan on September 15.¹³ (Tr. 2007.)

On September 8, the Appellant falsely reported that the Walls' car had been stolen by someone named Paul Fenwick.¹⁴ (Tr. 1432, 2281.) On September 10, on a tip from a DOH employee, Logan State Trooper Marty Allen found the victims' car on a secluded, dead end, dirt road in Chapmanville, Logan County. (Tr. 1816-17, 1820, 1927.) The car key was never found, but the condition of the steering wheel column did not suggest that the car had been hot wired. (Tr. 2212-13.) The investigating officers later recovered Ms. Castaneda's driver's license, discarded along Corridor G near Turtle Creek. (Tr. 1908.) Ordinarily, Ms. Castaneda left the car door unlocked and kept her keys on a nail just beside the kitchen door.

On September 10, members of the Logan County Sheriff's Department called the investigating officers, telling them that the Appellant had voluntarily come to their office wanting to talk about drug activity in Logan County. (Tr. 1815.) Later that afternoon, Detectives Randy West and Richard Rose arrived in Logan to discuss the murders. Before telling the Appellant that he was a suspect, they had him sign a *Miranda* waiver form. Once informed of their purpose, the Appellant denied being on Cabin Creek Saturday evening. Because the officers failed to tell the Appellant why they wanted to talk to him until after he waived his rights, the trial court suppressed Appellant's statement. (Tr. 1571-75.) *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹³The CB radio box was recovered from the victim's car. (Tr. 2054.)

¹⁴The Appellant also told Sam Walls that Paul Fenwick had stolen his car. (Tr. 2433.)

Later in the day the Appellant contacted Trooper Allen. (Tr. 1931.) The Appellant had, in the past, worked as a snitch for the trooper. He told Trooper Allen that two Kanawha County detectives had just questioned him about the Cabin Creek murders. The Trooper arranged a meeting for later that day. The Appellant met Trooper Allen that evening in a church parking lot across the street from the Walls' home. (Tr. 2284-85.) He claimed that he was at the Walls' home Saturday. At 11:00 a.m. he left to wash their car, and fill it with gas. (Tr. 2286.) Later, he met a friend in Logan and helped him load his truck. He returned to the Walls' home at about 1:00-1:15 p.m. (Tr. 2287.) At approximately 3:30, he hitched a ride to the Top of the Hill Tavern, north of Madison arriving sometime between 5:30 and 6:00 p.m. (Tr. 2289.) At about 6:30 p.m., he left the bar, and walked to Anita McKinney's house. (Tr. 2289.)

The same day he met with Trooper Allen, the Appellant called Anita McKinney telling her he was a suspect in a murder case. He asked her to lie to the police, saying that he was at her house the entire weekend, and was not driving the victims' car. (Tr. 2264-65.) She characterized his tone as "insistent," not threatening. (Tr. 2265.)

Later that evening Trooper Allen called Ms. McKinney. (Tr. 2266.) She told the trooper that the Appellant arrived at her house sometime after 6:30 p.m. (Tr. 2292.) She also told him that the Appellant did not have a car. Shortly thereafter, Ms. McKinney called Trooper Allen back admitting that she had been less than honest the first time. The Appellant had come to her house in the victims' car, and she had understated the seriousness of his injuries. (Tr. 2294.)

Appellant's friend Jeanette Laws testified that she saw the Appellant the day of the murders, between 7:30 and 8:00 p.m. (Tr. 2333.) He was driving a white Ford Taurus which he said belonged to his stepfather. (Tr. 2332-35.) He was wearing a camouflage jacket, a bloody, white teddy bear

t-shirt, blue jeans with blood on the left, front leg, and tennis shoes. (Tr. 2332.) His wrist was cut, and there were bloody scratches on his back. (Tr. 2334.) He took off the t-shirt and laid it on her floor. (Tr. 2334.) When Ms. Laws asked him how he had been injured, he told her that he had been in a fight with his ex-girlfriend's present boyfriend. (Tr. 2337.) The Appellant stayed at Ms. Laws' house for approximately 20 minutes. (Tr. 2336.)

The officers recovered the bloody teddy bear t-shirt from Jeanette Laws on September 13. (Tr. 1841, 1910.) Serological and DNA tests found blood stains consistent with Appellant and Ms. Castaneda on the shirt.¹⁵ (Tr. 2182.)

The State's DNA expert, FBI Agent Linda Harrison, testified that there was a 1-in-25 chance that another person would have the same alleles as the Appellant. (Tr. 2184.) Appellant claims that these odds rendered the evidence minimally probative. (Appellant's Brief 10.) Again, this is only half the story. In fact, Agent Harrison arrived at trial with a revised figure of a 1-in-250 random match probability. Because of the late disclosure, the State was not permitted to introduce this figure into evidence. (Tr. 2155-57.)

Before her death, Ms. Castaneda designed t-shirts identical to the one recovered from Ms. Walls. (Tr. 1708.) She sold some and kept the rest for her family. (*Id.*) The teddy bear t-shirts were designed for her family. (Tr. 1719, 1756.) The investigating officers recovered several t-shirts

¹⁵The Appellant now claims that this evidence has no probative value, as the Appellant was involved in an accident before putting the t-shirt on, and the victim had a medical condition which caused her to bleed from her rectum. This evidence was presented to the jury during the original trial. There was no evidence remotely suggesting that the victim had worn this shirt before or that the shirt was in the victims' car before the Appellate put it on. Once again, the Appellant is asking this Court to re-litigate an issue that was already decided.

similar to the one described by Ms. Walls, along with patterns, glitter, and decals from inside the McClain home. (Tr. 1828-29.)

On September 13, the investigating officers searched the Walls' home. (Tr. 2037, 2040.) They recovered a camouflage t-shirt, brown camouflage boots,¹⁶ black fingerless gloves (the same gloves identified by Denise Morgan), a camouflage jacket,¹⁷ a camouflage cap, camouflage pants, a military green web belt, a hunting knife, a brown leather sheath, and a brown leather case. (Tr. 2051.) The knife had a five-inch blade and a four- and one-half-inch handle. (Tr. 2051-52.)

The Appellant did not have his own bedroom, instead sleeping in the Walls' living room. (Tr. 2425.) Sometime in early September, the Appellant asked Mr. Walls if he could "wear" his hunting knife. Mr. Walls declined. (Tr. 2419, 2431.) Although he had seen the Appellant wear his boots, the same ones introduced by the State, he could not recall if the Appellant was wearing them the day he asked to borrow the knife. Mr. Walls did recall that the Appellant was wearing his black gloves, camouflage pants,¹⁸ and jacket. (Tr. 2423, 2424, 2426.) Later, Mr. Walls' mother found a green webbed belt¹⁹ hidden in a cigarette box. (Tr. 2429.)

¹⁶Teddy Painter spoke to the Appellant at approximately 1:00 p.m. on the day of the murders. He testified that the Appellant was wearing **boots**. Steven Pritt and Cathy Bragg also testified that the Appellant was wearing **boots**.

¹⁷Both Denise Morgan and Jeanette Laws testified that, on the day of the murder, they saw the Appellant wearing a camouflage jacket. (Tr. 2332, 2452.)

¹⁸Steven Pritt, and Teddy Painter testified that they saw the Appellant the day of the murders. Both testified Appellant was wearing camouflage pants. The day of the murders, Cathy Bragg noticed a man wearing camouflage pants walking towards the victims' home. She could not pick the Appellant out of a line-up.

¹⁹Teddy Painter and Steve Pritt testified that the Appellant was wearing a military-style belt with a hunting knife attached when they saw him. Mr. Painter testified that the belt was black. Mr. Pritt testified the belt was green. Cathy Bragg and Ernest Jarrell testified that they saw a man walking

Mr. Walls next saw his hunting knife the Monday after the murders. At the Appellant's insistence, Mr. Walls used it to cut a dinner roast. After fetching it from a bureau in his upstairs bedroom, Mr. Walls noticed that the knife's appearance had changed since he had last seen it. (Tr. 2437.) Someone had cleaned off deer hair and blood he had left on the blade. (*Id.*) The knife had traces of blood and sand. Before using it, Mr. Walls washed it. (*Id.*)

The victims' bodies were transported to the morgue at approximately 7:50 p.m. on Monday, September 9.²⁰ Upon arrival, they were immediately refrigerated. They remained refrigerated until 9:30 the next morning. (Tr. 2574.) Dr. Irvin Sopher performed Ms. Castaneda's autopsy at approximately 9:30 on Tuesday morning. He found external body stiffening of the small muscles of the jaw and neck. (Tr. 2521.) The cause of death was multiple stab wounds to Ms. Castaneda's back, shoulder, arms, and hands. (Tr. 2523.) He opined that the hunting knife recovered from the Walls' residence was consistent with these stab wounds. (Tr. 2532.) A vaginal swab revealed intact sperm. (Tr. 2543.) Dr. Sopher performed Ms. McClain's autopsy that same morning. The cause of death was multiple stab wounds to her chest and abdomen. (Tr. 2560.)

Dr. Sopher originally estimated the time of death at sometime between Sunday evening and Monday morning. (Tr. 2563.) He revised his opinion when told by law enforcement that the victims were last seen alive on Saturday evening at 5:00 p.m. (Tr. 2569, 2550.) Contrary to the Appellant's assertions, there is no evidence that Dr. Sopher tailored his testimony to incriminate the Appellant. He did not state unequivocally that the victims died on Saturday evening. (Tr. 2575.) Given the

along Cabin Creek the day of the murders. Both said that the Appellant was wearing a belt with a knife and canteen attached.

²⁰The bodies were originally found at approximately 5:30 p.m. **Monday** evening.

external conditions, the degree of rigor and decomposition, and non-medical information from the investigating officers, Dr. Sopher told the jury that he could not rule out the possibility that the victims died Saturday evening. Defense counsel was afforded a full and fair opportunity to explore this issue before the jury rendered their verdict.

III.

ASSIGNMENTS OF ERROR

In his brief, the Appellant assigns the following grounds as error:

A. The circuit court erroneously denied habeas corpus relief to the Appellant because the newly-discovered confession of Tommy Lynn Sells meets all five criteria for granting a new trial based on newly discovered evidence.

B. The circuit court erroneously considered a purported recantation by Tommy Lynn Sells, despite the recantation being unauthenticated, unsworn, and not subject to cross-examination in violation of the rules of evidence and this court's precedents regarding recantations.

IV.

STANDARD OF REVIEW

"A new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special." Syl. pt. 9, *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966).

A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. Syl. pt. 2, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000). In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning

a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review. Syl. pt. 3, *State v. Vance*. See also Syl. pt. 2, *State v. Dinger*, 218 W. Va. 225, 624 S.E.2d 572 (2005), quoting Syl. pt. 2, *State v. Vance*.

[I]t is not the province of [an appellate court] to review orders granting or denying motions for new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. While the appellate court may intervene when the findings of fact are wholly unsupported by the evidence, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

United States v. Johnson, 327 U.S. 106, 111-12 (1946).

A new trial will not be granted on the ground of newly discovered evidence unless the following criteria are met: (1) The evidence must appear to have been discovered before the trial, and from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained; (2) it must appear from the facts stated in his affidavit that [defendant] was diligent in ascertaining and securing his evidence, and the new evidence is such that due diligence would not have secured it before the verdict; (3) such evidence must be new and material, and not merely cumulative; cumulative evidence is additional evidence of the same kind to the same point; (4) the evidence must be such as ought to produce an opposite result at a second trial on the merits; and (5) the new trial will be generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. Syllabus, *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979). See also *Timberlake v. State*, 271 S.E.2d 792, 796 (Ga. 1980) (failure to show one requirement is sufficient to deny a motion for new trial).

V.

ARGUMENT

A. THE APPELLANT'S BRIEF UNDERSTATES THE STRENGTH OF THE STATE'S CASE AGAINST HIM.

This Court has ruled that a new trial based on newly discovered or after acquired evidence will only be granted upon a demonstration of unusual or special circumstances. Syl. pt. 9, *State v. Hamric, supra*. A confession by a third-party, discovered after a defendant has been convicted, may constitute grounds for a new trial if the trial court finds the third-party confession credible. *State v. King*, 173 W. Va. 164, 165-66, 313 S.E.2d 440, 442 (1984) (*per curiam*), citing *Bean v. United States*, 679 F.2d 683 (7th Cir. 1982). *See also Casias v. United States*, 337 F.2d 354, 356 (10th Cir. 1964).

The lower court found that the only issue properly raised by the Appellant was the post-trial confession of Tommy Lynn Sells. (Order Denying Appellant's Petition for Habeas Corpus Relief "Order") at 14. After reviewing all of the evidence and reviewing the demeanor of the witnesses, the lower court found Mr. Sells' confession implausible. Its findings were rooted firmly in the record. There is no evidence that its findings of fact were clearly erroneous or that its ultimate decision constituted an abuse of discretion. Indeed, the Appellant does not argue as much. Instead, he presents the same facts argued below and hopes this Court will ignore the standard of review and substitute its judgment for that of the trial court.

Appellant summarizes his argument on the second page of his brief:

As explained herein, the Appellant was charged with and convicted of the crimes because he was in the wrong place with the wrong possession. He was not in the wrong place at the wrong time, but he was in the wrong place close enough to the wrong time that, with the benefit of an admittedly altered time of death by the

medical examiner, Dr. Irwin Sopher (and in the absence of the confession of Tommy Lynn Sells) the police, prosecutor – and ultimately the jury – mistook the Appellant for the actual perpetrator.

Appellant's Petition for Appeal at 2.

The Appellant vastly understates the evidence against him. The State proved that he was in Leewood at the time of the murder. Steve Pritt (Tr. 2344-45), Kenneth Russell (Tr. 2277), Harold Brown (Tr. 2238), Cathy Bragg (Tr. 2305), and Ernest Jarrell (Tr. 2321-22), all testified that they saw the Appellant, or someone dressed like the Appellant, in the Leewood area on Saturday evening. Denise Morgan testified that the Appellant was wearing a camouflage jacket, blue jeans with a hole in the knee, and black fingerless gloves when he arrived at her home the next morning. These gloves were later identified by Sam Walls. Logan Banner news editor Teddy Painter saw the Appellant on the day of the murders wearing military-styled clothing, the same sort of clothing identified by Mr. Pritt, Mr. Jarrell, and Ms Bragg.

There is no independent corroborating evidence placing Mr. Sells at the victims' home between Sunday night and Monday morning. Kanawha County Public Defender employee Jane Brumfield testified that Mr. Sells was convicted of malicious wounding in West Virginia almost a year after the Appellant murdered Ms. Castaneda and Ms. McClain. Apart from the Appellant's arrest and Sells' word, there is no evidence that Sells was in West Virginia on the date of the murders. (Hab. Tr. 16, 28-29.) Although Sells claims that he lived with the victims before killing them, there is no eyewitness testimony placing him at their house between Sunday evening and Monday morning. Appellant's counsel did not call a single corroborating witness or offer a single piece of corroborating evidence in support of Sells' claim.

The Appellant admitted that he stole the victims' car after his accident on Cabin Creek Road. Although this was their only means of transportation, the victims never reported this theft to the police or even discussed it with their neighbors. More importantly, Sells never mentioned the theft in his alleged confession. Testimony adduced at trial proved that Ms. Castaneda kept the car unlocked and the keys on a nail next to the kitchen door. No car keys were found at the victims' home. The steering column of the victims' car showed no signs of tampering nor were the car keys ever recovered. The victims' neighbor, Dora Back, testified that she last saw the victims at 5:00 p.m. on September 7. When she returned at 8:30 p.m., the victims' car was gone. She never heard from them again. Ms. Back's daughter, Rachel Britton, arrived at her mother's house sometime between 5:40 p.m. and 6:00 p.m. (Tr. 1357, 1361.) The victims' car was not there.

Anita McKinney testified that the Appellant arrived at her home in Boone County at about 6:45 p.m. The Appellant was driving the victims' car and had their VCR in a box on the passenger seat. (Tr. 2256.) The Appellant had a cut to the lower left portion of his back, a cut wrist, and scrapes to his left knuckle. He left her house at about 7:00 p.m., driving to Jeanette Laws' home. Ms. Laws described him as wearing a camouflage jacket, white teddy bear t-shirt, blue jeans with blood on the left front leg, and tennis shoes. He left the bloody t-shirt with her. Subsequent DNA tests confirmed the presence of blood stains consistent with Ms. Castaneda and the Appellant.

The next morning he delivered Ms. Castaneda's VCR, Cobra CB radio, and Walkman headset to his friend, Denise Morgan. Two days after Appellant's visit, Ms. Morgan discovered that the Appellant was driving the victims' car. She called her father, a deputy sheriff, who, in turn, called the investigating officers, who recovered the items from her.

Prior to his arrest, the Appellant repeatedly lied to his friends and law enforcement, demonstrating a consciousness of guilt. He lied to Ms. McKinney, telling her that the VCR belonged to him, that he was driving his mother's car, and that he had injured himself by running through a briar patch.²¹ (Tr. 2257-60.) Later, after an interview with the Kanawha County Sheriff's Department, the Appellant asked Ms. McKinney to tell the investigating officers that he was at her house all weekend and had arrived on foot.²² When State Trooper Marty Allen called, she repeated the Appellant's lies. Sometime shortly thereafter, the Appellant called her back, asking her if she had done what he asked. After getting off the phone with him, Ms. McKinney called Trooper Allen back and admitted that the Appellant had arrived in the victims' car, and had not been there all weekend.

The day after the murders, the Appellant falsely claimed that the Walls' car was stolen by a man named Paul Fenwick. On September 10, Trooper Allen found the victims' car in a deserted area of Chapmanville. That same day, the Appellant went to the Logan County Sheriff's Department to discuss drug activity in the Logan Area. Two Kanawha County deputies drove to Logan to question the Appellant about the Cabin Creek murders. The Appellant denied being on Cabin Creek Road the evening of the murders. After this interview, the Appellant called Trooper Allen again. They met later that evening. The Appellant told Allen that he spent the evening of the murder at the Top of the Hill Tavern in Madison. (Tr. 2286-89.)

²¹He told Jeanette Laws that he was injured during a fight with his former girlfriend's present boyfriend.

²²After lying for the Appellant, Ms. McKinney called the officer back and admitted that she had been less than truthful.

Sam Walls testified that the Appellant lived with him that summer. The Appellant had stayed with him that summer, and frequently borrowed his camouflage clothing and his hunting knife. Pursuant to a search warrant and the Walls' consent, the investigating officers recovered several items of clothing consistent with the clothing worn by the Appellant the night of the murder. Mr. Walls testified that someone had washed the deer hair and blood from his hunting knife without his knowledge. He identified something that appeared to be blood and sand on the knife. Dr. Sopher later testified that the victims' injuries were consistent with Mr. Walls' hunting knife.

B. THE APPELLANT'S BRIEF OVERSTATES THE EVIDENCE CORROBORATING SELLS' CONFESSION.

In his brief to this Court, the Appellant lists no less than 15 corroborative facts allegedly bolstering Mr. Sells' testimony. (Appellant's Brief at 27.) Of these 15, any casual follower of the Appellant's trial would know at least eight:

- (1) A double homicide
- (2) was committed in Kanawha County, West Virginia
- (3) in September 1991
- (4) the victims were mother and daughter
- (5) the daughter's name was Pamela
- (6) the elderly woman was in poor health
- (7) the victims owned a white Ford Taurus
- (8) the stabbing was committed in the downstairs area of the residence.

Paralegal Jane Brumfield testified that the Appellant and Mr. Sells were in the old Kanawha County jail throughout the Appellant's trial. (Hr'g Tr. 30.) The murder trial received substantial press attention. (Hr'g Tr. 31.) The inmates at the jail had access to newspapers and television. (Hr'g Tr. 31.)

Mere statements confirming generally known facts, when weighed against the evidence adduced at trial, especially this trial, have little or no relevance to post-conviction proceedings. If

such a proceeding could be brought to a screeching halt because of such *de minimis* evidence, the truth-finding function, as well as the substantial interest in finality, would be substantially undermined. No court has ever made such a ridiculous ruling.

The Appellant also points to Mr. Sells' statement that he met Ms. Castaneda at the Route 60 Lounge in Saint Albans as "compelling" corroborative evidence. (Appellant's Brief at 28.) By the time the Appellant's trial was over, it was no secret that Ms. Castaneda sold her t-shirts at the Route 60 Club. Although the Appellant correctly states that the "True Detective" article does not mention this club by name, it does say, "Directly across the street from Pamela's babysitting job in St. Albans was a local tavern that featured a band on Wednesday and weekends." (R. at 725.)

On April 12, 2000, Mr. Sells told two Texas law enforcement officers that he had met Pamela Castaneda at the Route 60 lounge. (R. at 719.) During a May 11, 2004, interview with Public Defender Wendy Campbell, the Appellant was unable to recall the name of the bar or the street it was on, but said it was outside Charleston and had its "own little parking space." (R. at 733, 735.) He could not recall the bar's name during his September 29, 2004, evidentiary deposition, but testified that it had a "big parking lot." (Sells Evid. Dep. 15-16.) After giving it "a lot of thought since [he] was last in that neck of the woods" Mr. Sells claimed the bar was in Saint Albans off Route 60. (Sells Evid. Dep 16.)

Sells claimed that he sold cocaine from the bar, and that Ms. Castaneda first approached him to make a purchase. (Sells Evid. Dep. 16.) There is no independent evidence suggesting that a man named Tommy Sells sold cocaine at the Route 60 Lounge at or near the time of the victims' death. Nor did the Appellant present a single independent witness placing the two of them together at any time. Although the defense called four witnesses from the Route 60 Lounge, none testified that Ms.

Castaneda used or abused drugs. Even if she had, that can hardly be described as newly discovered evidence undiscoverable by the exercise of due diligence.

The Appellant also claims that the Cabin Creek murders fit Sells' *modus operandi*. According to the record, after his arrest in 2000, Mr. Sells confessed to 12 other murders.²³ There is no evidence suggesting a pattern. Mr. Sells used any number of methods to kill his victims, such as shooting, stabbing, strangling, and bludgeoning. (Sells Evid. Dep. 9.) Some victims he knew, some he lived with, some were total strangers. Not every victim was posed in a manner suggesting a sexual assault. To suggest that Mr. Sells' multi-state killing spree suggested a set pattern is not supported by the record. In fact, the record suggests otherwise.

Sells did testify that making his victims look like victims of a sex crime was "one of several ways" he left his victims. (Sells Evid. Dep. 25.) He also testified that he was careful not to leave any incriminating evidence behind. (Sells Evid. Dep. 47.) This included bodily fluids such as blood and sperm. (Sells Evid. Dep. 8, 63-64.) Dr. Sopher found intact sperm inside Ms. Castaneda's vagina. There was also blood splattered throughout the house, gauze pads with blood stains left on the kitchen table, and a blood spotted canteen left on the living room floor.

According to Mr. Sells, the murders were not preplanned, he simply grew tired of hearing the two victims arguing. Unlike several of his other murders, he did not sneak into their home at some early hour of the morning taking them unawares. There is no evidence that Sells ever hid out in an attic before killing. In fact, Sells' testimony that he stayed within the confines of that attic for

²³During his evidentiary deposition he claimed to have committed more than 30 murders. (Sells Evid. Dep. 8.)

four days does not ring true. As the Appellant concedes, Sells was a transient. He eluded capture by not staying in one place too long.

Janet Smith Elswick testified that she saw the victims, along with a “Columbian guy,” from the kitchen window of restaurant in Chesapeake on the Sunday or Monday immediately after the Appellant murdered them. (Hr’g Tr. 45-47.) Her testimony came almost 15 years after the murders, and 13 years after the Appellant’s trial. The Appellant’s friend, Jeanette Laws, claimed that she informed the State about Ms. Elswick just before she testified. (R. at 788-92.) She did not tell defense counsel nor bring the issue up in her trial testimony. Indeed, this did not come up until Ms. Laws wrote a letter to the Appellant’s father shortly after his trial. (R. at 789.) Ms. Castaneda was married to Lewis Castaneda, a Columbian. He was excluded as a suspect when the investigating officers discovered that he lived in New York at the time of the murders. (Tr. 1721-22, 1805.)

C. THE LOWER COURT’S FINDING THAT SELLS’ CONFESSION WAS NOT CREDIBLE WAS NOT CLEARLY ERRONEOUS.

Sells originally confessed to these murders three months after he was arrested in Val Verde, Texas, for murdering Katy Harris and slashing Krystal Surles’ throat. The Texas authorities had charged him with murder and he was facing the death penalty. Krystal Surles had witnessed the murder and was prepared to testify for the State. Knowing this, Sells began to confess to several different murders which he had committed across the country, including the Cabin Creek murders which he claimed came to him in a dream.

Sells repeatedly stated that he spent approximately two to four days living in the victims’ attic. He described it as finished like a bedroom. (Hr’g. Tr. 26.) During his evidentiary deposition he testified that it was an “[a]partment type room with a bathroom – just a attic with a apartment in

it.” (Sells Evid. Dep. 19.) He also claimed that Ms. McClain did not know he was there until the day she was murdered. Sells also referred to a small dog, a black afghan, and a brown couch.

The State called Ms. McClain’s son-in-law, Thomas Lee. (Hr’g Tr. 194.) Because his wife was appointed executor of the estate, Mr. Lee went through Ms. McClain’s entire house a week after the murders. (Hr’g Tr. 195-96, 206.) He described the attic as hot, dusty and dirty. Ms. McClain had stored her Christmas decorations and a trunk up there. A photograph demonstrated that a person at the bottom of the stairs would have been capable of seeing inside the attic. There was a single boarded up window at one end, and a burned out lightbulb hanging from the ceiling. (Hr’g Tr. 197.) There was an old mattress that had fallen onto the floor after leaning against the wall. Mr. Lee testified that there were no indications that anyone had slept up there. (Hr’g Tr. 198-99.) There was no bathroom. (Hr’g Tr. 199.) During trial, a photograph of the downstairs was accidentally labeled as a photo of the upstairs bedroom. (Hr’g Tr. 212.) Clearly, the Appellant was lying about the attic. He had never seen it, never stayed there, and could not describe it. His testimony conformed to the mislabeled exhibit, not the real home.

Sells also claimed that he stole a CB radio from the McClain home. In fact, this was the same radio taken by the Appellant and dropped off at Denise Morgan’s home. (Sells Evid. Dep. 56-57; Hr’g Tr. 217.) Sells also testified that the victims had a small or medium-sized dog that did not try to bite him during the murders because he was good with animals. (Sells Evid. Dep. 64-65.) In fact, the victims had two dogs--one, a Pug, which they kept in a cage, and a Chihuahua, which was later found dead in the victims’ laundry room. Sells claimed that the victims owned a brown couch with a black afghan. In fact, no such afghan was recovered. The State accidentally introduced a photo of a afghan from another residence.

The Appellant and Sells were incarcerated at the old Kanawha County jail while the Appellant's trial was taking place. Brian Keith Pringle testified that he had worked as a correctional officer at the Kanawha County jail beginning August 12, 1991. (Hr'g Tr. 130.) He testified that the Appellant was incarcerated when he first started working there or before he came up. For the majority of his stay, the Appellant was housed in the same section of the jail as Sells. (Hr'g Tr. 131.) Each prisoner had at least an hour a day to talk to other prisoners housed in the same section. (Hr'g Tr. 132.) Officer Pringle testified that they were housed together from May 1992 to sometime in 1993. (Hr'g Tr. 132.)

Appellant claims that it is "implausible" that he and Sells discussed Appellant's trial while incarcerated in the same jail and same section. He mischaracterizes these sort of conversations as conspiracies, hatched before Sells was re-arrested in Texas and sentenced to death. (Appellant's Brief 30.) Clearly, Sells would have no reason to believe he was facing a death sentence in Texas while incarcerated with the Appellant. The State has never argued that both parties "conspired" to muddy the waters by having Sells falsely confess. Sells is an opportunist, with information he obtained while speaking with the Appellant. He chose to use that information when he felt it suited his interest.

Appellant next argues that Sells was a drug addict with a limited intellect who had substantial problems remembering his own crimes. Appellant's argument undercuts his own witness's credibility. The record does demonstrate that Sells was a drug addict: It also demonstrates that he is a serial killer who managed to evade capture for years. Throughout his entire life he has drifted from one lie to another.

D. APPELLANT'S AUTHENTICITY CLAIM IS NOT COGNIZABLE IN HABEAS CORPUS.

A month after the post-conviction hearing, Sells submitted an unsworn letter to the State recanting his confession. (R. at 806; Hr'g, 5, May 6, 2007.) The letter is captioned "Val Verde County Sheriff's Department Voluntary Statement (Not Under Arrest)." It is signed by the Appellant, and James Poore, the Val Verde County Deputy Sheriff who originally told counsel for the State about Mr. Sells' recantation.

The State provided the letter to the defense as a supplement to its discovery responses on February 9, 2006. (R. at 805.) Sells claimed that he received a letter in 2000 from Indiana asking him to confess to the Cabin Creek murders. He does not specify who wrote this letter or why it would be coming from Indiana. He claimed that the letter provided him with the details he used in his confession. After he was convicted and sent to death row his then counsel, Terry McDonald, forwarded a letter from Kanawha County Public Defender Wendy Campbell which provided additional details about the murders. Between the two letters, Sells was able to concoct a confession. (R. at 806.)

The lower court convened an evidentiary hearing on February 17, 2006, at which point the State filed a copy of Mr. Sells' letter. Over the defense's objection, the court granted the State's motion to depose Sells. (*Id.*) Sells, then on death row, refused to cooperate with the State. At a second evidentiary hearing, both the State and the defense rested.

Appellant now claims that the recantation should not have been admitted because it was never authenticated by the State. West Virginia Rule of Evidence 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied

by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

A connection between a message and its source may be proven by circumstantial evidence, such as “an appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances.” *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir. 1994).

Habeas corpus is not a substitute for appeal. A showing of constitutional dimensions is required in order to set aside a collateral attack. *State ex. rel. Phillips v. Legursky*, 187 W. Va. 607, 608, 420 S.E.2d 743, 744 (1992). The Appellant has chosen to base his argument on a state rule of evidence. Such claims are not cognizable in habeas corpus. Thus, Appellant’s ground for relief is deficient as a matter of law.

Even if this Court were to find that the trial court abused its discretion, the error was harmless. In habeas proceedings, an error is harmful only if it “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The lower court spent little time considering Mr. Sells’ recantation. (Final Order 15.) Out of the 83 subparts contained in its final order, Sells’ recantation is mentioned once. (*Id.* at 75.) The court placed far more emphasis on other factors: That Mr. Sells’ description of the alleged bedroom on the top floor of the victims’ home where he allegedly stayed for three days was not true and his description of the room was based on a mislabeled trial exhibit (Order 44, 49); that he identified a black afghan depicted in a mislabeled photograph as belonging to the victims; his claim that he took the victims’ CB radio, the same radio stolen by the Appellant (Order 52); and when told that someone else had been convicted of these murders, Sells recanted, stating, “I didn’t tell you I did that. I said I had a dream about that last night.”(Order 42; Coy Smith Evid. Dep. 19; Allen Evid. Dep. 23); Sells admitted that he was

incarcerated in the same cell block at the Kanawha County jail with the Appellant while the Appellant's trial was going on (Order 43, 55); Corrections Officer Pringle's testimony that both Sells and the Appellant were in the same small cell block during the Appellant's trial; Sells' statement to author Dianne Fanning denying he committed the offense and saying the right person was in jail.²⁴ (Tr 141.)

The court also found that Sells' confession "pales when compared with the overwhelming and largely uncontested evidence" of the Appellant's guilt. (Order 72.) This includes evidence that he was near the victims' home Saturday evening; that he was wearing military style camouflage that day; that two witnesses saw a man dressed exactly like the Appellant in Leewood near the victims' home at the time of the murder; that he stole the victims' car and certain items, such as the remote to the VCR and the car keys that he could only have gathered from inside the house; that he was wearing a t-shirt that Ms. Castaneda made which was stained with both his blood and the victim Castaneda's blood; that he lied about the theft of Mr. Walls' car; that he first denied being in Leewood the night of the murders; that he lied to the investigating officers and Trooper Allen about his whereabouts that evening; that he asked Anita McKinney to lie for him by saying he was with her the entire weekend and had arrived on foot; that he lied to Ms. McKinney about the victims' VCR, which he claimed he was taking in for repairs; that the victims were last seen alive the same evening and about the same time Appellant was in Leewood; that the Appellant stole their car

²⁴Indeed, the order states, "Tommy Lynn Sells has recanted his confession on more than one occasion." The court does not point to the written recantation admitted during the February 17, hearing as one of those occasions.

Later Sells told Ms. Fanning that he would talk with Kanawha County Public Defender Wendy Campbell about the murders. During the interview he switched gears again: admitting to the murders.

sometime between 5:00 and 8:30 p.m., that neither victim reported the car stolen; that the Appellant ditched the victims' car in a secluded area of Logan County. If the admission of the statement was error, given the rest of the evidence, it was harmless.

Even without the letter, the mere fact that Sells' recanted bears on his credibility. The State need not introduce the recantation for the truth of the matter asserted. It may have been introduced to demonstrate how unreliable Sells was.

E. APPELLANT'S CASE LAW IS NOT DISPOSITIVE.

Appellant mentions the Jacob Beard trial throughout his brief; yet, the Jacob Beard trial transcript is not part of this record. Appellant's citations and any arguments derived from them should be ignored by this Court and stricken from Appellant's brief. (Appellant's Brief at 36, 37.) The results of the second Beard trial were never the subject of an appeal. Neither the Appellee nor this Court have the benefit of briefing by both parties. This Court has never issued an opinion related to the case. Counsel for the Appellee has never seen a copy of the transcript. More importantly, this information was not before the lower court in the case at bar. Findings by a trial court do not bind this Court: This Court's decisions bind the trial courts. To rule otherwise would turn this Court's role on its head.

In *State v. Talbott*, 408 So. 2d 861 (La. 1981), the defendant was convicted of rape and aggravated robbery. The Louisiana Supreme Court granted him a new trial after a third party, George Brumfield, confessed to the same crimes. Mr. Brumfield was arrested after he had committed a series of rapes, including several in the victim's area.

Because there were contemporaneous, objective facts connecting the alleged perpetrator to the crime, this case is factually distinguishable to the case at bar. Brumfield matched a description

of the perpetrator. He and his wife were registered in a hotel room two miles away from the scene of the crime and checked out of the room 45 minutes after the offenses occurred. A car matching the make, model, and description of the third party's car was seen at the crime scene. The third party gave a detailed description of the inside of the victim's house. Without assistance he directed law enforcement to the victim's home, and to within 10 to 15 feet from where the victim's car was abandoned. He directed the investigating officers to a toolbox containing the victim's car key, and a key to an office previously occupied by the victim. *Talbott*, 408 So.2d at 878-81. Brumfield's wife testified that he had confessed to her before confessing to the police and given her the victim's watch to hold. He left the hotel around the time of the offenses, and returned an hour later anxious to check out. Just prior to her testimony, Brumfield said, "I'm going to get you bitch!" Law enforcement testified that Brumfield's conduct was similar to methods he had used in other rapes. A key in-court identification was substantially undermined when it was determined that a law enforcement officer had to point out the defendant before the witness testified.

Far from giving controlling weight to Brumfield's post-trial confession, the state supreme court found that the trial court had abused its discretion by ignoring the sheer volume of independent, corroborative evidence. *Talbott*, 408 So.2d at 886. The Court afforded great weight to the testimony of Brumfield's wife, the physical evidence found in Brumfield's toolbox, and evidence of official misconduct regarding a key identification witness.

In the case at bar, the Appellant presented one piece of newly discovered evidence--Sells' confession, which Sells claimed came to him in a dream. Unlike *Talbott*, there was not another piece of independent, objectively corroborative evidence. As the court noted, Sells lied about the victims' attic; lied about the presence of a brown afghan in the victims' living room; lied about the dog; and

falsely claimed that he had stolen a CB which had, in fact, been taken by the Appellant. Sells could not say where he was living before the murder. (Sells Evid. Dep. 15.) He could not describe Ms. Castaneda with any specificity, stating she was as a heavy-set girl, old country trailer trash, lighter hair than mine,²⁵ spiral curly hair, rotten teeth.

He vaguely described the surroundings as "country." There was no mention of the concrete driveway or the homes nearby. Apart from the imaginary attic bed and bathroom, and the brown afghan, Sells could not describe the inside of the McClain house with any detail. (Sells Evid. Dep. 27.) He could not say what he ate while there; but did say that Ms. Castaneda delivered his meals upstairs with Ms. McClain knowing. He also testified that Ms. Castaneda left him alone in the house one day. (Sells Evid. Dep. 39.) A photograph introduced by the State at the post-trial hearing demonstrated that the attic was visible from the downstairs.

Sells claims he killed Ms. Castaneda first, while Ms. McClain watched. (Sells Evid. Dep. 22.) He described the clothing she was wearing as pants and a shirt. Previously, he had stated that Ms. Castaneda was wearing a gown. (Sells Evid. Dep. 23.) Two pages later he claimed that he could not recall his victims' names, differentiating them as the old one and the young one. (Sells Evid. Dep. 24.)

When asked where he left Ms. Castaneda's body, Sells' answer is vague to the point of being nonsensical: "One of them was in the – a doorway. The other one was like in – one – one was in like the kitchen, corner of the kitchen in a doorway – family room; the other was a little further back." (Sells Evid. Dep. 23.)

²⁵Sells had dark black hair.

In fact, Ms. McClain was found in her kitchen, under a table, and Ms. Casteneda was found propped up against a chair inside the living room. Neither were found in a doorway. He claimed that he stabbed Ms. McClain in the upper chest and throat. (Sells Evid. Dep. 24.) Dr. Sopher did not identify any stab wounds to Ms. McClain's throat and found several serious ones to her abdomen. (Tr. 2551-57.)

Sells could not say where he slept the night after the murders. (Sells Evid. Dep. 50.) Nor could he say, with any degree of specificity, where he went after the murders. (Sells Evid. Dep. 50-55.) There are no witnesses or physical evidence placing Sells at the crime scene.

There is no comparison between the facts available to the state supreme court in *Talbott* and the facts available to this Court in the case at bar.

Nor does Appellant's next case, *People v. Tankleff*, 49 A.D.3d 160 (N.Y. App. Div. 2007), a notorious and high profile case. Following a confession obtained through the use of artifice, the defendant was convicted of murdering his parents. After several direct and collateral attacks on his conviction were refused, the defendant was granted an evidentiary hearing on his Motion for a New Trial. The defendant called 23 witnesses, several presenting interlocking evidence strongly suggesting that a third party, Creedon, had committed the murders.

Applying a different standard of review, the Appellate Division of the Supreme Court of New York granted the Appellant a new trial.

The power to vacate a judgment of conviction upon the ground of newly-discovered evidence and concomitantly grant a new trial rests within the discretion of the hearing court. While the Court of Appeals has no power in a noncapital case to review the exercise of discretion, *this Court is not bound by the hearing court's factual determinations and may make its own credibility determinations.*

Tankleff, 49 A.D.3d at 178-79 (emphasis added).

In the exercise of its own independent discretion, the appeals court found that the lower court had arbitrarily ignored or discounted evidence, which strongly suggested the defendant's innocence. The Court focused on the uniformity of the testimony implicating Creedon, despite the disparate, independent sources.

As stated above, the Appellant has not corroborated Sells' confession in the same fashion. Unlike the numerous sources produced by the defendant in *Tankleff*, the Appellant's case rises and falls on a single, uncorroborated confession.

F. APPELLANT'S TESTIMONY ABOUT THE TIME OF DEATH AND THE RELIABILITY OF THE DNA TESTING ARE NOT "NEWLY DISCOVERED EVIDENCE."

In referring to the testimony of Frederick Whitehurst and Dr. Daniel Spitz, the lower court made the following factual findings:

61. Frederick William Whitehurst's testimony that there were quality control problems in the F.B.I. Laboratory was not based on first hand knowledge or expertise in the area of D.N.A. analysis. He gave no testimony that the D.N.A. testing in this case was improper or that the results reached were wrong. Habeas Tr 87-92.
62. Dr. Spitz gave no testimony other than matters which were addressed by Dr. Sopher in his trial testimony. In essence he disagreed with Dr. Sopher's opinion as to time of death. This evidence was available at the time of Appellant's trial or it could have been discovered by due diligence. Dr. Spitz admitted on cross-examination that the physical changes to the victims' bodies did not show that Dr. Sopher was incorrect in his evaluation of the time of death. Habeas Tr. 125-126. Dr. Spitz was in disagreement about the determination of the life cycle of various spermatozoa, but he testified that this was a reasonable difference in opinions. Habeas Tr. 126.

(Order at 12.)

Based on the above, the court ruled:

67. The evidence adduced at the habeas hearing of Mr. Whitehurst and Dr. Spitz do not qualify as newly discovered evidence. At most, their testimony would be an attempt to impeach Linda Harrison, the FBI Laboratory D.N.A. expert and Dr. Sopher, the State Medical Examiner. The Court is further of the opinion that their testimony, as presented, would not discredit the testimony at trial of either witness.

(Order at 14.) *See In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division*, 219 W. Va. 408, 415, 633 S.E.2d 762, 769 (2006) (newly discovered evidence must be, in part, new and material and not merely cumulative). *See also Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004) (evidence is new if it was not available at trial and could not be discovered earlier through the exercise of due diligence.); *State v. Cookson*, 837 A.2d 101, 110 (Me. 2003) (evidence known to defendant at trial but its significance not fully appreciated until after trial is not newly discovered evidence.).

The victims' times of death and Dr. Sopher's revised opinion were fully litigated below. Defense counsel was afforded every opportunity to explore Dr. Sopher's opinions on cross-examination. The defense brought out that his revised opinion was based, in part, on conversations he had with law enforcement and members of the Kanawha County Prosecuting Attorney's Office. The jury heard this evidence, and convicted.

More importantly, defense counsel's aim was exactly the same as Appellant's present counsel: to prove that the murders occurred after he had left the area. The defense should not be permitted to re-litigate an issue in the name of witness corroboration--in this case, Sells' confession--when this very same issue was litigated at trial for the same reason, to prove identity.

Dr. Spitz had little to add to the issue. Indeed, he agreed that non-medical crime scene indicators impact a forensic pathologist's estimates:

Q: Doctor, we've spoken so far just of factors set forth in the autopsy report. But I'd like to ask you, do medical examiners sometimes take into consideration non-medical crime scene evidence in estimating the time of death?

A: Yes, they do, and that's what I referred to earlier in my testimony that the changes to the body are one piece of the puzzle when estimating into this real time of death.

As a forensic pathologist and as a medical examiner, we use any and all credible and available information to come to a conclusion as to when somebody's death occurred.

And short of an eyewitness to be a credible eyewitness to the actual death, we're generally left with a range, and that range is determined based on changes to the body, as we've been discussing. Its also based on outside information, and that might be crime scene information, it might pertain to mail delivery or newspaper delivery or witness who may have seen one or more people associated with a death.

So, really, it's just based on all information, and really that the best way to doing this, you correlate this information to try and narrow the range as much as possible, because you never come to a definitive exact time of death unless you have a credible eyewitness or it's a witnessed event that has occurred.

(Tr. 121.)

Q: When you referred to outside information that the medical examiner can take into consideration, would one of those factors be, for example, when the victims were last seen alive, last reported to be seen alive?

A: Absolutely. That's a critical piece of information and it's often a starting point that you took to determine the time of death. When somebody is last seen alive and when somebody is found dead, generally known bits of information, and the idea that one can have a known alive time and a found dead time, now you try and narrow it more and more and more, to try and get a better understanding and a better handle on when the death occurred and try to put it within a smaller time period.

And you usually do that by acknowledging post-mortem changes, changes to the body, and other information that might become available in the course of an investigation.

Q: Well, also, when you refer to outside information, could one of those factors sometimes be when the suspected perpetrator was at the scene?

A: If that information is available, absolutely, it would be very important to know that.

(Tr. 121-22.)

In his original statement to Texas Ranger John Allen, Sells stated that he killed Ms. McClain, and Ms. Castaneda sometime in September 1991. (R. at 719.) In his May 11, 2004, statement to Public Defender Wendy Campbell, he was never asked when he killed them. He did say that he first met Pam Castaneda before 1992. (R. at 733.) According to his evidentiary deposition Sells came to West Virginia in August of 1991, and stayed throughout 1991 and 1992, off and on. (Sells Evid. Dep. 14, 37.) He could not recall the day he arrived at the McClain home or the day he left. (Sells Evid. Dep. 39.)

The Appellant argues that Dr. Spitz's testimony corroborates Sells' confession. In fact, it does not. If the victims' were killed on September 9 or the 10, there is no real evidence that Sells was in Cabin Creek on either of those days. Thus, there is no evidence that Sopher's range was incorrect. Without this connection Spitz's testimony rehashes facts which were addressed at the trial.

The same can be said of Dr. Whitehurst's testimony. There is no evidence connecting the 2004 report to the case at bar. Indeed, other courts have come to the same conclusion. *See United States v. Boose*, 498 F. Supp. 887 (N.D. Miss. 2007) (Frederick Whitehurst's allegations did not involve the procedures used by the FBI's DNA laboratory). FBI Agent Linda Harrison's findings were presented at a lengthy pre-trial suppression hearing, and at trial. Dr. Whitehurst's testimony sheds no additional light on her findings in this case.

G. ACTUAL INNOCENCE.

“A claim of ‘actual innocence’ is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” *Herrera v. Collins*, 506 U.S. 390, 404 (1993). *See also Murray v. Carrier*, 477 U.S. 478 (1986) (if a petitioner demonstrates actual innocence federal court will consider procedurally defaulted grounds for relief). The “miscarriage of justice” exception to the procedural default rule applies only in extraordinary circumstances, and actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998).

The United States Supreme Court has never held that a freestanding innocence claim is cognizable in federal habeas. *See House v. Bell*, 547 U.S. 518, 566 (2006) (Roberts, J., concurring) (defendant has not met higher evidentiary threshold for freestanding innocence claims, *if such claims exist*). Petitioner points to *Schulp v. Delo*, 513 U.S. 298 (1995), in support of his claim. The Appellant has misread the case.

Delo does not acknowledge a freestanding innocence claim. It merely states that a prisoner who has procedurally defaulted one of his habeas claims may use actual innocence as an excuse provided he can meet the demanding burden of proof set forth in *Delo*. *Id.* at 314-15.

VI.

CONCLUSION

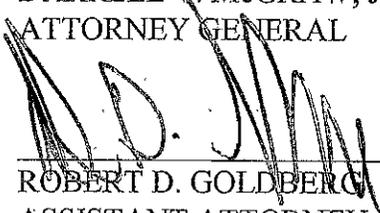
For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

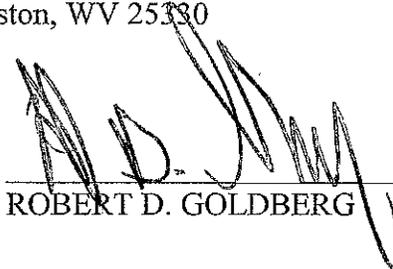


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing "*Brief of Appellee (as corrected on November 21, 2008)*" was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 21st of November, 2008, addressed as follows:

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