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Emily K. Miller
Prosecuting Attorney
93 Wyoming Street Suite 207
Welch, WV 24801

Sidney H. Bell
Attorney at Law

**RE: State v. Charles Jason Lively
& Related Habeas Corpus Issues**

Dear Emily:

As you are aware, I have been concerned for two years about the exculpatory expert opinions that Charles Jason Lively's attorneys have cited in connection with their efforts to gain his release from prison. You will recall the meeting in Charleston that you and I both attended in order to have the fire investigation experts explain their findings and opinions in the presence of Robbie Bailey and Tony Domingo. One of those experts, Dr. Craig Beyler, was retained by me after the Lively trial and the other one, Dr. Glen Jackson, was recommended by the state fire marshal and retained by the West Virginia attorney general's office in connection with the *habeas corpus* petition.

In addition to the reports of the fire investigation experts who both concluded the Whitley fire was an accidental electrical fire, we have been provided the supplemental report and opinion of Dr. Jackson who concluded that the testimony of one of our trial experts, Koren Powers of the State Police Forensic Laboratory, was materially and demonstrably false in regard to her characterization of the properties of toluene that she identified from samples taken near the point of the fire's origin.

I recently spoke for an hour by telephone with Jenny Whitley McReynolds, who is Dr. Whitley's daughter. I requested after our conversation that she be provided with copies of the experts' reports. I haven't heard from her since they were mailed to her, but I believe she understands the decision in the case is yours to make even though the family's input should be considered. Having spent a lot of time with Jenny and her brothers prior to and during the trial, I do not expect them to agree with me that Lively was wrongfully convicted of felony murder and should be released from prison. I would, however, expect them as educated, intelligent people to understand that a prosecutor's highest duty is to do what is just and right.

One of my biggest fears became a reality this week when I received a message about the case from Lacie Pierson, a reporter with The Charleston Gazette. The reporter is aware that the Innocence Project is advocating for Lively and that we have been confronted with compelling exculpatory evidence from experts who were not retained by the defendant but were retained by the State of West Virginia. I believe I expressed to both you and Ed Kornish that I feared this case would blow up in our faces with negative media attention and complaints to the Office of Disciplinary Counsel. Lively has remained in prison for two years after two of the leading experts in the field have told us the fire that caused Dr. Whitley's death was not arson but was an accidental electrical fire. I have acknowledged that my testimony at the *habeas* hearing was inaccurate when I said Dr. Beyler was equivocal in regard to the cause and origin of the fire. He was not. Dr. Beyler is strongly of the opinion that the fire could not have been deliberately set and was clearly an electrical fire that started between the bedroom floor and the living room ceiling.

I had two reasons to retain Dr. Beyler after the trial. First, I wanted to obtain an opinion in which I had more confidence after Robbie and Tony contradicted themselves at the co-defendant's trial. Secondly, I was concerned after watching a documentary about the Todd Willingham case that the science of fire investigations has debunked the physical findings that our witnesses from the state fire marshal's office had been taught to recognize as signs of arson.

The time to act to stop this injustice is now. I have never been a fan of Charles Jason Lively. I put all of my experience, trial skills and effort into obtaining his conviction for felony murder. Dr. Whitley was a person whom I greatly admired. I understand the sentiments of his children. Nevertheless, I have to recognize now that we were all misled or misinformed about the cause and origin of the fire. No one is saying--**at this point**--that anyone has been guilty of intentional wrongdoing. We now know from our own experts that if the case were tried again the state could not possibly prove beyond a reasonable doubt that Lively, or anyone else, intentionally set the fire. All of the evidence of what happened the night before and what Lively did after the fire was suspicious but is now irrelevant if the prosecution cannot prove arson which is the most material element of the offense.

Lively has been in jail or prison for 15 years. We have had knowledge of this compelling exculpatory evidence for two years. Further delay based on our failure to act would be immoral and

unethical. Any concern that McDowell County would be liable for civil damages if the state admits Lively was wrongfully convicted is unfounded. First, I don't believe he would have a cause of action at this time because no one has acted intentionally to wrongfully imprison him. Secondly, if he did have a cause of action, it would be against the State of West Virginia and the state's insurer instead of the county.

I hope you will immediately consider these concerns and promptly take the appropriate action. Publicity about the case will be much more favorable if we do the right thing now and rectify this wrong. It may not be a story at all if that is done. I believe you have been, and will continue to be, a good prosecutor. You should always keep this in mind: "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." (*ABA Standard 3-1.2*) If you honor that duty, you will never be wrong. Best wishes, Emily!

Sincerely,



Sidney H. Bell