UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7238

SAMUEL ANSTEY,

Petitioner - Appellant,

v.

RALPH TERRY, Superintendent, Mount Olive Correctional Complex,

Respondent - Appellee,

and

DAVID BALLARD, Warden, Mount Olive Correctional Complex,

Respondent.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., Senior District Judge. (2:17-cv-03462)

Submitted: May 28, 2020 Decided: June 8, 2020

Before MOTZ and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Andrew Jeram Katz, KATZ WORKING FAMILIES' LAW FIRM, LC, Charleston West Virginia, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Samuel Robert Anstey seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Anstey's 28 U.S.C. § 2254 (2018) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Anstey has not made the requisite showing. Accordingly, we deny Anstey's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: June 8, 2020

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J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SAMUEL ANSTEY,

Petitioner,

v. Civil Action No. 2:17-cv-03462

RALPH TERRY, Warden, Mount Olive Correctional Complex,

Respondent.

JUDGMENT ORDER

In accordance with the companion memorandum opinion and order this day entered, it is ORDERED and ADJUDGED that the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be, and it hereby is, denied. It is further ORDERED that this case be dismissed and stricken from the docket.

The court has additionally considered whether to grant a certificate of appealability. See 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v.

McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that the governing standard is not satisfied in this instance. Accordingly, the court ORDERS that a certificate of appealability be, and it hereby is, denied. Pursuant to Rule 11, Rules Governing Section 2254 Proceedings, petitioner may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

The Clerk is directed to forward copies of this order to the petitioner, all counsel of record, and the United States Magistrate Judge.

Enter: August 6, 2019

John T. Copenhaver, Jr.
Senior United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SAMUEL ANSTEY,

Petitioner,

v. Civil Action No. 2:17-cv-03462

RALPH TERRY, Warden, Mount Olive Correctional Complex,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending is the petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, filed June 28, 2017, and respondent's motion for judgement on the pleadings, filed March 30, 2018. This action was previously referred to the Honorable Cheryl A. Eifert, United States Magistrate Judge, for submission to the court of her Proposed Findings and Recommendation ("PF&R") for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). On December 19, 2018, the magistrate judge entered her PF&R recommending that the court grant the respondent's motion for judgment on the pleadings, deny the petitioner's petition, and dismiss this case. The court granted petitioner's request for additional time to file his objections, which were subsequently filed on January 22, 2019.

The court thereafter granted petitioner's request to temporarily stay consideration of his petition so that he may conduct proposed testing to gather further evidence. On July 25, 2019, petitioner's counsel informed the court that the testing produced no new evidence and that the court may proceed to consider the petition. The court accordingly does so.

Upon an objection, the court reviews a PF&R de novo. Specifically, "[t]he Federal Magistrates Act requires a district court to 'make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made.'" Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (emphasis in original) (quoting 28 U.S.C. 636(b)(1)).

The petitioner raises five objections to the PF&R. First, the petitioner contends that the magistrate judge incorrectly applied the standard of review for a judgment on the pleadings. Specifically, he contends that the magistrate judge considered solely the state's circumstantial theory of his case and failed to consider the evidence the petitioner presented as attachments to his habeas petition. A cursory review of the magistrate judge's opinion, however, reveals that the magistrate judge appropriately considered the relevant facts and analyzed the petition under the proper standard of review.

The magistrate judge first found that the "newly discovered evidence" that the petitioner asserts entitles him to relief -- the National Fire Protection Association 921 Guide for Fire and Explosion Investigations ("NFPA 921"), which was not the national authority for standards in fire investigations until 2000 -- is not a factual predicate that satisfies the requirements for second or successive petitions under 28 U.S.C. § 2244(b)(2). That provision states that a claim in a second or successive habeas corpus application shall be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Only subsection (B) is applicable here. As to this issue, the magistrate judge found: first, that the NFPA 921 standards are not a factual predicate but simply allow for new conclusions to be drawn from the already pre-existing facts; second, that the petitioner failed to show that the NFPA 921 could not have been previously discovered through the exercise of due diligence

because the standards were created in 1992, seven years prior to his previously-filed 1999 petition, even though they were not the national standard until 2000; and third, that aside from the failures under subsection (B)(i), the petitioner nonetheless failed to establish that even if the fire investigation presented at trial was disproven because of the new NFPA 921 standards, no reasonable factfinder would have found him guilty. The first objection refers primarily to this third conclusion. However, the magistrate judge indeed applied the correct standard when she considered whether the remainder of the evidence -- even without the fire investigation, which is the portion of the evidence the petitioner is contesting -- could sustain a guilty verdict. PF&R at 13-16. Moreover, having already reached two conclusions which found that the petitioner failed to meet the requirements of § 2244(b)(2)(B)(i), the magistrate judge's conclusion under § 2244(b)(2)(B)(ii) is not vital to the ultimate conclusion reached in the PF&R.

The magistrate judge next found that the second or successive petition was untimely under 28 U.S.C. § 2244(d)(1), which establishes a one-year filing deadline, because, at the latest, the NFPA 921 standards could have been discovered in 2011, which, according to one of the petitioner's experts, is when the most recent version of the NFPA 921 standards were produced. As the magistrate judge stated, explicitly applying

the correct standard of review: "when construing the period most liberally in Anstey's favor, the one-year statute of limitations began in 2011 when the version of NFPA 921 was published that provided the fire investigations standards that form the basis of Anstey's expert affidavits[.]"

The magistrate judge then denied petitioner's argument that his actual innocence claims render his second or successive petition cognizable, again correctly noting that even without the fire investigation -- that is, even assuming petitioner's claim was accepted -- it was not more likely than not that no reasonable juror would have found him guilty, applying the same standard as previously discussed for § 2244(b)(2)(B)(ii). Additionally, the magistrate judge correctly noted that: a freestanding claim of actual innocence has not been recognized by the Fourth Circuit or Supreme Court outside of a capital context; nonetheless the standard for a freestanding innocence claim is extraordinarily high; and the petitioner has not asserted new evidence supporting his factual innocence, but rather asserts that if the NFPA 921 standards would have been used to purportedly disprove the investigation at trial, the state could not have proven him guilty. The magistrate judge applied the correct standard and found this insufficient. Because the correct standard was applied for each of the

magistrate judge's conclusions, the petitioner's first objection is overruled.

Second, the petitioner objects to the magistrate judge's finding that an evidentiary hearing was not warranted to resolve this case, contending that the petitioner would have been able to provide evidence to support his innocence claim in an evidentiary hearing. However, the magistrate judge provided several, independent reasons as to why the petition must be dismissed, even when, as already discussed, construing all facts in the petitioner's favor. Thus, the magistrate judge correctly concluded that an evidentiary hearing was unnecessary, and the second objection is overruled.

Third, petitioner objects generally to the magistrate judge's conclusion that the petitioner failed to meet the requirements of § 2244(b)(2)(B). Specifically, he disputes the magistrate judge's conclusions that the NFPA 921 does not constitute a factual predicate, that the NFPA 921 could have been discovered through due diligence, and that the petitioner could not prove by clear and convincing evidence that no reasonable factfinder would have found him guilty of first-degree murder by arson. However, the petitioner presents no new arguments of which the magistrate judge did not properly dispose. Accordingly, the third objection is overruled.

Fourth, petitioner objects to the magistrate judge's finding that the petition was beyond the one-year statute of limitations because, according to the petitioner, the deadline of 28 U.S.C. § 2244(d)(1) does not apply to second or successive petitions. The magistrate judge discussed this issue and found that the clear language of the statute applies to any habeas petition, including second or successive ones. The court agrees with this analysis and further notes that courts consistently apply the statute of limitations to second or successive petitions, and the petitioner has not provided a case demonstrating otherwise. See e.g., McLean v. Clarke, No. 2:13CV409, 2014 WL 5286515, at *7 (E.D. Va. June 12, 2014) (applying the statute of limitations to a second or successive § 2254 petition but nonetheless finding that the petition was timely due to equitable tolling when the motion for authorization to file the petition was filed within the one-year deadline, "[d]ue to the lack of case law in the Fourth Circuit regarding whether filing the petition with the motion for authorization is sufficient to meet the statute of limitations, conflicting case law in the circuits to address the issue," and the circumstances of the filing in that case.); and Fierro v. Cockrell, 294 F.3d 674, 680 (5th Cir. 2002) (applying the statute of limitations to a second or successive petition and finding that it was outside of the statute of limitations

despite the motion for authorization being filed within the one-year period, because the motion for authorization was not itself an application for a writ of habeas corpus). The fourth objection is overruled.

Lastly, the petitioner objects to the magistrate judge's finding that the freestanding claim of actual innocence fails. Petitioner asserts general disagreement with the magistrate judge's conclusion and again requests an evidentiary hearing. The magistrate judge thoroughly considered the issue and the applicable law, and the court agrees with her conclusion. The petitioner's fifth objection is overruled.

The court, accordingly, ORDERS as follows:

1. That the petitioner's objections to the PF&R be, and they hereby are, overruled;

2. That the magistrate judge's Proposed Findings and Recommendation be, and they hereby are, adopted and incorporated in full;

3. That the petitioner's petition for a writ of habeas corpus be, and hereby is, denied; and

4. That the respondent's motion for judgment on the pleadings be, and hereby is, granted; and

5. That this case be, and hereby is, dismissed and stricken from the court's docket.

The Clerk is directed to transmit copies of this memorandum opinion and order to all counsel of record, any unrepresented parties, and the United States Magistrate Judge.

Enter: August 6, 2019

John T. Copenhaver, Jr.
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

SAMUEL ANSTEY,

Petitioner,

v. **Case No. 2:17-cv-03462**

RALPH TERRY, SUPERINTENDENT,
Mt. Olive Correctional Complex,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATIONS

Pending before the Court are Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, (ECF No. 1), and Respondent's Motion for Judgment on the Pleadings. (ECF No. 22). This case is assigned to the Honorable John T. Copenhaver, Jr., United States District Judge, and by standing order is referred to the undersigned United States Magistrate Judge for submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B).

The undersigned finds that the record before the Court is well-developed and provides a sufficient basis upon which to resolve this matter without need for an evidentiary hearing. *See* Rule 8, Rules Governing Section 2254 Cases. Having thoroughly reviewed and considered the record, the undersigned **FINDS** that Petitioner's second or successive § 2254 petition does not satisfy the requirements of 28 U.S.C. § 2244(b)(2)(B) and is untimely under the one-year statute of limitations set forth in the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §

2244(d)(1). Therefore, the undersigned respectfully **RECOMMENDS** that the presiding District Judge **GRANT** Respondent's Motion for Judgment on the Pleadings, (ECF No. 22); **DENY** Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, (ECF No. 1); and **DISMISS** this case from the docket of the Court.

I. Relevant Factual and Procedural History

In the early morning hours of February 8, 1994, a fire occurred at the mobile home where Petitioner Samuel Anstey ("Anstey") lived with his grandmother, who had adopted him as a child. *Anstey v. Ballard*, 787 S.E.2d 864, 868 (W. Va. 2016). Anstey escaped the fire through his bedroom window, but his grandmother died four days later as a result of smoke inhalation. *Id.* at 869. Anstey was tried in the Circuit Court of Fayette County, West Virginia (the "state court") for first-degree murder by arson in violation of West Virginia Code § 61-2-1 (1991). The state adduced a theory that Anstey, who was at the time an out-of-work coal miner, manipulated a toaster in the kitchen to catch fire and that he started a separate fire in his grandmother's bedroom. *Id.* at 870. The state offered additional circumstantial evidence of arson, including (1) that Anstey's bedroom door was surrounded by a towel and weather-stripping, which the state argued impeded smoke from entering; (2) that Anstey escaped the fire through his bedroom window, taking with him a shotgun and clothing, but leaving his grandmother behind; and (3) that he drove to various neighbors' homes before returning to the closest neighbor's house, who ultimately called authorities. *Id.* at 869-70; (ECF No. 22-2 at 153-54). The state also offered evidence that Anstey's relationship with his grandmother was tumultuous and that Anstey physically abused his elderly grandmother during their various altercations. *Id.* at 866-67. According to the state, Anstey had a financial motive to kill his grandmother, because in the days preceding the fire, Anstey's grandmother

had threatened to disinherit Anstey as the beneficiary of her sizeable estate, which consisted primarily of certificates of deposit valued in the hundreds of thousands of dollars. *Anstey*, 787 S.E.2d at 867-68.

In September 1995, after an eleven-day jury trial, Anstey was convicted of first-degree murder without a recommendation of mercy. *Id.* at 873. He was sentenced to serve the remainder of his life in prison without the possibility of parole. *Id.* Anstey filed a direct appeal of his conviction, which the Supreme Court of Appeals of West Virginia ("SCAWV") refused on December 4, 1996, given that appellate review was discretionary at that time. *Anstey v. Painter*, No. 5:99-cv-00120, 2000 WL 34012352, at *3 (S.D.W. Va. Mar. 16, 2000). Anstey then filed an unsuccessful petition for a writ of habeas corpus in the state court on February 6, 1998. He appealed the denial of that petition to the SCAWV, which again refused the appeal on December 16, 1998. *Id.* at *4.

After exhausting his state remedies, Anstey filed a federal post-conviction petition under 28 U.S.C. § 2254 in this Court on February 4, 1999. *Id.* The petition alleged that Anstey's conviction should be vacated due to various errors committed by the trial court, prosecutor, and Anstey's trial counsel. (ECF No. 1-2 at 133-57). However, as is relevant to the present matter, the petition did not allege errors relating to the arson investigation or arson evidence used to convict Anstey. (*Id.*). The Court dismissed the petition on the ground that it was untimely under the AEDPA, which became law on April 24, 1996 and imposed a one-year period of limitations in which state prisoners must file their federal habeas petitions. *Anstey*, 2000 WL 34012352, at *3, *6; *see* 28 U.S.C. § 2244(d)(1). Anstey appealed the decision to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), which affirmed the dismissal of his federal habeas petition. *Anstey v. Painter*, 20 F. App'x 171, 171-72 (4th Cir. 2001).

More than a decade later, in May 2014, Anstey filed a second state habeas petition asserting new claims. *Anstey*, 787 S.E.2d at 873. Anstey argued that the advancement of fire science and arson investigation since his 1995 conviction constituted "newly discovered evidence" and demonstrated that his trial was fundamentally unfair in violation of his right to due process of law. *Id.* at 873-74. The advancement to which Anstey referred was the *National Fire Protection Association 921 Guide for Fire and Explosion Investigations* ("NFPA 921"). *Id.* at 874. Anstey argued that although the NFPA 921 was first published in 1992, it did not become the national authority for standards in fire investigation until 2000 upon its endorsement by the United States Department of Justice, which was after his conviction. *Id.* The state court denied Anstey's habeas petition, and he appealed the decision to the SCAWV. On June 2, 2016, the SCAWV concluded that Anstey had not shown the existence of newly-discovered evidence warranting a new trial. *Anstey*, 787 S.E.2d at 875-82.

On June 28, 2017, Anstey filed the instant successive federal habeas petition, asserting the same grounds that he raised in his second state habeas petition. Anstey argues that his conviction should be vacated because "the advancement in the scientific method and understanding of fire science" since his 1995 conviction constitutes "newly discovered evidence." (ECF No. 1 at 30). He contends that the arson investigators failed to follow the proper scientific methods espoused in the 1992 version of the NFPA 921 guidelines; that the prosecution should have known that the arson investigators did not use the proper methods and thus should have not offered them as witnesses; that his trial counsel was ineffective in failing to challenge the unreliable scientific testimony; and that he is actually innocent of the crime of which he was convicted. *Id.* Anstey has received authorization from the Fourth Circuit to file this successive habeas petition.

(ECF No. 17).

II. Motion for Judgment on the Pleadings

Respondent has filed a Motion for Judgment on the Pleadings, arguing that Anstey's successive federal petition for habeas relief should be dismissed for three reasons. First, Anstey has not satisfied the requirements of 28 U.S.C. § 2244(b)(2)(B), which govern second or successive habeas corpus applications asserting claims that were not raised in a previous petition. According to Respondent, Anstey must show that his successive petition falls within one of two narrow exceptions under § 2244(b)(2)(B), which Anstey has failed to do.

Second, Respondent asserts that the petition is untimely even under the most permissive assessment of timeliness. Respondent indicates that under the AEDPA's one-year limitations period a petition asserting claims of newly discovered evidence, such as Anstey's petition, must be filed within one year of the date on which the factual predicate of the claims could have been discovered through the exercise of due diligence. Respondent contends that the factual predicate of Anstey's claims—that being, the fire investigation standards contained in the NFPA 921—was readily available and discoverable well before Anstey filed his federal habeas petition. Accordingly, Anstey's petition is precluded by the statute of limitations bar.

Finally, Respondent challenges Anstey's claims of actual innocence. Respondent notes that Anstey makes two types of actual innocence claims: one is a "gateway" claim to overcome the procedural obstacles that would otherwise preclude review of his petition; the second is a "freestanding" claim of innocence. Respondent argues that freestanding claims of innocence have not been recognized by the Supreme Court of the United States ("Supreme Court") or the Fourth Circuit. With respect to Anstey's

"gateway" innocence claim, Respondent maintains that Anstey must still satisfy the requirements of 28 U.S.C. § 2244(b)(2)(B) to benefit from an actual innocence procedural gateway, which again, Anstey cannot do.

In response to these arguments, Anstey maintains that he has fulfilled the requirements of § 2244(b)(2)(B). In Anstey's view, advancements in the field of fire science and investigation constitute a factual predicate that could not have been discovered at the time of trial through due diligence. Furthermore, Anstey asserts that if state investigators had followed the NFPA 921 guidelines when they investigated the fire at his grandmother's trailer, the outcome of his trial would have been different, because no reasonable factfinder could have found him guilty of murder by arson.

As to the timeliness of the petition, Anstey argues that this action is not time-barred, because the one-year limitation period contained in § 2244(d)(1) does not apply to second or successive petitions. At a minimum, Anstey contends, the statute is ambiguous as to whether the one-year limitation applies and, therefore, should be construed in his favor. In any event, Anstey believes that his petition was timely filed, because it was filed within one year and ninety days (the time frame allowed for an appeal to the Supreme Court) after the WVSCA affirmed the state habeas court's denial of his second habeas petition.

Lastly, Anstey contends that his actual innocence gateway claims are not procedurally barred. He reiterates that advancements in fire investigation constitute newly discovered evidence, thus excusing any procedural bar and allowing this Court to review the substantive constitutional challenges. Moreover, Anstey disagrees that the Fourth Circuit and Supreme Court have foreclosed freestanding actual innocence claims. He asserts that the validity of his freestanding actual innocence claim is apparent

on even the most cursory review of the evidence. As to both innocence claims, Anstey argues that if the flawed fire investigation evidence were removed from his case, the remaining circumstantial evidence would be entirely insufficient to convict him of murder by arson.

III. Standard of Review

A motion for judgment on the pleadings filed under Federal Rule of Civil Procedure 12(c) "is analyzed under the same standard as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *Alexander v. City of Greensboro,* 801 F. Supp. 2d 429, 433 (M.D.N.C. 2011) (citing *Burbach Broad. Co. of Del. v. Elkins Radio Corp.,* 278 F.3d 401, 405–06 (4th Cir. 2002)). A complaint fails to state a claim when, viewing the factual allegations as true and in the light most favorable to the plaintiff, the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp v. Twombly,* 550 U.S. 544, 570 (2007).

When deciding a motion for judgment on the pleadings, the court must accept all well-pleaded allegations of the petition as true and "draw all reasonable factual inferences" in favor of the petitioner. *See Massey v. Ojaniit,* 759 F.3d 343, 353 (4th Cir. 2014) (citation omitted); *Wolfe v. Johnson,* 565 F.3d 140, 169 (4th Cir. 2009). Nevertheless, the court is "not obliged to accept allegations that 'represent unwarranted inferences, unreasonable conclusions, or arguments,' or that 'contradict matters properly subject to judicial notice or by exhibit.'" *Massey,* 759 F.3d at 353 (quoting *Blankenship v. Manchin,* 471 F.3d 523, 529 (4th Cir. 2006)). A court presented with a motion for judgment on the pleadings in a section 2254 case must consider "the face of the petition and any attached exhibits." *Walker v. Kelly,* 589 F.3d 127, 139 (4th Cir. 2009) (quoting *Wolfe,* 565 F.3d at 169) (internal markings omitted). In addition, the

court may consider "matters of public record," including documents from prior or pending court proceedings, when resolving the motion without converting it into a motion for summary judgment. *Id.*

IV. Discussion

A. Anstey's second or successive petition does not satisfy the requirements of 28 U.S.C. § 2244(b)(2)

Congress enacted the AEDPA to "reduce delays in the execution of state and federal criminal sentences" and to "further the principles of comity, finality, and federalism." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (quoting *Woodford v. Garceau*, 538 U.S. 202 (2003)). To accomplish this purpose, Congress codified various mechanisms into the AEDPA, including a gatekeeping function that was based upon abuse of writ principles. Under the AEDPA, federal courts are permitted to consider second or successive habeas petitions only in narrow, explicitly-defined circumstances. *In re Wright*, 826 F.3d 774, 782 (4th Cir. 2016). Very critically, regardless of a petitioner's professed innocence or the merit of his habeas petition, a "claim in a second or successive § 2254 petition that was not presented in a prior petition must be dismissed unless the petitioner (1) shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable or (2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2).

"Although Congress did not define the phrase 'second or successive,' as used to modify habeas corpus application under section 2254, it is well settled that the phrase does not simply refer to all § 2254 applications filed second or successively in time." *Magwood v. Patterson*, 561 U.S. 320, 332 (2010). A petition is second or successive when it challenges the legality of the same judgment that was challenged in a prior petition that was adjudicated on the merits. *Slack v. McDaniel*, 529 U.S. 473, 485–89 (2000); *In re Gray*, 850 F.3d 139, 141 (4th Cir. 2017).

Anstey initially argued in this case that he filed a "second-in-time, but first" § 2254 petition, as opposed to a second or successive petition, because his first § 2254 habeas petition was dismissed as untimely and not reviewed on the merits. (ECF No. 8 at 2). However, unlike a dismissal of a § 2254 petition on the basis that it was prematurely filed before a petitioner exhausted his state remedies, a dismissal of a § 2254 petition as procedurally barred under the AEDPA statute of limitations is considered to be a dismissal on the merits for the purpose of determining whether a subsequent § 2254 petition is second or successive. *Ross v. Terry*, No. 2:16-CV-03826, 2016 WL 8488167, at *4 (S.D.W. Va. Oct. 6, 2016), *report and recommendation adopted,* 2017 WL 971047 (S.D.W. Va. Mar. 13, 2017) (collecting cases). Furthermore, after instituting this proceeding, Anstey filed an action in the Fourth Circuit to determine whether his petition was "second-in-time, but first" or second or successive. *See* (ECF No. 34 at 2 n.1). The Fourth Circuit authorized the instant federal petition as a successive application for post-conviction relief. (ECF No. 17). Therefore, the Fourth Circuit concluded that Anstey's current petition is indeed a successive habeas petition and not a second-in-time, but first petition. *Cf. In re Gray*, 850 F.3d 139, 140 (4th Cir. 2017) (stating that if the court of appeals concludes that a later-filed petition is not

second or successive, it denies the motion for authorization to file a second or successive petition as unnecessary and returns the petition to the district court).

Consequently, Anstey's successive petition must be dismissed unless he shows that a new rule of constitutional law applies to his case, or he demonstrates the existence of a new factual predicate that meets the requirements of 28 U.S.C. § 2244(b)(2)(B). In this case, Anstey does not rely on a new rule of constitutional law under 28 U.S.C. § 2244(b)(2)(A). Rather, Anstey contends under 28 U.S.C. § 2244(b)(2)(B) that he presents "newly discovered evidence in the form of substantial advancements in the field of fire science and investigation that could not have been discovered at the time of trial through diligence," which, "viewed in light of the evidence as a whole, would be sufficient to establish that no reasonable factfinder would have found [him] guilty of the underlying offense." (ECF No. 34 at 2).

The undersigned notes that while the Fourth Circuit concluded for the purpose of granting Anstey authorization to file this second or successive motion that Anstey made a *prima facie* showing that the § 2244(b)(2)(B) requirements were satisfied, the Fourth Circuit's decision was simply a conclusion that Anstey made "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *In re McFadden*, 826 F.3d 706, 707 (4th Cir. 2016). The Fourth Circuit's authorization of this petition was not dispositive of the determination of whether Anstey survives the gatekeeping requirements for the court to consider the merits of his successive habeas petition. *Id.* Accordingly, Anstey's petition should be examined to determine whether it satisfies both prongs of 28 U.S.C. § 2244(b)(2)(B).

Beginning with the first prong of 28 U.S.C. § 2244(b)(2)(B), Anstey must show that the factual predicate for the claims that he raises in his federal habeas petition could

not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2)(B)(i). Although the AEDPA does not define the term "factual predicate," courts within the Fourth Circuit have interpreted the term to mean "evidentiary facts or events and not court rulings or legal consequences of the facts." *Diver v. Jackson*, No. 1:11-CV-00225, 2013 WL 784448, at *3 (M.D.N.C. Mar. 1, 2013) (quoting *Brackett v. United States,* 270 F.3d 60, 69 (1st Cir. 2001)) (concerning § 2244(d)(1)(D), which includes the same language as §2244(b)(2)(B)(i)); *accord Gary v. Johnson*, No. 2:10-CV-00123, 2010 WL 11527408, at *5 (E.D. Va. June 18, 2010). The phrase "discovered previously" is likewise not defined in the AEDPA, but the Fourth Circuit has stated that the term "previously" refers to the last federal proceeding in which the petitioner challenged the same criminal judgment. *In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004) (regarding 28 U.S.C. § 2244(d)(1)(D)). Therefore, Anstey must show that the evidentiary facts or events that support the claims in his federal petition could not have been discovered at the time of his prior § 2254 petition in February 1999.

As discussed, in the petition, Anstey claims that he was wrongfully convicted of arson based upon unreliable testimony from fire investigators and experts that failed to adhere to the proper fire investigation methods specified in the NFPA 921. (ECF No. 1). He states that the "new factual predicate" for his habeas claims is the NFPA 921. (ECF No. 34 at 2). Anstey concedes that NFPA 921 is far from a new publication. In fact, he readily admits that the first version of NFPA 921 was published in 1992, which was years before the fire investigation in his case. However, Anstey asserts that NFPA 921 was not recognized as the prevailing standard of fire investigation until the early 2000s and, even then, the fire investigation community was slow to adopt the NFPA 921 standards. (*Id.* at 3). He contends that he "could not have discovered the later accepted, adopted

and implemented versions of NFPA through any exercise of due diligence." (*Id.* at 4).

1. The NFPA 921 is not a "factual predicate" for Anstey's claims

Importantly, Anstey does not allege that any of the facts concerning the fire investigation, the evidence used to convict him, his trial counsel's actions, or even the NFPA 921 itself was unavailable at the time of his last federal habeas proceeding. Indeed, all of the facts and evidence concerning the fire investigation were available as early as 1995, at the time of Anstey's trial. The NFPA 921 was also available at that time, and Anstey's trial counsel referenced the NFPA 921 in his cross-examination of the state's witness. *Anstey*, 787 S.E.2d at 871. Therefore, the existence of the standards in the NFPA 921 was known to Anstey as early as 1995. As recognized by Respondent, Anstey's defense focused on challenging the quality of the fire investigation and the validity of the state's theory regarding the cause of the fire. (ECF No. 23 at 13-14). While Anstey might not have thought to focus specifically on the NFPA 921 standards, he undoubtedly advanced the argument that the fire investigation was improper and that the opinions offered by the experts regarding the cause and origin of the fire were wholly unreliable and inaccurate. The United States Court of Appeals for the Second Circuit has stated that "if new information is discovered that merely supports or strengthens a claim that could have been properly stated without the discovery, that information is not a factual predicate." *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012) (citing *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007) (observing that the petitioner had "confused the facts that make up his claims with evidence that might support his claims"). "Furthermore, it should go without saying that a factual predicate must consist of *facts*" and the "[c]onclusions drawn from preexisting facts, even if the conclusions are themselves new, are not factual predicates for a claim." *Id.*

2. In any event, the NFPA 921 could have been discovered previously through the exercise of due diligence

Moreover, even if the NFPA 921 could be accepted as a factual predicate for Anstey's claims, he fails to demonstrate that this factual predicate could not have been discovered previously through the exercise of due diligence. The crux of Anstey's petition is that the fire investigation performed in 1994 significantly failed to conform to the 1992 version of the NFPA 921. (ECF Nos. 1, 34). To that end, Anstey submits expert affidavits in support of his position that "[i]f the state's investigators had followed the 1992 version of the NFPA guidelines—as they implied they had done in testimony—the only possible result of their investigation would have been that the fire's cause and origin were undetermined." (ECF No. 1 at 33). Yet, Anstey offers no justifiable explanation as to what precluded him from raising that argument and submitting similar affidavits in his prior habeas petition in February 1999. Although Anstey claims to have found "newly discovered evidence," he wholly fails to show that subsequent updates to the NFPA 921 and its more widespread adoption provide a viable new factual basis upon which to challenge his conviction. Simply because the NFPA 921 has been updated and become more widely adopted in the fire investigation community does not mean that it was previously unavailable to Anstey.

3. The facts underlying Anstey's claims, if proven, would be insufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found Anstey guilty of arson

Finally, even if Anstey is able to overcome the insurmountable hurdle of showing that the factual predicate for his claims could not have been discovered previously through the exercise of due diligence, he must show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish

by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B), *McQuiggin*, 569 U.S. at 396. Anstey argues that he would never have been convicted of murder by arson if the alleged unreliable testimony concerning the cause and origin of the fire was not admitted at trial. (ECF No. 34). However, as Respondent correctly points out, Anstey fails to appreciate the circumstantial evidence that was offered to sustain his conviction. Even if the testimony based on the fire investigation was excluded or disproven at trial due to the investigators' failure to adhere to the NFPA 921, the state offered circumstantial evidence of Anstey's guilt. The state offered the undisputed fact that only Anstey and his grandmother were present in the home when the fire started. The state introduced evidence concerning the troubled relationship between Anstey and his grandmother, as well as his grandmother's recent threats to disinherit Anstey in her will. In addition, Anstey's actions during the fire were questionable. Anstey escaped through his bedroom window, taking belongings with him, but leaving his grandmother in the burning trailer without making an effort to rescue her. He then drove to several neighbors' homes before returning to the closest neighbor's house, which was a mere fifty-five feet from the burning trailer. Only that neighbor was available to call for help. *Ballard*, 787 S.E.2d 866-69. The undersigned cannot conclude by clear and convincing evidence that no jury would have convicted Anstey based on the foregoing circumstantial evidence.

In West Virginia, "to sustain a conviction of arson, when the evidence offered at trial 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 sufficiency of evidence that is

required to show that a fire was incendiary in nature is extremely low. For instance, in one case, the only evidence of incendiary origin "consisted of the testimony of fire marshals that they believed the fire to be of incendiary nature, caused by a flammable liquid." *State v. Adkins*, 446 S.E.2d 702, 704–05 (W. Va. 1994) (citing *Mullins*, 383 S.E.2d at 52). In another case, *State v. Yates,* 288 S.E.2d 522 (W. Va. 1982), "the evidence of incendiary origin consisted only of the opinion of a deputy [marshal] that the fire was of such origin." *Id.* (citing *Yates,* 288 S.E.2d at 523). "Evidence was even introduced in the *Yates* trial contradicting the State's evidence that the fire was incendiary in nature, but the SCAWV "found that the jury's determination that the fire was incendiary should stand." *Id.*

Most telling, in a more recent case, *Adkins*, *supra*, no physical evidence was introduced relating to the alleged incendiary nature of two fires that the defendant was accused of setting. *Adkins*, 446 S.E.2d at 705. In fact, regarding one of the fires, the state's expert testified that "he could not completely eliminate natural gas or electrical causation," but that "the fire was suspicious" and he stated that "there was possibly an incendiary fire." *Id.* Regarding the other fire, an expert merely concluded that the fire was "set with human hands." *Id.* The SCAWV held that although "the evidence regarding the incendiary nature of the fires was rather limited, there was sufficient evidence upon which to sustain the jury's conclusion that the fires were of an incendiary nature." *Id.*

Anstey maintains that the jury would have reached a different verdict if the jurors had known that the fire investigators "did not follow any acceptable method of fire investigation – let alone NFPA 921 standards." (ECF No. 34 at 11). However, under West Virginia law, mere testimony that the fire was possibly or probably incendiary was enough to sustain Anstey's conviction. The state was not required to show that the fire

investigators followed any exacting standards in determining that the fire was caused by arson, let alone show that the investigators followed the NFPA 921. Furthermore, as discussed above, the state offered evidence that Anstey was connected to the crime. He admitted that he and his grandmother were alone at the time of the fire and the state offered various evidence of Anstey's suspicious behavior and motive. Therefore, given the standard that this court must apply on habeas review, Anstey cannot show by clear and convincing evidence that a jury would not have convicted him absent the constitutional errors that he alleges in his habeas petition.

For the above reasons, the undersigned **FINDS** that Anstey does not satisfy the requirements of 28 U.S.C. § 2244(b)(2)(B) and his successive petition must be dismissed under the AEDPA.

B. Anstey's second or successive petition is untimely under 28 U.S.C. § 2244(d)(1)

In addition to imposing strict gatekeeping requirements on second or successive habeas petitions, the AEDPA established a one-year filing deadline in 28 U.S.C. § 2244(d)(1). Anstey argues that "there is not an established one-year-filing requirement for a *second or successive § 2254 petition* under the AEDPA." (ECF No. 34 at 11) (emphasis in original). He contends that the one-year period of limitation provided in 28 U.S.C. § 2244(d)(1) does not apply to his petition because the deadline was not included in the portion of the statute that pertains to second or successive petitions, 28 U.S.C. § 2244(b), or the general statute concerning federal habeas petitions filed by state prisoners, 28 U.S.C. § 2254. (ECF No. 34 at 12).

Anstey's interpretation of 28 U.S.C. § 2244(d)(1) is unavailing. The statute specifies that "[a] 1-year period of limitation shall apply to an application for a writ of

habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C.A. § 2244(d)(1). As is evident by the clear language of the statute, the one-year deadline applies to any habeas application, not only to a prisoner's first § 2254 petition, as Anstey suggests. The notion that second or successive habeas petitions are unrestrained by the limitation period is contrary to the principal purpose of the AEDPA to reduce delays in the execution of sentences and to promote comity, finality, and federalism. If a state prisoner satisfies the requirements of 28 U.S.C. § 2244(b)(2) in order to bring a second or successive petition based upon a new rule of constitutional law or new factual predicate, it does not follow that that the prisoner has free reign to file the habeas petition at any time, even decades after the new rule of constitutional law was made retroactive to cases on collateral review or the new factual predicate could have been discovered.

Rather, in Anstey's case, assuming *arguendo* that the later adoption of the NFPA 921 qualifies as a "factual predicate that could not [have been] discovered previously through the exercise of due diligence," as Anstey argues, he had one year from the date on which he could have discovered such factual predicate to file his § 2254 petition under the AEDPA. (ECF No. 34 at 2); *McQuiggin v. Perkins*, 569 U.S. 383, 388–89 (2013). Critically, the relevant date is when Anstey *could have* discovered the factual predicate for his claims through the exercise of due diligence, not when he actually discovered the factual predicate for his claims. 28 U.S.C. § 2244(b)(2). As previously discussed, Anstey's petition contends that the testimony offered at his trial was contrary to the 1992 version of the NFPA 921. (ECF No. 1 at 35). Therefore, the factual predicate for his claims was discoverable even before his conviction in 1995. However, Anstey maintains that the NFPA 921 "was not recognized as the prevailing standard of care until the early 2000s."

(ECF No. 34 at 3). Giving Anstey the benefit of the doubt that he could not have discovered the NFPA 921 until it became the benchmark for fire investigation in the early 2000s, the one-year deadline passed years before Anstey filed his federal petition on June 28, 2017. Going further, the expert affidavits that Anstey attached to his petition relied upon the 2011 version of the NFPA 921. (ECF No. 1-2 at 3 n.3, 21 n.6). According to one of the experts, he used that version of the NFPA 921 not because it provided new techniques or contained significant scientific advancements that changed the complexion of Anstey's case, but simply because it happened to be the most recent version of the standards at the time he was completing his review. (ECF No. 1-2 at 3, n. 3). Nevertheless, even using that edition of the NFPA 921, the alleged "factual predicate" for Anstey's claims clearly could have been discovered in 2011. Therefore, when construing the period most liberally in Anstey's favor, the one-year statute of limitations began in 2011 when the version of NFPA 921 was published that provided the fire investigation standards that form the basis of Anstey's expert affidavits in support of his habeas petition.

The undersigned notes that Anstey's second state habeas petition ordinarily would have tolled the AEDPA deadline. 28 U.S.C.A. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."). However, under any of the conceivable calculations stated above, whether the period began in 1992 when NFPA 921 was first published, whether it began in the "early 2000s" when NFPA 921 became the national standard, or whether it began in 2011 when the version of NFPA 921 on which Anstey's habeas experts rely was published, the one-year AEDPA deadline expired before Anstey

filed his second state habeas petition in May 2014. Therefore, Anstey's second state habeas petition did not toll the AEDPA period, because there was no period left to toll. *Castillo v. Perritt*, 142 F. Supp. 3d 415, 417 (M.D.N.C. 2015) ("[O]nce the limitations period has expired, later-filed State post-conviction petitions cannot revive it.") (citations omitted). Given that no state proceeding tolled the limitations period, Anstey's federal petition is untimely unless it is subject to equitable tolling.

The one-year limitations period under the AEDPA may be tolled in "'those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation against the party.'" *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (quoting *Rouse*, 339 F.3d at 246). The doctrine of equitable tolling is available only in extraordinary cases and only when the petitioner has diligently pursued his rights. Garden variety attorney negligence, lack of knowledge regarding the law, and *pro se* status are all insufficient grounds to justify equitable tolling. *See Lanahan v. Helsel*, No. CV JFM-15-2133, 2016 WL 4742231, at *2 (D. Md. Sept. 8, 2016) (citations omitted); *also Barrow v. New Orleans S.S. Ass'n,* 932 F. 2d 473, 478 (5th Cir. 1991) (refusing to apply equitable tolling where the delay in filing was the result of petitioner's unfamiliarity with the legal process or his lack of legal representation); *Rouse v. Lee,* 339 F.3d 238,248-249 (4th Cir. 2003) (negligent mistake by party's counsel in interpreting AEDPA statute of limitations does not present extraordinary circumstances warranting equitable tolling); *Smith v. McGinnis,* 208 F.3d 13, 18 (2nd Cir. 2000) (*pro se* status does not establish sufficient ground for equitable tolling); *and Felder v. Johnson,* 204 F.3d 168, 171-173 (5th Cir. 2000) (lack of notice of AEDPA amendments and ignorance of the law are not rare and exceptional circumstances that warrant equitable tolling). Additionally, the petitioner must

"demonstrate a causal relationship between the extraordinary circumstance on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the circumstances." *Britt v. Commonwealth of Virginia*, No. 1:15CV1581, 2016 WL 1532238, at *3 (E.D. Va. Apr. 14, 2016) (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)).

Considering Anstey's argument that the one-year AEDPA period does not apply to his petition or, alternatively, that his petition was timely filed, it is unsurprising that he does not advance an argument regarding equitable tolling. Irrespective of Anstey's silence on the issue, the record very clearly does not demonstrate any extraordinary circumstances that were external to Anstey's conduct that prevented him from timely filing his § 2254 petition despite the diligent pursuit of his rights.

For the above reasons, the undersigned **FINDS** that Anstey's petition is untimely under the AEDPA and must be dismissed.

C. Anstey's actual innocence claims do not render his second or successive petition cognizable

As noted, Anstey contends that he raises two types of actual innocence claims: (1) a "gateway" actual innocence claim based upon *Schlup v. Delo*, 513 U.S. 298 (1995), and *McQuiggin*, 569 U.S. at 392, and (2) a "freestanding" actual innocence claim that Anstey states was "established in *Herrera v. Collins*, 506 U.S. 390 (1993) and affirmed in *McQuiggin*." (ECF No. 34 at 14-15).

The undersigned first addresses Anstey's "gateway" actual innocence claim. The Supreme Court established in *Schlup* that a federal court can consider claims that would otherwise be procedurally barred if a petitioner offers new evidence that would have

made it "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536–37 (2006) (citing *Schlup*, 513 U.S. at 327); *United States v. Jones*, 758 F.3d 579, 583 (4th Cir. 2014). According to *Schlup*, this formulation "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." *Id.* Importantly, the actual innocence exception is not a freestanding claim for habeas relief, but it is rather a gateway for a federal court to consider otherwise defaulted claims. *Boothe v. Ballard*, No. 2:14-CV-25165, 2016 WL 1275054, at *52 (S.D.W. Va. Mar. 31, 2016), *aff'd*, 670 F. App'x 193 (4th Cir. 2016); *Dreyfuse v. Pszczokowski*, No. 3:16-CV-06717, 2017 WL 470908, at *1 (S.D.W. Va. Feb. 3, 2017); *Roberts v. Hejirika*, No. AW-11-CV-868, 2013 WL 2154797, at *8 (D. Md. May 16, 2013). "To be credible, ... a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Booth*, 2016 WL 1275054, at *53 (citing *Schlup*, 513 U.S. at 324).

In *McQuiggin*, the Supreme Court considered the *Schlup* standard in the context of an untimely habeas petition. The Court held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* ... or, as in [McQuiggin's] case, expiration of the statute of limitations." *McQuiggin*, 569 U.S. at 386. However, the ruling in *McQuiggin* was confined to first habeas petitions. *Id.* at 396; *Ruff v. Perdue*, No. 1:14-CV-00221, 2015 WL 13735441, at *3 (N.D.W. Va. Mar. 23, 2015), *report and recommendation adopted*, 2015 WL 6692254 (N.D.W. Va. Nov. 3, 2015). The Supreme Court made clear in *McQuiggin* that the AEDPA imposes a higher burden on second or successive habeas

petitioners. *Id.* at 396-97. In order for a federal court to entertain a claim in a second or successive petition, the petitioner must satisfy 28 U.S.C. § 2244(b)(2)(B). *Id.* For the reasons already discussed, Anstey does not satisfy the § 2244(b)(2)(B) standard. Therefore, he cannot traverse the actual innocence procedural gateway.

Next, the undersigned considers Anstey's independent claim of actual innocence. Anstey argues that a freestanding actual innocence claim was established in *Herrera* and affirmed in *McQuiggin*. (ECF No. 34 at 15). However, the Supreme Court stated in *Herrera* that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400. As the Court discussed, "habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. In *McQuiggin*, the Supreme Court stated that it has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin*, 569 U.S. at 392 (citing *Herrera,* 506 U.S. at 404–405). Therefore, the Supreme Court has not definitively resolved the issue. As it presently stands, a freestanding claim of actual innocence has not been recognized by the Supreme Court or by the Fourth Circuit outside of the capital context. *Smith v. Mirandy*, No. 2:14-CV-18928, 2015 WL 1395781, at *4 (S.D.W. Va. Mar. 25, 2015); *Cooper v. O'Brien*, No. 5:14-CV-00112, 2015 WL 13735779, at *3 n.5 (N.D.W. Va. Aug. 28, 2015), *report and recommendation adopted*, 2015 WL 6085717 (N.D.W. Va. Oct. 16, 2015), *aff'd*, 639 F. App'x 196 (4th Cir. 2016) ("Thus, a freestanding claim of actual innocence is not cognizable in federal habeas corpus and such claim should be

dismissed."); *Teleguz v. Pearson*, 689 F.3d 322, 328 n.2 (4th Cir. 2012) (mentioning, in dicta, that a petitioner can raise a freestanding innocence claim in a capital case).

The undersigned notes that Anstey does not assert that he has new evidence proving his factual innocence, but rather he argues that, if he had received a fair trial, the state could not have proven him guilty of arson beyond a reasonable doubt. Evidence which would show that Anstey did not commit the crime as compared to an argument that the state did not have enough evidence to convict him of the crime, as Anstey alleges in this case, are very distinct concepts. Actual innocence refers to factual innocence, not legal insufficiency. *See, e.g., Souvanaratana v. Clarke*, No. 3:16-CV-00993-JAG, 2017 WL 3447810, at *8 (E.D. Va. July 21, 2017), *report and recommendation adopted,* 2017 WL 3446525 (E.D. Va. Aug. 10, 2017), *appeal dismissed,* 712 F. App'x 317 (4th Cir. 2018). Furthermore, although the Supreme Court has not articulated a standard under which freestanding actual innocence claims would be evaluated, it has made clear that the "threshold for any hypothetical freestanding innocence claim is extraordinarily high." *Teleguz*, 689 F.3d at 328 (markings and citations omitted).

In any event, for the reasons stated above, the undersigned **FINDS** that Anstey's professed actual innocence does not render the claims in his successive petition cognizable on federal habeas review.

III. Proposal and Recommendations

For the reasons stated, the undersigned respectfully **PROPOSES** that the presiding District Judge confirm and accept the foregoing findings and **RECOMMENDS** as follows:

1. Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, (ECF No. 1), be **DENIED** and **DISMISSED, with prejudice**; and

2. Respondent's Motion for Judgment on the Pleadings, (ECF No. 22), be **GRANTED**.

The parties are notified that this "Proposed Findings and Recommendations" is hereby **FILED**, and a copy will be submitted to the Honorable John T. Copenhaver, Jr., United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and three days (if received by mail) from the date of filing this "Proposed Findings and Recommendations" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendations" to which objection is made and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to the opposing parties, Judge Copenhaver, and Magistrate Judge Eifert.

The Clerk is instructed to provide a copy of this "Proposed Findings and Recommendations" to Petitioner, Respondent, and counsel of record.

FILED: December 19, 2018

Cheryl A. Eifert
United States Magistrate Judge

FILED: August 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7238
(2:17-cv-03462)

SAMUEL ANSTEY

Petitioner - Appellant

v.

RALPH TERRY, Superintendent, Mount Olive Correctional Complex

Respondent - Appellee

and

DAVID BALLARD, Warden, Mount Olive Correctional Complex

Respondent

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Harris, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2244

§ 2244. Finality of determination

Effective: April 24, 1996
Currentness

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 965; Pub.L. 89-711, § 1, Nov. 2, 1966, 80 Stat. 1104; Pub.L. 104-132, Title I, §§ 101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

28 U.S.C.A. § 2244, 28 USCA § 2244
Current through P.L. 116-179. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts [Statutory Text & Notes of Decisions subdivisions I to XIV]

Effective: April 24, 1996
Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in multiple documents.>

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

28 U.S.C.A. § 2254, 28 USCA § 2254
Current through P.L. 116-179. Some statute sections may be more current, see credits for details.

Affidavit of Dr. Gerald Hurst

Table of Contents

I. Introduction

1. My name is Gerald Hurst. I am over the age of twenty-one, am not suffering from any disabilities, and I make this affidavit from personal knowledge of the matters addressed herein.

A. Retention, Scope of Work, and Summary of Conclusions

2. I was asked by the West Virginia Innocence Project Clinic at the West Virginia University College of Law in the Spring of 2012 to evaluate the facts and circumstances surrounding the fire that occurred on February 8, 1994, in the home of Marie Donollo. One woman died of smoke inhalation as a result of the fire. The man arrested and convicted for setting the fire in question is Samuel Anstey.
3. The materials that served as the basis for my review included the materials listed in Appendix A (attached).
4. Based on my review of all the available materials, it is my conclusion that:
    - The procedures followed by the Fire Investigators in this case were inadequate to produce scientifically valid and reliable conclusions.
    - There was and is insufficient evidence presented by the State to support Mr. Franck's over-inclusive statements. The little evidence that exists is incorrectly turned into inculpatory evidence through Mr. Franck's statements that each phenomenon could be attributable to only one cause.
    - Mr. Franck's conclusion that the toaster was the cause of the trailer fire is not a scientifically valid conclusion.
    - There is no evidence that there was a second fire in bedroom number two.

II. Brief Summary of Methodology

5. Since its publication in 1992, NFPA 921 has become the recognized guide to fire investigation, and has become the standard of care for assessing the reliability of expert testimony on fire investigations.[1] This widespread acceptance, however, was not immediate.

6. NFPA 921 is subject to frequent revisions every three to four years and combines the knowledge and experience of fire, engineering, legal, and investigative experts across the United States.[2]

7. The investigative technique I employ in fire investigations is the scientific method. The National Fire Protection Association (NFPA) has published a *Guide for Fire and Explosion Investigations* (NFPA 921),[3] which incorporates the scientific method into the field of fire investigations. I used the scientific method when I evaluated the relevant facts of the fire at Box 121 Glen Jean, West Virginia.

8. **It is clear based upon my review of the transcripts of the State's origin and cause witnesses that they did not follow the scientific method in connection with their investigation of the trailer fire.**

III. Independent Analysis of Fire

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[1] *See* Department of Justice, FIRE AND ARSON SCENE EVIDENCE: A GUIDE FOR PUBLIC SAFETY PERSONNEL 6 (2000) https://www.ncjrs.gov/pdffiles1/nij/181584.pdf (stating that the NFPA 921 "has become a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires."); *see also* John Lentini, *The Standard of Care in Fire Investigations*, CANADIAN ASSOCIATION OF FIRE INVESTIGATORS JOURNAL (2007).

[2] The most current version of NFPA 921 was published in 2011. *See* National Fire Protection Association, NFPA 921: GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS (2011) [hereinafter NFPA 921].

[3] The first edition of NFPA 921 was published in 1992, and a new edition is published every three or four years. The current edition in effect as of the date of my affidavit is the 2011 Edition. Hereinafter, the version of the NFPA 921 being referenced will be the 2011 version, unless otherwise noted.

9. The inadequacy of evidence for review is a direct reflection on the inadequacy of the investigation conducted by the State. Despite the limited availability of evidence, however, it is apparent that the fire investigators involved in this case inadequately recorded the available evidence, mischaracterized the available evidence, and utterly failed to subject their findings to the rigorous testing that renders finding scientifically valid.

A. Failure to Test a Hypothesis

10. **The State's expert utterly failed to follow the scientific method. Failure to follow the scientific method when conducting a fire investigation renders scientifically invalid results**. Rather than forming a hypothesis and then subjecting that hypothesis to rigorous testing, the State's expert formed a hypothesis and then set out to prove that hypothesis valid. The rigorous scientific testing required to produce scientifically valid results would have resulted in attempts to disprove the hypothesis once it was formed. Instead, the State's expert fell victim to an expectation bias.

11. Because of his failure to follow the scientific method, and because he succumbed to expectation bias, the State's expert did not proactively eliminate reasonably possible natural or accidental causes. Thus, his determination that the fire was incendiary was scientifically invalid.

B. Analysis of Fire Origin

12. Upon completion of origin testing, investigators are required to "review the entire process, to ensure that all credible data are accounted for and all credible alternate origin hypotheses have been considered and eliminated." NFPA 921 § 17.7. If the

investigator encounters data that is contradictory to the final hypothesis, such data "should be recognized and resolved," but if "resolution is not possible, then the origin hypothesis should be re-evaluated." NFPA 921 § 17.7.2. Furthermore, NFPA 921 specifically states that "when using the scientific method, the failure to consider alternate hypotheses is a serious error." NFPA 921 § 17.7. Thus, **the State's expert committed serious error by failing to consider alternate hypotheses, as required by NFPA 921.**

C. Analysis of Fire Cause

13. The methodology used for determining the origin and cause of fires is the scientific method. NFPA 921 §18.2. "A fire cause determination can be considered reliable only if the origin has been correctly determined." NFPA 921 § 18.1.

14. **Because the State's expert failed to properly test his hypothesis identifying the point of origin, the expert's determination of the fire's cause is not scientifically reliable.**

IV. Errors in the State's Analysis and Opinions

15. At trial, the State's experts concluded that there were two separate incendiary fires: one fire in bedroom #2, and one fire in the kitchen/living room area which was intentionally started by the manipulation of a toaster. These incriminating conclusions were based on the following:

    a. Second origin fire debris: The state's experts concluded that fire debris seized from the heater vent in bedroom #2 was caused from burned "paper-type material." This conclusion was based on the "discoloration" of the linoleum surrounding the vent. The linoleum that served as the basis for this

conclusion was not seized as evidence, nor was the discoloration clearly visible in photographs of the scene.

b. V-burn pattern: The observation of a "V" burn pattern on the kitchen wall behind the toaster led to the conclusion that that area was the origin of the fire.

c. Hall breaker: Three days after the fire, the electrical breaker connected to the hallway smoke detector (breaker #4) was found and photographed in the "off" position. The State used this "fact" as evidence that the breaker had not tripped, but instead was turned off at the time of the fire and therefore did not sound on the night of the fire.

d. Saddle mark: A saddle mark on a section of the toaster's power cord was used as the basis for the State's expert's assertion that the power cord was intentionally placed inside the toaster and rested on the heating element of the toaster.

e. Beading: Beads and beading at the end of the toaster wire was, according to the State's experts, caused by a short-circuit.

f. Toaster fire: The existence of "patterns" inside the toaster's cover served as a basis for the conclusion that the toaster's cord had been stuffed inside the body of the toaster.

g. Evaluation of alternatives: Mr. Franck testified that "It's not that difficult to determine" where a fire started because of the burn patterns created. He did not consider a location other than the kitchen counter as a source, because he

decided that the burn patterns did not indicate any other possible points of origin besides the kitchen counter.

A. Failure to follow procedures laid out in NFPA 921

16. According to the scientific method enumerated in NFPA 921, in order to get a scientifically valid final hypothesis, a fire investigators must follow and, if necessary, repeat seven steps: identify the problem, define the problem, collect data, analyze data, develop a hypothesis, test the hypothesis, and select a final hypothesis. NFPA 921 figure 4.3 (2011). The State's fire investigators failed to refer back to the scientific method in describing its methodology during trial testimony.

17. NFPA 921 specifically provides that "if no hypothesis can withstand an examination by deductive reasoning, the issue should be considered undetermined." NFPA 921 § 4.3.6. In the case at hand, the fire investigators failed to accomplish the rigorous testing that ensures scientific validity.

18. The investigative approach employed in this case was aimed at proving the hypothesis that the fire was incendiary. During the course of the investigation, investigators never attempted to disprove their hypotheses, thereby failing to eliminate accidental causes. **By focusing on the toaster, they failed to do anything beyond a pro forma consideration of other causes.**

19. Regardless of the amount of evidence that points toward a deliberate act, a fire cannot be considered incendiary until all reasonably possible natural or accidental causes have been eliminated. Natural or accidental causes must be eliminated through careful investigation and analysis.

B. Errors in the State's Point of Origin determination

i. "V" Patterns

20. Mr. Franck used the V patterns above the counter where the toaster was located as proof that the fire originated there. Transcript 1412-13. Empirical studies have demonstrated that a "V" pattern simply indicates that something close to a wall burned.

21. The conclusion that the origin of the fire was the kitchen counter near the toaster is, therefore, not scientifically supported. **The available evidence is insufficient to determine the point of origin**.

ii. Toaster Fire

22. Mr. Franck testified that the presence of patterns inside the toaster's cover indicated that the toaster's power cord had been stuffed inside the toaster. There is no evidence beyond Mr. Franck's opinion-based assertion, however, in support of the conclusion that the cord was stuffed up inside the toaster. Although such an observation would have been unusual and worthy of noting and photographing, neither of the fire department officials who first identified and seized the toaster at the scene made any mention of the cord being inside the toaster.

23. The basis for the reported "patterns" in the toaster arising from contact between the power cord and the heating element was neither demonstrated nor tested. The conclusion that the black marks inside the toaster cover were caused by stuffing the power cord inside the toaster has no basis in fact, and is therefore scientifically unsupported.

C. Errors in the State's fire cause determination

i. Saddle Marks

24. The State's expert, Harold Franck, states in his trial testimony that "the most likely culprit for that saddle mark . . . would be a heating element." Transcript pg. 1424 lines 22-24. However, Mr. Franck's opinion is not based on the requisite scientific methodology that NFPA 921 requires. Mr. Franck hypothesizes that the wire's pressing up against the hot element of the toaster would cause the saddle marking on the wire, but failed to test and prove that hypothesis. Therefore, at the time of trial, the conclusion that the saddle mark could have originated from the cord being stuffed inside the toaster was an unsupported hypothesis.

25. Mr. Franck states that the only thing to produce the saddle mark in the wire would be pressing the wire against the heating element of the toaster. This unequivocal statement is scientifically invalid, however, for two reasons. First, Mr. Franck's failure to test this hypothesis renders him unknowledgeable about whether pressing the wire against the heating element will, in fact, cause the effect of the particular saddle markings found in this case. Second, absent thorough testing and experiments, Mr. Franck cannot unequivocally rule out other causes of saddle marking with any degree of scientific certainty.

26. The published literature demonstrates that it is not uncommon to find saddle marks on wiring after a fire, and the marks can have a variety of origins. In fact, in recent years, saddle marks have been produced through a variety of means.

ii. Beading

27. Days after the fire, Mr. Franck disassembled the toaster and two pieces of wire fell out. Mr. Franck determined that the wire which had beading at the end of the wire was the result of the wires short-circuiting. Handling practices at the fire scene

essentially made it impossible to correlate a particular piece of wire with a specific location. Additionally, such an affirmative identification of beading is not always scientifically possible because melted wires and arced wires are often indistinguishable.

D. Errors in the State's Opinion on Multiple Origins

28. NFPA 921 clearly and unequivocally states, "The scientific method requires that all data collected that bears upon the origin be analyzed. This is an essential step that *must take place before the formation of any hypotheses.*" NFPA 921 § 17.4 (emphasis added). Mr. Franck, by his own admission, made a conclusion regarding the origin of the alleged second fire without having tested the single piece of evidence which he based his conclusion on.

29. When asked about the alleged fire in bedroom #2, Mr. Franck stated "I have evidence that heat occurred there," and then further clarified that the evidence which he referred to was "the discoloration of the linoleum underneath of the register." Transcript pg. 1523 lines 7-8, 13-14. By his own admission, however, Mr. Franck did not retrieve that linoleum, and was therefore unable to verify or refute the hypothesis that there was a fire in that bedroom.

30. The record provides no evidence of a fire in bedroom #2: the seized evidence was fire debris which could reasonably have been carried into the bedroom during fire suppression, rescue, and investigation activities. Because no tests were conducted to eliminate the reasonable possibility of debris having been carried into the bedroom, a conclusion that a second fire existed separate from the major fire in the kitchen/living room area is not scientifically supported.

V. Conclusion

31. As a result of my skill, knowledge, education, training, and experience, I conclude to a reasonable degree of scientific certainty that the fire investigation did not conform to recommended fire investigative protocol, was not conducted in a methodical and reliable fashion, and did not utilize the scientific method to determine origin and causation.

32. Mr. Franck rendered material opinions regarding fire origin and causation that were scientifically invalid, unreliable, and contrary to the standards of NFPA 921.

33. Based on all the available evidence, and the testing performed on that evidence, the only scientifically supportable conclusion is that the origin and causation of the fire were undetermined.

I swear under penalty of perjury that the foregoing is true and correct.

Gerald Hurst

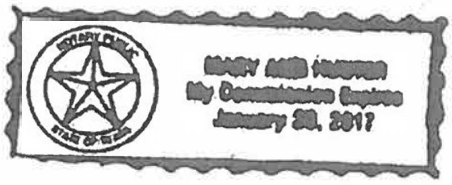
Dr. Gerald Hurst

Subscribed and sworn to before me this 10th day of January, ~~2013~~. 2014

Mary Ann Hurst

Notary Public in and for the State of Texas

My commission expires: 1/28/2017.



Appendix A

I reviewed the contents of four CDs. The contents of those CDs are listed below.

Specifically, CD 1 contained:

- Defense Witnesses
  - Charles Kovarik – Defense Expert (Engineer)
  - Rodney Carney – Made video that was not used at trial. Firefighter at scene.
  - Tim May – Fire origin expert
- State Witnesses
  - Bret Rust – firefighter
  - David Brash – firefighter
  - Harold Franck – State fire origin expert
  - Jack Holt – firefighter
  - John Morrison – State trooper and lead investigator
  - Robert Begley – firefighter
  - Roger York – State Fire Marshal
  - Sam Jasper – Firefighter
  - Steven Cruikshank – firefighter
  - William Terry Massey – firefighter

CD 2 contains photographs of the fire scene after the fire, exhibits used by experts at trial, and photographs of things that were used in trial. These photographs and exhibits were used at trial. Specifically, CD 2 contained:

- Defendant's exhibits
  - Defendant's Exhibit 4 - Photo of wiring in lamp
  - Defendant's exhibit 5 - overview of lamp remains
  - Defendant's exhibit 6 - overview of lamp and conductor packaged
  - Defendant's exhibit 7 - One conductor with beading
  - Defendant's exhibit 8- overview of area of short circuit lamp wiring
  - Defendant's exhibit 9 - close up of short circuit
  - Defendant's exhibit 10 - close up of separating of conductor
  - Defendant's exhibit 11 - close up of bead of copper on conductor
  - Defendant's exhibit 12 - close up of the welded conductor
- State's Exhibits
  - State's exhibit 2 - Diagram of mobile home
  - State's exhibit 3 - Photo of trailer rear outside 2-8-94
  - State's exhibit 4 - photo of outside front of trailer 2-8-94
  - State's exhibit 5 - Photo of trailer bedroom windows - outside fire line
  - State's exhibit 6 - inside trailer - fire damage in kitchen
  - State's exhibit 7 - photo inside hall to kitchen
  - State's exhibit 8 - photo of kitchen area above toaster debris removed
  - State's exhibit 9 - color photo of countertop and toaster
  - State's exhibit 10 - photo inside of toaster - close up of plunger
  - State's exhibit 11 - photo of inside of breaker box - 1st photo
  - State's exhibit 12 -photo of point of origin before debris removed – outlet

- State's exhibit 13 - photo of kitchen - high fire damage
- State's exhibit 14 - Toaster on its side - crumb tray and wiring
- State's exhibit 15 - Photo inside victim's bedroom
- State's exhibit 16 - Photo of Defendant's Bedroom with storm window
- State's exhibit 17 - Photo of breaker box inside defendant's room
- State's exhibit 18 - Photo of defendant's bedroom closet area
- State's exhibit 19 - color photo of defendant's bedroom with towel visible above door
- State's exhibit 20 - photo of hall toward the defendant's bedroom door
- State's exhibit 21 - photo from defendant's bedroom door down hall
- State's exhibit 22 - photo of victim's bedroom - interior - smoke damage and door open
- State's exhibit 23 - Photo of victim's bedroom - interior - heat and smoke on door frame
- State's exhibit 24 - photo looking down on victim's bedroom window
- State's exhibit 25 - photo of outside from victim's bedroom window - slide open window
- State's exhibit 26 - photo of victim's bed area - shows glass on bed.
- State's exhibit 27 - color photo of debris in victim's bedroom from second fire
- State's exhibit 28 - color photo of victim's bedroom vent at end of victim's bed
- State's exhibit 29 - Photo of victim's bedroom heating vent after debris removed
- State's exhibit 30 - Photo of vent in bedroom - inside of vent pipe removed from the floor.
- State's exhibit 31 - photo of wall thermostat - shows set at 75 degrees
- State's exhibit 32 - Photo of hall to victim's bedroom door – lock
- State's exhibit 33 - photo of hall to victim's bedroom - smoke damage and furnace
- State's exhibit 34 - victim's bedroom door and frame with heat damage
- State's exhibit 35 - Photograph of toaster on side on countertop = crumb tray and electric wiring (investigators placed it there)
- State's exhibit 36 - Photo of area toaster was
- State's exhibit 37 - photo of fire area - stove and knob, coffee maker, and light bulb
- State's exhibit 38 - photo of exhaust fan or fan on wall above oven
- State's exhibit 39 - photo of coffee pot, microwave, and range
- State's exhibit 40 - photo of ceiling damage in living room
- State's exhibit 41 - photo of hallway entrance
- State's exhibit 42 - photo of smoke detector location
- State's exhibit 43 - photo of heat or smoke line and doorway in upper hallway
- State's exhibit 44 - photo of doorway to storage - locked area
- State's exhibit 45 - photo of exterior view of front to trailer - victim's bedroom window
- State's exhibit 46 - photo of defendant's bedroom window
- State's exhibit 47 - photo of area below defendant's bedroom window
- State's exhibit 48 - photo of rear of trailer
- State's exhibit 49 - Photo of outside of trailer and porch
- State's exhibit 50 - photo of bar area - shows a lamp in living room
- State's exhibit 51 - photo of wall in kitchen area - toaster with aluminum foil top
- State's exhibit 52 - photo of toaster with plunger halfway down - where toaster found

- State's exhibit 53 - photo of crumb tray of toaster
- State's exhibit 54 - photo of some electrical outlet - not in rear trailer
- State's exhibit 55 - photo of origin after debris removed
- State's exhibit 56 - photo of fire origin area after toaster removed
- State's exhibit 57 - Photo of down view of stove which is off - toaster also –
- 4 Photographs of State's exhibit 63
- 3 Photographs of State's exhibit 64
- 7 Photographs of State's exhibit 65
- 1 Photograph of State's exhibit 66
- 3 Photographs of State's exhibit 67
- 1 Photograph of State's exhibit 74
- 2 Photographs of State's exhibit 78
- 1 Photograph of State's exhibit 79
- 4 Photographs of State's exhibit 80
- 5 Photographs of State's exhibit 81
- 1 Photograph of State's exhibit 82
- 4 Photographs of State's exhibit 83
- 2 Photographs of State's exhibit 84
- 2 Photographs of State's exhibit 86
- 1 Photograph of State's exhibit 87
- 3 Photographs of State's exhibit 88
- 3 Photographs of State's exhibit 91
- 2 Photographs of State's exhibit 92
- 2 Photographs of State's exhibit 93

CD 3 contains a video of a walkthrough of the scene of the fire made by Rodney Carney after the fire. Rodney Carney was an Oak Hill Fire Department fireman. Specifically, CD 3 contained:

- Carney's Video Part 1
- Carney's Video Part 2

CD 4 Contained photographs that were originally provided to former WVU clinic students by Mr. Anstey's power of attorney.

Affidavit of Mark Goodson

Table of Contents

I. Introduction

My name is Mark Goodson. I am over the age of twenty-one, am not suffering from any disabilities, and I make this affidavit from personal knowledge of the matters addressed herein. I have never been convicted of a felony or a crime of moral turpitude.

II. Credentials

1. Below I have listed several of my qualifications regarding my certifications, education, and employment. For my complete CV, see Appendix A (attached).

A. Education

2. I hold a BS in Electrical Engineering, received in 1979 from Texas A&M. I have graduate hours in fire protection engineering and forensics.

B. Licensure

3. I am licensed as a Professional Engineer in Texas (1984) and hold licensing in 13 other states. My licenses have never been revoked, nor have I been disciplined by any engineering board.

C. Publication

4. I have published in excess of 35 peer-reviewed articles, including 30 on fire investigation or causation. I serve as a Peer Reviewer for the *Fire & Arson Investigator*.

D. Patents

5. I hold 3 patents on fire prevention methods, and have 4 more patents pending.

E. Appointments

6. I was the first PE in Texas to serve on the State Electrical Board. I was appointed a Special Court Master from 1989 to 1991 in the 116th Judicial District of Texas. I was appointed by the State of Texas in 2012 to review old arson/murder convictions for which the veracity of the science used to convict defendants is in question.

F. Employment

7. I have been self-employed as a consulting engineer since 1984. I have analyzed over 4000 fire or fire events, I have testified in excess of 350 times at deposition and greater than 100 times at trial.

III. Retention, Scope of Work, and Summary of Conclusions

8. I was asked by the West Virginia Innocence Project Clinic at the West Virginia University College of Law in the Spring of 2013 to evaluate the facts and circumstances surrounding the fire that occurred on February 8, 1994, in the home of Marie Donollo. One woman died of smoke inhalation as a result of the fire. The man arrested and convicted for setting the fire in question is Samuel Anstey.
9. The materials that were provided for my review included those listed in Appendix B. (attached).
10. Based on my review of all the available materials, it is my conclusion that:
    - The engineering work carried out in this case was based on gross misunderstandings of how certain devices function and work.
    - The engineering work conducted did not make use of appropriate laboratory techniques.
    - The engineering work did not make use of appropriate techniques on the fire scene.

- Given that the engineering work was poor and incomplete, it is not a reliable source of data to use in trying to determine how this fire started.

IV. Brief Summary of Methodology

A. Fire Science prior to NFPA 921

11. Prior to the publication of NFPA 921, fire investigation was unscientific, inconsistent, and seriously flawed. Fire investigators were individuals without any training in scientific methodology. Myths regarding how to "recognize arson" were passed from one generation of fire investigator to another. These myths were either completely untested, or stemmed from scientifically unsound practices. The easily applied and readily understood indicators, known as "rules of thumb" have become known as the "mythology of arson investigation."[1]

12. In 1980, the National Bureau of Standards (which is now known as the National Institute of Standards and Technology (NIST)) released a publication, the *Fire Investigation Handbook*, which through significant input from the National Fire Academy contained arson indicators that were based on little or no scientific testing. This document was distributed widely, and it became a resource that fire investigators throughout the United States relied on.

13. In response to the widespread usage of the NBS Handbook and the concerns regarding the validity of fire investigations, the National Fire Protection Association (NFPA) created a Technical Committee to create guidelines that would assist fire investigators. The NFPA published the first edition of the NFPA 921, *Guide for Fire and Explosion Investigations* in 1992.

[1] *See* JOHN LENTINI, SCIENTIFIC PROTOCOLS IN ARSON INVESTIGATION 433 (2006).

B. Fire Science after NFPA 921

14. Since its publication in 1992, NFPA 921 has become the recognized guide to fire investigation, and has become the standard of care for assessing the reliability of expert testimony on fire investigations.[2] This widespread acceptance, however, was not immediate. In fact, o state that NFPA 921 was not immediately embraced by the fire investigation profession would be an understatement. "As with any new standard, NFPA 921 aroused the ire of those accustomed to working to their own subjective standards. In 1999, these individuals organized a write-in campaign that urged the NFPA to delete any reference to science in the document."[3]

15. The outrage that NFPA 921 sparked is understandable. The validity of the NFPA 921 conclusions meant that hundreds, if not thousands, of incorrect conclusions characterizing an accidental fire as intentionally set. Fire investigators were suddenly faced with the acceptance of responsibility for innocent people who were wrongly convicted or families that were deprived of insurance money that they deserved.

16. NFPA 921 faced hostility from fire investigators until roughly 2000. In 2000, the Department of Justice, the Office of Justice Programs, and the National Institute of Justice established the reliability and validity of NFPA 921 by publication of a document: *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel.* This

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[2] *See* Department of Justice, FIRE AND ARSON SCENE EVIDENCE: A GUIDE FOR PUBLIC SAFETY PERSONNEL 6 (2000) https://www.ncjrs.gov/pdffiles1/nij/181584.pdf (stating that the NFPA 921 "has become a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires."); *see also* John Lentini, *The Standard of Care in Fire Investigations*, CANADIAN ASSOCIATION OF FIRE INVESTIGATORS JOURNAL (2007).

[3] John Lentini, SCIENTIFIC PROTOCOLS IN ARSON INVESTIGATION 12 (2012).

guide proclaimed NFPA 921 to be "a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires."[4]

17. The NFPA 921 is subject to frequent revisions every three to five years and combines the knowledge and experience of fire, engineering, legal, and investigative experts across the United States.[5]

i. Scientific Method

18. The investigative technique I employ in fire investigations is the scientific method. The National Fire Protection Association (NFPA) has published a *Guide for Fire and Explosion Investigations* (NFPA 921),[6] which incorporates the scientific method into the field of fire investigations. I used the scientific method when I evaluated the relevant facts of the fire at Box 121 Glen Jean, West Virginia.

19. NFPA 921 provides that the following six steps involving the scientific method must be utilized in investigating a fire and the phenomena associated with it:

> **4.3.1 Recognize the Need.** First, one should determine that a problem exists. In this case, a fire or explosion has occurred and the cause should be determined and listed so that future, similar incidents can be prevented.
>
> **4.3.2 Define the Problem.** Having determined that a problem exists, the investigator or analyst should define in what manner the problem can be solved. In this case, a proper origin and cause investigation

[4] Department of Justice, FIRE AND ARSON SCENE EVIDENCE: A GUIDE FOR PUBLIC SAFETY PERSONNEL 6 (2000) https://www.ncjrs.gov/pdffiles1/nij/181584.pdf.

[5] The most current version of NFPA 921 was published in 2011. *See* National Fire Protection Association, NFPA 921: GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS (2011) [hereinafter NFPA 921].

[6] The first edition of NFPA 921 was published in 1992, and a new edition is published every three or four years. The current edition in effect as of the date of my affidavit is the 2011 Edition. Hereinafter, the version of the NFPA 921 being referenced will be the 2011 version, unless otherwise noted.

should be conducted. This is done by an examination of the scene and by a combination of other data collection methods, such as the review of previously conducted investigations of the incident, the interviewing of witnesses or other knowledgeable persons, and the results of scientific testing.

4.3.3 Collect Data. Facts about the fire incident are now collected by observation, experiment, or other direct data gathering means. The data collected is called empirical data because it is based upon observation or experience and is capable of being verified.

4.3.4 Analyze the Data. The scientific method requires that all data collected be analyzed. This is an essential step that must take place before the formation of the final hypothesis. The identification, gathering and cataloging of data does not equate to data analysis. Analysis of the data is based upon the knowledge, training, experience, and expertise of the individual doing the analysis. If the investigator lacks expertise to properly attribute meaning to a piece of data, then assistance should be sought. Understanding the meaning of the data will enable the investigator to form hypotheses based on the evidence, rather than on speculation.

4.3.5 Develop a Hypothesis (Inductive Reasoning) Based upon the data analysis the investigator produces a hypothesis, or hypotheses, to explain the phenomena, whether it be the nature of fire patterns, fire spread, identification of the origin, the ignition sequence, the fire cause, or the causes of damage or responsibility for the fire or explosion incident. This process is referred to as inductive reasoning. These hypotheses should be based solely on the empirical data that the investigator has collected through observation and then developed into explanations for the event, which are based upon the investigator's knowledge, training, experience, and expertise.

4.3.6 Test the Hypothesis (Deductive Reasoning). The investigator does not have a valid hypothesis unless it can stand the test of careful and serious challenge. Testing of the hypothesis is done by the principle of deductive reasoning, in which the investigator compares his or her hypothesis to all known facts as well as the body of scientific knowledge associated with the phenomenon relevant to the specific incident. A hypothesis can be tested either physically by conducting experiments or analytically by applying scientific principles in "thought experiments."

When relying upon experiments or research of others, the investigator must ensure that the conditions and circumstances are sufficiently similar. When the investigator relies on previously

> conducted research, references to the research relied upon should be noted. If the hypothesis cannot be supported, it should be discarded and alternate hypotheses should be developed and tested. This may include the collection of new data or the re-analysis of the existing data. The testing process needs to be continued until all feasible hypotheses have been tested and one is determined to be uniquely consistent with the facts and with the principles of science. If no hypothesis can withstand an examination by deductive reasoning, the issue should be considered undetermined.

20. **It is clear based upon my review of the transcripts of the State's origin and cause witnesses that they did not follow the scientific method in connection with their investigation of the trailer fire**. Rather, the State's experts relied upon outdated methods that had permeated the fire investigation community for years prior to the time of their investigation and testimony, and those methods are no longer accepted within the fire investigation community today.

V. Engineering Analysis That Should Have Been Carried Out

21. At trial, the State's experts concluded that there were two separate incendiary fires: one fire in bedroom #2, and one fire in the kitchen/living room area which was intentionally started by the manipulation of a toaster. These incriminating conclusions were based (in part) on the following:

- Hall breaker: Three days after the fire, the electrical breaker connected to the hallway smoke detector (breaker #4) was found and photographed in the "off" position. The State used this "fact" as evidence that the breaker had not tripped, but instead was turned off at the time of the fire and therefore did not sound on the night of the fire.

  Mr. Franck also stated that he "knew that the breaker was off" when discussing the reason that the smoke detector did not alarm. Transcript 1451

lines 4-8. Mr. Franck failed to consider, however, Mr. Begley's statement that the breaker servicing the smoke detector (breaker #4) was tripped and that he flipped it on and off when he arrived at the scene. Transcript 1099 line 10 & 15.

22. Three of the breakers, according to a State's witness, were not in a full detent position, which would be consistent with them being tripped. Why did these breakers trip?

23. It would be standard procedure for an engineer to trace out and determine the reason for breakers to have tripped in a fire - i.e., what circuit(s) were they connected to and why those circuits faulted. This is the basis for *arc mapping* and good engineering investigation. If, as an example, arcing was found on the circuit feeding the smoke detector, this could establish that the smoke detector was receiving power during the fire. In the alternative, it could indicate that the smoke detector circuit arcing caused the fire.

24. It is standard engineering practice to x-ray breakers from circuits that feed suspected fire causative appliances (in this case, the toaster) and to test the breakers electrically for proper functioning. This was not done.

- Smoke Detector: Mr. Franck stated during cross examination that the detector in this case "ha[d] a little screen on it, and that screen sensor ought to be cleaned" after being exposed to smoke. Transcript 1417 lines 20-21. Mr. Franck also testified that the smoke detector in this case was "probably a carbon monoxide detector."

25. Smoke detectors are either of the ionization type, photoelectric type, or both. Neither of these types of detector contains a screen to be cleaned after exposure to products of combustion, unless extreme soot has accumulated, in which case the detector is thrown way. They *may* require vacuuming if installed in a dusty environment, but that is a different situation. **There is no smoke detector where smoke collects on a screen.**

26. Mr. Franck also stated that the detector found in this case was "probably a carbon monoxide detector." *Transcript* 1471 line 15. **There is no carbon monoxide detector component in the smoke detector in question**. Ionization smoke detectors detect ions that change current flow in the ionization chamber. Photo electric smoke detectors bounce infrared light off of smoke particles in a chamber, with the reflections being detected by photo diodes or photo transistors. Carbon monoxide does NOT interfere with the ionization process in smoke detectors, nor is it detected in a photo electric detector, because it is clear and colorless. Carbon monoxide detectors are used as an adjunct to smoke detectors, and not as an alternative.

27. No *Chladni* pattern analysis of the smoke detector was carried out, as would be usual and customary, to see whether or not the detector had sounded during the fire.

    - Toaster Fire: Mr. Franck testified that the presence of patterns inside the toaster's cover indicated that the toaster's power cord had been stuffed inside the toaster. The existence of "patterns" inside the toaster's cover served as a

basis for the conclusion that the toaster's cord had been stuffed inside the body of the toaster.

28. **There is no evidence beyond Mr. Franck's opinion-based assertion, however, in support of the conclusion that the cord was stuffed up inside the toaster**. The basis for the reported "patterns" in the toaster arising from contact between the power cord and the heating element was neither demonstrated nor tested.

29. 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-tray) to confirm this belief.

VI. Conclusion

30. As a result of my skill, knowledge, education, training, and experience, I conclude to a reasonable degree of scientific certainty that **the engineering associated with this fire investigation represented poor engineering knowledge of the phenomenon involved, did not make use of proper field or laboratory techniques to determine the role(s) of the smoke detector, electrical circuits, and/or the toaster in this fire. The use of this engineering work product, given its shortcomings, can only lead to improper conclusions in trying to understand how the fire occurred**.

I swear under penalty of perjury that the foregoing is true and correct.

Mark Goodson

Subscribed and sworn to before me this 27 day of March, 2014.

SHARI LYNN BORTH
Notary Public, State of Texas
My Commission Expires
February 24, 2015

Shari Lynn Borth

Notary Public in and for the State of Texas

My commission expires: February 24, 2015.

Appendix A

GOODSON ENGINEERING
CONSULTING ENGINEERS

Mark E. Goodson, PE
Principal Engineer
mark@goodsonengineering.com

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LICENSURE:

Arizona Professional Engineer, License 35588
Arkansas Professional Engineer, License 11459
California Professional Engineer, License 17319
Colorado Professional Engineer License, 39558
Florida Professional Engineer License, 74398
Maryland Professional Engineer, License 40916
Missouri Professional Engineer License, 032425
Nebraska professional Engineer, License E15065
New Mexico Professional Engineer, License 16140
North Carolina Professional Engineer, License 033568
Oklahoma Professional Engineer, License 21609
South Carolina, Professional Engineer 31276
Texas Professional Engineer, License 56446 (Electrical, Mechanical)
Virginia Professional Engineer, License 050653
Washington Professional Engineer, License 44580
NCEES Council Record 26095

EDUCATION:

BSEE, Texas A&M, 1979
Research Statistics, UTHSC-D, 1983
Expert Testimony, SMU Law School, 1984
Fire Protection Engineering, El Centro, 1984
NMR Imaging, UTHSC-D, 1984
Civil Litigation, El Centro, 1985
Medicolegal Death Investigation, UTHSC-D, 1986
Fire Cause and Origin, CCJC, 1987
Forensic Path, Lecture series, 1987-88, UTHSC-D
National Electric Code, Northlake JC, 2000

AFFILIATIONS:

FELLOW, American Academy of Forensic Sciences (AAFS)
MEMBER, Institute of Electrical and Electronic Engineers (IEEE)
MEMBER, International Association of Arson Investigators (IAAI)
MEMBER, National Fire Protection Association

EXPERIENCE:

Goodson Engineering, *Principal Engineer*, Denton, TX - 1984 - Present
TRW Optic Electronics, *Manager of Design Group*, 1980-1985
Rockwell International, *Electrical Engineer*, 1979-1980
Rockwell International, *Co-op student*, 1977-1979

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APPOINTMENTS

Court Master, 116th Jud. Dist. of Texas, 1989-91 *Groom v. Schrmek* (Electrocution case)
Consultant for engineering related deaths, Dallas, Collin, and Tarrant County Medical Examiner Systems
Member, State of Texas, Electrical Board (ESAB), TDLR, 2003-2007
Editorial Board, 2006 to present, *Fire and Arson Investigator*
Member, State Fire Marshal's Office – Science Advisory Workgroup, appointed 2012
BATF, National Response team, Electrical Engineer.

PUBLICATIONS:

"GFIs Prevent Electrocutions", SDM Magazine, August 1985
"Technical Shortcomings of Doppler Traffic Radar", Journal of Forensic Sciences, October 1985
"Evaluating Sound Discriminators", SDM Magazine, Sept. 1984
"Seatbelts that Don't Work: Eng. and Path. Findings", Forensic Sciences Gazette, August 1986
"Effects of Radar Detectors on Traffic Speeds", Journal of Police Science & Administration, Dec 1987
"Investigating Fires by Auger Electron Spectroscopy", Forensic Sciences Gazette, unpublished
"Electrically Induced Deaths Where Water Immersion is Present", American Journal of Forensic Medicine and Pathology, November 1993
"A Discussion of Deaths by Lighting", Journal of Forensic Sciences, November 1993"
Handbook of "Electrical Hazards" (Book Review), Journal of Forensic Sciences, May 1999
"GFIs and Fire Investigations", Fire and Arson Investigator, January 1999
"Electrically Induced Fuel Gas Fires", Fire and Arson Investigator, July 1999
"Surge Suppressor Fires", Fire and Arson Investigator, January 2000
"Electric Water Heater Fire Causation", Fire and Arson Investigator, October 2000
"Circuit Breaker Performance in Cold Temperatures", Fire and Arson Investigator, July 2001
"Effects of P-U Foam Systems on Wiring Ampacity", Fire and Arson Investigator, July 2002
"Fires Caused by Fractured Heating Elements", Fire and Arson Investigator, October, 2002
"Electric Cooktop Fires", Fire and Arson Investigator, October 2003
"Hidden Dangers of Halogen Lamps", Fire and Arson Investigator, January 2004
"CSST and Lightning", Proceedings, Fire and Materials 2005 Conference, January 2005
"The Link Between Lightning, CSST, and Fires", Fire and Arson Investigator, October 2005
"AC to DC Adapter Fires", Fire and Arson Investigator, October 2006
"Circuit Breaker Myths," Fire and Arson Investigator, October 2007
"Engineering Labs," Fire & Arson Investigator," January 2008
"Rope Lighting Fires," Fire & Arson Investigator, October 2008
"Real Time Radiography," Fire and Arson Investigator, January 2011
"Transformer and Cable Sectioning," Fire and Arson Investigator, July 2011
"Electronic Ballast Fires," Fire and Arson Investigator, July 2011
"Examination of Fire Damaged MOVs," Proceedings, PSES, IEEE, October 2011
"CSST Lab Protocol," Fire and Arson Investigator, January 2012
"Cleaning of Fire Damaged Wires," Fire and Arson Investigator, April 2012
"Igniting Others to Action, Fire and Arson Investigator, April 2012
"Analysis of the PSC Motor," Proceedings ISFI, October 2012.
"The Application of CT X-ray to Analysis of Electrical Components, Proceedings IFSI, October 2012
"Math and Fire," Fire and Arson Investigator, October 2012
"Forensic Usage of Computed Tomography," Fire and Arson Investigator, April 2013

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PRESENTATIONS:

Traffic Radar, AAFS 1986 meeting
Investigating Electrocutions, AAFS 1986 meeting
The Compromised Security System, AAFS 1985 meeting
Data Communications Security, IRS 1 week course, 1984
Security Systems, seminar, SHSU CJC, Huntsville, Texas 1986
Failures in Fire and Smoke Detection Systems, AAFS 1987 meeting
Products Liability Aspects of Radar Detectors, AAFS 1987 meeting
Forensic Evidence, Dallas County Bar, February 1987
The Window Shade Restraint, 1990 AAFS meeting
Abuse of FMVSS, 1990 AAFS meeting
Killer TV Slits Woman's Throat - How?, AAFS 1990 meeting
Death by Electric Fence Charger, AAFS 1994 meeting
Thermal Switch Concepts in Electrical Fires, AAFS 1994 meeting
Audio Tape Analysis, 1994 AAFS meeting
Effects of Auto Emissions Systems on CO Deaths in Closed Spaces, AAFS 1996 meeting
Investigating Electrocutions Where GFI's have Failed, AAFS 1996 meeting
GFI's and Fire Prevention, accepted for AAFS 1997 meeting
Surge Suppressors and Fire Causation, accepted for 1997 AAFS meeting
Investigating Electrical Fires, West Texas F&A Investigators, May 1997
Investigating Electrical Fires, North Texas F&A Investigators, October, 1997
Electrical Fire Causation, West Texas Fire Service Conference, December 1997
Deaths Following Exposure on Presumed Non-lethal Electrical Sources, AAFS, Feb 1998
Mechanical & Electrical Fire Causation, Okla. Ch. IAAI, October 1998
Exploding Multi-meters, AAFS, February 1999
Shock Prevention Schemes for Electric Power Tools, AAFS, February 1999
Electrical Fires, NFPA 921, North Texas Fire Investigators, October 2001
Electrical Fires, NFPA 921, State Arson Conference, March 2002
Smoke Detector Design, AAFS, 2002
Electric Deficiencies of Foam Insulation, AAFS, 2002
Electrical Fire Investigation, West Texas IAAI, April 2003
CSST Failures, Propane Defense Association, October 2004
Lightning Induced CSST Fires, Inter-science Fire and Materials, San Francisco, Jan 2005
Arson Issues – TCDLA, October 2008
Deaths Caused by Hyperthermia in Suicide Involving Automotive Exhaust, AAFS, 2010
Energized Gas Line Fires, IAAI 2010 AGM, May, 2010
Energized Gas Line Fires, OAAI, Columbus, Ohio, August 2010
Arson Investigation, TCDLA December 2010
MOV Fires, PSES, San Diego, October 2011
CSST Fires, Missouri IAAI, Kansas City, March 2012
Analysis of the PSC Motor," ISFI October 2012
The Application of CT X-ray to Analysis of Electrical Components, ISFI, October 2012
Arson Investigations, Texas State FMO Symposium, Houston, Texas, January 2013
CSST Fires, Texas State FMO Symposium, Plano, Texas, April 2013
Arc mapping, Texas State FMO Symposium, Houston, Texas June 2013
Arson & Actual Innocence – Texas CCA Center for Am. & International Law, Aug 14, 2013
IEEE PSES, Austin, Texas, Oct 9, 2013 (w Michael Custer) Use of IC Bond Wires as Fuses
Texas State FMO – Plano, Texas – Eutectic Binary Alloying in Fires
Texas State FMO – Corpus Christi, Texas – Fires from E Cigarettes

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PATENTS

7562448	Method of preventing electrically induced fires in gas tubing
7821763	Device for preventing electrically induced fires in gas tubing
8251085	Leak prevention method for gas lines

PATENTS PENDING

13/279,932	Apparatus and Method for Detection and Cessation of Unintended Gas Flow
13/596,972	Apparatus and Method for Detection and Cessation of Unintended Gas Flow
13/455,686	Electrical Wiring System and Method
13/751,745	Beverage Mixing System and Method

Appendix B

I was given for review the contents of four CDs. The contents of those CDs are listed below.

Specifically, CD 1 contained:

- Defense Witnesses
  - Charles Kovarik - Defense Expert (Engineer)
  - Rodney Carney – Made video that was not used at trial. Firefighter at scene.
  - Tim May – Fire origin expert
- State Witnesses
  - Bret Rust – firefighter
  - David Brash – firefighter
  - Harold Franck - State fire origin expert
  - Jack Holt – firefighter
  - John Morrison – State trooper and lead investigator
  - Robert Begley – firefighter
  - Roger York – State Fire Marshal
  - Sam Jasper – Firefighter
  - Steven Cruikshank – firefighter
  - William Terry Massey – firefighter

CD 2 contains photographs of the fire scene after the fire, exhibits used by experts at trial, and photographs of things that were used in trial. These photographs and exhibits were used at trial. Specifically, CD 2 contained:

- Defendant's exhibits
  - Defendant's Exhibit 4 - Photo of wiring in lamp
  - Defendant's exhibit 5 - overview of lamp remains
  - Defendant's exhibit 6 - overview of lamp and conductor packaged
  - Defendant's exhibit 7 - One conductor with beading
  - Defendant's exhibit 8- overview of area of short circuit lamp wiring
  - Defendant's exhibit 9 - close up of short circuit
  - Defendant's exhibit 10 - close up of separating of conductor
  - Defendant's exhibit 11 - close up of bead of copper on conductor
  - Defendant's exhibit 12 - close up of the welded conductor
- State's Exhibits
  - State's exhibit 2 - Diagram of mobile home
  - State's exhibit 3 - Photo of trailer rear outside 2-8-94
  - State's exhibit 4 - photo of outside front of trailer 2-8-94
  - State's exhibit 5 - Photo of trailer bedroom windows - outside fire line
  - State's exhibit 6 - inside trailer - fire damage in kitchen
  - State's exhibit 7 - photo inside hall to kitchen
  - State's exhibit 8 - photo of kitchen area above toaster debris removed
  - State's exhibit 9 - color photo of countertop and toaster
  - State's exhibit 10 - photo inside of toaster - close up of plunger
  - State's exhibit 11 - photo of inside of breaker box - 1st photo
  - State's exhibit 12 -photo of point of origin before debris removed – outlet

- State's exhibit 13 - photo of kitchen - high fire damage
- State's exhibit 14 - Toaster on its side - crumb tray and wiring
- State's exhibit 15 - Photo inside victim's bedroom
- State's exhibit 16 - Photo of Defendant's Bedroom with storm window
- State's exhibit 17 - Photo of breaker box inside defendant's room
- State's exhibit 18 - Photo of defendant's bedroom closet area
- State's exhibit 19 - color photo of defendant's bedroom with towel visible above door
- State's exhibit 20 - photo of hall toward the defendant's bedroom door
- State's exhibit 21 - photo from defendant's bedroom door down hall
- State's exhibit 22 - photo of victim's bedroom - interior - smoke damage and door open
- State's exhibit 23 - Photo of victim's bedroom - interior - heat and smoke on door frame
- State's exhibit 24 - photo looking down on victim's bedroom window
- State's exhibit 25 - photo of outside from victim's bedroom window - slide open window
- State's exhibit 26 - photo of victim's bed area - shows glass on bed.
- State's exhibit 27 - color photo of debris in victim's bedroom from second fire
- State's exhibit 28 - color photo of victim's bedroom vent at end of victim's bed
- State's exhibit 29 - Photo of victim's bedroom heating vent after debris removed
- State's exhibit 30 - Photo of vent in bedroom - inside of vent pipe removed from the floor.
- State's exhibit 31 - photo of wall thermostat - shows set at 75 degrees
- State's exhibit 32 - Photo of hall to victim's bedroom door – lock
- State's exhibit 33 - photo of hall to victim's bedroom - smoke damage and furnace
- State's exhibit 34 - victim's bedroom door and frame with heat damage
- State's exhibit 35 - Photograph of toaster on side on countertop = crumb tray and electric wiring (investigators placed it there)
- State's exhibit 36 - Photo of area toaster was
- State's exhibit 37 - photo of fire area - stove and knob, coffee maker, and light bulb
- State's exhibit 38 - photo of exhaust fan or fan on wall above oven
- State's exhibit 39 - photo of coffee pot, microwave, and range
- State's exhibit 40 - photo of ceiling damage in living room
- State's exhibit 41 - photo of hallway entrance
- State's exhibit 42 - photo of smoke detector location
- State's exhibit 43 - photo of heat or smoke line and doorway in upper hallway
- State's exhibit 44 - photo of doorway to storage - locked area
- State's exhibit 45 - photo of exterior view of front to trailer - victim's bedroom window
- State's exhibit 46 - photo of defendant's bedroom window
- State's exhibit 47 - photo of area below defendant's bedroom window
- State's exhibit 48 - photo of rear of trailer
- State's exhibit 49 - Photo of outside of trailer and porch

- State's exhibit 50 - photo of bar area - shows a lamp in living room
- State's exhibit 51 - photo of wall in kitchen area - toaster with aluminum foil top
- State's exhibit 52 - photo of toaster with plunger halfway down - where toaster found
- State's exhibit 53 - photo of crumb tray of toaster
- State's exhibit 54 - photo of some electrical outlet - not in rear trailer
- State's exhibit 55 - photo of origin after debris removed
- State's exhibit 56 - photo of fire origin area after toaster removed
- State's exhibit 57 - Photo of down view of stove which is off - toaster also –
- 4 Photographs of State's exhibit 63
- 3 Photographs of State's exhibit 64
- 7 Photographs of State's exhibit 65
- 1 Photograph of State's exhibit 66
- 3 Photographs of State's exhibit 67
- 1 Photograph of State's exhibit 74
- 2 Photographs of State's exhibit 78
- 1 Photograph of State's exhibit 79
- 4 Photographs of State's exhibit 80
- 5 Photographs of State's exhibit 81
- 1 Photograph of State's exhibit 82
- 4 Photographs of State's exhibit 83
- 2 Photographs of State's exhibit 84
- 2 Photographs of State's exhibit 86
- 1 Photograph of State's exhibit 87
- 3 Photographs of State's exhibit 88
- 3 Photographs of State's exhibit 91
- 2 Photographs of State's exhibit 92
- 2 Photographs of State's exhibit 93

CD 3 contains a video of a walkthrough of the scene of the fire made by Rodney Carney after the fire. Rodney Carney was an Oak Hill Fire Department fireman. Specifically, CD 3 contained:

- Carney's Video Part 1
- Carney's Video Part 2

CD 4 Contained photographs that were originally provided to former WVU clinic students by Mr. Anstey's power of attorney.