Background

Petitioner Thomas Gervasi Pro Se currently confined in PA State Institution at Smithfield, Box 999 / 1120 Pike St, Huntingdon PA 16652. Institutional number KN 2225.

Last direct appeal was denied by Supreme Court of Pennsylvania, January 2014. This petition is being timely filed on July 28, 2014, pursuant to 42 PA.C.S. 9545 (b)(1)(3), as petitioner’s first for post conviction collateral relief.

Petitioner was sentenced on March 16, 2012, for a term of 5 to 11 years following a jury trial in Lackawanna County Court by Judge Margaret Moyle. No credit given for house arrest, Dec 21, 2011, through March 20, 2012. Petitioner has served 2 years, 4 months, and 13 days without house arrest time credit.

Petitioner was convicted on the following:

Arson, Endangering Person, CC 3301A, 6 counts

Arson, Intent to Collect Insurance, CC 3301 C3

Arson and Related Offenses, CC 3301 D2, 2 counts

Criminal Mischief, CC 3304 A1, 2 counts

Exhibit I

Petitioner is eligible for relief due to:

1. Ineffective assistance of counsel which in the circumstances of this particular case so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
2. Violations of the Constitution of the United States and the Commonwealth of PA in that the circumstances of this particular case so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
3. The unavailability of exculpatory evidence that has come available and would have changed the outcome of the trial had it been introduced.
4. Evidence suppressed and/or ignored by arresting officers, investigators, and Assistant District Attorneys.
5. Relevant testimony and evidence not permitted by the court.

Petitioner has taken action in:

PA Superior Court, August 23, 2012. Appeal Denied.

PA Supreme Court, January 14, 2014. Appeal Denied.

Petitioner was represented previously by:

Paul Walker, Esq. Trial Counsel, Matthew Comerford, Esq. Trial Counsel, Curt Parkins, Esq. Trial Counsel, of Walker/Comerford LLC Law Firm, 207 N Washington Ave, Scranton PA 18503.

Gilbert Abramson, Esq. Appellate Atty, Dennis Abramson, Esq. Appellate Atty, Michael Tolcott, Esq. Appellate Atty, of Gilbert Abramson & Associates, One Presidential Blvd, Bala Cynwyd PA 19004.

The Commonwealth cannot claim any exception to this petition as it is timely filed under 42 PA. C.S., paragraph 9543(b).

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Petition for Post Conviction Collateral Relief

To the court of Common Pleas, Lackawanna County,

Before you is Thomas S. Gervasi, Pro Se Petitioner, an innocent man, falsely accused and wrongfully convicted primarily, but not exclusively due to, ineffective assistance of counsel, seeking relief.

Petitioner requests, and this complex case demands, immediate release so as to effectively depose witnesses, review files, investigate issues and organize case for necessary evidentiary hearing. Petitioner is presently serving the third year of a five to eleven year sentence at: PA SCI Smithfield, Box 999/1120 Pike St, Huntingdon PA 16652.

PCRA Grounds

1. Trial attorney failed to object or demand a “Frye” hearing on expert status of Trooper Andress, PSP, and the hypothetical theory on how the fire started. This was highly prejudicial to the defendant and offered to the jury as proof by both prosecution and court. (Trial transcript, Day five, Dec 19, 2011, pg 76 line 12 and pg 80 line 5.) Exhibits II & III
2. Trial Attorney failed to object to Trooper Andress’ testimony (Day five, Dec 19, 2011), ask the court to strike his prior testimony (Day 4, Dec 2011), and prevent the further testimony of Detective Monahan, SPD, after they both viewed the scene, without my permission, during the trial, in the presence of Judge and Prosecutor, despite my instruction to place the objection and move to strike. Trial attorney’s remark was “Don’t worry, they can’t convict you. They have no evidence”.
3. Trial Attorney failed to execute 17 subpoenas to individuals who could present conflicting evidence to prosecution witnesses including prosecution witnesses who were not called to testify by prosecution against the instruction of the Defendant.
4. Trial Attorney failed to hire financial expert to explain the much improved financial situation of the defendant and discredit the errors, omissions and additions in the Rose reports of Nov 9, 2009, and Dec 9, 2011.
5. Trial attorney failed to impeach witness Otto Vasquez as Vasquez had reversed his story from preliminary hearing to trial to that which better fit the prosecution’s hypothesis of events. Trial attorney also failed to point out the location of the mailbox at the time of the fire which was Vasquez’s excuse as to why he traveled so far to the road where he ‘happened’ to see me in the garage. (Preliminary hearing Feb 22 2010, pg 81, Exhibit IV, and 94, Exhibit V. And trial transcript pg 268-271). Trial attorney explains why he didn’t impeach, (trial transcript Dec 21, 2011, pg 13 lines 18-22), “It doesn’t mean that I have to prove somebody else took a match and lit a fire. I don’t have that burden, never did, never will as a defense attorney.”
6. Trial Attorney failed to question witness, Carl Spindler, on Erie Insurance recorded deposition, June 25, 2008, on multiple issues which were contrary to sworn testimony of Spindler and other prosecution witnesses, including but not limited to, his statement of another person (Joshua Boinske) who approached him at the fire scene while the fire was in progress and said, “…looks like Tommy...” “The last house I lived in…Tommy’s (Defendant)”, “I told you about that…” “…house went right up.” (Erie transcript, pg 39). Exhibit VI. This was a reference to the 1023 Bunker Hill St. home I sold to Joshua and his sister in 2006. The house was destroyed by fire in 2007, one year before my garage was destroyed by fire. The insurance money from the 1023 Bunker Hill St. fire was never used to rebuild the structure, instead the structure was left abandoned; the occupants, Joshua and his sister, moved to Florida and the city was left to raze the structure. Trial Attorney didn’t think this obvious Reasonable Doubt (at minimum) was important, and he ignored it. When I suggested he ask Det. Monahan (Myer) on cross examination, why he told Spindler to “shut his mouth” during the investigation, I was told by Walker “I have to work with these people”. (Erie transcript pg 41, line 19, through pg 42, line 22) Exhibit VII
7. Trial Attorneys met without me, after instruction to not make any decisions or meet on the issues of this case outside of my presence and my knowledge of such. Trial attorney met with prosecution and decided to not admit information on myself and many of the prosecution’s witnesses in regards to prior criminal activity. Witnesses held multiple arrests and issues of poor credibility including two witnesses holding criminal conspiracy charges and jail time. My rap sheet carried one issue, a speeding ticket in 1985. This issue would carry heavy weight with the jury and the credibility of those standing, in unison, against Petitioner. Not only did trial attorney meet and agree to omit this evidence, he was obviously unaware of it, although it being part of Discovery, as he was clearly surprised by how “clear” the report was and how he didn’t “think in (his) career”, he’d “seen a presentence report as clear as this one.” Not only had trial attorney not read the discovery item(s), he learned of this issue from the presentence report months after his unauthorized decision to ignore this evidence of facts and issues of character. (Sentencing transcript Mar 16, 2012, pg 40 lines 7-21)
8. Trial attorneys failed to ask court for continuance to investigate nature of presiding Judge’s recusal from this case which came 3.5 years after the incident and just 3 days before trial.
9. Trial attorney actually uses the word embellish in regards to how he will present his closing argument to the jury, (Trial transcript Dec 21, 2011, pg 7 lines 6-11) Exhibit VIII, not once, but twice “I may embellish...”, “..rest assured, I’ll probably embellish” and continues “..but it’s your collective recollection of the facts that apply, not mine.” In other words, he’s going to make it look better than it is but you (the jurors) don’t have to believe him.

10. Trial attorney uses an “off the cuff” approach to closing argument knowing full well of the prosecutions intent of a PowerPoint closing argument. (Trial transcript, Dec 20, 2011, PM session, pg 253, lines 12-14) Exhibit IX

11. Trial attorney failed to present to court case law on party opponent issue after being instructed by the court to do so giving the court nowhere to go but rule with the prosecution on this important constitutional issue. (Trial transcript PM session, D ec 20, 2011, pgs 1-15) Exhibit X

12. Demurer: After dozens of misstatements by prosecution, defense attorney says nothing to dispute the prosecution’s case based on prior sworn statements by most of the witnesses that were contrary, contradictive and opposite in some cases of what the prosecutor has given the court, and was testified to at this trial, causing the court to have no other way to rule but allow this trial to continue. (Trial transcript Dec 17, 2011, pgs 214-217) Exhibit XI, parts 1-4

13. Trial attorney’s failure to present to jury political influence and public media pressure to prosecute petitioner as revealed in sidebar conversation, (Trial transcript Dec 20, 2011 PM session, pg 7 lines 9-20) Exhibit XII, and (Defendant’s brief in support of post sentence motion filed Aug 2, 2012, pg 9 section IV line 6). Exhibit XIII

14. In the trial transcript of this case alone there are upwards of 170 issues of misrepresentation by trial attorney. Too many to mention in this brief. Understanding the law frowns upon but does not exclude the cumulative effect of issues presented or excluded by trial attorney on the jury’s determination of innocence or reasonable doubt, this case demands an evidentiary hearing to determine motive of trial attorneys for not taking the extra step to exploit these many issues. For justice to be served this Pro Se Petitioner requests and this issue alone demands immediate release so as to investigate and prepare for such evidentiary hearing.

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Witnesses to be investigated and/or deposed and/or called to testify at evidentiary hearing:

1. SPD Officer OBrien
2. Carl Spindler
3. Toni Gillette
4. Paul Walker Esq
5. Curt Parkins Esq
6. Matthew Comerford Esq
7. John Brazil Esq
8. Gilbert Abramson Esq
9. Michael Talcott Esq
10. Russell Andress PSP
11. Martin Monahan SPD
12. John McHale
13. Joshua Boinske
14. Judge Gibbons
15. Ben Gervasi
16. Gina Gervasi
17. Thomas Davis SFD Ret
18. David Gervasi SFD
19. Juror #6
20. Juror #9
21. Michael Mitchell
22. Jean Admiri
23. Matthew Loomis
24. Otto Vasquez
25. Charles Smith
26. Tracy Smith
27. Dewy Belles
28. Jolene Belles
29. Daniel W Rose
30. John M Agosti
31. Frank Gervasi
32. Francesca Bouselli
33. Robert Corbett
34. Neil Deluca
35. Judy Sharr
36. Sally Kohut

Due to my incarceration I am unable to gather addresses, execute or prepare affidavits and subpoenas or depose these and other witnesses.

Petitioner is asking for, and evidence set forth demands, 1. Immediate vacating of conviction without prejudice with admission of ineffective trial counsel, or if the court does not see fit above request, immediate release and new trial. 2. Immediate release on bail at pre-trial level pending evidentiary hearing and/or new trial.

Petitioner is not a flight risk.

Bail Issue

Over the course of time from arrest, Petitioner:

1. Voluntarily turned himself in for arrest
2. Never violated rules of probation in any way
3. Always showed up on time for every court action
4. Never violated rules of house arrest.

Over course of time from arrest to trial, Petitioner:

1. Had bail reduced by court from $100,000 secured to $100,000 unsecured.
2. Had travel restrictions to limits of Lackawanna County increased to Commonwealth of PA to no travel restrictions
3. Had check-in to probation office daily reduced to check-in or call once per month
4. Had no violations of any kind during period.

Petitioner is not a flight risk; his only goal is to be cleared of these heinous crimes he did not commit.

Attachments:

Exhibits I thru XIII

Due to Petitioner’s incarceration he is unable to secure additional exhibits at this time.

Declaration

I, Thomas Gervasi, hereby verify these statements made with this motion are true and correct to the best of my knowledge, information and belief, and subject to penalties.

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P.O.A. for Thomas Gervasi KN2225,

SCI Smithfield, Box 999 / 1120 Pike St

Huntingdon PA 16652

Certificate of Service

I, Thomas Gervasi, hereby certify I am serving three (3) copies of this Petition for Post Collateral Relief upon the Clerk of Courts of Lackawanna County, Pennsylvania, 200 N Washington Ave, Scranton PA 18503, by and through my Power of Attorney.

July\_\_\_\_\_, 2014 Thomas Gervasi Pro Se Petitioner, by:

P.O.A. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_