**COURT OF COMMON PLEAS**
**CLERMONT COUNTY, OHIO**



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| **STATE OF OHIO** | : | |
| Plaintiff | : | **CASE NO. 1990 CR 05505** |
| vs. | : | **Judge McBride** |
| **MICHAEL D. WEBB** | : | **DECISION/ENTRY** |
| Defendant | : | |

Judith Brant, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Office of the Ohio Public Defender, Gregory W. Meyers and Kimberly S. Rigby, assistant state public defenders for Michael D. Webb, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

This cause is before the court for consideration of a motion for leave to file a delayed motion for new trial.

The parties submitted memoranda regarding the motion for leave pursuant to the court's briefing order. The court took the issues raised by the motion under advisement upon the filing of the final memorandum on April 26, 2013.

Upon consideration of the motion, the record of the proceeding, the evidence submitted for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

## FACTS OF THE CASE AND PROCEDURAL BACKGROUND

In its 1994 decision in the appeal of this case, the Ohio Supreme Court set forth a detailed summary of the facts of this case as follows:

> "On November 21, 1990, three-year-old Michael Patrick ('Mikey') Webb was killed in a fire at his home. Mikey's father, defendant-appellant Michael D. Webb, was convicted of Mikey's aggravated murder and was sentenced to death.
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> Webb lived in Goshen Township, Clermont County, with his wife Susan, his sons Charlie and Mikey, and the teenaged daughters of his first marriage, Tami and Amy. In 1978, Webb's first wife Linda and her mother died in a traffic accident; Amy was badly injured. Amy and Tami received a total settlement of $42,667.33 for personal injury and wrongful death, plus at least $7,567.42 from their grandmother's estate. The probate court appointed Webb guardian of Tami and Amy's estate. In 1982, Webb invested the estate funds in a twenty-six-week certificate of deposit ('CD'), face value $51,800, renewing it regularly until 1985.
>
> From 1985 to 1988, Webb appropriated most of the estate funds for his personal use. He would redeem his daughters' CD, purchase another with a lower value, and retain the balance of the funds. Webb did this seven times between 1985 and 1988. Each time he bought a new CD, Webb instructed the bank to deposit the interest in his checking account. His authorization to spend guardianship funds had expired on July 1, 1984.
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> After July 1983, Webb neglected to file an account with the probate court. In February 1987, Webb came into court after receiving a notice ordering him to file an account or be

removed as guardian. Webb told the probate judge 'that he had spent the money' and knew he had to replace it.

In 1987, Linda Webb's father died, leaving $51,059.66 to Tami and Amy. Webb did not report these funds to the probate court as being part of the guardianship. He bought a one-year CD in his daughters' names, face value $50,000, with this money. On January 18, 1989, Webb redeemed the CD, receiving $51,825.73, and bought a new CD with a face value of $50,300. About a month later, he redeemed that CD prematurely, receiving $48,522.29. He used $35,000 to open a savings account in his own name, keeping the balance.

In 1990, Webb met Nadine Puckett. Their friendship quickly blossomed. On October 31, 1990, Nadine's ex-husband found them together. The next morning, Nadine went to stay with her sister in Dayton. Between November 1 and November 20, Webb made several trips to Dayton to see Nadine, and phone company records showed frequent calls from Webb's phone to Nadine's sister's house. During this period, Webb told Nadine he planned to leave Susan.

James Pursifull worked for Webb's bodyshop until quitting on October 23, 1990. Webb told people that he had fired Pursifull and accused Pursifull of threatening and harassing him. Webb later requested Pursifull to help with some work at his house because Webb 'had to go in the hospital to get his colon removed'; Pursifull never came to appellant's home. The prosecution later argued that Webb had been trying to 'set [Pursifull] up' by getting him to leave fingerprints at Webb's residence.

On the evening of November 20, 1990, Tami Webb locked the door leading outside from the basement (where she and Amy had their bedrooms) and went to bed. Early the next morning, Tami was awakened by cold air and the smell of gasoline. Webb came into her room. A frightened Tami told him she smelled gasoline. Webb said that he did too, and that he thought the house was 'rigged.' He ordered Tami to 'get down' or 'lie down' and to 'get Amy.' He never told her to get out of the house. Webb then went upstairs. Tami, too frightened to leave her bed, pulled the covers up and closed her eyes. She later testified that, when she opened them, she saw a man in a red sweatshirt staring at her. However, she conceded on cross-examination that her 'feeling' that

'someone else was in the house' was 'based upon the fact that [she] could not believe' her father had set the fire.

After that, Amy heard an explosion upstairs. Tami yelled at Amy to get out of the house, and they both ran out through the basement door and around to the front of the house, where they saw Webb. Webb's hands were bloody. It was later discovered that he got out by breaking through the bathroom window. A firefighter rescued Charlie and Susan from the master bedroom. Mikey died of smoke inhalation.

Township Fire Chief Virgil E. Murphy investigated the fire scene. In the foyer, he found a plastic gasoline can that had come from Webb's garage.

A 'very definite po[u]r pattern or trailer' was noted in the foyer. Murphy followed the trailer down a hallway leading to the bathroom and bedrooms. From the hallway, the trailer led into the master bedroom up to the base of the bed. (Charlie's crib stood next to that bed.) The trailer also went into Mikey's room 'up the side of the bed and across the bed to the rear wall.' Arson investigators took samples from the trailers for analysis. The samples contained gasoline.

After examining the house, Murphy concluded that the fire was caused by arson and had started in two places. One fire was contained in the hall closet. A second had started at the bathroom door, at the end of the hallway nearest the bedrooms, and moved from there into the bedrooms and down the hallway toward the living room.

An unignited gasoline trailer led downstairs to the basement, where Murphy found a two-liter pop bottle containing gasoline; the bottle had Webb's fingerprints on it. Gasoline had also been poured on Tami's bed, and Murphy smelled it on Amy's bedclothes. Murphy concluded: 'If all the trailers * * * had ignited the chances of anybody escaping from that home [were] very, very slim.'

Police found bloodstains matching Webb's blood type on the bathroom windowsill and basement door. The bathroom window had been broken from the inside. Blood trails on the ground led away from the window. A matchbook found outside bore a partial fingerprint in blood; Webb later admitted to police the print was his. Moreover, Webb had a peculiar way of holding a matchbook when he lit matches,

> and the print's location indicated that Webb had put it there while lighting a match.
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> On the morning of November 21, Webb told one of Susan's brothers that a fire bomb had been thrown through the bathroom window. Subsequently, he told Amy, Tami, and Susan's brother Larry Beck that he had broken the bathroom window to get out. He also told Amy that, when the explosion occurred, he was going into the master bedroom to get Susan, and the explosion had thrown him into the bathroom.
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> Webb was indicted on two counts of aggravated murder, R.C. 2903.01. Each count bore a felony-murder specification, R.C. 2929.04(A)(7), and a course-of-conduct specification, R.C. 2929.04(A)(5). Webb was also indicted on four counts of attempted aggravated murder, one count of aggravated arson under R.C. 2909.02(A)(2), five counts of aggravated arson under R.C. 2909.02(A)(1), and one count of aggravated theft.
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> The jury convicted Webb on all counts and, after a mitigation hearing, recommended death for the aggravated murder of Mikey Webb. The trial court sentenced Webb to death. The court of appeals affirmed."[1]

The Ohio Supreme Court affirmed the defendant's conviction and sentence.[2] During its examination of the sufficiency of the evidence set forth at trial, the court discussed as follows:

> "Webb argues that someone else could have set the fire. But Fire Chief Murphy found a two-liter pop bottle, one-third full of gasoline, in the basement. The bottle had Webb's fingerprints on it. There is no plausible innocent reason for Webb's fingerprints to be on a bottle of gasoline in a house that had just been set afire with gasoline.
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> Moreover, the jury could reasonably reject any theory involving an intruder. All doors had been locked. The front door was still locked when firefighters arrived. Investigators found no signs that the other doors had been forced. Moreover, Larry Beck, Webb's brother-in-law and next-door neighbor, had an alert dog who usually 'barks if there's a

[1] *State v. Webb* (1994), 70 Ohio St.3d 325, 325-328, 638 N.E.2d 1023.
[2] Id. at 343.

noise outside.' Beck's dog did not bark on the morning of the fire, a fact remarkable enough for Beck to mention to police. (Although Beck later downplayed the dog's alertness, we must view the evidence in the light most favorable to the state.)

The evidence shows that Webb had domestic, financial, personal and other motives to have his wife and children dead. He was aware that the lives of Susan and the children were insured.

* * *

A matchbook was found in the toilet, further supporting the state's theory that the fire started at the bathroom door. That matchbook bore the logo of a Tennessee motel where the Webbs had vacationed earlier that month. The matchbook found outside bore the same logo. It also bore Webb's bloody fingerprint, and the print's location indicated that Webb had been lighting a match.

Webb lied to his brother-in-law, telling him a firebomb had been thrown through the bathroom window. Webb knew better; by his own admission, he was near the bathroom when the fire started and broke the window himself.

To sum up: physical evidence linked Webb to the gasoline, the matches, and the fire's point of origin. He had strong motives to kill. He lied to his family about the fire. A reasonable trier of fact, viewing the evidence in the light most favorable to the state, could have found him guilty.

Webb contends that the state failed to prove intent to kill Susan, Tami, Amy, or Charlie. We disagree. The trailer on the first floor led into the master bedroom up to the foot of Susan's bed, which was right next to Charlie's crib. Gasoline was found on Tami's bed, and Chief Murphy smelled it on Amy's bedclothes. That is sufficient to show intent to kill."[3]

The defendant now moves this court for leave to file a delayed motion for new trial. In the motion, the defendant points to new evidence regarding two potential

[3] Id. at 331-332.

alternate suspects as well as an expert report regarding the possible points of origin of the fire.

## LEGAL ANALYSIS

## STANDARD OF REVIEW

Pursuant to Criminal Rule 33:

> "(A) Grounds
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> A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
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> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
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> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
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> (3) Accident or surprise which ordinary prudence could not have guarded against;
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> (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;
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> (5) Error of law occurring at the trial;
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> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly

> discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.
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> (B) Motion for new trial; form, time
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> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.
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> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period."

The present motion for new trial was filed on the basis of newly discovered evidence and was, therefore, required to be filed within one hundred and twenty days after the date of the verdict. Due to the fact that the motion was not filed within that time frame, pursuant to Crim.R. 33(B), the defendant must demonstrate by clear and convincing proof that he was unavoidably prevented from the discovery of said new evidence. "The standard of 'clear and convincing evidence' is defined as 'that measure

or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' "[4]

" 'A party is 'unavoidably prevented' from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence."[5] "In *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus, the Supreme Court of Ohio held the following: "[t]o warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence."[6]

In the case at bar, the defendant argues that the evidence at issue relates to two alternative suspects and that evidence regarding both suspects was in the possession of police but was not given to defense counsel. The two alternate suspect theories raise distinct issues and will be examined separately below.

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[4] *State v. Berry* (May 10, 2007), 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶ 22, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, paragraph three of the syllabus.
[5] *State v. Lake* (Jan. 20, 2011), 5th Dist. No. 2010CA88, 2011-Ohio-261, ¶ 37, quoting *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N .E.2d 859 (Ohio App. 10th Dist., 1984).
[6] Id. at ¶ 39. See, also, *State v. Clark* (May 4, 2009), 12th Dist. No. CA2008-09-113, 2009-Ohio-2101, ¶ 24, citing *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350, 612 N.E.2d 1227.

## I. ALTERNATE SUSPECTS

### (A) BOB GAMBRELL

Initially, in his motion for new trial, the defendant argued two alternate legal theories with regard to the police report pertaining to Bob Gambrell. The defendant first argued, as he did before the Sixth Circuit Court of Appeals, that the report was never turned over to defense counsel and that said failure constitutes a *Brady* violation.

The defendant also raised the alternative argument of ineffective assistance of counsel in response to allegations made by the former Clermont County Prosecutor at the executive clemency hearing that he did, in fact, turn the report over to defense counsel. These comments were not sworn testimony but were instead made during closing arguments at the clemency hearing.[7] In its response to the motions presently before this court, the state addressed the *Brady* issue at length but failed to allege, or present any evidence to show, that the report at issue was disclosed to the defense prior to or during the trial. In his reply memorandum, the defendant acknowledged this lack of response by the state and indicated that the court should consider it an admission that the trial prosecutor did not disclose the report and, as such, should analyze this as a *Brady* issue, not ineffective assistance of counsel.

This court agrees. There is no evidence before this court that the report at issue was turned over to defense counsel, other than an affidavit from a federal public defender relating the unsworn statements made by the former prosecutor at the clemency hearing. That hearsay statement in the affidavit has no evidentiary value and

[7] Defendant Michael D. Webb's Motion for New Trial, Exhibit F at ¶¶ 7 and 9-11.

will not be considered by the court. Further, there is evidence before this court from defendant's trial counsel that the report at issue was never disclosed to him.[8] Therefore, the issue relating to Bob Gambrell and the police report pertaining to conversations with Gambrell and Tracy Jordan is a *Brady* issue, not an ineffective assistance of counsel issue.

The police report at issue is a five-page, handwritten report made on November 26, 1990 by what appears to be "Col. R.C. Snyder."[9] That report states in relevant part as follows:

> "* * * At Goshen High School to speak with Tracy Jordan who reportedly smelled gasoline on and about the person on Amy Webb's ex boyfriend (*sic*), Bob Gambrell, * * * in a classroom the morning of the fire. Tracy absent from school, possibly at home * * *.
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> * * * Out at Jordan's residence where I and Chief Murphy interviewed Tracy in the presence of her mother. She confirms that Bobby was seated next to her in class that AM, but she didn't smell any gas. She thinks Bob and Amy as spilt up. Claims Bobby made the statement, 'I hope it was Amy's house that burnt up.' Bobby had no visible injuries. Knew he was planning to 'run away' to FLA, but had no intention of taking Amy with him. States he frequently wears a Goshen High School jacket, doesn't think he was wearing it that AM. Bobby left school during second period that AM, was acting strange.
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> * * *
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> Bob Gambrell on (*sic*) station for interview in presence of Chief Murphy. * * * Initially stated he was not at school on 11/21, then changed his mind – arrived at school around 0730, had been picked up at 0715 by a friend Denita Griffis. Claims he was home all night w/ Adam and Dad. On 11/21 wore ripped jeans and a black Mike Jordan T shirt. At this time he has a very minor puncture wound on the heel of his left hand which he claims he received while push-starting a

[8] Motion for New Trial, Exhibit D at ¶¶ 5-6.
[9] Defendant Michael D. Webb's Motion for Leave to File a Delayed Motion for New Trial, Exhibit A.

> car. Denied making statement Jordan alleges, what he actually said was 'I hope it wasn't Amy's house that burned.' States his GHS jacket is in the car of an acquaintance – Jason Brandenburg who attended Western Brown High School. States he'll locate it and bring it in for exam."[10]

"A *Brady* claim contains three elements: (1) the evidence 'must be favorable to the accused' because it is exculpatory or impeaching; (2) the State must have suppressed the evidence, whether willfully or inadvertently, and (3) the evidence must be material, meaning 'prejudice must have ensued' from its suppression."[11]

The report at issue is at least arguably impeaching or exculpatory and it is no longer disputed that this report was not turned over to defense counsel. As such, the defendant has satisfied the first two *Brady* elements.

As noted by the Sixth Circuit Court of Appeals, it is the third element that is the key element in the analysis of the defendant's argument on this issue. The Sixth Circuit Court of Appeals noted that "[t]he key question here is the last one: Did the failure to turn over the police report prejudice Webb's case? Put another way, is there 'a reasonable probability that' the report 'would have produced a different verdict'?"[12]

The defendant states in his motion for new trial that "[f]ederal courts rejected Webb's *Brady* claim as to the Gambrell evidence because they believed the scientific evidence made it immaterial."[13] This is only partially true. The Sixth Circuit Court of Appeals did set forth the "implausible chain of events" necessary to believe that Gambrell started the fire considering where Chief Murphy testified the fire's two points of origin were located in proximity to where Webb claimed he was standing at the time

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[10] Id.
[11] *Webb v. Mitchell*, 586 F.3d 383, 389 (6th Cir., 2009).
[12] Id.
[13] Motion for New Trial at pg. 22.

the fire started.[14] However, the Sixth Circuit Court of Appeals also noted that "[n]ot only does this argument rest on a precarious chain of inferences, it also rests on a flimsy foundation: that Tami saw an unidentified person in a red sweatshirt in the house shortly before the explosion."[15] As noted significantly by every court that has reviewed this case, Tami Webb conceded on cross-examination that her statement about seeing someone in a red sweatshirt was a "feeling" based "upon the fact that she could not believe Webb started the fire."[16] This clearly called Tami's statement about seeing someone in a red sweatshirt that morning into serious question and this statement was not given much weight, if any, by the jury, by virtue of its verdict.

It should also be noted, as it was by the Sixth Circuit Court of Appeals, that there is physical evidence linking Michael Webb to this crime. Webb's fingerprints were on a matchbook found outside the house and were also found on a 2-liter bottle containing gasoline that was located in the house. Further, Michael Webb was in the home at the time the fire started and there is no physical or testimonial evidence, other than Tami Webb's statement which she admitted on cross was not based on fact, that there was any other person in the house that morning other than the members of the Webb family.

The Sixth Circuit Court of Appeals also made this statement during its discussion of the *Brady* issue: "But, even though the police fingerprinted Gambrell in 2003 to see if his prints matched unidentified prints from the crime scene, not one piece of physical evidence links Gambrell to the fire."[17] There is no citation to a report in that decision on the 2003 fingerprints and the court did not locate such a report in the evidence before it.

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[14] *Webb v. Mitchell*, supra, 586 F.3d at 389-390.
[15] Id. at 390.
[16] Id.
[17] Id.

Therefore, the court will not base any of its conclusions in the present decision on this statement in the opinion of the Sixth Circuit Court of Appeals.

As set forth by the Ohio Supreme Court "[w]hen the prosecution withholds material, exculpatory evidence in a criminal proceeding, it violates the due process right of the defendant under the Fourteenth Amendment to a fair trial."[18] " '[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' "[19] "Thus, the key issue in a case where exculpatory evidence is alleged to have been withheld is whether the evidence is material."[20]

" * * * [I]n determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' "[21] This standard of materiality applies regardless of whether the evidence was specifically or generally (or not at all) requested by defense counsel.[22]

The police report at issue does not rise to this level. There is no reasonable probability that, had this report been disclosed to the defense, the result of the trial would have been different and, as such, this evidence was not material.

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[18] *State v. Johnston* (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898.
[19] Id., quoting *Brady v. Maryland* (1963), 373 U.S. 86, 87, 83 S.Ct. 1194, 1196-97.
[20] Id.
[21] Id. at 61, quoting *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481.
[22] Id.

First, there is no indication in the police report who "reported" that Tracy Jordan said Gambrell smelled of gasoline on the morning of the fire. Regardless, Tracy Jordan herself denied that Gambrell smelled of gasoline.

As to the statement made by Gambrell the morning of the fire, he either said he hoped Amy's house was the one that burned up or he hoped it wasn't her house. Even considering Tracy Jordan's recollection of Gambrell's statement, this is not an inculpatory statement or an admission of guilt. Further, as noted by the Sixth Circuit Court of Appeals, this would be quite an odd statement for Gambrell to make had he set the fire.[23]

Additionally, the fact that Gambrell often wore a red Goshen High School jacket and did not have the jacket on that day does not indicate his guilt of any of the crimes at issue in this case. As noted above, the defense's insistence on the importance of red jackets, red sweatshirts, etc. in the new evidence presented with this motion ignores the significant fact, also noted by other reviewing courts, that Tami Webb's recollection of seeing someone in red staring at her the morning of the fire was called into question by Tami herself during cross-examination when she admitted that this "memory" was not based on any actual fact but was instead based solely on her feeling that her father could not be guilty of this horrific crime. Certainly, this feeling is understandable, as it must be difficult beyond measure for anyone, let alone the defendant's own daughter, to understand why a father would set fire to his own home, endangering the lives of his entire family and resulting in the death of a young son. Nonetheless, Tami's admission made her testimony on this point unreliable and not credible, an opinion which was

[23] *Webb v. Mitchell*, supra, 586 F.3d at 390.

obviously shared by the jury in this case given the fact that they convicted the defendant of this crime.

Had this report been disclosed to the defense, the defendant's trial counsel obviously would have taken certain steps to investigate Bob Gambrell as a possible alternate suspect.[24] However, this still does not mean that there was a reasonable probability that, had the report been disclosed to the defense, the result of the proceeding would have been different. As analyzed above, the defendant's current theory that Gambrell is a viable suspect is tenuous at best - it involves various leaps in logic and relies on testimony from Tami Webb that has been discredited by Tami herself.

For these same reasons, the suppression of this report would not rise to the standard of entitling the defendant to a new trial pursuant to Crim.R. 33(A)(2) which, as set forth above, allows a court to grant a new trial when misconduct of the prosecuting attorney materially affected the defendant's substantial rights. As discussed above, the suppression of this report did not prevent the defendant from having a fair trial and its disclosure would not have affected the outcome of this trial.

## (B) "BOB" AS DISCUSSED BY JACKIE ALLEN

Jackie Allen told Sergeant Stratton during her interview that a man she knew as "Bob," who worked at Swifty's Gas Station which was located next to Allen's home, came to her several days after the fire and told her that, the next morning, there would

[24] Motion for New Trial, Exhibit D.

be something by her door and he asked that she take it to the FBI.[25] Allen states that the next morning there was, in fact, a blue gym bag on her porch.[26] She states that she and her mother went through the gym bag and it had various items in it, including a red sweatshirt, a black notebook and a letter addressed to Allen.[27] Ms. Allen says that the letter said "I did something so stupid."[28] In the black book, Allen states there were names of people and dates, including Mike Gay, a friend of Allen's family, and Sherry Apgar.[29] Allen stated that the book said Sherry Apgar was "missing" or "still missing."[30] Allen states the letter addressed to her included the statement "Mike Webb, case or job went bad. Boy died in fire. Boss man pissed off. Family was supposed to have been on vacation."[31]

Allen states that she called Miami Township Police Station and that four officers came to her home, including Officer Fred Fatute, an officer named Ron, and one other officer whose name she does not recall, and the police chief for Miami Township at the time.[32] Allen states in her affidavit that this meeting took place prior to Mike Webb's trial and that she showed the officers the contents of the bag.[33] She further states that she asked the police chief if he was going to turn the bag over to the FBI and he replied "we got our man."[34] Allen stated in her interview that the chief left with the bag.[35]

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[25] State's Memorandum in Opposition, Exhibit 5, pg. 11.
[26] Id. at pgs. 11-12.
[27] Id. at pgs. 12-13.
[28] Id. at pg. 14.
[29] Id.
[30] Id. at pgs. 14-15 and 31.
[31] Id. at pgs. 15-16; and, Motion for Leave, Exhibit C, ¶ 9.
[32] Id. at pgs. 21-22.
[33] Motion for Leave, Exhibit C, ¶¶ 12-13.
[34] Id. at ¶ 13.
[35] State's Memorandum in Opposition, Exhibit 5, pg. 71.

Allen relates a story during her interview about when she was with several of these same officers some years later, but she denied having a relationship or going out with any of the officers.[36] When Sergeant Stratton informed her that Fred Fatute admitted they had a sexual relationship at some point, Allen recants and admits that was correct and explains why she did not initially tell the truth about that.[37] It should also be noted that Fred Fatute states in his affidavit that he worked as a Goshen Township police officer until he took a job as an officer with Miami Township in January 1991.[38] He also states that, while he did respond to the fire initially on November 21st, he was not involved in the investigation of the fire.[39]

With regard to Sherry Apgar, Allen's affidavit states that "Sherry was a young woman who disappeared in 1989-90."[40] When Sergeant Stratton informs Allen during their interview that Sherry Apgar did not go missing until 1999, Allen has no real answer for this discrepancy and, listening to the audio recording of the interview, she clearly becomes defensive and agitated when her recollection of the events is questioned. Ms. Allen cannot explain how Apgar's name could have been in this black book as missing when she did not go missing until 1999. Even after being confronted with this information, she initially insists that "her name was in there because I haven't forgotten that."[41] It should also be noted that while Allen states in her affidavit that she and Apgar "were not friends" but that she knew of her, in her interview she states "me and Shari

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[36] Id. at pg. 28.
[37] Id. at pgs. 50 and 59-60.
[38] State's Memorandum in Opposition, Exhibit 2, ¶¶ 2 and 4.
[39] Id. at ¶¶ 3-4.
[40] Motion for Leave, Exhibit C, ¶ 10.
[41] State's Memorandum in Opposition, Exhibit 5, pg. 37.

was best friends. I have a daughter by her uncle as a matter of fact. * * * my daughter is an Apgar."[42]

Allen's time line of events is flexible to say the least. When she first starts the interview she gives the year that this happened as 1991 after her daughter Amanda was born.[43] She later states that it could have been earlier and that Amanda might not have been born at the time.[44] Allen then insists multiple times during the interview that this interaction with Bob happened just several days after the fire and in her affidavit she states it was "[n]ot long after the fire that killed Mikey Webb[.]"[45] She is clear when asked that it was definitely not years after the fire and it was soon after the fire that she received the gym bag.[46] Allen's subsequent conversation with Sergeant Stratton does not add any clarity to the situation.

During his interview, Chief Snyder stated that he did not recall riding or working with Officer Fred Fatute.[47] He stated that he initially did not remember anything about going to meet with a woman at the location of Allen's home, but he said "Shirley Allen," a name related to him by his son, then rang a bell with him.[48] Chief Snyder then relates a story about a Shirley Allen, told to him by his wife, who was married to a police officer.[49] Chief Snyder states "I don't know whether I'm putting stuff that really didn't happen into context or whether I actually did something. I've been trying to you know get the help from [inaudible] people and you as to whether this really even happened."[50]

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[42] Id, pg. 31; and Motion for Leave, Exhibit C, ¶ 10.
[43] Id. at pg. 9.
[44] Id. at pg. 36.
[45] Id. at pgs. 17-18, 33, and 36; and, Motion for Leave, Exhibit C, ¶ 4.
[46] Id. at pg. 33.
[47] Reply Memorandum, Exhibit I, pg. 7
[48] Id.
[49] Id. at pg. 9.
[50] Id.

Chief Snyder says that he has a "foggy" memory of a front porch and a woman holding up a book like a binder containing white pages with black stripes and scribbling or writing.[51] Throughout his conversation with Sergeant Stratton, Snyder expresses his confusion about the situation and what is real and what is not about his memories. While stating that he is focused on the idea and memory of a book with the scribbling in it, he admits "I don't even know if the book existed, I'm going to level with you."[52]

Harry Snyder was involved in a car accident in June of 1990 wherein his vehicle was hit by a drunk driver.[53] He was off work for some time recuperating from this serious accident and his injuries, including PTSD, eventually caused him to have to retire from the police department.[54] Snyder is honest in his interview with Sergeant Stratton that he is not sure if this foggy memory of a woman on a porch with a binder or notebook is even real. Therefore, this is not corroborative evidence of Jackie Allen's statements as Snyder himself cannot attest to the reliability of this memory.

Generally, a court is not permitted to assess the credibility of statements set forth in affidavits without first holding an evidentiary hearing and taking testimony from the affiants to get a more accurate and reliable assessment of their credibility while on the stand. However, a trial court can discredit an affidavit on its face if that affidavit has internal inconsistencies sufficient to destroy its credibility.[55]

In the case at bar, there are factual claims set forth in Allen's affidavit that are untrue, namely that Sherry Apgar was a young woman who disappeared in 1989-90.

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[51] Id. at pg. 10.
[52] Id. at pg. 18.
[53] Id. at pg. 5.
[54] Id. at 5 and 7-8.
[55] See, e.g., *State v. Gray* (Dec. 2, 2010), 8th Dist. No. 94282, 2010-Ohio-5842, ¶ 27; and, *State v. Mitchell* (Feb. 6, 2004), 2nd Dist. No. 19816, 2004-Ohio-459, ¶ 19, citing, *State v. Wright*, 67 Ohio App.3d 827, 831, 588 N.E.2d 930 (Ohio App. 2nd Dist., 1990).

The prosecution presented the interview with Jackie Allen in opposition to the present motion and, in that interview, Allen is presented with the fact that Sherry Apgar did not go missing until 1999. Allen is, at first, still insistent that Apgar's name appeared in the book and that the notion "missing" or "still missing" was next to her name. Allen never presents any explanation as to how Apgar's name could have been in that book as missing when she did not go missing until almost a decade later.

The fact that Allen falsely reported in her affidavit that Apgar went missing in 1989-90 and stated vehemently in her interview before being confronted with the truth that Apgar's name was in the book as "missing," demonstrates that either (1) Allen's memory of this situation is faulty and undependable, making her affidavit unreliable and not credible, or (2) Allen injected false facts into her affidavit to corroborate her statements which destroys the validity of her entire story and her credibility as an affiant.

The court has also discussed above several statements made by Allen that she herself contradicted during her interview, such as the status of her friendship with Sherry Apgar and the timing of when she allegedly received the bag, which varies widely throughout her initial interview and subsequent interview as Allen seems to strain to keep her story within the bounds of real facts, such as the date the fire occurred and the date Apgar went missing. Also, in her affidavit Allen states that she knew of Mike Webb when they were in high school but they were not friends and her only connection to him is what is set forth in the affidavit.[56] She does not relate anywhere in her affidavit that Mike Webb was known by her "whole family," that she's "known him since [she] was like 14-15[,]" and that her brother Jeff knows him very well.[57]

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[56] Motion for Leave, Exhibit C, ¶ 1.
[57] Memorandum in Opposition, Exhibit 5, pgs. 16-17.

The court finds that the Allen's affidavit was wholly discredited by the factual inaccuracy regarding Sherry Apgar, as this one fact led to an unraveling of many different key contentions in Allen's affidavit, including the timing of when this entire incident with "Bob" allegedly occurred. In her interview, Allen also revealed several other inaccuracies or, at the very least half-truths, set forth in her affidavit.

The defense insists that the court should not focus on this one issue and instead listen to Allen's statement as a whole. This is precisely what this court has done. The court read the transcripts of Allen's interviews, listened to the audio recording of Allen's initial interview, and read her affidavit. Allen discredits herself throughout her interview with Sergeant Stratton at various times and she certainly discredited herself by including a false fact (the timing of Apgar's disappearance) in her affidavit. Allen appears to clearly recall seeing Apgar's name in the book next to the notation "missing" and that this "freaked [her] out."[58] She noted to Stratton that Apgar is related to her and that, upon seeing her name in the book, she remarked about it to her mother.[59] She states that Apgar was already gone at the time.[60] However, this story is completely discredited by the timing of the events related by Allen. Since Allen was so certain about seeing Apgar's name in the book and her memories surrounding it, which she gives in great detail, and this fact turns out to be false, the court cannot find any of her other statements, given with the same detail and apparent certainty, to be reliable or credible. The defense asks the court to ignore these false statements of fact and inconsistencies and give credibility to other statements made by Allen. By doing so, the defense ignores

[58] Id. at pg. 14
[59] Id.
[60] Id. at pg. 31.

the fact that the court cannot give credibility to or trust the reliability of anything set forth by Allen when she has already demonstrated having a problem in relating the truth.

Since Allen's affidavit has been discredited, there is no credible evidence before the court that the blue gym bag and its contents as set forth by Allen ever existed. There is further no credible evidence that this alleged evidence was ever given to the state and, as such, no *Brady* violation or issue of failing to preserve evidence has been properly raised.

Further, the unreliability of this "new evidence" forecloses a finding that said evidence creates strong probability that it will change the result if a new trial is granted. Allen's statements throughout her interview are contradictory and not supported by fact. Allen first states that she received the bag in 1991 but also insists several times that she received the bag shortly after the fire, which occurred in November 1990. She is very positive of the fact that Sherry Apgar's name is in the black book and is then completely befuddled when confronted with the information that Apgar did not disappear until 1999.

While Allen stated that Fred Fatute came to her home that day, she noted that it was in response to a call to Miami Township police department and that she called that department because she knew the officers there, presumably including Fatute. However, Fred Fatute worked for Goshen Township until January 1991. Fatute states in his affidavit that he was not involved in the investigation of the fire and there is nothing in the record contradicting this statement. It defies logic that Fred Fatute would have responded to a call to the Miami Township police in November or December 1990, when he did not begin to work there until January 1991. This appears to be a case of

Allen, who knew Fatute and remembers him as a Miami Township officer, trying to use "facts" to bolster the credibility of her story.

The court also notes that the defense again makes much of the red sweatshirt Allen indicated was in the gym bag. As the court discussed above, there is no real import to the existence of a red sweatshirt since Tami Webb's discredited her own testimony on this matter, admitting that this testimony was based only on a feeling borne of her disbelief that her father could have set the fire.

For the reasons set forth above, Jackie Allen's affidavit does not constitute "new evidence" which would require granting the defendant's motion for leave or his motion for a new trial.

## II. EXPERT TESTIMONY

The other issue raised in the motion for leave to file a delayed motion for new trial currently before the court is testimony given at trial regarding the points of origin of the fire.

First, as noted in the standard of review, when a defendant seeks leave to file a motion for new trial out of time, he must establish by " 'clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely.'"[61] As the Twelfth District Court of Appeals recently stressed, " '[t]he requirement of clear and convincing evidence puts the burden on the defendant to

[61] *State v. Thornton* (June 10, 2013), 12th Dist. No. CA2012-09-063, 2013-Ohio-2394, ¶ 18, quoting *State v. Williams,* 12th Dist. No. CA2003–01–001, 2003–Ohio–5873, ¶ 17.

*prove* he was unavoidably prevented from discovering the evidence in a timely manner.'"[62]

The defendant has not established in his motion for leave that he was unavoidably prevented from discovering this fire evidence until now. In his motion, the defendant notes that he is indigent and is a death row inmate. However, as a death penalty inmate, the defendant has had almost continuous legal representation since his trial, as evidence by the appellate history of this case. Though modern fire science had not yet developed by the time of Webb's trial, it began to develop in the 1990s, with its full acceptance taking place with the 1999 decision of the United States Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238. There is no evidence before the court that prior appellate counsel had attempted to obtain the services of a fire expert in the last decade and were unable to do so. The science set forth by Hurst in his report was available years prior to the defendant's motion but the defendant simply did not seek the services of a fire expert until now. Those facts do not establish by clear and convincing evidence that the defendant was unavoidably prevented from discovering this evidence until last year.

Further, upon analysis of the expert report, the defendant would not meet the requisite standard for the granting of a new trial even if leave were granted to file his motion.

As set forth above, Goshen Township Fire Chief Virgil E. Murphy investigated the fire scene. He noted definite gasoline pour trailers in the foyer the led down a hallway leading to the bathroom and bedrooms and, from the hallway, the trailer led into the master bedroom up to the base of the bed and also went into Mikey's room up the side

[62] Id. at ¶ 19, quoting *State v. Rodriquez–Baron* (Nov. 16, 2012), 7th Dist. No. 12-MA-44, 2012-Ohio-5360, ¶ 11.

of the bed and across the bed to the rear wall. Murphy also found an unignited gasoline trailer that led downstairs to the basement, where the two-liter pop bottle containing gasoline containing Webb's fingerprints was found. Gasoline had also been poured on Tami's bed and Murphy testified he smelled it on Amy's bedclothes as well.

Murphy testified at trial that that the fire was caused by arson and had started in two places. He opined that one fire was contained in the hall closet and that a second fire had started at the bathroom door, at the end of the hallway nearest the bedrooms, and moved from there into the bedrooms and down the hallway toward the living room.

The defendant now presents the report of Gerald L. Hurst, who received a Ph.D. in chemistry from Cambridge University, and who has over thirty-nine years of practical experience in the analysis of accidental and incendiary fires.[63] The state does not contest that Hurst is an expert in fire science and the court will consider him as such for the purposes of analyzing this motion.

Hurst sets forth in his report a general history of the evolution of fire science.[64] In that section, he notes that "[i]n 1990, there was no accepted standard of care in fire investigation and no real requirement that experts provide a scientific basis for their opinions."[65] This fact is generally understood in the law to be correct and is not disputed by the state.

Hurst notes in his report that Chief Murphy relied on the fact that there was "a marked absence" of burns on a clothing rack across from the closet to support his conclusion that the fire did not come from the direction of the closet but instead traveled

[63] Motion for Leave, Exhibit B, pg. 1.
[64] Id. at pgs. 6-8.
[65] Id. at pg. 6.

from the opposite end (where the bathroom was located) towards the living room area.[66] Hurst opines that:

> "[a]pparently Mr. Murphy believed that liquid spill fire propagation could somehow exhibit some form of horizontal mechanical and thermal momentum which would carry the flames and smoke onward in the direction of the initial flame propagation. When gasoline vapor is ignited, the resultant flames do develop modest momentum but this momentum is generated by buoyancy and is directed vertically upward, not horizontally."[67]

Hurst opines that the closet was not necessarily a point of origin because it is not reasonable to conclude that the fire started in the closet simply because there was a higher level of damage in the closet.[68] Hurst states that it is reasonable to assume that the fire in the closet was caused by flames traveling under the door.[69] However, Hurst does not state that the closet could not have been a point of origin; he only states that one cannot reasonably conclude as much simply because there is greater damage in the closet.[70]

Hurst also noted that Murphy relied on this same incorrect theory when discussing the effects of the fire on a chair located in the hallway. Murphy testified that, had the fire exited out of the closet and ignited the vapor trail, there should have been burn damage to that chair and it should have been moved from the concussion wave as it came through from the right-hand side. Chief Murphy noted that the burns on the chair were on the right side of the chair, which faced the bathroom and that there were little to

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[66] Id. at pgs. 4-5.
[67] Id. at pg. 5.
[68] Id. at pg. 8.
[69] Id.
[70] Id.

no burns on the left or front side of the chair.[71] Hurst states in his report that this testimony "relied on the false concept of a 'concussion wave' effect somehow related to burn patterns."[72] Hurst opines that "there is no significant concussive wave associated with simple horizontal flame propagation."[73] Hurst also noted that Murphy's reasoning regarding the degree of burning to the right side of the chair relied on the "overly simple rule of thumb in 1990 that the level of damage is usually greater closer to the origin."[74] In the case of a gasoline vapor trail being ignited at a rate of 10 feet per second, "the difference in exposure time of the two sides of the chair amounts to only a small fraction of a second – a difference too small to be detectable by burn pattern analysis."[75]

Hurst concludes that, based on the evidence he examined, "the origin could have been any ignition source applied to any part of the gasoline vapor. And the vapor would have extended beyond the gas trails themselves and could easily have covered the entire floor area of the first story of the building."[76]

The defendant cites the case of *Han Tak Lee v. Glunt*, 667 F.3d 397 (3rd Cir.,2012), in support of his claim that his trial violated his right to due process. In that case, Lee sought "habeas relief on his due process claim by showing that the admission of the Commonwealth's fire expert testimony undermined the fundamental fairness of Lee's entire trial because the testimony was premised on unreliable science and was therefore itself unreliable."[77] The defendant anticipated that his expert would conclude "that there is no support for the conclusion that the fire was intentionally set if he [was]

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[71] Id. at pg. 5.
[72] Id. at pg. 6.
[73] Id.
[74] Id.
[75] Id.
[76] Id.
[77] *Han Tak Lee* at 407.

given the opportunity to analyze the fire scene evidence and apply the principles known through the new developments in fire science to that physical evidence."[78]

This case is markedly different from the case at bar. If Lee's expert were able to examine the evidence in the case and conclude that the fire was not intentionally set, this would be clearly exculpatory and call into question whether a crime was even committed in that case. Further, the state of Pennsylvania presented no evidence to the Third Circuit that supported the validity of the trial fire expert's methodology.[79] Therefore, the state presented no argument that the trial fire expert's conclusions were still valid.

In the case at bar, the report rendered by Gerald Hurst does call into question the methodology used by the fire chief at the time of the trial. However, what Hurst does not, and apparently cannot, say in his report is that the fire did not start precisely where Chief Murphy testified it started, namely the closet and/or, more significantly, the hallway by the bathroom. While the methodology may have been incorrect, this does not necessarily mean the conclusion was incorrect. Hurst opines in his report that the fire could have started anywhere on the first floor. Therefore, the fire could still have started in the hallway by the bathroom. Hurst's testimony is not exculpatory for the defendant.

The defendant argues that all of this new evidence taken together is sufficient to warrant a new trial. However, this new evidence does not call into question much of what the jury heard in this case – the defendant's motives, his opportunity, his strange action of not telling Amy to exit the house despite believing the house was "rigged" with

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[78] Id.
[79] Id.

gasoline, the matchbook found with his fingerprint on it consistent with the way he lit matches, his fingerprints found on a 2-liter bottle containing gasoline, the lack of reliable evidence placing any person outside the Webb family in the house that morning, the fact that Webb initially lied to a family member about how the bathroom window was broken, and the fact that Webb was standing on the first floor near a gasoline vapor trail where the fire could have started when the fire ignited. Further, Webb said that, after he smelled the gasoline, he was running frantically throughout the house trying to figure out what was going on but, apparently, he never ran into a mysterious stranger anywhere on the first floor or in the basement during this frantic search.

As noted above, to warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

For the reasons discussed in this section and the sections above, the new evidence presented with this motion does not disclose a strong probability that it would change the result if a new trial was granted. Further, the fire science evidence merely impeaches and contradicts the testimony given by Chief Murphy. The defendant's expert does not aver that the conclusions set forth by Chief Murphy were impossible or not supported by the evidence; he only states that Murphy's methodology is not supported by modern fire science and that the fire could have started anywhere on the

first floor. This does not foreclose Murphy's conclusion that the fire started in the closet and/or the hallway by the bathroom, both of which are locations on the first floor.

For the reasons set forth above, the court finds that the defendant has not met his burden to be entitled to leave to file a delayed motion for new trial and, as such, said motion shall be denied.

## CONCLUSION

The defendant's motion for leave to file a delayed motion for new trial is not-well taken and is hereby denied.

The defendant's remaining motions, including his motion for an evidentiary hearing, are hereby rendered moot.

**IT IS SO ORDERED.**

DATED: 12-30-13

Judge Jerry R. McBride