**No. _____**

IN THE

# Supreme Court of the United States

SAMUEL ANSTEY,

*Petitioner*,

v.

RALPH TERRY, SUPERINTENDENT, MOUNT OLIVE CORRECTIONAL COMPLEX,

AND

DAVID BALLARD, WARDEN, MOUNT OLIVE CORRECTIONAL COMPLEX.

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a petitioner whose conviction was based substantially on discredited arson investigation techniques can survive summary judgment under 28 U.S.C. § 2244 on a theory that changes in fire investigation science constitute newly discovered evidence.

## PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner is Samuel Anstey, an individual. He was the Petitioner-Defendant below.

Respondents are Ralph Terry, Superintendent, Mount Olive Correctional Complex, and David Ballard, Warden, Mount Olive Correctional Complex. They were the the Respondents Below.

There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

### United States Court of Appeals for the Fourth Circuit:

*Anstey v. Terry*, No. 2:17-cv-03462 (Order denying certificate of appealability filed June 8, 2020).

### United States District Court for the Southern District of West Virginia:

*Anstey v. Painter*, No. Civ. A. 5:99-0120, 2000 WL 34012352, (S.D. W. Va. Mar. 16, 2000).

*Anstey v. Terry*, No. 2:17-cv-03462, Entry No. 1 (06/28/2017).

### Supreme Court of Appeals of West Virginia:

*Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

## PARTIES TO THE PROCEEDING AND RELATED CASES (cont.)

**Circuit Court of Fayette County, West Virginia:**

*State v. Anstey*, Indictment No. 94-F-31 (Sentencing filed on September 14, 1995).

*Anstey v. Trent, No. Civ.A 98-C048-H (Cir. Ct. Fayette Cnty. 1998).*

*Anstey v. Ballard*, Civil Action No. 14-C-134 (Order Denying Petition for Writ of Habeas Corpus filed December 24, 2014).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel R. Anstey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The Fourth Circuit's judgment (Pet. App. 2a–3a) is unreported but is available at 807 Fed. Appx. 280 (Mem.) (June 8, 2020, 4th Cir.). The Judgment of the District Court for the Southern District of West Virginia (Pet. App. 4a–5a) is also unreported but available at 2019 WL 3713715. The Proposed Findings and Recommendations of the United States Magistrate Judge (Pet. App. 15a–38a), which were adopted by the District Court is available at 2018 WL 8966973.

## JURISDICTION

The Fourth Circuit entered judgment on June 8, 2020 and denied rehearing on August 11, 2020. Pet. App. 3a, 39a. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted at Pet. App. 40a–45a.

## STATEMENT

As of November 9, 2020, Petitioner, Samuel Anstey, will have spent 25 years, 1 month, and 18 days in prison for a crime that he did not commit. On February 8, 1994, a fire broke out inside a trailer that Mr. Anstey shared with his grandmother. Pet. App. 16a. Mr. Anstey was able to escape through his bedroom window, but his grandmother (who was 87 years old at the time) was not able to escape. Pet. App. 16a. Firefighters managed to pull Mr. Anstey's grandmother out of the burning trailer. She was rushed to the hospital but passed away a few days later due to smoke inhalation. Pet. App. 16a.

### Investigation

Robert Begley, a volunteer firefighter in Oak Hill with minimal fire investigation training, initially investigated the fire scene. Pet. App 68a–71a. Over the course of Begley's investigation, he moved debris and tracked ashes through the trailer; he also altered pieces of evidence, namely, a toaster and circuit breakers. Pet. App. 58a, 68a–69a. All of this was done before photographs were taken of the scene. Pet. App. 68a–69a.

After Begley had already exited the trailer, Assistant State Fire Marshal Roger York (whose job it was to make a final determination regarding the fire) arrived to examine the scene. Before entering the trailer, York asked Begley and other firemen whether they had any suspicions of what started the fire. Pet. App. 49a. Later, Fayette County Fire Coordinator, Steven Cruikshank, and Forensic Engineer, Harold Franck, also reviewed the site. York focused his cause/origin suspicions on the toaster and hired

electrical expert Harold Franck to examine it. Pet. App. 50a. Franck also performed a duplicate full-scale fire investigation. Although his investigation was supposed to be impartial, Franck met with York before beginning his investigation; York informed Franck about all of the "relevant information" concerning the fire, and Franck reviewed their evidence that was already collected before conducting his own investigation. Following the investigation, Mr. Anstey was charged with first degree murder by arson and was tried in the Circuit Court of Fayette County, West Virginia. Pet. App. 16a.

**Trial**

At trial, the State theorized that Mr. Anstey manipulated the toaster in the kitchen to catch fire by modifying it so that it would not turn off. Pet. App. 16a. According to the State, Mr. Anstey then stuffed the cord inside the toaster, covered the toaster in aluminum foil, turned it on, and went to his bedroom to wait for the toaster to catch fire. Pet. App. 16a. Further, the State accused Mr. Anstey of attempting to set a second fire in his grandmother's bedroom, a claim that went unsupported at trial. Pet. App. 16a. Trial Counsel did not object to the admission of any of this evidence. Pet. App. 17a–18a. Petitioner was ultimately convicted of First-Degree Murder by Arson and was sentenced to life imprisonment without the possibility of parole. Pet. App. 17a.

Following his conviction, Mr. Anstey filed a petition for a direct appeal, which the West Virginia Supreme Court of Appeals ("SCAWV") refused on December 4, 1996. Pet. App. 17a.

**Post-Conviction**

On February 6, 1998, Mr. Anstey filed a *pro se* petition for a writ of habeas corpus in the Circuit Court of Fayette County. Pet. App. 17a. This petition was denied without an omnibus hearing. Pet. App. 17a. He then appealed the denial of that petition *pro se* to the SCAWV, which also refused the appeal on December 16, 1998. Mr. Anstey moved the court to reconsider its refusal, but it denied the motion on January 21, 1999. Pet. App. 17a.

On February 4, 1999, Mr. Anstey filed a *pro se* federal post-conviction habeas petition pursuant to 28 U.S.C.A. § 2254 in the United States District Court for the Southern District of West Virginia. Pet. App. 17a. Mr. Anstey asserted his conviction should be vacated on the following grounds: (1) the constitutional right to an impartial trial court, (2) the constitutional right to a fair trial, and (3) the right to effective assistance of counsel. Pet. App. 17a. The District Court did not reach the merits and dismissed the petition on the ground that it was untimely under 28 U.S.C.A. § 2244 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year statute of limitations in which state prisoners must file their initial federal habeas applications. Pet. App. 17a. Mr. Anstey then appealed the denial to the United States Court of Appeals for the Fourth Circuit ("4th Circuit"), which affirmed the dismissal of his federal habeas petition. Pet. App. 17a.

Mr. Anstey, an individual with only a high school education and with no close family or friends to assist him, believed that he had no more options to prove his innocence. It was not until late 2005 that

Mr. Anstey heard about the West Virginia University College of Law's legal clinic from a fellow inmate. Mr. Anstey immediately applied in October 2005. Unfortunately, Mr. Anstey's case sat uninvestigated for several years among the multitudinous applications submitted to the clinics. It was not until October 23, 2013, that the recently formed West Virginia Innocence Project ("WVIP") discovered Mr. Anstey's case, officially engaged him as a client, and investigated his case. It was only after this point that WVIP discovered, and Mr. Anstey was made aware of, the developments made in arson science since his trial.

In May 2014, Mr. Anstey, through the WVIP, filed a second state habeas petition in the Circuit Court of Fayette County. Pet. App. 18a. The petition asserted that the advancements in fire science and arson investigation since the time of his trial and conviction in 1995 constituted newly discovered evidence and demonstrated his trial was fundamentally unfair. Pet. App. 18a. Mr. Anstey presented the *National Fire Protection Association 921 Guide for Fire and Explosion Investigations* ("NFPA 921") and revisions made to it after his trial as newly discovered evidence of advancements in fire science. Pet. App. 18a. Mr. Anstey further asserted that even though the NFPA 921 was published in 1992, it was openly disregarded at the time of his trial by the law enforcement community as well as the investigators who testified against him. Pet. App. 18a. It did not become the national authority for fire investigations until 2000, when it was adopted by the United States Department of Justice ("DOJ") in their publication, "Fire and Arson

Scene Evidence: A Guide for Public Safety Personnel" ("DOJ Publication"). Pet. App. 18a. Mr. Anstey also argued his trial violated his right to due process of law. Pet. App. 18a. Still yet, the Circuit Court of Fayette County denied Mr. Anstey's second state habeas petition, again without an evidentiary hearing. Pet. App. 18a. Mr. Anstey then appealed to the West Virginia Supreme Court of Appeals, which concluded that Mr. Anstey had not made the sufficient showing of newly discovered evidence to warrant a new trial. Pet. App. 18a.

In June 2017, Mr. Anstey filed a successive federal habeas petition under 28 U.S.C.A. § 2254, which asserted the same grounds as those in his second state habeas petition. Pet. App. 18a. Specifically, Mr. Anstey reasserted that his conviction should be overturned because the new scientific developments in fire and arson investigation since his 1995 trial constitute newly discovered evidence. Pet. App. 18a. He also argued that the arson investigators, at the time of his trial, completely neglected to follow the correct and proper scientific methods as detailed in the 1992 version of NFPA 921. Pet. App. 18a. Additionally, Mr. Anstey asserted that the prosecutors should have known the arson investigation was conducted using improper methods and should not have called the investigators as witnesses. Pet. App. 18a. Mr. Anstey argued his trial counsel was ineffective in failing to challenge the admittance of these experts and their unreliable scientific methods. Pet. App. 18a. Mr. Anstey also asserted a freestanding claim of actual innocence. Pet. App. 18a.

The District Court subsequently adopted the Magistrate Court's recommendation to dismiss and denied Mr. Anstey's petition, once again, without an evidentiary hearing. Pet. App. 13a. Mr. Anstey sought to appeal the District Court's order, but the Fourth Circuit declined to issue a certificate of appealability and dismissed Mr. Anstey's appeal. Pet. App. 3a. This petition for a writ of certiorari follows.

## REASONS TO GRANT THE PETITION

### I. The Lower Courts' Construction and Application of "Factual Predicate" and "Due Diligence" Under AEDPA in Effect Denies Innocent, Incarcerated Individuals The Protections and Scrutiny the Right to Federal Habeas Corpus is Intended to Ensure

By enacting 28 U.S.C.A. § 2254, Congress made remedies available in federal court to individuals, such Mr. Anstey, who have been convicted in state court. However, a claim presented in a second and successive habeas corpus petition under § 2254 will be dismissed unless, "the *factual predicate* for the claim could not have been discovered previously through the exercise of *due diligence*." 28 U.S.C.A. § 2244(b)(2)(B)(i) (1996).

### A. Congress Failed to Define "Factual Predicate" When Drafting AEDPA, Which Has Caused Confusion and Division Among The Lower Courts, Thus, a Decision by This Court Will Provide Clarity and Promote Uniform Application of Federal Law

Congress did not include a definition for "factual predicate" when drafting AEDPA, and "factual predicate" appears in three different sections of the Act: § 2244(b)(2)(B)(i), § 2244(d)(1)(D), and § 2254(e)(2)(A)(ii). Congress's failure to provide a definition for factual predicate has confused and divided the lower courts. This confusion and division among the courts as to the meaning of factual predicate, particularly with respect to § 2244, has in effect deprived innocent individuals such as Mr. Anstey the right to federal habeas corpus.

#### 1. Changes in Science Should be Sufficient "Factual Predicate" for the Purpose of § 2244

There are two prevailing definitions of factual predicate that lower courts apply. The first definition defines factual predicate as the "vital facts." *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012); *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007); *Sain v. Campbell*, 2018 WL 6314610, at *2 (6th Cir. 2018); *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000); *Mathena v. U.S.*, 577 F.3d 943, 946 (8th Cir. 2009); *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012); *Purkey v. Kansas*, 2008 WL 2397479, at **2 (10th Cir.

2008); *Cole v. Warden Georgia State Prison*, 768 F.3d 1150, 1155 (11th Cir. 2014). The second definition defines factual predicate as "evidentiary facts or events not court rulings or legal consequences of the facts." *Brackett v. U.S.*, 270 F.3d 60, 69 (1st Cir. 2001). The Fifth and Fourth Circuits have not expressly adopted either of these definitions but District Courts within those circuits have applied both definitions.

The nebulous nature of these definitions has led courts to apply the standard in an underinclusive manner. The overly-confined nature in which courts have applied these definitions is particularly apparent when courts examine discredited forensic techniques.

In this case, the Magistrate Court applied the "evidentiary facts" definition and determined that "[t]he NFPA 921 is not a 'factual predicate' for Mr. Anstey's claims" because "all of the facts and evidence concerning the fire investigation were available as early as 1995, at the time of Anstey's trial." Pet. App. 26a. The Magistrate Court incorrectly concluded that because the NFPA 921 was available at the time of Mr. Anstey's first federal habeas petition in 1999, it was not a factual predicate and thus was procedurally barred by § 2244. This is because Mr. Anstey is not asserting that the version of the NFPA 921, which was available at the time of his first federal habeas petition, is the new factual predicate for his second federal habeas petition. Rather, the factual predicates Mr. Anstey alleges are the modifications to the NFPA 921 that occurred after 1999, and the DOJ's express adoption in 2000 of the NFPA 921 as the foremost guide for conducting fire investigations to ensure accurate and reliable conclusions. Pet. App. 9a–10a.

It is the facts and assumptions that fire investigators apply during their investigations that have changed, as expressed by the changes to NFPA 921 and its adoption by law enforcement authorities. These changes are the factual predicate asserted in this case.

The ambiguity of the phrase "factual predicate" in AEDPA is evidenced by the differing definitions the lower courts have constructed, and this has led courts to overly-confine what constitutes a factual predicate, particularly with regard to changes in forensic science. This Court should resolve that ambiguity and find that changes in fire investigation science can be a factual predicate sufficient to satisfy § 2244 when the changes are of such a magnitude as they are in this case. When a petitioner files a second or successive habeas petition presenting documentary evidence that changes in science undermine the reliability of their conviction and shed light on their innocence, this should be more than enough to satisfy the factual predicate requirement in § 2244.

### 2. The Advancements in Arson Investigation Science are a Sufficient Factual Predicate for Mr. Anstey to Survive Summary Judgment Under § 2244

The dramatic developments in arson science, specifically the modifications to the NFPA 921 that occurred after 1999 and the DOJ's express adoption of the NFPA 921 in 2000 are a sufficient factual predicate. The DOJ's express adoption of the NFPA 921 demonstrates that methods and procedures used

in fire investigations that are contrary to or run afoul of the scientific standards set in the NFPA 921 do not produce accurate and reliable conclusions as to the fire's cause and point of origin. This fact is relevant because the fire investigation that took place in Mr. Anstey's case was contrary to and ran afoul of the scientific standards of the NFPA 921, rendering the investigators' conclusion that the subject fire was arson inaccurate and unreliable.

The modifications to the NFPA 921 that occurred after 1999 are relevant because the substance of the modifications significantly undermine the State fire investigators' cause and origin determination. Specifically, the 2017 edition of the NFPA 921 explicitly cautions investigators to "fully examine the eutectically melted[1] area and the cause for the two metals to have come in contact." National Fire Protection Association, *NFPA 921: Guide for Fire and Explosion Investigations* at § 9.11.3 (2017). Eutectic melting is "very easily identifiable by use of Scanning Electron Microscope and Energy Dispersive X-Ray Spectrometer (SEM/EDS) techniques which permit elemental analysis." *Id*. Moreover, "the damaged area may show a distinctly different metallic color." *Id*.

This is especially relevant here because the State's "electrical expert" Harold Franck, testified at trial that Mr. Anstey shoved the toaster's power cord through the top of the toaster to the bottom opening,

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[1] Eutectic melting is damage "that occurs when a metal of different composition contacts the subject metal. The original melting may or may not be electrically related, but the damage to the subject metal caused by deposition of the second does not involve an electrical current and is not a form of electrical damage." NFPA 921 § 9.11.3 (2017 ed.).

plugged the cord into the wall, and then rigged the toaster's plunger to remain down, so the toaster would catch on fire. And according to Franck, the composition of the toaster's power cord was copper and the composition of the toaster's heating elements was nichrome. Pet. App. 54a. However, contrary to the requirement of scientifically based reasoning as expressed in the 2017 edition of the NFPA 921, the basis for Harold Franck's reasoning was "the presence of 'patterns' inside the toaster's cover." Pet. App. 70a. Franck's assertion was entirely opinion-based and not grounded in science. *Id.* at 0071. "The basis for the reported 'patterns' in the toaster arising from contact between power cord and the heating elements was neither demonstrated nor tested. Pet. App. 71a. The contact should have been documented with a microscope, and then the heating elements and wiring subject to SEM/EDX (Scanning Electron Microscope/Energy Dispersive X-Ray) to confirm this belief." Pet. App. 71a. This type of investigative rigor has allowed us to understand just how flawed the assumptions that investigators, like Franck, had relied on for decades. It is the change in the underlying knowledge that establishes the factual predicate.

Furthermore, the 2017 edition of the NFPA 921 explicitly warns fire investigators of the dangers of expectation bias and stresses that it should be avoided at all costs because it leads to unreliable cause and point of origin determinations. NFPA 921 § 4.3.9 (2017). Instead, "fire investigators must collect and examine all of the data in a logical and unbiased manner to reach a scientifically reliable conclusion." *Id.* The substance in the 2017 edition, with respect to

expectation bias, is relevant because the State fire investigators in Mr. Anstey's case "succumbed to expectation bias" and failed to "eliminate any other possible natural or accidental causes," making the determination that the fire was incendiary scientifically invalid. Pet. App. 49a. We know that the state's investigators based their conclusions on false assumptions, failed to actually test their hypotheses, and did not even attempt to investigate or rule out other possible causes of the fire. Pet. App. 48a–56a. Again, it is the fundamental body of knowledge underlying arson investigations that has changed over time, and it is these changes that constitute the factual predicate in Mr. Anstey's case.

Mr. Anstey has demonstrated that his claims have merit, and he should be given a chance to present his evidence and show that he is innocent. Without a clear definition by this Court, lower courts will continue to misconstrue the procedural requirements set out in § 2244 for second or successive habeas corpus petitions. This misconstruction will lead to more and more petitions being "procedurally barred" leaving the merits unaddressed. Only this Court has the power to correct Congress's initial error and the lower courts' misconstruction that followed as a result.

### B. Mr. Anstey Has Exercised Due Diligence by Actively Seeking Legal Assistance in His Case Because Requiring an Unsophisticated and Unassisted Prisoner to Discover Developments in Fire Investigation Science Exceeds a Reasonable Standard of Due Diligence

Keeping in mind the realities of the prison system, a reasonable person in Mr. Anstey's circumstances would not have discovered, on their own, the revisions made to NFPA 921 or the developments in law enforcement's treatment of it. Nor can Mr. Anstey be said to have been on notice of these developments because they did not come into existence until after his trial. Furthermore, Mr. Anstey had neither the means nor the resources to discover revised versions of NFPA 921. The only thing Mr. Anstey could have realistically done under his circumstances was to actively pursue legal assistance. Because he did so, Mr. Anstey has satisfied 28 USCA § 2244's due diligence requirement. To require more of a petitioner in his circumstances would "simply ignore[ ] the reality of the prison system" and exceed a reasonable standard of due diligence. *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000)

### 1. When a Petitioner's Factual Predicate Did Not Exist at the Time of Trial or Has Meaningfully Changed Since Then, Due Diligence Analysis Should Turn on When a Person in Petitioner's Circumstances Would Have Discovered the Factual Predicate

When evaluating due diligence, courts should keep in mind the realities of the prison system. *Easterwood*, 213 F.3d at 1323. Therefore, courts should consider a petitioner's level of sophistication and the effects incarceration imposes on a petitioner's ability to discover changes in the science of fire investigations and the body of scientific knowledge utilized by law enforcement when conducting these investigations. *Easterwood*, 213 F.3d at 1323; *Wims v. U.S.*, 225 F.3d 186, 190 (2d Cir. 2000) (holding that the proper task is to determine when a duly diligent person "in petitioner's circumstances" would have discovered the new evidence); *Schlueter v. Varner*, 384 F.3d 69, 75 (3d Cir. 2004) (finding that "physical confinement can limit a litigant's ability to exercise due diligence.").

Cases finding a lack of due diligence point to a petitioner having inquiry notice of the evidence *as it existed at the time of trial*. *See Solorio v. Muniz*, 896 F.3d 914, 921 (9th Cir. 2018) (concerning Brady material that existed at the time of trial); *In re Lambrix*, 776 F.3d 789, 795 (11th Cir. 2015) (concerning the authenticity of physical evidence presented at trial, as well as alleged judicial bias, corruption, and false testimony). More leniency is

granted to petitioners when future developments significantly change that evidence's legal impact on a petitioner's case. *Easterwood*, 213 F.3d at 1323; *Wims*, 225 F.3d at 190; *Schlueter*, 384 F.3d at 75.

A petitioner is expected to investigate new facts only "where he is on notice that new evidence might exist." *Solorio*, 213 F.3d at 917. In *Solorio*, the petitioner brought forward "newly discovered evidence" of Brady material in his second habeas petition, including evidence that a police informant received leniency on a traffic citation for assisting the prosecution in the petitioner's case, as well as an arguably exculpatory taped interview with one of the prosecution's witnesses. *Solorio*, 213 F.3d at 917; *see generally Brady v. Maryland*, 373 U.S. 83 (1963). The petitioner was aware, at the time of trial, of the police informant as well as the existence of the taped interview, but he did not know of the leniency granted to the informant or of the contents of the taped interview. *Id.* at 920. Despite not knowing these details *that existed at the time of trial*, the petitioner was on inquiry notice of the police informant and the taped interview; further investigation, which the petitioner had the means to undertake, would have uncovered the leniency granted to the informant and the contents of the taped interview. *Id.* Therefore, the court held that by not investigating the evidence further at the time of trial, the petitioner had failed to exercise due diligence. *Id.*

In cases where a petitioner's factual predicate did not exist at the time of trial, unlike in *Solorio*, courts should grant a petitioner more leeway in the time it takes him to discover that factual predicate. After all, petitioners are only required to exercise due, or

reasonable, diligence, rather than maximum feasible diligence, and that analysis may not "ignore[ ] the reality of the prison system." *Wims*, 225 F.3d at 190 n. 4; *Easterwood*, 213 F.3d at 1323. The petitioner in *Easterwood*, filing his third habeas petition *pro se*, brought forward a case that was published after his conviction as "newly discovered evidence"; the case discussed the fact that an expert who testified against the petitioner at trial was suffering from untreated bipolar disorder possibly severe enough to "impair and distort his diagnostic judgment." *Easterwood*, 213 F.3d at 1323. The District Court for the Eastern District of Oklahoma dismissed the petition as time-barred, finding that the case cited by the petitioner had been published for over a year. *Id*. at 1322. However, the Tenth Circuit Court of Appeals found that this was an unjust result, noting that the petitioner had less access to court opinions than the general public. *Id*. at 1323. The court held that the statute of limitations only began to run when the case was made available in the prison library, rather than when it was published. *Id*. The court stated that requiring more from the petitioner "simply ignores the reality of the prison system," and therefore would exceed a reasonable standard of due diligence. *Id*.

The major distinction between cases like *Solorio* and those like *Easterwood* is the nature of the petitioner's "newly discovered evidence." When the factual predicate brought forward as "newly discovered evidence" existed at the time of a petitioner's trial and has remained unchanged since then, a petitioner is considered to already be on inquiry notice of that evidence if he knew it existed at the time of trial. *Solorio*, 213 F.3d at 921. If, however,

the factual predicate did not exist at the time of trial or has meaningfully changed since then, courts grant a petitioner leeway in the time they are allowed to bring forward that new evidence. *Easterwood*, 213 F.3d at 1323; *Wims*, 225 F.3d at 190; *Schlueter*, 384 F.3d at 75. In the latter instances, the proper task is for a court to consider when a duly diligent person "in petitioner's circumstances" would have discovered the new evidence, while keeping in mind the limitations imposed by that petitioner's incarceration. *Wims*, 225 F.3d at 190; *Easterwood*, 213 F.3d at 1323; *Schlueter*, 384 F.3d at 75.

**2. A Duly Diligent Incarcerated Person in Mr. Anstey's Circumstances Would Not Have Discovered the New Evidence Earlier Because it Did Not Exist at the Time of Trial, and Mr. Anstey Did Not Have the Means to Discover the New Evidence Unassisted While in Prison**

Mr. Anstey's "newly discovered evidence" falls into the second camp of cases because, since his trial, the NFPA 921 has been significantly updated and has been endorsed by the DOJ as the standard for conducting fire investigations. Pet. App. 25a. Similar to the petitioner in *Easterwood*, Mr. Anstey would have had no way of knowing about the revisions or the endorsement without access to copies of the revised NFPA 921 or the DOJ Publication. *See Easterwood*, 213 F.3d at 1323. Unlike the petitioner in *Easterwood*, however, neither copies of the NFPA nor

the DOJ Publication were ever made available in the prison library where Mr. Anstey is incarcerated. *See Id*. Nor are copies of NFPA 921 easily accessible online, especially considering the limited internet access afforded to incarcerated individuals. Mr. Anstey simply did not have the resources to investigate these revisions. Finally, Mr. Anstey would have had no way of learning about the DOJ Publication because it did not exist at the time of his trial, so he cannot be said to have been on inquiry notice of it. Through no reasonable standard of due diligence could a person in Mr. Anstey's circumstances have discovered, on their own, the revisions made to the NFPA 921 or the change in law enforcement's treatment of the NFPA 921 through the DOJ Publication. *See Wims*, 225 F.3d at 190.

All a duly diligent person in Mr. Anstey's circumstances could have done is seek outside help. Unfortunately, Mr. Anstey has no close friends or family to reach out to. *See Schlueter*, 384 F.3d at 75 (finding that due diligence analysis should consider whether or not a petitioner enjoys his family's assistance, involvement, and resources). Furthermore, he has no money to retain counsel. Mr. Anstey's only remaining hope to prove his innocence came when he heard from a fellow inmate about the free services from West Virginia University College of Law's clinical program in 2005. Mr. Anstey immediately applied to the clinical program. Regrettably, it was not until 2013 that the WVIP officially engaged Mr. Anstey as a client. It was only at that time that Mr. Anstey could realistically have been made aware of the revisions made to NFPA 921 and its subsequent endorsement by the DOJ. And

since that time, WVIP has vigorously litigated for Mr. Anstey's innocence. The delay in pursuing Mr. Anstey's case was completely out of his control, and, in the interest of justice, it should not be held against him. He has brought forward at the earliest reasonable time the issues of the advances in fire investigation science and the DOJ's endorsement of those techniques. For over twenty years, he has done everything that a reasonably diligent person in his circumstances could do to advocate for his innocence. Mr. Anstey has therefore satisfied his expectation of due diligence under 28 U.S.C.A. § 2244.

## II. Mr. Anstey Has Presented Clear and Convincing Evidence of Constitutional Violations Sufficient to Satisfy the Requirements of § 2244(b)(2)(B)(ii)

No court—state nor federal—has sufficiently grappled with the fact that Mr. Anstey's conviction was obtained with demonstrably unreliable evidence, clothed with the authority of expertise, and based on an inherently flawed and thoroughly discredited arson investigation. Absent the completely erroneous conclusion by the State's investigators that the fire in this case was an act of arson, no reasonable factfinder could have found Mr. Anstey guilty.

Mr. Anstey's argument in this regard asserts two distinct Constitutional claims: 1) that the introduction of the false arson evidence violated Mr. Anstey's due process rights under the Fourteenth Amendment; and 2) that the failure of Mr. Anstey's trial counsel to challenge the admissibility of the State's expert testimony violated Mr. Anstey's right

to effective assistance of counsel under the Sixth Amendment.

### A. The Introduction of Discredited Expert Testimony at Mr. Anstey's Trial Violated His Right to Due Process, and but for this Error No Reasonable Factfinder Would Have Found Him Guilty

The only evidence indicating Mr. Anstey committed the arson that serves as the basis for his conviction was the testimony of two fire investigators for the State that has now been thoroughly discredited by two different experts who have reviewed the evidence. This discredited evidence was critical to the case against Mr. Anstey, and if the evidence is properly excluded, there is simply no way his conviction can stand.

The Fourteenth Amendment to the United States Constitution guarantees that no "State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. There is no question that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment[.]" *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The same is true when the State fails to correct false evidence "when it appears." It is also true that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisbena v. California*, 314 U.S. 219 (1941). Thus, when the use of false evidence is not done knowingly by the State, the

court's focus must be whether or not the introduction of the false evidence rendered the proceeding fundamentally unfair. Allowing the State to introduce now-discredited "expert" testimony based on false assumptions and flawed methodologies certainly meets such a standard.

As the lower court correctly pointed out, under West Virginia Law, "to sustain a conviction for arson, when the evidence offered is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." *State v. Mullins*, 383 S.E.2d 47, 53 (W. Va. 1989). However, the lower court then relies on two other cases for the proposition that "the sufficiency of the evidence required to show that a fire was incendiary in nature is extremely low." PF&R at 15-16 (citing *State v. Adkins*, 446 S.E.2d 702 (W. Va. 1994); *State v. Yates*, 288 S.E.2d 522 (W. Va. 1982). This entire argument presumes that the scant evidence of arson relied on in *Adkins* and *Yates* was reliable, scientifically valid, and admissible under modern standards of fire investigation Both cases predate the adoption of the NFPA 921, and the testimony referenced by the lower court from those cases is exactly the type of unsupported, unreliable, untestable, and unscientific "expert" testimony that led to Mr. Anstey's conviction. PF&R at 15. By endorsing such testimony, courts are endorsing convictions based on conclusions roughly as reliable as those reached by reading tea leaves or pulling tarot cards.

There is simply no way that the State's fire investigators could have properly concluded, with any degree of scientific certainty, that the fire in Mr.

Anstey's case was incendiary. As Mr. Anstey's expert affidavits opine, the investigative methods were fundamentally deficient in significant ways and failed to explore and rule out non-incendiary causes. Pet. App. At 0064. The investigation relied on evidence that had been tampered with before investigators arrived on scene, and they failed to account for this during their investigation. Pet. App. At 0064. Finally, investigators relied on assumptions now firmly understood to be nothing more than "mythology." Pet. App. At 0064. The conclusion the state's investigators reached regarding the cause of the fire were false, because they relied on false premises.

Absent the erroneous conclusion of the state's investigators, there is not enough evidence to sustain the charge against Mr. Anstey *as a matter of law*, because there is no evidence that the fire was in fact incendiary. All that remains is circumstantial evidence of motive and what the State characterizes as suspicious activity by Mr. Anstey on the night of the fire. This evidence is not sufficient to sustain a conviction for arson in West Virginia.

Therefore, Mr. Anstey has clearly shown that but for the violation of his due process rights via the introduction of discredited evidence by the state, no reasonable factfinder would have convicted him.

### B. Mr. Anstey's Right to Effective Assistance of Counsel was Violated When His Attorney Failed to Challenge the Admission of the Unreliable Arson Evidence, and but for this Error, no Reasonable Factfinder would have Convicted Mr. Anstey.

There is no conceivable strategic purpose for not challenging the admission of the conclusions of the state's fire investigators in Mr. Anstey's case, and this failure represents ineffective assistance of counsel that substantially prejudiced Mr. Anstey by allowing the jury to convict him based on unreliable evidence. Prior to trial, Mr. Anstey's counsel consulted with their own expert regarding fire investigations, and their expert determined, as subsequent experts have, that the investigation in this case failed to meet even the much more relaxed investigative standards that existed in 1994. Even more importantly, this Court had already issued its decision in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), and the West Virginia Supreme Court had essentially adopted the *Daubert* standard in *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1993), which clearly established the trial court's gatekeeping role regarding expert testimony under Rule 702.

Under the Sixth Amendment to the United States Constitution, every defendant is guaranteed the " . . . Assistance of Counsel for his defence." U.S. Const. amend VI. Ineffective assistance of counsel claims are governed by the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must show that (1) counsel's

performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687. Both prongs must be met. *Id.*

The first prong of the *Strickland* test requires courts to "apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," with a strong presumption that counsel's performance was effective. *Strickland*, 466 U.S. at 689–90. The reviewing court cannot second-guess counsel's strategic or tactical decisions. *Id*. At 681.

Armed with his expert and this new case law, Mr. Anstey's counsel had an excellent opportunity to have the testimony of the state's fire investigators thrown out entirely. At the very least, a *Daubert* challenge would have given trial counsel an opportunity to cross examine the state's investigators *in camera*, an endeavor that only would have aided cross-examination at trial given the serious issues with the state's investigations.

Simply put, Mr. Anstey's trial counsel had everything he needed to lodge a successful challenge to the admission of the now-discredited testimony, and he failed to do so. The decision not to lodge such a challenge was objectively unreasonable given the safeguard against erroneous expert testimony provided by Daubert, and his failure to do so prejudiced Mr. Anstey substantially by allowing the erroneous conclusions of the state's investigators to reach the jury.

## III. The Lower Courts' Interpretation and Application of § 2244 Has Effectively Suspended Habeas Corpus for Individuals Challenging a State Court Conviction Based on Discredited Expert Testimony by Application of Insurmountable Procedural Hurdles

Since its passage, AEDPA has effectively eliminated meaningful federal court review of state court convictions, particularly those where individuals attempt to challenge the use of discredited forensic science to obtain the conviction. Rather than spending time evaluating the merits of these claims and developing a body of case law that addresses the use of completely unreliable evidence in courts across the country, federal courts have continually grappled with the interpretation of the various procedural impediments imposed by AEDPA. By doing so, these courts have developed an obstructive body of case law that further impairs the protections and scrutiny that the right to habeas corpus is intended to ensure. The interest in finality has fully undermined the interest of justice.

In addition to the arbitrary one-year limitation period applied by the lower courts pursuant to § 2244(d)(1), the lower courts clearly favored the State's factual assertions over Mr. Anstey's and never meaningfully addressed Mr. Anstey's evidence of innocence by denying him an evidentiary hearing. Mr. Anstey's case exemplifies the corruption of federal habeas law into a system designed to dismiss petitions rather than enforce the Constitution.

### A. AEDPA'S One-year Statute of Limitations Does Not Apply to Second or Successive Petition, Which Already Require Substantially Heightened Pleading Standards

Under 28 U.S.C.A. § 2244(d)(1) "a 1-year statute of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." However, this provision has not been explicitly applied to second or successive petitions, as it is not incorporated into § 2244(b), which governs the filing of second or successive petitions. This Court's jurisprudence and principles of statutory construction indicate that the statute of limitation should not apply to second or successive petitions.

This Court has already recognized that the miscarriage of justice exception articulated in *Schlup v. Delo*, 513 U.S. 298 (1995), survived the passage of AEDPA. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (citing *McClesky v. Zant*, 499 U.S. 467, 495 (1991)). Although *Schlup* applies only to first-filed petitions, the *McQuiggin* Court specifically determined that § 2244(b)(2) incorporated the *Schlup* exception with heightened requirements to further restrict second or successive petitions. *McQuiggin*, 569 U.S. at 395—98. This comports with the understanding that although "AEDPA seeks to eliminate delays in the federal habeas review process," Congress did not "los[e] sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights." *McQuiggin*, 569

U.S. at 397 (citing *Holland v. Florida*, 560 U.S. 631, 648–49 (2010)).

Indeed, the narrow avenue provided to file second or successive petitions is further limited by the due diligence requirement of § 2244(b)(2(B)(ii). A petitioner who is dilatory in asserting his or her claims will not have them heard. It is due diligence under § 2244(b), not the one-year limitation period, that serves as the gatekeeper for second or successive petitions. It is unnecessary and unreasonable to require a petitioner to satisfy two different timing requirements for first and second or successive petitions.

This reading of the statute is also supported by principles of statutory construction. Under the principle of *expressio unius est exclusive alterius* "where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded." *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001). Absent the explicit incorporation of the one-year statute of limitations into § 2244(b), it should not apply to a petition under that subsection. To the extent there is any ambiguity on this point, the rule of lenity requires the court to adopt the interpretation of the statute most favorable to the defendant. Thus, the one-year statute of limitations should not apply to second or successive petitions.

Therefore, the lower court erred by dismissing Mr. Anstey's petition based on its finding that the petition was untimely under § 2244(d).

### B. Mr. Anstey is Entitled to Relief from Procedural Barriers Due to His Convincing Claim of Actual Innocence

Even if the Court concludes that the one-year limitation period applies, and even if the court determines that Mr. Anstey failed to act with due diligence in pursuing his claims, his innocence claim is sufficiently convincing to merit full consideration of his claims under *McQuiggin*, which provides an equitable exception to the statute of limitations under § 2244(d)(1). *McQuiggin*, 569 U.S. at 392. "In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding a procedural bar to relief." *Id.* Again, the Court relied on *Schlup* and the miscarriage of justice exception, which "applies to a severely confined category of cases: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted the petitioner.'" *Id.* at 395. Ultimately, "focusing on the merits of a petitioner's actual-innocence claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception–ensuring that 'federal constitutional errors do not result in the incarceration of innocent persons.'" *Id.* at 400 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

In Mr. Anstey's case, there is simply no evidence that he set the fire that ultimately resulted in his grandmother's death absent the discredited testimony presented at his trial. The expert affidavits presented by Mr. Anstey clearly articulate multiple

possible accidental causes of the fire apparent from *even* the limited investigation conducted in this case that the State failed to explore. When the District Court summarily denied Mr. Anstey's petition without a hearing, it failed to grapple with this fact. The lower court accepted the State's circumstantial evidence as dispositive, despite the fact that this evidence would be *legally* insufficient under West Virginia law to convict Mr. Anstey, let alone factually sufficient.

This case exemplifies the problem of unreliable forensic evidence. Unlike more traditional forms of newly discovered evidence (such as recantations, previously unknown witnesses, or new confessions), changes in science affecting the reliability of previously accepted forensic conclusions are a relatively recent phenomenon. While the standards for admitting such evidence have changed substantially over time, the standards governing post-conviction challenges to such evidence have lagged far behind. Changes in science do not fit as neatly into the traditional standards of newly discovered evidence, and in cases such as Mr. Anstey's, where he has obtained multiple expert opinions completely discrediting the testimony used to convict him, the Court should apply an equitable exception to procedural barriers and allow courts to focus on the merits of these claims.

Mr. Anstey's case is unique in that he has produced convincing evidence that his conviction was based on nothing more than speculation. This is a sufficient showing to merit an equitable exception to any procedural defaults that would otherwise justify summary dismissal.

### C. Mr. Anstey's Claims Require an Evidentiary Hearing

Mr. Anstey has never had a post-conviction hearing. Following his conviction, his direct appeal to the Supreme Court of Appeals of West Virginia was refused without an opinion during an era when the court's jurisdiction was discretionary. West Virginia has never had an intermediate appellate court. The same judge that presided over his trial denied his first state habeas corpus petition, filed *pro se*, without appointing counsel or holding a hearing. His first federal habeas corpus petition, also filed *pro se*, was also summarily denied.

In 2012, after almost two decades seeking legal help, Mr. Anstey's case finally came to the attention of the West Virginia Innocence Project. Upon review by experienced post-conviction attorneys, the serious deficiencies in Mr. Anstey's prosecution were manifest. These deficiencies were confirmed by two of the nation's foremost experts in fire investigation, who attested to the specifics of their conclusion in sworn affidavits. Despite this new evidence, the State trial court again denied Mr. Anstey's petition without holding an evidentiary hearing. Mr. Anstey's efforts in state court came to a head in 2016, when the West Virginia Supreme Court ruled that changes in fire science did not constitute newly discovered evidence and that Mr. Anstey's claims were adequately presented in his petition and affidavits.

"In deciding whether to grant or deny an evidentiary hearing, a federal court must consider whether a hearing could enable an applicant to prove

the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schirro v. Landrigan*, 550 U.S. 465, 474 (2007). An evidentiary hearing is the best method for the court to assess credibility of the facts alleged in an affidavit. *Teleguz v. Pearson*, 689 F.3d 322, 331 (4th Cir. 2012).

The consistent denial of an evidentiary hearing demonstrates clearly that the lower courts fail to see the gravity of these circumstances, likely due to the inherent complexity of the issues. Fire investigation is a complicated scientific endeavor, which is exactly why the industry now insists on well-trained experts following scientific standards and reliable methods. With an evidentiary hearing, Mr. Anstey's experts would testify not only to the contents of their affidavits, they would be able to explain just how poorly the underlying investigation was conducted. The experts would be able to expound upon the substantial evidence indicating possible accidental causes of the fire, that the state's investigators failed to even consider, and the manifest bias the investigator's fell victim to during the investigations. Affidavits alone are simply insufficient to convey just how bad the fire investigation and resulting conclusions truly were.

Furthermore, Mr. Anstey would have been able to finally rebut the circumstantial evidence the courts have consistently relied on to uphold his conviction. He could explain why he could not save his grandmother on the night of the fire and his efforts to locate help once he escaped the trailer. He could also testify and present additional evidence showing that the financial motive alleged by the state was illusory.

Mr. Anstey still had legal access to the money at issue at the time of the fire.

All of this evidence is necessary for a court to consider the alleged errors in light of the evidence as a whole. The complicated nature of these cases has simply never had a meaningful review on the merits. Therefore, Mr. Anstey has been effectively denied his right to habeas corpus review, first by intractable state courts protecting their own judgments, and then by federal courts applying impractical and unreasonable procedural barriers on an indigent, incarcerated individual that was convicted based on mythology.

## CONCLUSION

This petition should be granted.

Respectfully submitted,

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November 5, 2020