

STATE OF WEST VIRGINIA,

COUNTY OF RALEIGH, to wit:

AFFIDAVIT

1. From January 1, 1993, until December 31, 2012, I was the elected Prosecuting Attorney of McDowell County, West Virginia.
2. I was the lead prosecutor in *State v. Charles Jason Lively* (05-F-157).
3. At Charles Jason Lively's trial, the State's most important scientific arson evidence was testing conducted by the West Virginia State Police Forensic Laboratory on a sample of material collected from the fire site at the victim's bedroom floor, known as "Sample 12." As I understood it at the time, the State Lab's testing showed the presence of a miscellaneous ignitable liquid with toluene as the one dominant component in Sample 12.
4. In preparing the Lively case for trial, I conferred at least once with Ms. Koren Powers of the State Lab, because she had performed the testing and analysis of samples collected from the house. My understanding from discussions with Ms. Powers was that the toluene found in Sample 12 could have come from the use of charcoal starter fluid or gasoline as a liquid accelerant, because charcoal starter fluid and gasoline contain toluene.
5. Based on that understanding from my discussions with her, I asked Ms. Powers during her direct testimony (page 1066):

Q. And can you give us some examples of what products toluene is found in? The fire marshal mentioned paint thinner, something like that. Can you mention some other products that might be found in?

A. Toluene is a component in many ignitable liquids that we find. It's a component of gasoline. It's found by itself in some charcoal starters, some paint thinners, or some floor strippers, things like that. It's a relatively common product.

6. I pursued this line of testimony to show that the fire could have been started using charcoal starter fluid, gasoline, or another common household substance readily available to a person like Mr. Lively.
7. I alluded to the above testimony in my summation (page 1504):

And about the positive sample -- about the ignitable liquid that came again from Dr. Whitley's bedroom floor. The forensic scientist who testified identified that substance as an ignitable. And she mentioned charcoal starter fluid as one of the products that that's in. Charcoal starter fluid is one of the things you find toluene in. That sample was found on the second floor of the bedroom.

8. Again, here, my point was that Jason Lively could have set the fire using a readily available substance like charcoal starter fluid.
9. I now know from Dr. Jackson's report that Ms. Powers' testimony and my summation of that testimony were false. Charcoal starter fluid is in fact not known to contain toluene at all, and does not contain toluene as a single component, as was found in Sample 12. And, while gasoline contains toluene, it does not contain it as a single component. Thus, I now know that Sample 12 cannot have come from the use of charcoal starter fluid or gasoline as a liquid accelerant.
10. I also understood from my discussions with Ms. Powers that only Sample 12, and not Samples 1-11, had been found to contain an ignitable liquid.
11. I therefore elicited the following testimony from Ms. Powers at trial (Pages 1063 and 1067, respectively):

A miscellaneous ignitable liquid in the light range was identified in item No. 12. There were no ignitable liquids identified in items No. 1 through 11.

Q. And even though you examined all of the other eleven samples submitted by Mr. Bailey, you did not detect any identifiable ignitable liquids in those?

A. Mostly just pyrolysis products or products that will be the result of something burning.

12. Again, I now know from Dr. Jackson's report that this testimony was illogical and misleading.
13. Other samples in fact did contain ignitable substances, sometimes in even greater quantities than the toluene found in Sample 12, yet the State Lab wrote off these results as "just pyrolysis products" whereas the toluene in Sample 12 was claimed to be a liquid accelerant. Figure 11 of Dr. Jackson's report shows this conclusion was especially specious by showing the burning of a wooden laminate flooring with no liquid toluene can produce a dominant toluene peak through pyrolysis.

14. Based on Dr. Jackson's report, there was no basis to say that Sample 12 contained liquid toluene while all other components found in samples were "just pyrolysis products."
15. In summary, though I did not know it at the time, I now know that the State presented false and highly misleading evidence at Mr. Lively's trial regarding the most important part of the State's arson case—the theory that Sample 12 showed the use of a liquid accelerant like charcoal starter fluid.
16. As a result, it is even clearer now than it was at the time of my first affidavit that Charles Jason Lively was wrongfully convicted.



SIDNEY H. BELL

Taken, subscribed and sworn to before me in my said state and county on this the
9th day of January, 2020.

My commission expires 4-7-2024.



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