

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT

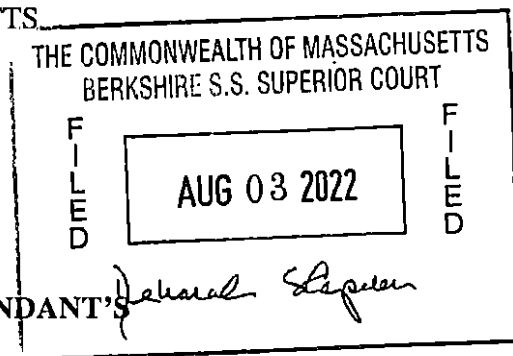
Docket No. CR86-0010-CR86-0013

COMMONWEALTH OF MASSACHUSETTS

v.

WILLIAM CASCONI

COMMONWEALTH'S RESPONSE TO DEFENDANT'S  
MOTION FOR NEW TRIAL



The defendant was convicted in 1987 of arson and three counts of second-degree felony murder. He was sentenced to three concurrent life sentences for the felony murder counts and 18-20 years for the arson count. He has been incarcerated for almost thirty-five years. He now moves for post-conviction relief through a motion for new trial primarily on grounds that newly developed arson science demonstrates that he was wrongfully convicted of arson and felony-murder. He also alleges that his trial counsel was constitutionally ineffective and that the prosecutor misstated evidence. Ultimately, the defendant is requesting that in the interests of justice, this court vacate his convictions.

As part of the Commonwealth's ongoing obligation to ensure that convictions are based on competent evidence, the Commonwealth has carefully considered the defendant's newly discovered evidence claiming that his convictions are based on "outdated and faulty fire science." As a result of the Commonwealth's investigation into the evidence, including consulting with an arson investigation expert, the Commonwealth acknowledges that the legal scientific "standard of care" for fire investigations has developed and changed in the years since the defendant's trial.

Experts in this field rely on different investigative methods and standards when reviewing forensic evidence at a fire scene to determine the cause and point of origin of the fire. With this in mind, the Commonwealth agrees that an evidentiary hearing in the issue of arson science is appropriate in this case because it appears that the evidence presented at trial, specifically related to the cause and origin of the fire at 279 State Street may no longer be scientifically sound, thus casting doubt on the integrity of this conviction.

### **PROCEDURAL BACKGROUND**

Following a jury trial, the defendant was convicted on June 15, 1987 of one count of arson and three counts of second-degree felony murder. For the murder charges, he was sentenced to three life sentences with parole eligibility, to be served concurrently, and for the arson charge, he was sentenced to 18-20 years. The defendant became parole eligible after serving a 15 year minimum sentence. According the Department of Correction records, the defendant waived his right to seek parole in 2002, 2007, and 2017 because he disagreed with the official version of the incident and maintained his innocence.<sup>1</sup>

Following his conviction, he sought a direct appeal and his convictions were affirmed in 1990. See *Commonwealth v. Cascone*, 28 Mass. App. Ct. 1112 (1990) (a copy of this Rule 1:28 decision is included as D. App. 1-8, Ex. 1). On July 1, 2021, the defendant filed his motion for new trial, pursuant to Mass. R. Crim. P. 30(b), asserting: (1) newly developed arson science casts doubt on the justice of his conviction; (2) the prosecutor misstated evidence in her closing

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<sup>1</sup> The defendant was 17 years old at the time of the incident and has no other criminal record. While incarcerated, he has not presented as a danger or disciplinary threat. He had some disciplinary reports, with the majority of them happening in the first half of his incarceration. Since transferring to Norfolk in 1995, his incarceration has been uneventful. He has attended minimum group training and education programming while incarcerated. Also because the defendant was a juvenile at the time of the offense, he is eligible for annual classification and potential placement in a minimum security facility pursuant to *Commonwealth v. Deal*, 478 Mass. 332, 334, 336-337 (2017) citing *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013). From a review of his Department of Corrections records, it appears that he did not participate in the reclassification process from 2018-2020 to a minimum security facility and has remained at Norfolk.

regarding the defense expert's testimony; and (3) trial counsel was constitutionally ineffective for a variety of reasons. These issues were not raised as part of the defendant's direct appeal.

On January 28, 2022, the defendant filed a motion for stay of execution of sentence, which the Commonwealth did not oppose. This Court denied that motion on June 13, 2022.

The Commonwealth hereby responds to the defendant's motion for new trial and with an evidentiary hearing scheduled, primarily on the issue of the development of arson science and related newly discovered evidence, and also reserves the opportunity to supplement this response following that hearing.

### **RELEVANT FACTUAL BACKGROUND**

The factual findings made by the Appeals Court are included below, along with testimony from the trial record.<sup>2</sup> Any new facts based on newly developed evidence, are discussed separately in the argument section.

#### **Events Leading up to the Fire at 279 State Street:**

The Commonwealth agrees with the defendant's summary of the trial testimony describing the building at 279 State Street. D. Memo 4-6.

On the night of October 26, 1984, Brent "Buddy" Tatro and Glen Sumner drove in a maroon Chevy Nova to a rest area on Route 2 outside of North Adams to meet up with William Cascone, the defendant, who was seventeen years old at the time. After meeting up and picking up some beer that had been previously hidden, the three men drove back to North Adams, to find a place to party. Tr. IV, 796-798. They were hoping to party at Jeanette Scott's new apartment. Tr. IV, 797. She was Sumner's distant cousin. *Id.*

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<sup>2</sup> This factual summary is focused on testimony that is relevant to this motion for new trial.

The apartment was on the top floor<sup>3</sup> of a multi-family house in North Adams. *Cascone*, 28 Mass. App. Ct. 112, at \*1. There was a group of people who “drank to excess” at the all-night party. *Id.* Those at the apartment included Jeanette’s two daughters, who were sleeping in their bedroom, (Tr. IV, 658), Jeanette Scott, Jay Deeley, Mike Ritcher, Brent Tatro, Glen Sumner, William Cascone, and Sherry Tatro (a cousin of Brent, Glen, and Jeanette). Tr. IV, 666. Those attending the party drank beer and coffee brandy in the kitchen and smoked a lot of cigarettes. Tr. IV, 671. Throughout the evening, people went out for various reasons, including to buy more cigarettes. Tr.V, 973, Tr.IV, 671; 807, Tr.VIII,1681;1700.

“After an extended, and to the defendant, humiliating altercation with the tenant, the defendant was singled out and ordered to leave the party, which he did reluctantly, muttering threats to get even.” *Cascone*, 28 Mass. App. Ct. 112, at \*1. Scott had become angry with Cascone’s behavior at the party. Tr.IV, 675. Cascone left with Brent Tatro around 11:00 p.m. in attempt to pick up some dates for the party. Tr.VIII, 1692; III, 572; IV, 666. They were not able to find any girls to come back to the party with them. *Id.* Before they left, Scott told Cascone there were already enough people there and that he could not bring anybody else to the apartment. Tr.IV, 666. He gave her a look that she interpreted as not caring about what she said. *Id.* During the party, Cascone made advances towards Scott, which were overheard by Mike Ritcher. Tr.III, 574-575. Ritcher also overheard Scott say she would not go out with him “if he was the last man on earth.” *Id.* Cascone then called her a “fucking cunt” in a loud, angry voice. *Id.*

According to a witness, Bernard Marsh, who lived below Scott’s apartment, he was woken up around 2:00-2:30 a.m. by hearing Scott repeatedly scream “Get him the fuck out of here.” Tr. IV, 751. He continued to hear her voice until he left his apartment. *Id.* at 756. Marsh had plans to

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<sup>3</sup> The building had four stories from the front and three stories from the back because it was built into a hill. Scott’s apartment was on the fourth floor—or the “third floor rear” as referred in the defendant’s memo. D. Memo 5, n. 10.

go hunting and was going to be picked up around 4:00 a.m. *Id.* at 752. While he was waiting for his ride, Marsh saw two men (Cascone and Brent Tatro) get into a maroon Chevy Nova and drive off and then return about ten minutes later. Tr. IV, 748-749. Cascone testified that they left to get more cigarettes around 1:30 a.m.<sup>4</sup> Tr. VIII, 1700.

When they returned to the apartment with more cigarettes, around 4:00 a.m., Tatro was tired and Scott allowed him to sleep in the middle bedroom. Tr. IV, 430; Tr. V, 888-889. Tatro went into that bedroom, fell asleep, and eventually died in the fire. Deeley also planned to sleep at the apartment. Tr. V, 892. Scott did not want Cascone to spend the night at her apartment and they began shouting at each other. Tr. IV, 672; Tr. V, 889-890. They were arguing over the leftover beer—Scott thought it belonged to her cousin and did not want Cascone to take it. Tr. IV, 673-674; Tr. V, 891. After arguing about the beer for a bit, Scott gave some to Cascone and yelled at him to “get the fuck out.” Tr. IV, 675-676.

Scott was mad and pushed Cascone out through the back door after he said to her “something to [the] effect that I’d be sorry, or I’ll get you back.” Tr. IV, 678. Cascone testified that Scott slapped him and screamed at him “This ain’t no fucking hotel, and you ain’t staying here.” Tr. VIII, 1206. Cascone acknowledged that Scott gave him some beer and that she yelled at him to leave, but he denied ever threatening her. Tr. VIII, 1708-1709. He also denied trying to pick up Scott or making advances towards her. Tr. VIII, 1694. According to Cascone, Scott yelled and screamed at him, but he did not think there were any fights. Tr. VIII, 1747; 1750; 1751. He agreed that Scott yelled at him to get out. *Id.*, at 1751.

It is unclear what time Cascone left Scott’s apartment, as the time varied with each witness at trial. Scott testified he was gone by 4:00 a.m. or 5:00 a.m. Tr. IV, 680. Deeley did not know what

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<sup>4</sup> The times of certain events are vary depending on the witness.

time he left. Tr.V, 892. Ritcher, who was in the kitchen most of the night, thought that Cascone left at around 4:45 a.m. Tr.IV, 637; 641-642. Ritcher was thinking of leaving around that same time. Tr.IV, 641. Cascone told Ritcher he was going down to the car and was going to stay there. *Id.* at 641-642. Ritcher did not ask Cascone for a ride and instead, stayed in the kitchen. *Id.* Cascone did not provide a specific time during his direct examination. On cross-examination, he testified he left around 4:00 a.m. and said he saw a digital clock in the kitchen when he was leaving. Tr.VIII, 1761. During his interview with Massachusetts State Police Trooper Scott the day after the party, he indicated that he left “between 3:30 a.m. and 4:00 a.m.” Tr. VII, 1349. During his cross-examination, he indicated that when Trooper Scott interviewed him a second time, in 1986, he remembered that digital clock said “3:57” but that he did not remember that the day after the party. Tr.VIII, 1762.

Cascone “remained close by outside the structure for some time after his departure, by which time the structure was enveloped in flames that blocked exiting by the stairwells.” *Cascone*, 28 Mass. App. Ct. 122, at \*1.

**Relevant Witness Testimony Regarding the Fire from those Inside Scott’s Apartment:**

Ritcher testified that at 5:00 a.m. he saw flames from where he was sitting in the kitchen. Tr. III, 585. He explained he saw a “wall of flame” that was “not on the back porch, but it was coming over the back porch.” *Id.* Ritcher ran out of the kitchen and yelled that the house was on fire. *Id.* at 586. He was alone in the kitchen. Tr.IV, 645. He did not recall hearing any other occupants in the building yelling about the fire. *Id.*

Scott testified that Ritcher yelled “there’s a fire” about twenty minutes after Cascone left the apartment through the back door to the porch. Tr.IV, 681. Scott was sitting in the parlor room and ran to the back door where she saw flames outside the kitchen window. *Id.* at 682. She opened

the kitchen door to see if they could get out that way, but flames came up at her face from the back porch. *Id.*; Tr.V, 895. Scott started yelling "Grab the kids!" Tr.V, 895. She ran to the front door that leads to the stairway and smoke and flames came at her. Tr.VI, 682-683. She could see the flames coming up the side of the wall in the staircase. *Id.* at 684. With the door open, the apartment filled with smoke. Tr.V, 967. The occupants then tried to escape from the fourth floor window. Deeley tried to close the kitchen door with one arm while he held Sandra Scott in the other arm, but flames were bursting in. Tr.V, 898. Deeley and Richter tried to get Scott's two children out through a window but the distance to the ground was too far. Tr.V. 904-905. As they were trying to get them out by hanging out the window, the windowsill gave way and the two men fell four stories to the ground. Tr.V, 903-905. When Deeley fell, he could see the flames "coming in real fast" into the parlor, through the doorways, across the ceiling from the kitchen; too fast for the children to escape. *Id.* at 907. He lost consciousness when he fell, but when he came to he kept "yelling and screaming" that there were children in the apartment. *Id.* at 905-906. He thought the fire started "ten to twenty minutes" after Cascone left. *Id.* at 908.

Sumner, who had been asleep on the couch in the parlor, was woken up by someone screaming "Fire!" Tr. IV, 812. He could see smoke out the back of the building. *Id.* at 813. He kicked out a window and pushed Sherry Tatro and Scott out to fall to the ground. Tr.IV, 814; V, 969. Sumner thought about throwing the children out the window, but there was no one to catch them and he did not want to get in trouble if they died that way. Tr.IV, 815-816. When he was standing by the window, the apartment was filling with smoke and fire. *Id.* He eventually jumped out the window onto a roof. *Id.* Cascone and someone else he did not know helped him down. *Id.* at 818. Cascone asked him where Brent Tatro was and Sumner said he thought he was with Cascone. *Id.*

The two girls did not make it out of the apartment and both died in the fire. Tr.VI, 1321. Brent Tatro, who had been sleeping in a bedroom, also remained in the apartment and died. Even though Ritcher yelled “fire” in the apartment, presumable Tatro did not hear and never had the opportunity to try to escape. Fireman discovered the bodies of three victims in the rubble of the building in October 27, 1984.

**Other Relevant Witness Testimony Regarding the Fire:**

Simon Simon, the owner of the building who lived on the second-floor, was awoken by the sounds of Chris Morehouse yelling about the fire and pounding on the door. Tr.VI, 1108. Morehouse lived in a third floor apartment with Kathy Monette.<sup>5</sup> *Id.* Simon could see fire on the south side of the porch, but no fire on the north side of the porch. *Id.* at 1109-1110; 1113. When he looked outside, he could see a large orange glow behind the building. Then he yelled at his wife to call the fire department. *Id.*

Fred Altieri was at Altieri’s bar, across from 279 State Street, at 5:00 a.m. waiting to meet his uncle. Tr.IV, 770-771. He was in front of the bar walking to the door when he heard someone calling frantically. *Id.* at 772. He saw someone running across the street coming towards him yelling that the building was on fire. *Id.* at 773-774. He described the man as 5’ 8” tall, with long, unkempt hair and facial hair that he described as “scruff.” *Id.* When Altieri first looked over at the building, he did not see the fire, but eventually saw smoke billowing from the top. *Id.* at 775. He ran over to the building with the other man to try to coax a man to jump down from the “porch roof.” *Id.* at 776. He knew he called the fire department, but was not sure if it was before or after

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<sup>5</sup> Neither Chris Morehouse nor Kathy Monette testified at the trial, but they did testify before the grand jury. They lived on the 3<sup>rd</sup> floor of the building. Monette woke up at her usual time, 5:00 a.m., and saw the fire on the porch around 5:10-5:15 a.m. Grand Jury Tr. 101-103

helping the man on the roof. *Id.* at 775; 777. He opened the bar to the firefighters and tried to help other people who had come from the building. *Id.* at 780.

David Boucher lived at 262 State Street, the building beside 279 State Street, and his car was parked between the two buildings. Tr.V, 976. He was up at 4:30 a.m. that morning to go hunting and was out by his car between 5:00 and 5:05 a.m. *Id.* at 977. He did not see any flames or smoke at that time. *Id.*

#### **Testimony of the Firefighters Regarding the Fire:**

The call for the 279 State Street fire came into the fire station at 5:34 a.m. Tr.III, 407. John LeClair could see the fire from the bunk room at the fire station, which was less than half a mile away. *Id.* As the truck approached the building, LeClair could see that the whole rear of the building was on fire. *Id.* at 409-410; 422. It looked like the fire got onto the roof because there was heavy black smoke coming from the roof and upper windows. *Id.* at 422.

LeClair and another firefighter, Thomas Hawke, entered the building through the porch on the south side on the ground level. *Id.* at 411-412. They were able to go up the stairs to the first floor before they had to stop due to smoke, fire, and heat. *Id.* at 413. They were unable to go any further without getting a hose line. *Id.* When they had a hose, four firefighters went back inside to look for people inside. *Id.* at 414. LeClair was last in the line and remained on the first floor to ensure there was a way to get out. *Id.* at 416-417. He saw live wires arcing and flames starting coming into the hallway behind him and was concerned they would be trapped. *Id.* at 417-418. They had to retreat out of the building. There was too much fire for an interior attack. *Id.* LeClair said the “stairway was like a chimney. That’s where the fire was going straight up.” *Id.* at 420. The whole porch in the back of the house was involved in the fire and the fire in the front hallway had “completely consumed the building.” *Id.* at 421.

James Hayes was another firefighter who arrived on the scene a few minutes later because he was off-duty and had gone from home to the station then to the fire. *Id.* at 435-438. As he went up the stairs with the hose, he saw the door to left at the top of the second flight of stairs was on fire and the stairs were “all burnt out.” *Id.* at 438. As they tried to get out of the building, they had become trapped because the fire “flashed over” and there were live wires arcing over the window. *Id.* at 438-439. They used to the hose to knock down the fire so they could get out. *Id.* at 440. The firefighters continued to fight the fire from outside the building. Hayes set up the ladder truck in an attempt to rescue people from the top floor of the building, but was ordered to not go into the building. *Id.* at 442-446. Hayes said when he was on the southwest corner he could see the “concentration of the flames were the first and second floor. The third floor [he] could see through the flame that the back porches were still intact and the bottom two floors were just a skeleton that was left.” *Id.* at 448. He stayed at the building into the morning and eventually removed rubble until the three bodies were found. *Id.* at 454-455. The north side of the building had to be knocked down to find the bodies. *Id.* at 455. By that time, the rest of the building had collapsed.

**Testimony of Harvey Chandler Regarding Cascone’s Confession:**

Harvey Chandler testified that on December 27, 1984, his son, Charles, asked him to witness a conversation between him and Cascone. Tr. V, 992-93. At around 10:00 p.m. that night, Chandler went with his son to pick up Cascone from his home. *Id.* at 95-96. Cascone got in the son’s truck and sat in between Chandler and his son. *Id.*, 997-998. Chandler’s son then drove them to the Rowe Town dump. *Id.* 998. On the way to the dump, Chandler’s son told Cascone he had received a summons regarding a fire in North Adams and that he had been speaking to Trooper Scott. *Id.* 998. Cascone responded that he has “been hassled by all the ‘bacon’ in the area.” *Id.* 1020. He noted he had been thrown out of a party in the building that had burned in North Adams.

*Id.* Cascone then asked to be taken home, and upon arriving at his home, Cascone and Charles got out of the truck to continue speaking. *Id.* at 1021. Chandler remained in the truck and rolled his window down to hear the conversation. *Id.* at 1021-22.

Chandler testified he heard his son and Cascone speaking in low voices, and he was not able to distinguish anything they said until Cascone began sobbing and raised his voice. *Id.* at 1022. At that time, Cascone stated “[w]ell, I didn’t mean to kill anybody. I just wanted to scare ‘em. But the fire got too big and I looked around for something to put it out, but I couldn’t find anything, so I split.” *Id.* at 1022. After this meeting, Chandler and his son drafted a transcript of the meeting. *Id.* at 1036.

Three days later, on December 30, Chandler and his son met with Cascone again. *Id.* at 1022-23. On this occasion they met at Buckland Pizza House (“Pizza House”). *Id.* Before going to the Pizza House, Chandler asked the Chief of Police in Buckland to look into the Pizza House to witness that Chandler and his son were meeting with Cascone. *Id.* The Chief of Police walked by and waved upon seeing Chandler, his son, and Cascone. *Id.*

On cross examination, Chandler admitted he knew the family of the young man who died in the fire. *Id.* at 1025. He also noted his son had been indicted in Franklin County for rape, and that case went to trial in November 1984. *Id.* at 1025-26. Chandler testified at that trial on behalf of his son, and Cascone’s brother testified against Chandler’s son. *Id.* at 1027-28. Chandler’s son was found not guilty of rape. *Id.* at 1030. Chandler’s son was also charged with intimidation of a witness, threatening to commit a crime, and filing a fraudulent insurance claim. *Id.* at 1028-30. The insurance claim involved a fire loss. *Id.* The indictment alleging a fraudulent insurance claim was dismissed in March 1985. *Id.* at 1039. Chandler met with Trooper Scott in June 1985 to

provide a verbal statement about his interactions with Cascone. *Id.* at 1038-39. Within a month of this meeting, the remaining charges against Chandler's son were dismissed. *Id.* at 1039.

**Trooper Robert Scott's Testimony Regarding his Investigation of the Fire:**

Trooper Scott opined that the fire was the result of arson. Tr.VII, 1358. Scott was the State Fire Marshal's representative in Berkshire County at the time of the fire. Tr.VI, 1215. He had been investigating the cause and origin of fires for about eleven and a-half years and investigated about 300 structure fires in that time. *Id.* He arrived at the fire scene around 8:00 a.m. on October 27, 1984, after receiving a call about the fire at 6:00 a.m. *Id.* at 12810-1281. When he arrived the building was nearly destroyed. *Id.* He called the barracks for Trooper Smith to come assist since it looked like a complicated investigation. *Id.* He investigated the scene until around 2:00 p.m. that day.

He started by looking for exterior burn patterns to determine the direction that the fire came from. *Id.* His goal was to trace the fire back to where the ignition occurred. *Id.* The nature of fire is to "burn upward and then outward" which forms a "conical-shape pattern until it reaches an apex" and then shows the lowest and longest point of the burn. *Id.*<sup>6</sup> He expects to see more burn damage in the area of the origin of the fire as compared to secondary or drop-down fires. *Id.*

He started at the front of the building, then moved to the north side where he noticed a low area of burn that was actually on the front, but there was very little burn damage there. *Id.* at 1288. The fire did not penetrate all the way through this ground level apartment and there was no flame damage on the east side of the building. *Id.* He found the back walls were more heavily damaged

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<sup>6</sup> Throughout his testimony, Trooper Scott explained the significance of burn patterns in general and what he observed at the fire scene, which were commonly relied upon during fire investigations at that time. This summary does not go into detail of that information, since most of those factors are no longer considered scientifically sound.

than any other exterior walls. *Id.* at 1289. The sheds that had been on the south side of the building were completely burned. *Id.* at 1298.<sup>7</sup>

He found significant burn patterns at the west (rear) side of the building. *Id.* 1300-1301. He pointed out a cone pattern that indicated to him the fire was travelling up the stairwell until it was inhibited by the ceiling and then traveled vertically in both directions until it reached the next level. *Id.* He opined that the fire burned into the stairs from the first level and went up until it hit the porch roof above and there was material missing from the roof. *Id.* at 1303.

He found the lowest burn area on the west side (rear) of the building; at the southwest portion of the porch at the first level (Simon's) porch. *Id.* at 1301-1302; 1311. Based on this pattern and because the entire structure in this area exhibited complete burning on the walls and structure, he determined this is where the fire started. *Id.* at 1304; 1313. He discussed other patterns that supported his conclusion, including the interior wall of the north porch and a shed on the north side was intact and unburned (*Id.* at 1305-1306); that there was more burn damage in the back as compared to the front (*Id.* at 1311); there was a burn pattern that fanned out at the top and extended down that pointed to the area of origin (*Id.* at 1312-1313); the structure was weakened and began to collapse into the point of origin (*Id.* at 1313).

Scott also explained that the hallways could also act like chimneys and that once the fire penetrated from the porch into the kitchen and bathroom, he would expect it to move very quickly through the doors going into the hallway, where the fire could move and burn upwards. *Id.* at 1307.

Scott was not able to immediately sift through the debris at the origin point because there was a danger the walls could collapse and the area was still very hot. *Id.* at 1313-1314. He dug down at some locations but only got as far as a slab foundation, which was the floor of the porch.

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<sup>7</sup> While he was investigating the fire, the other firefighters were overhauling the scene, which is the process of moving debris in order to extinguish any burning embers in the area. *Id.* at 1299.

*Id.* at 1314. During his search, he found roofing material—asphalt shingles—which are extremely flammable. *Id.* at 1315. He also went up on a ladder to try to get an overview of the structure. *Id.* at 1316. He took a picture at the scene that showed the damage slopes to the southwest corner. *Id.* at 1320.

After the bodies were found, he went back to his investigation at the point of origin, where it was still hot and smoky. Tr. VII, 1335. He determined it would be impossible to do a reconstruction because: it was not safe due to embers; heavy equipment was needed to knock down the walls, which would further contaminate the scene; and it was still hot. *Id.* at 1336. He looked for sources of heat in the area that could have provided ignition for the fire. *Id.* at 1337. He considered electrical sources but did not think it was likely because he would expect fire to be located more in the interior of the building. *Id.* at 1340. He also considered lightening; biological spontaneous heat, chemical spontaneous heat or gas explosion but there was no evidence of any of these. *Id.* at 1339-1347.

Scott considered whether the accidental disposing of smoking materials—cigarettes or matches—could be the heat source that started the fire. *Id.* at 1348. Scott opined that the disposal of a match or cigarette did not start this fire. *Id.* at 1352. He claimed that cigarettes are not a good source for starting open combustion fire because the surface temperatures are low and the mass of the heat source is small. *Id.* at 1353. He opined that it would take a cigarette hours to start a fire and would produce a lot of smoke. *Id.* at 1355. Matches produce extremely hot temperatures, but the heat source is very small and they can easily self-extinguish if dropped from thirty-six inches or higher. *Id.* at 1356. Scott concluded that this fire “was arson” because it “was a “non-accidental application of an open flame to available combustible materials.” *Id.* at 1362. The “combustible materials” were the boxes and other items on the porch. *Id.* at 1364. He did not identify the source

of the open flame, but when the prosecutor suggested a match was used, Trooper Scott did not disagree. *Id.* at 1364-1365. When asked about location for the match to start the fire, he said “at the bottom of these materials” on the porch would be the ideal place. *Id.* at 1365.

On cross-examination, Scott stated that by the time he left the scene of the fire on the afternoon of October 27, he had determined the origin point of the fire. *Id.* at 1407. He determined that cause of the fire later that evening, after he spoke to Cascone. *Id.* at 1408. He explained that he determined the origin based on: burn patterns, interviews with firefighters, interview with Simon, the landlord. *Id.* at 1410. Trooper Smith interviewed other witnesses, as well. *Id.* To determine the cause, Scott starting with eliminating accidental start to the fire, timing of the fire, knowing Cascone’s actions and the time he left Scott’s apartment, weather conditions, knowing the degree of likelihood of different ways the fire could have started, and knowing about how fire burns and develops over time. *Id.* at 1412-1414.

He checked for accelerants because these are often used in intentionally set fires. *Id.* at 1423. The presence of an accelerant makes determining cause easier, in part, because they leave a unique burn patterns. *Id.* at 1424. He had a hydrocarbon detector, called a “sniffer” when he did his investigation. *Id.* at 1418. It helps detect chemical fuels when they are involved in a fire. *Id.* He did not use it. *Id.* at 1423. He did not sift or collect any debris or other samples to test for hydrocarbons or any other analysis. *Id.* at 1427-1429. He did some digging in the southwest corner of the porch until hit the cement pad underneath, it was about a ten square foot area. *Id.* at 1431; 1482. He did not preserve any samples, dig into the debris, or take any photographs while digging in this area. *Id.* He did not collect or preserve any samples to be sent to the lab for any kind of testing. *Id.* at 1432-1435. He did not sift or dig through remains in any attempt to determine whether this was an accident or intentionally set fire. Scott did not utilize the Drott (heavy

equipment) to knock down any of the walls, which can be done in a way that preserves the scene but also makes it safe for investigation. *Id.* at 1436-1437. He did not preserve any electrical appliances or wiring to determine whether this was an electrical fire. *Id.* at 1438-1439. He did not diagram the building or ask any occupants to diagram where the electric outlets or fuse box were located. *Id.* at 1440-1442. He did not contact the electric company. *Id.* About a month before the trial, he contacted the gas company, but not as part of his initial investigation to determine the cause. *Id.* at 1446. He then found out there were some issues with gas appliances on October 18, just days before the fire. *Id.* at 1447.

Scott admitted that when he examined what he concluded was the origin point, he did not find anything that appeared to be the cause of the fire. *Id.* at 1452. How the fire is extinguished can impact the investigation into the cause of the fire. *Id.* at 1454. Scott did not collect any information from the firefighters about this either. *Id.* at 1455. He did not conduct thorough interviews with the owners of the building or other witnesses. *Id.* at 1455-1456. He did not examine any wood at the point of origin to look for fire patterns that would be consistent with petrochemicals. *Id.* at 1461. He did not examine or take any samples of pipes for testing that could have assisted in this investigation. *Id.* at 1469-1471. He looked at the glass at the building, but took no photographs, did not make any notations, did not assemble any of the glass. *Id.* at 1479-1480. He did not take any soot or ash samples for testing. *Id.* at 1480.

**Testimony of Defense Expert, James Keaveney:**

At the time of the trial, Lieutenant James Keaveney was a firefighter in the Chelsea Fire Department. Tr.VIII, 1567-1569. Before he testified, there was an issue to whether he had an opinion as to the cause of the fire. Tr.VIII, 1564. The Commonwealth requested a voir dire arguing that his testimony that he did not have an opinion was inadmissible because that was of no

assistance to the jury. Tr.VIII, 1564. The Defense argued that his opinion was “undetermined origin,” which is the same as saying it was not an arson. *Id.* The judge did not hold a voir dire, but indicated he would rule on any objections as they came up during the testimony. *Id.*

Keaveney did an independent review of the fire scene, interviewed firefighters and witnesses and also reviewed statements, reports, photographs, and the grand jury minutes. He became involved in April 1986, after the defendant had been indicted. *Id.* at 1572. He did not see the scene in the days immediately following fire and he mostly learned about witness accounts by reading statements and interviews. He testified generally about how he investigates a fire. *Id.* at 1574-1579; 1581-1587. He explained that he labels a fire either “incendiary” which would be a cause of an arson fire or “accidental” would be a non-arson. *Id.* at 1574-1575. He also stated that before he could give a cause of arson, the first thing to do is eliminate accidental fires. *Id.* at 1588.

He testified that based on his review he “couldn’t determine the point of origin.” *Id.* at 1590. He would not eliminate “electrical malfunction” or “gas malfunction” as possible causes for this fire. *Id.* at 1592. He could not eliminate an accident as the cause and would not label this fire as an arson, either. *Id.* When asked by the judge “do you have an opinion as to the cause of this fire?” He answered “no.” *Id.* at 1593. Essentially, on direct examination he gave no opinion as to the cause and origin of the fire.

On cross-examination he acknowledged that witness statements indicated the fire was first observed on the southwest corner and there was no fire on the north. Tr. VIII, 1631. These statements came from Kathy Monette and Simon Simon, who were among the first people to see the fire. *Id.* at 1631-1632. He acknowledged there was no electricity on the back porches. *Id.* at 1632. He described where the fire was in relation to the stairs and the stringer, indicating it was on the southwest side. *Id.* at 1634-1635. He opined that the fire was more advanced on the porch than

in the apartment; and more involved in the first floor than higher up and this would mean it was burning longer on the first floor. *Id.* at 1636-1637. He also agreed that based on the intensity of the burning, a major source of the fire was on the fourth floor. *Id.* at 1642.

He agreed that a fire started by careless smoking will likely smolder for hours, produce a lot of smoke, and does not move as fast as a set fire. *Id.* at 1638. He noted that less than a gallon of gas could start a fire and that he would not expect to find gas or residue in the debris from an investigation if only a gallon was used. *Id.* at 1648. It is not unusual to not find gas in the debris of a fire even if he thinks it is there. *Id.*

**William Cascone's Testimony:**

On the evening of the party, he was wearing a black leather jacket, black leather vest, a gray shirt, white cords and a pair of tan cowboy boots. Tr. VIII., 1682. He arrived at Jeanette Scott's apartment with Glen Sumner, Brent Tatro, and Sherry Tatro between 8:00 and 8:30 p.m. They went up the backstairs to get the apartment. Tr.VIII, 1676. When they arrived, Scott, Jay Deeley, and Mike Richter were already there. *Id.* They all sat around drinking alcohol and smoking cigarettes for about an hour and a-half. *Id.* at 1679. He had about four beers during that period and felt the effect of the alcohol. *Id.* at 1681. Cascone was running low on cigarettes, so he collected money and went across the street to Altieri's bar to get more cigarettes for the group. *Id.* at 1681.

At Altieri's he bought four packs of cigarettes: three packs of Marlboro and one pack of Marlboro Lights because they ran out of regulars. *Id.* at 1683. He did not get any matches when he bought the cigarettes. *Id.* at 1684. Scott was upset with him for getting the Marlboro Lights because she got stuck with that pack. *Id.* at 1685.

They were smoking through the evening; they opened the back door in the kitchen because it was really smoky inside. *Id.* at 1687. People went out onto the porch throughout the evening, but

he did not know if cigarettes were being lit up outside. *Id.* He did not see anybody come inside to dispose of cigarettes while smoking outside and there were no ashtrays outside, so he assumed the cigarettes “went over the side of the building.” *Id.*

Around 11:00 p.m., he and Brent Tatro left and went looking for girls. *Id.* at 1689-1690. Everybody had kept on drinking. *Id.* at 1691. Cascone had four more beers between the time he went to Altieri’s and left with Tatro at 11:00 p.m. *Id.* They tried to pick up girls in North Adams for about fifteen to twenty minutes, but were unsuccessful and went back to Scott’s apartment. *Id.* at 1694. When they get back, they all continue to drink and smoke cigarettes. *Id.* at 1696. He drank another four beers from the time he got back from North Adams until he left again. *Id.* at 1697.

He recalled that Sherry Tatro also left to get more cigarettes and Scott left and came back with a bag. *Id.* at 1699. Each time someone left, they used the back stairs. *Id.* at 1700.

Cascone and Brent Tatro left the apartment again between 1:30 a.m. and 2:00 a.m. to get more cigarettes *Id.* at 1697; 1700. They drove down the street and found an open store and bought three packs of Marlboros. *Id.* at 1701. They asked for matches, but did not get any. *Id.* Shortly after they got back, Tatro asked Scott if he could sleep in one of the rooms. *Id.* at 1704. Cascone drank more beer and stayed up talking with Richter and Deeley. *Id.* at 1705.

A few moments later, Scott slapped his hand out from under his head and said “this ain’t no fuckin’ hotel, and you ain’t staying here.” *Id.* at 1706. He got up to get some of the beer from the fridge and she stopped him and said “You ain’t having none of this beer.” *Id.* at 1707. She tried to kick him. *Id.* He did not kick, hit, or yell at her. *Id.* He said he wanted a couple of his beers and would leave. *Id.* She yelled at him to “get the fuck out.” *Id.* at 1708. Deeley intervened and picked Scott up and carried her into another room. *Id.* He denied threatening her in any way. *Id.* at 1709. She gave him some beers and he left by himself. *Id.*

When he left, he had one cigarette lit that he was smoking. *Id.* at 1710. He did not have any matches so he lit another cigarette off the first one when he was done with it. *Id.* He did not smoke any more cigarettes after that because he did not have any way to light one. *Id.* He went to the car and fell asleep. *Id.* at 1711.

Cascone did not know how long he slept, but he heard something that sounded like an “explosion.” *Id.* at 1711. He got out of the car and walked over to the dumpster to urinate and he heard “crackling sounds like kindling wood burning.” He finished going to the bathroom and “ran up the side stairs that go to the back” and when he opened the door to the first floor, he saw flames that went “half-way up the stairs” and around the door he had opened. *Id.* at 1712. He ran up the concrete stairs to the second floor, where the Simons lived. *Id.* at 1713. He tried going up the stairs, but was not able to because of the flames. He saw flames shooting up and through onto the top porch. *Id.* There were flames on the stairway leading from the Simon apartment to the third floor. *Id.* at 1714. He tried to run up the stairs to get people out. *Id.* at 1714-1715. He went up to the second floor, where the Simons lived and did not make it to the third floor. *Id.* at 1717.

He went to the front of the building and smashed through a screen to unlock a door. After he opened the door, he went into the hallway yelling for people to get out. *Id.* at 1717. Next, he ran across the street to Altieri’s bar looking for someone to call the fire department. *Id.* at 1718. He and Fred Altieri ran back to the building and saw Sumner on the roof and then caught him as he came down from the roof. *Id.* at 1719-1720. Cascone did not know whether the fire department was called. *Id.* After they caught Sumner, he saw three other people from the building down on the street. *Id.* Sumner asked Cascone to take him to the hospital. *Id.* at 1721. At that time, the fire department had not arrived and there were no ambulances. *Id.* Cascone asked about Brent Tatro, but Sumner did not know where he was. *Id.* at 1722.

He fell asleep in the car at the hospital and then a few hours later drove back to the apartment building, but it was barricaded off by that point. *Id.* at 1723. He eventually took the car back to the Tatro's place and told the family what happened. *Id.* at 1727. Then, he went to Betty Paulsen's place, where he had been living at the time. *Id.*

Cascone met with the Chandlers on three occasions, including at the dump in Rowe. *Id.* at 1730-1731. Charlie Chandler accused Cascone of having one of his guns, which had been stolen. *Id.* at 1732. Cascone bought the gun from a friend, Ted Paulsen. *Id.* He did not say anything to the Chandlers about the fire. *Id.* He denied threatening anyone at the party and denied setting any fire at the apartment building. *Id.* at 1737-1738.

On cross-examination, he reiterated that he and Scott did not argue until she told him to get out, but she was mad about him getting her Marlboro Light cigarettes instead of regular. *Id.* at 1745. He recalled hearing the sound of broomstick pounding on the floor at the same time Scott was yelling at him to get out. *Id.* at 1751. When he left, he went to the car because he did not want to leave Sumner and Tatro behind, but he had nowhere else to go. *Id.* at 1758.

He said the last time he left with Brent Tatro it was around 2:00 a.m. and they saw a man sitting outside in camouflage clothing. *Id.* at 1752. They had gone down the road to get more cigarettes. *Id.* at 1755.

He had originally told Trooper Scott that he did not have any cigarettes or matches when he left the apartment for the last time. But on cross-examination, he acknowledged that during his testimony he said he had a lit cigarette and that he used it to light another cigarette. *Id.* at 1760-1761. He was asleep in the car when he heard loud noise or something "exploded." *Id.* at 1780-1781. He heard the explosion and then got up to urinate near the dumpster by the store on the first

floor of the building. *Id.*; at 1791. While he was urinating, he heard a crackling sound and stopped. *Id.* He saw a “very bright light” coming off the porches. *Id.* at 1792.

## **ARGUMENT**

### **I. The Commonwealth Agrees that there Have Been Significant Changes in Arson-Science and Investigations Since this Case Was Investigated in 1984 and the Trial Was Held in 1987 that Should Not be Overlooked**

As will be seen, in light of the newly developed fire-science standards and investigative procedures that came into effect after this 1984 trial, the integrity of the investigation and evidence revealed from the arson scene in this case is problematic because the circumstantial evidence relied upon at trial is no longer scientifically sound because of new developments in arson science and investigation standards.

During the course of its investigation, the Commonwealth has consulted with two different experts in the field of fire investigation. Sargent Paul Horgan, a member of the Massachusetts State Police, Fire and Explosion Investigation Unit, reviewed the report and analysis offered by defense expert, Dr. Craig Beylor, to provide the District Attorney’s Office with an initial assessment of the claims regarding the developments in arson science that have taken place since the investigation and trial in this case. Sargent Horgan did not review any records from the underlying investigation, trial, or appeal. Based on his assessment and recommendation, the Commonwealth sought out an independent expert.

Prior to the hearing on the defendant’s motion for a stay of execution of sentence on June 1, 2022, the Commonwealth confirmed with their expert, Wayne Chapdelaine, that he would have his evaluation and report completed no later than July 15 to allow the Commonwealth time to prepare its response to the motion for new trial. Chapdelaine assured counsel the report would be completed in time. After the hearing, he confirmed availability for proposed dates to testify via

Zoom (since he is in Canada) at an evidentiary hearing. Despite multiple requests by phone and email for a report, the Commonwealth has not received anything and has not heard from this expert since July 21, 2022.

Because the Commonwealth did not want to cause any further delay, the Commonwealth responds to the motion for new trial relying primarily on Sargent Horgan's limited assessment, outlined in the affidavit attached, as Commonwealth's Exhibit A.<sup>8</sup> Should the Commonwealth receive an expert opinion from Chapdelaine prior to the evidentiary hearing, it requests the opportunity to file a supplemental response with that additional information.

**A. Standard of Review for Motion for New Trial Based on Newly Discovered Evidence**

The defendant has moved for new trial pursuant to Mass. R. Crim. P. 30(b) alleging newly discovered evidence. A judge "may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). While the ultimate consideration is whether "justice may not have been done," the Supreme Judicial Court has "'crafted a latticework of more specific standards designed to guide judges' determinations . . . as to whether a new trial should be ordered.'" *Commonwealth v. Rosario*, 477 Mass. 69, 77 (2017), quoting *Commonwealth v. Brescia*, 471 Mass. 381, 388 (2015). The defendant bears the burden of proving the facts on which he relies in his motion for new trial. See *Commonwealth v. Vaughn*, 471 Mass. 398, 403 (2015).

In cases alleging newly discovered evidence, such as this one, the defendant "must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." *Commonwealth v. Grace*, 397 Mass. 303, 305 (1986), citing *Commonwealth v. Ortiz*, 383 Mass. 523, 537-538 (1984) and *Commonwealth v. Brown*, 378 Mass. 165, 171 (1979).

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<sup>8</sup> A signed copy of the affidavit will be filed once it is received back from Sargent Horgan. He has read and approved the filing of the attached affidavit.

Evidence is considered newly discovered where it was “unknown to the defendant or his counsel and not reasonably discoverable through “reasonably pretrial diligence.” *Commonwealth v. Epps*, 474 Mass. 743, 763-764 (2016) citing *Grace*, 397 Mass. at 306. The evidence must not only be new, but must also be “material and credible” and “carry a measure of strength in support of the defendant’s position.” *Brown*, at 171-172.

In assessing a claim based on newly discovered evidence, the “judge must find that there is a substantial risk that the jury would have reached a different conclusion” had the evidence been admitted at trial. *Grace*, 397 Mass. at 306, citing *Commonwealth v. Markham*, 10 Mass. App. Ct. 651, 654 (1980). Ultimately, the motion judge does not decide whether the verdict would have been different, but instead determines “whether the new evidence would probably have been a real factor in the jury’s deliberations.” *Grace*, 397 Mass. at 306, citing *Davis v. Boston Elevated Ry.*, 235 Mass. 482, 495-496 (1920); *Markham*, 10 Mass. App. Ct. at 654.

And, in rare cases, in order to determine whether “justice may not have been done” a motion judge “may need to look beyond the specific, individual reasons for granting a new trial to consider how a number of factors act in concert to cause a substantial risk of miscarriage of justice and therefore warrant the granting of a new trial.” *Brescia*, 471 Mass. at 397. Put another way, a judge may consider a “confluence of factors” when determining whether there has been a miscarriage of justice. *Id.*; see also *Rosario*, 477 Mass. at 78.

#### **B. The NFPA 921 Sets the Standard of Care for Fire Investigations that Concern the Origin and Cause of Fires**

The Guide for Fire and Explosion Investigations by the National Fire Protection Association, or the “NFPA 921” was first published in 1992 and has been updated several times, with the most recent edition published in 2021. The NFPA 921 was developed to counter fire

investigation myths and instead introduce scientific methods and standards to be used in fire investigations.

The standard method for fire investigations under the NFPA 921 is the scientific method, which includes: (1) recognizing the need (identifying the problem); (2) defining the problem; (3) collecting the data; (4) analyze the data; (5) developing a hypothesis (inductive reasoning); (6) test the hypothesis (deductive reasoning); and (7) select final hypothesis (conclusion or opinion). See *NFPA 921*, Basic Methodology, Chapter 4. Until data is collected, no hypothesis can be formed or tested. *Id.* Investigators should avoid presumption bias and confirmation bias through the proper use of the scientific method. *Id.* This scientific method should be followed in the same manner regardless of any suspicions about the fire being investigated. After 1992, experts and investigators should be using this methodology to give opinions regarding cause and origin of fires and explosions. *Id.*

Generally, under the NFPA 921, causes of fire can be broken down into four main categories: accidental, natural, incendiary, and undetermined. NFPA 921, Chapter 20. Unlike many crimes, fires are often the result of an accident and not an intentional or negligent act by a person. For example, a fire can start because of an electrical wiring defect and not as a result of any act by a person. Some accidental fires can be the result of human behavior, but not intentional. For example, a person can intentionally start a fire in a fireplace and then spreads outside of the fireplace area because there are highly flammable materials nearby, which could be deemed accidental fire even though it was intentionally set. A proper and thorough investigation using the above-listed scientific method should take all potential causes into consideration. *Id.*

The implementation of NFPA 921 guidelines into arson investigations also ensures fair convictions and prevents injustice based on unreliable “junk” science. The Commonwealth

acknowledges that the NFPA 921 is the current standard of care for fire investigators conducting origin and cause investigations, but that it was not in place in 1984. Because these standards were not used in this case, the investigative theories and evidence relied on to determine point of origin and cause of this fire are no longer scientifically sound. Although the methods used by Troopers Scott and Smith during the 1984 investigation may have been suitable then, those techniques and opinions derived from them were based on the common beliefs, training and experience that was available at the time. Most of those methods and investigative techniques are now considered to be outdated and inadequate.

The Commonwealth acknowledges that the fire-science and the NFPA 921 standards are newly discovered evidence for the purposes of this motion for new trial. Had this evidence been available at the time of trial, both the Commonwealth's and the defense strategy might have been different. In addition, the investigations and expert testimony in this case based on this newly discovered evidence "would probably have been a real factor in the jury's deliberations." See *Commonwealth v. Mazza*, 484 Mass. 539, 540 (2020), quoting *Grace*, 397 Mass. at 306.

### **C. The Developments in Fire Science Cast Doubt on the Integrity of this Conviction**

There is no dispute that the standards used for investigations into the cause and origin of fires have changed significantly since this fire occurred in 1984. But, these developments in fire-science alone may be enough vacate a conviction, even if it is not enough to determine innocence. Cf. *Rosario*, 477 Mass. at 81.

In *Rosario*, the SJC noted that the motion judge found the "fire science evidence was newly discovered" but that she concluded "by itself the new evidence did not cast doubt on the justice of the convictions." 477 Mass. at 76 & n.10. The new fire science aspect of *Rosario* was intertwined

with other newly discovered evidence and was not the sole reason the conviction was vacated.<sup>9</sup> Indeed, the SJC did not hold that developments in fire science would always be newly discovered evidence that would vacate a conviction or determine innocence. In its analysis of the motion judge's decision, the SJC found that "[a]lthough the new fire science evidence presented by the defendant . . . certainly does not prove the fire was accidental, it does provide an alternative theory as to cause (accidental, unknown origin) and explains that burn patterns alone could not prove that flammable liquids were involved." *Id.* at 80. The SJC went on to say that "had the new fire science evidence been available at the time of trial, it might have changed the defense strategy" and that this new evidence "could have provided a basis for the jury to question further the defendant's confession, as well as the Commonwealth's evidence regarding how the fire developed." *Id.* at 80-81. As stated, the new fire science was only part of the Court's overall analysis of newly discovered evidence in that case. The SJC found that "[a]lthough the evidence presented in support of the defendant's motion for new trial does not necessarily mean that he is innocent, the judge concluded . . . that justice was not done" and this was not an abuse of the judge's discretion. *Id.* at 81. Similarly, here, the developments in the fire science cast doubt on the justice of the defendant's conviction, based largely on the Commonwealth's evidence, but it does not necessarily mean he is innocent.

According to Sargent Horgan, an arson-scene investigation needs to stand on its own and apart from any confession or other circumstantial evidence that is presented at trial. See Comm.

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<sup>9</sup> The SJC found the motion judge did not err in granting a new trial after considering the new fire science, in addition to following newly discovered evidence: a diagnosis of delirium tremens (DTs) that was relevant to the voluntariness of the defendant's confession that he threw a Molotov cocktail; a statement from an interpreter indicating the police officers added in accusations about the origin of the fire; and statements prepared for the defendant were not translated into Spanish before it signed. *Rosario*, 477 Mass. at 76-81. The SJC noted that his statement may have corroborated the arson theory, but on the other hand, the new fire science evidence may have caused the jury to question whether the fire was intentionally set, and therefore, whether the statement was corroborated. *Id.* at n. 10.

Ex. A. Here, the defendant had motive, means, and opportunity to set this fire, and he admits was near the likely origin area of the fire shortly before it started. As will be seen, in light of the newly developed fire-science standards and investigative procedures, the integrity of the arson scene in this case is problematic because the circumstantial evidence derived from the investigation and relied on at trial are, in large part, no longer scientifically sound.

Although the investigation at the fire scene performed by Trooper Scott was done in good faith at the time, based on the information, training, and experience that was available in 1984. But many of those methods are now outdated and unreliable. There are deficiencies in the investigation that are not in accordance with present day scientifically acceptable standards and procedures pertaining to the point of origin and cause of the fire.

Generally, the fire scene investigation starts with determining the area of origin and then moves on to cause. Sargent Horgan was “inclined to believe the fire investigators had determined the right area for the origin” as the southwest corner of the second floor porch, but that the overall investigation was inadequate, especially under NFPA 921 standards. See Comm. Ex A. For example, there should have been more digging, delayering, and taking of samples for testing, photographing the area. An origin investigation should also include examination of actual physical effects of the fire—things that can be observed, measured, and documented—like char patterns, lines of demarcation, oxidation of materials, distortion, melting of items and materials, color changes, smoke and soot damage, structural collapse, and other signs of damage. See e.g. NFPA 921, Ch. 4. Although Trooper Scott relied on things like V-shaped burn patterns, lowest point of burn, greatest area of damage, and drop-down burning patterns, these are not part of the NFPA 921 protocols to determine origin and to the extent these might be currently relevant, they are not relied on in the same way they were relied on in 1984. Sargent Horgan also noted that there was

heavy equipment on the scene that could have been used to clear safety hazards to allow for better access to examine the suspected area of origin. But this was not done here and likely could have resulted in stronger evidence to support the conviction. The Commonwealth does not concede that the origin determination was erroneous, but the investigation was not thorough enough and is likely not based in science.

Based on Sargent Horgan's review of Dr. Beylor's report, he agrees that it does not appear that the fire-scene investigators conducted a thorough enough examination to eliminate all accidental causes and sources of this fire, which is also part of the NFPA 921 standards. Potential accidental causes like chemicals, cooking, trash, or combustibles close to a heat source, electrical, gas, or hearing appliances, natural causes, young children, spontaneous combustion and smoking were not thoroughly investigated in this case. There was no documentation of what physical examinations or interviews were performed to specifically eliminate these causes. These deficiencies call into question the reliability of the evidence presented at trial, and in turn, the overall integrity of this conviction.

The defendant asserts that Trooper Scott misunderstood how carelessly discarded smoking materials could have accidentally caused this fire. D. Memo 61. Sargent Horgan opines that the improper disposal of smoking materials was probably not a viable cause for the fire. See Comm. Ex. A. But, keeping in mind that Sargent Horgan did not review the entire record in this case, he is critical that this potential cause was not sufficiently investigated in light of the multiple statements made by the people at the party that night about how much they smoked that night. This criticism is supported by the evidence, including that the defendant and Brent Tatro left multiple times to get more cigarettes when they ran out and there was testimony that cigarettes and matches were being disposed of out the back porch. And, with the NFPA 921 standards in mind, things like

witness statements and documentation should be done and presumptions should be avoided during the data collection and development of hypothesis stages of an investigation. See NFPA 921, Ch. 4. For example, there should have been physical evidence collected, documented, and preserved for testing in order to eliminate disposed smoking materials as a cause, and the same should have been done for other potential accidental causes. It does not appear that this type of thorough examination was performed here.

It is apparent that the investigation here likely followed the “negative corpus” method, which would have been commonplace and the accepted standard at the time. Negative corpus can be defined as determining an ignition source or cause of the fire through a process of elimination without sufficient physical proof. See NFPA 921, § 18.7.5. This method of investigation generally does not comply with the current NFPA 921 standards of care because it tends to rely on subjective and speculative conclusions and would likely result in an untestable hypothesis. It does not follow the scientific method, outlined above. The likely outcome of an investigation where there is not sufficient evidence of the ignition source would be “undetermined cause” whereas the “negative corpus” method permits the investigator to make assumptions based on their experience to determine the cause. The Commonwealth’s strategy at trial relied on the expert opinions that would have been derived from this type of outdated and unreliable negative corpus methodology, which would now be considered substandard. An opinion as to cause (including “undetermined cause”) that is based on newly discovered NFPA 921 standards and follows the scientific method would be the type of evidence that would be a factor in the jury’s deliberations and therefore, casts doubt on the justice of the conviction. *Grace*, 397 Mass. at 306. Like *Rosario*, the relevant fire science is newly discovered evidence that casts doubt on the conviction, but does not necessarily mean innocence.

Although not specifically mentioned by Sargent Horgan, some of the analysis and evidence that were relied on at trial, including such things as: area of lowest burn; area of the most fire damage; V-patterns; apex patterns, and drop-down burn, are not necessarily reliable evidentiary sources for point of origin analysis under NFPA 921 standards.<sup>10</sup> The area of origin may be determined by using witness interviews, fire patterns, arc mapping, fire dynamics and other sources, including assessment of damage at the scene. The Commonwealth expects that these will be addressed in more detail at the evidentiary hearing. As such, the Commonwealth requests that it be allowed to supplement its memorandum on these issues after the hearing.

As stated, the Commonwealth agrees that there is newly discovered evidence in this case that would have had been a factor to the jury and casts doubt on soundness of this conviction.

**II. The Elimination of Second-Degree Felony Murder Following *Commonwealth v. Brown*, 447 Mass. 805 (2017) Prevents the Commonwealth from Re-Trying this Case on those Grounds**

An important point that the Commonwealth and this Court also cannot overlook is the fact that the Supreme Judicial Court eliminated the crime of “second-degree felony murder” in *Commonwealth v. Brown*, 477 Mass. 805, 825 (2017). Under *Brown*, the SJC held, prospectively, that felony-murder is no longer an independent theory of liability for murder. *Id.* The Court concluded that “a defendant may not be convicted of murder without proof of one of the three prongs of malice.” *Id.* at 807-808. As was further clarified in Justice Gants’ concurring opinion (joined by Justices Lenk, Hines, and Budd), the Court determined that going forward “felony-murder will require a finding of actual malice, not merely constructive malice.” *Id.* at 825. As the concurring opinion further explained the “sole remaining function of felony-murder [is] to elevate what would otherwise by murder in the second degree to murder in the first degree where the

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<sup>10</sup> The Commonwealth had anticipated that the independent expert would address these areas since he would be reviewing the entire record.

killing occurs during the commission of a life felony” which in turn “will entirely eliminate the concept of felony-murder in the second-degree.” *Id.* at 832 & n.4

The SJC later clarified that post-*Brown*, felony-murder was limited to its “statutory role as an aggravating element” because “a defendant may not be convicted without proof of one of the three prongs of malice.” *Commonwealth v. Buth*, 480 Mass. 113, 120 (2018), quoting *Brown*, 447 Mass. at 807. Put another way, the element of malice “would no longer be satisfied simply by proof of intent to commit the underlying crime” but rather “one of the three prongs would have to be proved.” *Commonwealth v. Martin*, 484 Mass. 634, 644 (2020), citing *Brown*, *supra*; see also *Commonwealth v. Pfeiffer*, 482 Mass. 110, 131, n. 22 (*Brown* prospectively abolished the concept of constructive malice).

Here, the defendant was indicted on first-degree murder and the judge instructed the jury on the crimes of first and second degree murder; felony-murder by reason of arson; and involuntary manslaughter.<sup>11</sup> As to second-degree murder, the jury was instructed that malice could be inferred for second-degree murder, but not for first-degree murder. Tr.IX, The jury was then instructed that they could also find the defendant guilty of felony-murder in the second degree and the elements were given. Then, in explaining the verdict slip, the judge told the jury there were two options for the second-degree murder charge: (a) felony-murder and (b) inferred malice.<sup>12</sup> The judge then told the jury they could find the defendant guilty of second degree murder “by either one of them, by both of them.” Tr.IX, 2008

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<sup>11</sup> The Appeals Court found that the judge “erred in instructing that voluntary intoxication is irrelevant in considering malice element of second degree murder,” but that the error had “no effect on the verdicts, which specifically found the defendant guilty of second-degree murder on a felony-murder basis.” *Cascone*, 28 Mass. App. Ct. 1112 (1990) (See Exhibit 1 attached to the motion for new trial). The court further stated that “any error in drawing the line between second degree murder and involuntary manslaughter was irrelevant in view of the verdicts returned.” *Id.*

<sup>12</sup> The verdict slips appear at Exhibit 50 Defendant's Appendix attached to the Motion for New Trial demonstrate these options.

Later, in response to the jury's request to "redefine malice as regards [to] felony (arson) murder" the judge instructed: "The effect of the felony murder rule is to substitute the intent to commit the underlying felony arson for the malice necessary for murder. So that under the felony murder doctrine intent to commit the underlying felony—the arson in this case—is substituted for the malice necessary for murder." Tr. II, 2042. Following *Brown*, this type of substitute or "transferred" intent instruction would not properly reflect the law. See also *Martin*, 484 Mass. at 644.

As stated, the jury returned guilty verdict on three counts of second-degree murder by reason of felony (arson) murder and one count of arson. See Def. Memo Ex. 50. This brings up at least two issues for the Commonwealth to consider in assessing this case: (1) if the arson charge is no longer supported by sound scientific evidence, the Commonwealth does not likely have sufficient evidence for the arson charge or an underlying felony; and (2) because the rule in *Brown* applies prospectively, the Commonwealth is precluded from proceeding on a theory of second-degree felony murder should the motion for new trial be allowed. In other words, the Commonwealth could not present the theory that Cascone "willfully and maliciously" set the building on fire and therefore could be found guilty of arson under G. L. c. 266, § 1; and that by proving the required element of intent for the arson, that intent could then also be transferred to establish malice necessary for a murder charge.<sup>13</sup>

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<sup>13</sup> The Commonwealth is not suggesting that *Brown* or that the reasoning the SJC employed for abolishing second-degree felony murder should be applied retroactively to this case based on the 1987 trial. Indeed, the SJC has consistently refused to extend *Brown* to cases that were tried before that case was decided. See *Martin*, 484 Mass. at 644-645 (declining to apply *Brown* retroactively even though the appeal was pending when it was decided); *Pfeiffer*, 482 Mass. at 122 (*Brown* prospectively abolished constructive malice); *Commonwealth v. Bin*, 480 Mass. 665, 681 (2018) (explaining that *Brown* did not abolish the felony-murder rule entirely, but instead the prospectively narrowed the application); *Buth*, 480 Mass. at 120 (stating the new rule was prospective only). Rather, the Commonwealth is trying to address the challenges it would face should the Court allow the defendant's motion for new trial.

### **III. Any Misstatements by the Prosecutor During Closing Argument Did Not Result in a Substantial Likelihood of a Miscarriage of Justice**

The defendant alleges that the prosecutor made misstatements of the evidence in her closing argument. D. Memo 70-73. As the defendant points out, none of the misstatements regarding the testimony of Keaveney were objected to at trial or raised in the defendant's direct appeal.<sup>14</sup> Claims raised in a motion for post-conviction relief based on grounds that were available, but not raised on direct appeal are waived. See *Commonwealth v. Randolph*, 438 Mass. 290, 293 (2004). The waiver doctrine serves a dual purpose: to protect society's interest in the finality of its judicial decisions and to promote judicial efficiency. *Id.* at 294 (citation and quotations omitted). However, waived claims of error must still be considered and are reviewed for substantial risk of miscarriage of justice. *Id.* Relief must only be granted when the court is "left with uncertainty that the defendant's guilt has been fairly adjudicated." *Id.* at 294, quoting *Commonwealth v. Azar*, 435 Mass. 675, 687 (2002).

"A prosecutor must limit comment in closing statement to the evidence and fair inferences that can be drawn from the evidence." *Commonwealth v. Cole*, 473 Mass. 317, 333 (2015), quoting *Commonwealth v. Kelly*, 417 Mass. 266, 270 (1994); see also *Commonwealth v. Grimshaw*, 412 Mass. 505 509 (1992) ("A prosecutor may . . . in closing argument, analyze the evidence and suggest what reasonable inference the jury should draw from that evidence"). A prosecutor's comments made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury. *Cole*, 472 Mass. at 333.

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<sup>14</sup> On direct appeal, the defendant alleged that the prosecutor erred in her closing argument when: (1) she stated that the defendant made up his story after listening to witnesses testify; (2) commented on defendant's courtroom demeanor; and (3) misstated the evidence. The panel of the Appeals Court rejected all three of his claims. *Cascone*, 28 Mass. App. Ct. 112, at \*5.

Here, the judge gave a standard instruction that “Evidence is not the opening statements made by counsel. It is not the closing arguments made by counsel.” Tr. IX, 1960. “Any statements made by either attorney which was either not introduced or established by the evidence as you recall it is to be ignored by you, unless in fact you do recall it; it is to be forgotten and should play no part in your deliberations in this case.” *Id.* The judge also made clear that “evidence is the testimony that you’ve heard from the witnesses who have taken the stand” and “the exhibits which have been introduced.” *Id.* This instruction should not be overlooked since it properly instructed the jury that comments by the attorneys were not evidence and were not to be considered as such. The defendant argues that it should not be considered curative because it was not specific to the prosecutor’s erroneous statements about Keaveney’s testimony. D. Memo 71. It is not a specific curative instruction, but the defendant did not object to the closing argument, did not request a curative instruction, nor did he object to the jury instructions.<sup>15</sup> The judge was not on notice to give a more specific instruction. That the defendant did not object or request a curative instruction during the closing arguments is “not dispositive of the issue [but] is some indication that the tone, manner, and substance of the now challenged aspects of the prosecutor’s argument were not unfairly prejudicial.” *Commonwealth v. Cintron*, 438 Mass. 779, 789 (2003). Moreover, because of the defendant’s failure to object and to raise this claim earlier, the review here is not for prejudicial error, but the higher standard of substantial risk of miscarriage of justice. With that in mind, the lack of a specific curative instruction should not weigh against the Commonwealth and the instruction given should be deemed sufficient to remove prejudice, under the circumstances.

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<sup>15</sup> After the judge gave the instructions, defense counsel made a brief objection to the “doctrine of inferred malice,” but also acknowledged that the judge was required to give that instruction. Tr. IX, 2011-2012. This was the only objection to the jury instructions.

Here, the defendant alleges that the prosecutor mischaracterized the testimony of defense expert, Keaveney. D. Memo 71-73. When asked, Keaveney stated that the fire started “in the area” of the back porches and that based on Mr. Simon’s statement he was able to establish that the fire started in the southwest corner of the back porches. Tr. VIII, 1632-1633. He also stated that the “fire started in the rear.” Tr. VIII, 1633. Keaveney did not give a precise point of origin, but acknowledged on cross-examination that certain witnesses reported areas where they observed the fire had started. The prosecutor’s statements could be viewed as an inference that Keaveney agreed with general area for the origin of the fire: the back of porch in the southwest corner. Interestingly, Dr. Baylor summarized Keaveney’s cross-examination in a similar manner as the prosecutor did in her closing, “FM Keaveney offered that the fire origin was the back of the building in the southwest corner. He included within the building or on the porch within the area of origin. He offered that an appropriate investigation of the fire scene could be accomplished in two days.” D. App. 550, Ex. 41.<sup>16</sup>

Acknowledging that the arson-science has evolved, at the time of trial, the evidence of arson was strong based on Trooper Scott’s investigation and testimony and the standards that were used at that time. By contrast, Keaveney stated he could not conclude the origin and the cause of the fire. Tr. IX, 1896-1897. As Dr. Baylor pointed out, Keaveney’s investigation amounted to “a one-page signed report” concluding that the origin and cause of this fire cannot be determined due to the lack of early observations of the fire and the lack of evidence actually collected. D. App at p. 541 (Ex. 41). There was not much substance to his “non-opinion” testimony to overcome the

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<sup>16</sup> In addition, during recross-examination, Keaveney was asked whether as of June 1, he “was still working on the southwest corner as the point origin.” Tr. VIII, 1659-1660. He did not directly answer. *Id.* at 1660. Then he was asked again, “were you still working on the southwest corner as the area of origin when you spoke to Trooper Scott on June 1<sup>st</sup>?” *Id.* He responded “no.” *Id.* He then admitted he had lied to Trooper Scott when he told him that he was still using the southwest corner. *Id.*

evidence presented by the Commonwealth regarding the origin of the fire. The Commonwealth disagrees that Keaveney's testimony was "clearly exculpatory" even before the prosecutor gave her closing argument. Instead, his opinion may have, at best, blurred the issue for the jury, but it was not likely enough to cause reasonable doubt in the jurors mind.

Looking at the remainder Keaveney's testimony, in a light most favorable to the defendant, it can reasonably inferred that he was critical of the Commonwealth's investigation. This was likely an attempt by the defense to call into doubt the reliability and credibility of Trooper Scott's conclusions as to origin and cause, based on his substandard investigation. Keaveney was critical that the building was demolished without a dig and thorough search of the area. He explained all the things that he would have done, including removing debris layer by layer; check and inspect appliances for malfunctions; check for electrical and gas problems; excavate the site; draw diagrams of his observations; take soil samples to test for accelerants; collect ash and char; and take more photographs. Tr.VIII, 1579-1588. Thus, even without being able to give a specific different opinion as to origin and cause, this was valuable evidence presented in an attempt to attack the credibility and outcome of the Commonwealth's entire investigation.

As the prosecutor tried to argue to the judge, not having an opinion is of no assistance to the jury, and that was the case here, regardless of any misstatements by the prosecutor in her closing. The defendant has not shown that the statements made by the prosecutor, in context of her entire closing and weighed against the remaining evidence, meet the high standard of substantial risk of miscarriage of justice.

#### **IV. Although Defense Counsel May Have Made Some Missteps in Hindsight, Counsel was Not Constitutionally Ineffective Such that a New Trial is Warranted on those Grounds**

The defendant states there were two possible defenses in any arson case: (1) the fire was accidental, or (2) someone else set the fire. D. Memo 73. He alleges that counsel could have argued one of these defenses, or both in the alternative.<sup>17</sup> But here, the defendant points out that counsel did not present the jury with “significant third-party culprit evidence, including Nassif’s confession and the testimony of two eyewitnesses who saw an unidentified man fleeing the fire.” D. Memo 73. He raises the following grounds for his claim of ineffective counsel: (1) the failure to call Kathy Monette and Chris Morehouse as witnesses after mentioning them as possible witnesses in his opening statement (D. Memo 75-84); (2) the failure to investigate and present a third-party culprit defense involving, Wayne Nassif and George Belanger (D. Memo 85-89); (3) not arguing in his closing that the fire was accidental (D. Memo 90-93); and (4) the failure to investigate exculpatory witness, John Perdue’s “repudiation of Charles’ fabricated confession” (D. Memo 93-100). Although the Commonwealth acknowledges that with hindsight, it appears that defense counsel may have made some missteps during this trial, it does not agree that counsel’s performance was constitutionally ineffective or that a new trial should be granted on these grounds.<sup>18</sup>

##### **A. Standard of Review for Waived Claims of Ineffective Assistance of Counsel**

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<sup>17</sup> It is unclear to the Commonwealth how defense counsel could have effectively argued both of these points in the alternative since they appear to be contradictory positions on how the fire started. For example, if the evidence shows the fire was started accidentally, then how could the evidence also show the fire was intentionally set by someone else? It would seem the evidence to prove those two scenarios would not be consistent and presenting both theories to a jury could backfire and be confusing. This conflicting argument is a theme throughout the motion for new trial. The defendant argues that counsel was ineffective for failing to argue in closing that this was an accidental fire, but also argues counsel was ineffective for failing to present a third-party culprit defense, which implies the fire was intentionally set—just not by Cascone.

<sup>18</sup> It bears noting that at the time this motion for new trial was filed, defense counsel, Attorney Cohen, was unwilling to sign an affidavit regarding his representation of the defendant in this trial. D. App. 491-493; Ex. 38.

In his direct appeal, the defendant alleged counsel was ineffective, but on different grounds than he raises here. Because the grounds being raised here were not raised on direct appeal, they are waived. *Randolph*, 438 Mass. at 293; see also *Commonwealth v. Wheeler*, 52 Mass. App. Ct. 631, 636 (2001) (applying waiver rule to ineffective assistance of counsel claims). Similarly, in cases where an ineffective assistance claim was waived and is being raised in a motion for new trial, the motion judge considers whether there was a substantial risk of miscarriage of justice. *Id.*

For claims of ineffective assistance of counsel, the court applies the well-known two-prong *Saferian* test: the defendant must show that (1) there has been “serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer”; and (2) counsel’s poor performance “likely deprived the defendant of an otherwise available, substantial ground of defense.” *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). “[A] defense is ‘substantial’ for *Saferian* purposes where [the court has] a serious doubt whether the jury verdict would have been the same had the defense been presented.” *Commonwealth v. Millien*, 474 Mass. 417 (2016). The SJC has explained that the “substantial risk of miscarriage of justice” review standard is the same as the prejudice standard under the second prong of the *Saferian* standard. *Id.* at 432; see also *Commonwealth v. Epps*, 474 Mass. 743 (2016) (same).

An informed strategic decision amounts to ineffective assistance of counsel “only if it was manifestly unreasonable when made.” *Commonwealth v. Martin*, 427 Mass. 816, 822 (1998). The “manifestly unreasonable test” is a “search for rationality in counsel’s strategic decision, taking into account all the circumstances known or that should have been known to counsel in the exercise of his duty to provide effective representation to the client and not whether counsel could have made alternative choices.” *Commonwealth v. Kolenovic*, 471 Mass. 664, 674-675 (2015). The

reasonableness of counsel's decision making must be based on the decision "when made" and may not be "informed by what hindsight may reveal." *Id.*

**B. Defense Counsel's Decision to Not Call Christopher Morehouse and Kathy Monette to Testify Was Not Manifestly Unreasonable as Their Testimony was Not Crucial and Does Suggest a Viable Third-Party Culprit Defense**

The defendant is arguing that counsel was ineffective when he failed to call Christopher Morehouse and Kathy Monette as witnesses at trial because he claims they would have testified that the person they saw fleeing from the fire was not the defendant. D. Memo 75. The defendant somewhat overstates the importance of what their testimony would have been and assumes the jury would have found these witnesses credible and important enough to overcome the Commonwealth's other evidence.

It is true that in his opening statement, defense counsel said that Patricia Marsh, Monette, and Morehouse were all expected to testify that the person they saw coming down from the fourth floor, past them on the stairs was not wearing the same clothes that the defendant was wearing that night. Tr.III, 403, D. Memo. 77. Counsel acknowledges that none of them saw the face of this person and would only be describing him by what he was wearing. *Id.* He did not explain to the jury why this testimony was important for them to consider nor did he say how it was crucial to the defense other than to say this man's clothing was not the same as what the defendant was wearing that night. *Id.* The prosecutor also mentions Marsh, Monette, and Morehouse as possible witnesses and that they will testify that they saw a man running from Monette's apartment. Tr.III, 360-361. However, the prosecutor suggests that their description of this person on the stairs resembles that of Glen Sumner, but that there will be evidence that Sumner was in the window with the children at that same time, inferring that the person in the stairs was not Sumner. *Id.* She goes on to say that the jury will hear evidence that the defendant went into the building to help get

people out.<sup>19</sup> *Id.* at 361. She then states “you’ll hear some evidence that may lead to conclude that the fleeing figure they saw was Cascone, although they don’t describe him as like Cascone.” *Id.* It is not entirely clear from either opening statement what the attorneys were planning to do with this same witness testimony as part of their case, but they both thought it was worth mentioning. And then, neither party called Monette and Morehouse as witnesses. As will be seen, the decision not to call Monette and Morehouse was not manifestly unreasonable at the time of trial, and the failure to call them to testify did not prejudice the defendant or have any impact on the jury’s verdict.

**1. Monette and Morehouse Were Not Important Witnesses to Either the Commonwealth or the Defense**

At best, Monette and Morehouse’s testimony before the grand jury was vague and inconsistent description. The affidavit provided by Morehouse in 2020 does not add any strength to the defense, nor does the description of the defense’s recent conversation with Monette. D. App. 33- 41, Ex. 4 and 5. It is not clear that either witness would have provided “compelling exculpatory testimony” that would have any impact on the jury’s verdict, as is suggested by the defendant. D. Memo 81. As will be seen, they were not important eyewitness to the crime, they could barely describe who they saw during this intense moment as they were trying to escape the fire and, their testimony was not critical to the defense that the fire was accidentally set. Contrast *Commonwealth v. Lane*, 462 Mass. 591 (2012). Any one of these could be the reason why neither party called them to testify.

Morehouse testified at grand jury that he saw a male run down the stairs, but only saw the back of him—“he was short. . . maybe 5’ 9”, small build, black hair.” GJ at 120. Morehouse also said that he was “pretty sure” that he saw that “same kid” sitting over at Altieri’s after the fire and

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<sup>19</sup> This is consistent with Cascone’s own testimony.

it seemed like he was hurt. GJ at 120-121. Morehouse said there was “another guy leaning over him, with . . . blonde, curly, long hair, with no shirt on, with dungarees.”<sup>20</sup> *Id.* Morehouse assumed this other man “had come down from the party, too, but he wasn’t hurt.” *Id.* He further stated that he only saw the back of the head and it was “just a fast glimpse” of the person running down the stairs. *Id.* at 124-125. Later in his grand jury testimony, Morehouse was asked if it was Glen Sumner that he saw sitting by Altieri’s after the fire and he said: “I don’t know. I really don’t know. I can’t say because I hadn’t seen Glen in maybe two years.” *Id.* at 130. He repeated that he thought the person who ran down “was the same kid who was over [at Altieri’s]” but that he did not really know. *Id.*

The defendant included an affidavit signed by Morehouse on 9/11/2020. See D. App. 33-38, Ex. 4. This affidavit does not provide any clearer description of the person on the stairs. Morehouse said the person he saw running down the front stairs was a “little shorter” than him and had a slim build. *Id.* at 35. He said that he told the police about him, what he was wearing, and “everything else he could remember” after the fire. *Id.* His affidavit does not add any new information or details that were not already known at the time of trial.<sup>21</sup> Morehouse also stated that neither defense counsel nor anybody from his office contacted him to testify at the trial and that he would have been willing to testify or speak to counsel if they contacted him. *Id.* at 37-38. Contrary to the defendant’s suggestion, the affidavit does not really tell us anything about defense counsel’s strategy at the time of trial. For example, it is possible defense counsel expected the Commonwealth to call Morehouse as a witness and he was planning to cross-examine him on the

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<sup>20</sup> This other person at Altieri’s does roughly match the defendant’s description—long, blonde hair and the defendant indicated that he had taken his shirt off in order to smash in the screen to get in the building.

<sup>21</sup> There are several corrections and hand-written alterations in this affidavit, which could raise questions about how reliable Morehouse’s memory is about the events that happened that morning, which is certainly understandable almost forty years later.

details about the person he saw and when Morehouse was not called, counsel made a strategic decision not to call because they did not have anything significant to add.

Morehouse's possible testimony, based on his prior statements, is not significant and does not cast doubt on the jury's verdict. Morehouse has never provided a clear description of the man he saw running down the stairs and has recently indicated to the Commonwealth that he did not really see him that well and could not identify him.<sup>22</sup> There is not enough information from Morehouse that could lead to a viable third-party culprit defense that this unidentified person who was briefly seen alone on the stairs was the one who set the fire. Without more, it is reasonable that the jury would conclude that he was just another person who was trying to escape the burning building.

As for Monette, her grand jury testimony was helpful in that it established a time for the fire based on her morning routine of her alarm going off at 5:00 a.m. GJ at 102. But, like Morehouse, her vague description of the person she saw on the stairs does not cast doubt on the jury's verdict. She testified that she saw the "back of him as [she] was going down the stairs, but it was quick glance because [she] was in a hurry. He had dark brown hair, a jean jacket, corduroys on, and he was short and skinny. About 5'2" [or] 5' 3". Weighed about maybe 130 pounds." GJ at 109. Monette clarified that this person did not "run by her" on the stairs, she just "spotted him." GJ at 111. She testified that if she saw his face, she would not recognize him. *Id.* According to a police report of a telephone conversation with Trooper Smith on 10/31/1984, Monette told him the person she saw had "black hair and moustache and he was skinny." D. App. 567, Ex. 45. It is also

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<sup>22</sup> As part of its investigation, the District Attorney's office has communicated with Morehouse. He has been cooperative. He reiterated that he did not know the person he saw fleeing from the building, only saw them for a brief moment, and could not identify them. This is consistent with his prior statements. Because the Commonwealth does not believe Morehouse has anything new or helpful to add at this time, it did not seek an affidavit. The Commonwealth informed Morehouse that there could be a hearing in the future.

reported that she said she “could recognize him again.” *Id.* This is inconsistent with her grand jury testimony given on 11/12/1985, where she states she did not see his face and would not recognize him.<sup>23</sup>

Although Monette and Morehouse might have been “disinterested” witnesses (D. Memo 81-82) their potential testimony was not important, powerful, or clearly exculpatory for the defense. There is nothing from their testimony that suggests this person set the fire. At best, they place an unknown person on the stairs trying to escape the burning building. In addition, the defendant testified that he went upstairs in the building when it was on fire. If the defendant’s argument is that these “exculpatory eyewitnesses” were going to testify that it was not Cascone on the stairs and somehow suggest this other person set the fire, that could be seen by the jury as contradictory to Cascone’s own testimony that he was in the building. This would not be helpful to the defense or his credibility as a witness. With that in mind, along with the insignificance of their testimony, it was a reasonable strategic decision not to engage in further investigation where these witnesses would not add to or provide a potentially substantial defense.

## **2. The Defendant Has Not Established He Was Prejudiced by the Failure to Call These Witnesses**

Even if this court concludes that the defense counsel’s performance was below that of an ordinary attorney because he failed to call Monette and Morehouse to testify, the defendant cannot meet the prejudice prong to establish ineffective assistance of counsel.

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<sup>23</sup> As part of the defendant’s investigation into his motion for new trial, a law student spoke with Monette (now known as Kathy Pindick). D. App. 39-41, Ex.5. She did not provide any new information and could not recall what the man looked like. *Id.* at 40. She reported that she was at the trial in a waiting room, but was not called to testify and she did not know why. *Id.* She told the law student that she no longer wanted to speak about the fire and that she is “done with this” and did not want to say anything else. *Id.* She did not sign the affidavit that was prepared for her. *Id.* The Commonwealth had planned to contact this witness as part of its investigation, too. But, in light of her statement to the defense and the conclusion that her testimony was not that significant to the defense case, the Commonwealth has decided to postpone any interviews for now.

It is not likely that calling either Monette or Morehouse to testify about the person they saw on the stairs would have had a substantial impact on the jury's verdict. The person they saw did not match Cascone's description. But, this was not a case where a defense of mistaken identity would likely change the outcome where it was established that the defendant was at the scene of the fire and he testified that he went inside the building and up the stairs to try to get people out. Moreover, there is not enough information from their testimony to present a viable third-party culprit defense. That these two witnesses saw someone that did not match the defendant's description running down the stairs to get out of a burning building does not exclude the defendant as the person who set the fire, nor does it establish that this person set the fire. In addition, suggesting a third-party set the fire would be inconsistent with the defense that the fire was accidental. Also, the Commonwealth relied on additional evidence in their investigation and prosecution of this case other than just that the defendant was in the building after the fire started.

Monette and Morehouse did not see a man "fleeing from the building" as is suggested by the defendant. D. Memo 83. This misstates their grand jury testimony—that they only caught a brief glimpse of the person on the stairs. Morehouse testified that he saw "a guy running down the stairs" and that he was "pretty sure" that he saw that "same kid" sitting over at Altieri's and that it seemed like he was hurt. GJ at 120-121; 129. That does not support an inference that this person was "fleeing" from the scene of the crime. Morehouse also described seeing another guy at Altieri's with blonde, curly long hair with no shirt on and wearing dungarees, who was standing over the dark-haired "kid" that he saw on the stairs. *Id.*<sup>24</sup> This other person could have been the defendant. In any event, based on Morehouse's testimony, the jury would have heard that these two men presumably came from the burning building and stayed across the street. Morehouse's

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<sup>24</sup> Morehouse asked the person sitting on the ground "who did it" and he responded "I don't know. Someone did it. I don't know who." GJ at 121.

testimony does not reasonably support a defense that this person he briefly saw on the stairs was a potential third-party culprit who was “fleeing from the building” after setting it on fire.

In describing the anticipated testimony, the prosecutor said: Marsh, Monette, and Morehouse “saw a figure in the hallway, that it was a man, and he was running from Monette’s floor down the front center stairs of the building . . . They’ll tell you they only got a glimpse of him. They’ll tell you it looked like the description of Glen Sumner.” Tr.III, 360-361. She went on to say: You’ll hear some evidence that William Cascone told the police that he had gone inside the building . . .” and “you’ll hear some evidence that may lead you to conclude that the fleeing figure they saw in the hallway was Cascone, although they don’t describe him as Cascone.” Tr.III, 361. As an initial matter, neither the witnesses nor the prosecutor describe a man as “fleeing from the building” although that would be a reasonable description of someone escaping a fire. Second, whether this “fleeing figure” in the hallway was Cascone was only one small portion of the Commonwealth’s entire case. In fact, it was such an insignificant part of the case that the prosecution did not ask Marsh many questions about this man and also did not call the other two to testify. Thus, it is not accurate to suggest that Monette and Morehouse’s testimony, if called, would have “directly contradicted the Commonwealth’s theory of the case” such that it would have raised reasonable doubt or that the jury’s verdict would have been different had they testified. Moreover, this also overlooks other evidence the Commonwealth presented in this case. Even if this witness testimony might have cracked open the door to the possibility of a third-party culprit defense, it also could have called into question the credibility of the defendant’s own testimony that he was in the building. The different description of the person in the stairs at could have been confusing to the jury and they may have concluded that Cascone was not telling the truth about going into the building to try to save people.

In addition, their testimony would have been similar as Marsh's, which ultimately was not helpful for either party. At grand jury, Marsh indicated that she saw a person go down the stairs and leave the building. GJ at 165. At trial, Marsh testified that she saw a man turning the corner to go down the flight of stairs underneath her. Tr.V, 1061. She did not see his face and only saw the back or side of his head. *Id.* She noticed he had shoulder-length, black curly hair. *Id.* He was moving when she saw him and she would not be able to recognize him if she saw him again. *Id.* at 1062. On cross-examination, she reiterated that she only saw the back of his head and that he seemed to be coming from at least the third floor. *Id.* at 1075-1076. She did not see the clothing this man was wearing. *Id.* This was the extent of Marsh's testimony about the person on the stairs. Even if Monette and Morehouse's testimony were added, it would not be enough for a viable third-party culprit defense, nor does it appear to be enough to warrant an investigation into whether this person was a third-party culprit. Monette and Morehouse's testimony would not have created reasonable doubt and therefore, the defendant cannot show that he was deprived of a substantial defense on these grounds.

This case is not the same as the *Anderson v. Butler* case relied upon by the defendant where a defense attorney stated in his opening that he was going to call a psychiatrist and psychologist in support of a "diminished capacity" defense and then did not call them. 858 F.2d 16, 17 (1st Cir. 1988).<sup>25</sup> That type of defense would fall apart without qualified experts being called to testify. The same cannot be said about Monette and Morehouse in this case, where their testimony was not that significant to the defense being presented at the trial, nor to a new defense of a third-party culprit.

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<sup>25</sup> The failure to call the two doctors was deemed ineffective assistance of counsel in *Anderson* because: the opening statement where the "promise" was made took place the day before defense counsel rested without calling the witnesses; the jurors had been asked on the voir dire as to their acceptance of psychiatric testimony; and in closing argument, the defense counsel brought up the fact that he did not call those witnesses. *Anderson*, 858 F.2d at 17. Here, Monette and Morehouse were briefly mentioned in the opening statement, but their testimony was not crucial to the defense.

Based on the foregoing, this Court should not conclude that trial counsel was ineffective for failing to call Monette or Morehouse because it was a reasonably strategic decision at the time it was made and the defendant has not established any prejudice in form of reasonable doubt or a substantial risk of miscarriage of justice.

**C. Defense Counsel Was Not Constitutionally Ineffective for Failing to Investigate William Stanley's Unreliable and Vague Statements Implicated Wayne Nassif and George Belanger as Potential Culprits**

The defendant alleges that William Stanley implicated both Wayne Nassif and George Belanger as potential suspects in the arson and that counsel was ineffective for failing to investigate this potential third-party culprit defense. D. Memo 85-92. There are statements from Stanley to the Commonwealth in which he claims Nassif and Belanger were the ones who started the fire. But, the statements are vague, unreliable, inconsistent, and do not provide many facts that would lead the defense counsel to believe an investigation was necessary.

**1. Counsel Was Not Ineffective for Failing to Interview Stanley Based on the Limited and Inconsistent Statements that he Provided about Nassif**

"A defendant is entitled to present evidence that another person committed the crime." *Commonwealth v. Phinney*, 446 Mass. 155, 163 (2006), citing *Commonwealth v. Rosa*, 422 Mass. 18, 22 (1996). However, that "evidence must be relevant, not too remote or speculative, and must not confuse the jury by diverting their attention to collateral matters." *Id.* If this third-party culprit evidence "'is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility.'" *Id.*, quoting *Commonwealth v. Keizer*, 377 Mass. 264, 267 (1979). But, not all evidence fits into this category and that is the case here.

As the defendant admits, with Stanley's criminal record and inconsistent statements, he was not a credible or reliable witness either in the 1980s or more recently. D. Memo 85. In this statement, dated 01/04/1985 Stanley claims that Nassif told him he set the fire. D. App. 108; Ex.29.

Nassif apparently told him that he soaked the rags in gasoline and the “other guy lit the match and told him to run.” *Id.* Stanley said Nassif told him that he and “Billy Tatro” started a fight. Nassif and “the other guy set it [the fire] to break up the party.” *Id.*

Stanley’s statement does not match other information known about that evening. No other witness mentions there being any fight before, during, or after the party, other than the yelling between Scott and Cascone. No witness places Wayne Nassif at the party or around the building before, during, or after the party, including Cascone who had left the party throughout the evening and was outside in a parked car behind the building when the fire started. For example, Brent Tatro and the defendant left the party multiple times to get cigarettes and to pick up girls and Cascone never mentions seeing Nassif or anyone else around the building. Bernard Marsh, who was waiting for his ride outside around 4:00 a.m did not mention seeing Nassif or Belanger outside the building at that time. D. App. at 13-14; Ex. 13-14; Tr.IV, 748-750.<sup>26</sup> Based on the testimony of the people who were at the party, it was starting to die down just before the fire started so there was no need to “break it up.” Cascone was gone; Richter was sitting alone in the kitchen; Tatro had gone to sleep in the bedroom; Scott and Deeley were in the parlor where Scott was reading a book; and Sumner and Sherry Tatro were asleep on a couch. The testimony of the party-goers is fairly consistent about what happened that night. Stanley’s story is not consistent with any of the witness stories.

Stanley’s credibility must be questioned when in his second statement to the police dated 09/03/1985, his story has changed. In his first statement, Nassif told him that he set the fire; this time he overheard two inmates in jail talking about the fire. D. App. 109, Ex. 30. It was not Nassif who told him the set the fire, but that he “heard someone else talking.” *Id.*

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<sup>26</sup> Another witness, David Boucher, testified at grand jury that when he went to his car around 5:00 a.m. the fire had not started and he did not see any people in the area at that time. GJ 12-15.

Then, there is a third version of the story, in a letter to then-ADA Ford dated 12/12/1985. D. App. 110-113, Ex. 31. Stanley goes back to his original story that it was Nassif who told him what happened and that he participated in starting the fire. *Id.* at 111. Stanley provides no details about the fire. Stanley includes that “Mr. Gorge Banger or Blanged, Jr.” was the other person involved in starting the fire. *Id.* This statement appears in the middle of a letter where it is clear that Stanley is looking for something in return from either the police or the District Attorney’s office. He ends by asking whether this would “help [him] in the outcome of [his] case” and that he would like to become an “informer for your office” and that he wants to change. *Id.* at 112. There does not appear to be any additional contact between Stanley and the Commonwealth after this; nor did defense counsel contact Stanley.<sup>27</sup>

This is the very limited and inconsistent information that would have been available to defense counsel when he was preparing for trial. This is not enough information for defense counsel to be considered ineffective for not engaging in further investigation, at the time the decision was made. See *Kolenovic*, 471 Mass. at 674-675 (reasonableness of decision making is based on when the decision was made and not what hindsight has revealed). In addition, the defendant refers to “Nassif’s confession” but that overstates what was known at the time of trial. Nassif did not confess to the police or come forward in any meaningful way to confess to setting the fire and the defendant has still not produced anything directly from Nassif admitting he set this fire or any reliable evidence to support that claim. Instead, all there is are Stanley’s inconsistent statements, citing different sources, suggesting Nassif set the fire. The Commonwealth agrees that third-party culprit evidence is often admissible at trial, but (as will be discussed in more detail) the

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<sup>27</sup> In Charlotte Whitmore’s affidavit, the current defense team spoke to trial counsel and had drafted an affidavit. Trial counsel said he “did not remember interviewing the incarcerated man or other witnesses regarding a third-party culprit.” D. App. 492, Ex.38. Trial counsel refused to sign any affidavit. *Id.*

evidence here does not meet that standard for admissibility. Although it probably would have been better if defense counsel had interviewed Stanley as part of trial preparation, counsel is not required “to pursue every possible avenue in order to forestall an ineffective assistance claims.” *Commonwealth v. Britto*, 433 Mass. 596, 604 (2001). Here, counsel chose a viable defense that the Commonwealth could not prove that the fire was intentionally set, which is required for arson. Through cross-examination and presentation of defense expert, Keaveney, counsel exposed flaws and deficiencies in Trooper Scott’s investigation of the fire scene and tried to focus on accidental causes for the fire, including the large number of cigarettes that were smoked and matches that were disposed of that night. This was not manifestly unreasonable based on what was known at the time and with that defense theory in mind, counsel’s failure to investigate Stanley’s allegations based on these vague and inconsistent statements is not constitutionally ineffective.

## **2. The Defendant Has Not Shown he was Prejudiced by His Counsel’s Failure to Interview Stanley**

Even if the failure to interview Stanley fell below the conduct which might be expected from an ordinary fallible lawyer, the defendant cannot show that the failure deprived him of an otherwise available, substantial ground of defense. See e.g. *Farley*, 432 Mass. at 156-157.

The information provided by the defendant to support his claim that Nassif and Belanger were potential third-party culprits demonstrates a tenuous connection between these two men and some of the people at the party, or people who lived in the building. D. Memo 34-37. But, there is no reliable evidence that places either of them near the State Street building the night of the party. According to Belanger’s sister, Laurie O’Dell, Belanger knew people who were in the building, yet none of the mention seeing him there that evening or after the fire. His name never comes up other than through Stanley in the 1985 letter to ADA Ford. The description that Belanger was short with a slim build and brown curly hair, at best, speculatively places him (or someone who looks

like him) on the stairs of the building, but this alone does not “tend to show” that he committed the crime. In addition, the person that Morehouse saw on the stairs was also at Altieri’s after the fire and this person said he did not know who started the fire. That O’ Dell said that her brother was “mad” that Scott was dating Deeley or opined that he was “capable of setting the State Street fire” is not evidence of a “compelling motive” to intentionally set this building on fire. D. App. 485-490, Ex.37. Both Nassif and Belanger had lengthy criminal histories, including a prior arson charge for Nassif, but that is not sufficient to consider them as potential third-party culprits in this particular fire.

In 2019, Stanley signed an affidavit that was prepared by law students working on the defendant’s case. D. App. 496-500, Ex. 39. For the first time, more than 30 years after the fire, Stanley provides some details about his conversation with Nassif that took place in in the Berkshire House of Corrections “in the mid-80s.” *Id.* at 496. Despite having contact with the police and the District Attorney’s Office in 1985, Stanley did not provide any of this information before being contacted in 2019. According to Stanley, Nassif started the fire because he was mad at his old landlord. *Id.* at 497. Stanley did not know the name of the landlord, but stated Nassif had lived at the building where the fire started. *Id.* Apparently, Nassif said that he told the landlord he would get back at him for kicking him out by setting the fire. *Id.* There does not appear to be any record of Simon, the owner and landlord of the building, telling the police about Nassif’s threat after the fire. Nassif allegedly told Stanley that Belanger was with him when he started the fire. *Id.* Stanley apparently also spoke to Belanger, who admitted he was involved in the fire and was “broken up” about it. *Id.* at 498. Stanley claims Belanger killed himself in 1993 because he was depressed about his involvement in the fire. *Id.*<sup>28</sup> In the affidavit, Stanley states that Nassif did not tell him how he

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<sup>28</sup> Belanger’s sister did not provide a reason for her brother killing himself in 1993. D. App. 489, Ex. 37.

started the fire, but in 1985 Stanley reported that Nassif told him they used gasoline and rags. *Id.* 498; at Ex. at 108.<sup>29</sup>

The defendant does not provide a substantive motive for either of them to set this particular fire—everything he relies on is remote and speculative based on Stanley’s and O’Dell’s statements. In Stanley’s affidavit the suggestion is Nassif started the fire because he was mad at his old landlord, but Simon, the owner of the building makes no mention of this threat.<sup>30</sup> And, in O’Dell’s affidavit the suggestion is Belanger was mad at Scott because they broke up and he started the fire. But he also denied setting the fire when she asked about it. At best, all of this information combined is speculative and is not of “substantive probative value” and would likely prejudice or confuse the jury. *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 800 (2009); citing *Commonwealth v. Conkey*, 443 Mass. 60, 66 (2004) and *Keizer*, 377 Mass. at 267; see also *Phinney*, 446 Mass. at 163. As O’Dell says, it was just a rumor that Belanger was involved. Nothing that the defendant has provided here amounts to reliable evidence that Nassif and Belanger committed the crime or “had the motive, intent, and opportunity to commit it.” *Silva-Santiago*, 453 Mass. at 800, quoting *Commonwealth v. Lawrence*, 404 Mass. 378, 387 (1989). There was not

This evidence would likely confuse the jury with collateral matters such that it would not likely be admitted at the trial as third-party culprit evidence. *Silva-Santiago*, 453 Mass. at 800;

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<sup>29</sup> The defendant asks this Court to consider Stanley’s testimony as admissible and reliable. D. Memo 86, n. 458. Without going into detail, the Commonwealth does disagree with some of the defendant’s arguments about exceptions to hearsay and Nassif’s potential Fifth Amendment rights as part of this assessment. However, the Commonwealth does not agree that Stanley’s 2019 affidavit should be considered as what his “testimony” would have been at a trial in 1987. Nor should this affidavit be referred to as “Nassif’s confession.” Most of what is contained in that affidavit was not known at the time of trial and some of the conversations Stanley had with Nassif and Belanger appear to have taken place after the trial and would not have been part of his testimony at trial. The defendant has not produced any reliable evidence to corroborate Stanley’s statement.

<sup>30</sup> Trooper Scott interviewed Simon a few hours after the fire. D. App. 12-13, Ex. 3. There is nothing in his report indicating that Simon reported to Scott that Nassif threatened to burn down the building for revenge.

*Phinney*, 446 Mass. at 163. As the SJC has said “the evidence ‘must have a rational tendency to prove the issue the defense raises, and the evidence cannot be too remote or speculative.” The limitations for admissible evidence in these cases “recognizes that the admission of feeble third-party culprit evidence poses a risk of unfair prejudice to the Commonwealth, because it inevitably diverts jurors’ attention away from the defendant on trial and onto the third-party, and essentially requires the Commonwealth to prove beyond a reasonable doubt that the third-party culprit did not commit the crime.” *Silva-Santiago*, 453 Mass. at 800. This would have been the case here had defense counsel attempted to admit the same evidence that the defendant is relying on here.

Because the defendant has not shown that he was deprived of an otherwise substantial grounds for defense based on counsel’s failure to interview Stanley based on the vague and inconsistent statements he gave in 1985, this court should deny his claim of ineffective assistance of counsel on these grounds.

#### **D. Defense Counsel’s Effectively Presented the Evidence in his Closing Argument**

Despite the defendant’s assertion that his counsel did not “effectively present the evidence elicited at trial that supported an accident defense,” (Def. Mot. p. 91), defense counsel persuasively outlined the perceived flaws in the Commonwealth’s evidence and then noted for the jury that there was no evidence of a crime. Specifically, defense counsel argued that before the jury could find the defendant committed a crime, they “must find that a crime has been committed. Where is the evidence of the crime? The fact that a fire occurred and that people lost their lives in the fire, that doesn’t mean that a crime has occurred, as much as the prosecution would like you to believe that.” Tr. IX, 1894. Nevertheless, the defendant continues to find fault with defense counsel’s closing statement. But his argument here fails.

Defense counsel spent a substantial portion of his closing argument attacking the evidence presented by the Commonwealth that would point to the defendant as the individual responsible for the fire or that the fire was caused deliberately. *See, e.g.*, Tr. IX., 1881-82, 1888-90 (questioning the motives and possible bias of key witnesses, including, Harvey Chandler, and noting this witness could not identify the defendant as the man who confessed to the alleged crime). Defense counsel also repeatedly attacked the credibility of multiple witnesses who had testified against his client, including the victims' mother's own motive for her testimony. *See* Tr. 1889-90 (arguing the children's mother had a high amount of alcohol in her blood and that she wanted to pass the guilt she feels along to someone else, namely, the defendant). Therefore, this is not a case analogous to the cases primarily relied on by the defendant.

For example the defendant cites to *Commonwealth v. Farley*, but in *Farley*, unlike here, defense counsel put forth a defense initially, but “then failed to develop this defense through evidence, cross-examination, or in summation.” 432 Mass. 153, 156 (2000). Specifically in *Farley*, there was a possibility another individual might have killed the victim. *Id.* There was semen and sperm cells found at the scene along with blood that did not belong to the defendant, which indicated a third person was at the scene of the crime. *Id.* Nevertheless, defense counsel did not independently test any of this evidence, cross exam witnesses regarding this evidence, and he did not interview witnesses regarding this evidence. *Id.* Instead, defense counsel merely “claimed someone else committed the crime and then did absolutely nothing to develop that defense before the jury.” *Id.* at 156, n.4. *See also Commonwealth v. Street*, 388 Mass. 281, 287 (1983) (concluding defense counsel's decision to abandon a defense to instead argue for a conviction of murder in the second degree, which undercut his own expert's testimony, destroyed any claim that the “defendant was incapable of deliberately premeditating his actions”); *Commonwealth v.*

*Westmoreland*, 388 Mass. 269, 273 (1983) (finding that defense counsel's decision to argue for a verdict of guilty for voluntary manslaughter when there was no evidence of provocation while there was "sufficient evidence which, if believed, would have warranted the jury in returning a verdict reflecting their belief that the defendant was not criminally responsible" required a new trial). Here, defense counsel extensively questioned witnesses, had an expert witness testify about the cause and origin of the fire, and attacked the Commonwealth's case while bolstering his own client's innocence. Simply because the jury ultimately found the defendant guilty does not mean that defense counsel's closing statement was ineffective.

The defendant also wrongfully claims defense counsel did not "review the evidence concerning the point of origin and the cause of the fire in a thorough and meaningful manner with the jury." (Def. Mot. p. 91). In fact, counsel did meaningfully review that evidence when he argued at length that Trooper Scott's investigation essentially amounted to no investigation as he did not check the electrical or gas records, he did not take or preserve any samples, and he did not use any of the "expensive sophisticated equipment" available to him. Tr. IX., 1894. Defense counsel argued Trooper Scott essentially went to the scene, looked around, spoke to some firefighters, and then concluded the fire was deliberately caused without doing any tests and without finding anything in the three foot area he searched. Tr. IX., 1894. In his closing, defense counsel also noted his expert, Keaveny, could not determine the point of the fire's origin and he could not conclude what caused the fire. Tr. IX., 1896-97.<sup>31</sup> While counsel may not have focused in on every single detail the defendant highlights in his motion regarding the possible cause of the fire, (Def. Mot. p. 91), defense counsel effectively summarized key pieces of evidence presented to the jury on this issue.

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<sup>31</sup> Notably, Keaveny did not conclude the fire was an accident. Instead, he testified he could not eliminate an accident as the cause, but he would not label this fire as an arson. Tr. VIII., 1590

Ultimately, defense counsel exclaimed there was “[n]ot one piece of evidence indicating that . . . a fire was set. Not one piece of direct evidence that Billy Cascone was responsible for the cause of that fire, that he set that fire!” and the defendant “is here, not because they have found evidence, but because there is no evidence. Tr. IX., 1896. While defense counsel did note that the jury might, based on “sympathy or a sense revulsion,” want to conclude “somebody ought to be responsible for this,” counsel properly noted “[t]hat’s not what we’re here for.” Tr. IX., 1880. In context, this was not a concession that a crime was committed as the defendant claims. (Def. Mot. p. 92-93). Although counsel did not mention the word “accident” during his closing, the majority of the argument centered around the defendant’s innocence and holes in the Commonwealth’s case, including that the fire was not intentionally set, which would have led the jury to question whether a crime had even occurred. As a result, the closing argument was proper and defense counsel was not constitutionally ineffective on this issue.

**E. Defense Counsel’s Failure to Investigate John Perdue, as a Potential Exculpatory Witness was Not Ineffective Assistance of Counsel, Based on the Circumstances at the Time the Decision was Made**

The defendant alleges that defense counsel should have investigated John Perdue’s “repudiation of Charles [Chandler’s] fabricated confession.” D. Memo 93. The defendant’s theory here is that Perdue would have shown that Harvey Chandler was not reliable and that his story that the defendant’s confession was “the latest iteration of an ongoing scheme by the Chandlers” to frame the defendant for setting the State Street fire. *Id.* Based on the circumstances at the time of trial, it was not obvious that Perdue knew anything other than what he testified to at the grand jury. It was not clear at the time (and is still not) that interviewing him would have lead to a substantial and material defense for trial, as is suggested by the defendant. The defendant’s argument relies

heavily on hindsight, holding defense counsel to a higher standard than is proper, and overstating the strength of the potential defense.

**1. Generally, Counsel has a Duty to Investigate, but Not Every Failure to Investigate Results in a Constitutionally Ineffective Assistance of Counsel or a New Trial**

Defense counsel has “a duty to make reasonable investigations,” but counsel is also afforded the opportunity to “make reasonable decision that makes particular investigations unnecessary.” *Commonwealth v. Denis*, 442 Mass. 617, 629 (2004), quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984); see also *Commonwealth v. Baker*, 440 Mass. 519, 529 (2003). ““Strategic choices made after less than complete investigation are reasonable” only to the extent that “reasonable professional judgments support the limitations on the investigation.”” *Commonwealth v. Hampton*, 88 Mass. App. Ct. 162, 167 (2015), quoting *Wiggins v. Smith*, 539 U.S. 510 533 (2003), quoting *Strickland*, 466 U.S. at 690-691. The reasonableness of a decision must be based on when it was made and may not be “informed by what hindsight may reveal.” *Kolenovic*, 471 Mass. at 674. Here, defense counsel did not interview Perdue or call him as a witness, but this was not an unreasonable decision at the time it was made based on the circumstances at the time it was made.

**2. Counsel’s Failure to Investigate Perdue, a Minor Witness in this Complicated Arson Case, Does Not Amount to Ineffective Assistance Because it was a Reasonable Decision at the Time of Trial**

The defendant has provided an affidavit prepared in 2019 from Perdue claiming Charles came up with a “scheme” for Perdue to tell the police that the defendant confessed to him that he started the State Street fire. D. App. 96-99, Ex. 26. Perdue told Charles that he did not “want to get involved” in this plan. *Id.* at 98. It seems that there was only one conversation where Charles allegedly asked Perdue to say the Cascone confessed about starting a fire and then that was the end of it.

In this same affidavit, Perdue states that met a prosecutor shortly before giving his grand jury testimony. *Id.* The prosecutor told him that Charles Chandler said Cascone confessed to Perdue about starting fires at Mohawk Park.<sup>32</sup> *Id.* at 98. Perdue told him this was not true. *Id.* at 98. He told the prosecutor he did not know Cascone that well and “that Bill has never confessed to starting any fire.” *Id.* He alleges that the prosecutor wrote out a statement for him to sign that said Cascone told him he set a fire. *Id.* at 99. Perdue claims the prosecutor threatened him with contempt of court and would put him in jail if he did not sign the statement. *Id.* Perdue felt like he was “bullied into signing the statement.” *Id.* The affidavit says “Charlie Chandler dragged me into this mess” and the words “to frame Bill Cascone” are crossed out and initialed by Perdue. *Id.* In the affidavit, Perdue states that he does not remember testifying at the grand jury. *Id.*

There are obvious credibility issues with Perdue’s affidavit that cannot be overlooked. First, the affidavit is focused on whether Cascone confessed to starting a fire at Mohawk Park, and references to “North Adams fire” are crossed out by Perdue. Also, Perdue crossed out the words “to frame Bill Cascone” twice and the words “trying to get payback” suggesting he does not agree with that description of what was happening at the time. In addition, Perdue seems to remember some specific details about his meeting with the prosecutor, what the statement said and being threatened to sign a statement, yet cannot even “remember testifying at grand jury.” *Id.* at 99. That he remembers those details, but not his grand jury testimony given shortly thereafter does not seem credible.

At grand jury, Perdue testified that neither Cascone nor his two brothers ever talked to him about the North Adams fire. GJ at 175. He denied telling Charles Chandler that Cascone admitted setting the North Adams fire. *Id.* He said that he was at a party a couple years earlier and that

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<sup>32</sup> The affidavit originally said North Adams fire and it is crossed out and fires at Mohawk Park” in hand written instead. D. App. 98; Ex. 26.

somebody told him that Cascone “had something to do with” a fire at Mohawk Park. *Id.* at 175-176. He did not hear this directly from Cascone, but he did tell Charles Chandler about that rumor. *Id.* at 176. He repeated that he never told Charles Chandler that Cascone admitted to setting the fire in North Adams. *Id.* This is the extent of Perdue’s grand jury testimony. He was never asked about a written statement.

Because Perdue testified at grand jury, defense counsel probably should have done some minimal investigation and perhaps met with Perdue. See e.g. *Baker*, 440 Mass. at 529. But that misstep alone is not enough to determine counsel was constitutionally ineffective. Even now, considering the affidavits from Perdue and his minimal testimony at grand jury, the defendant does not demonstrate that he was deprived of a substantial and material defense by counsel’s failure to investigate.

At the time of the trial, there does not appear to be any significant evidence that Perdue had any helpful information to assist the defense. There is an “interview report” of Charles Chandler dated 12/17/84 that indicates Chandler told the police “about a week and a half after the fire in North Adams, John Perdue told me that Bill Cascone told him that he was the one who set the fire.” D. App. 94, Ex. 24. Perdue was asked about this a grand jury and denied it. But, there is a statement from Perdue (not signed) that says “Billy Cascone never told me that he set the fatal fire in North Adams. There was a fire in a shed behind the Mohawk Park and about two days after that fire I heard Bill Cascone say that he set that fire.” D. App. 95, Ex. 25.

At best, there appears to have been some conflict between Chandler’s and Perdue’s statements, but Perdue kept saying that Cascone did not confess to him. At grand jury he was asked twice whether he told Charles Chandler that Cascone confessed to him and he denied ever having that conversation. This alone was not enough to tip-off defense counsel that Perdue might have

had any useful information that Chandler was developing a “scheme” to implicate Cascone as the person who set the fire or that there was some substantial defense that was being left uninvestigated. At the time of trial, it did not appear that Perdue had anything to add to Cascone’s defense. He was not at the party; it is not clear that he knew anybody at the party; he barely knew the defendant; and he consistently connected the defendant to the Mohawk Park fires, but not the North Adams fire. It is only with hindsight and some deep investigating by the defendant years later that there is any connection drawn between Perdue and an alleged fake confession by Cascone.<sup>33</sup> Based on Perdue’s grand jury testimony and very brief statement to the police (Ex. 25) in which both times he denied that Cascone confessed anything to him, it was reasonable, at the time, for defense counsel not to investigate Perdue because there was no suggestion that he would provide a potential a material or substantial defense.

### **3. The Defendant Has Not Shown that the Failure to Investigate Perdue Deprived him of a Substantial Defense**

Because defense counsel’s performance was not below what might be expected of an ordinary fallible lawyer, this Court does not even need to consider whether the prejudice prong of the *Saferian* test was met. However, even if this Court were to conclude that counsel’s performance was substandard for failing to investigate a witness who, at the time of trial, appeared to know nothing about the defendant or the State Street fire, the defendant cannot establish prejudice.

The defendant’s reliance on *Commonwealth v. Diaz Perez* for the proposition “where a ‘case is a weak one for conviction’ counsel’s failure to investigate a substantial defense theory that would have been a real factor in the jury’s deliberations demands a new trial” is misplaced based the facts of this case. D. Memo 93, citing *Diaz Perez*, 484 Mass. 69, 79 (2020). In that case, the

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<sup>33</sup> This connection between Perdue and Chandler was not raised during the direct appeal either, which suggests it was not all that obvious to the defendant even right after his conviction that his trial counsel should have investigated Perdue or that Perdue would have any information that would lead to a “substantial defense,” which he still does not.

Court was considering whether the missing testimony of a witness, who would have directly implicated another person in the crime, where mistaken identity and eyewitness identification were key issues warranted a new trial. *Id.* at 77-80. In that case, the witness was expected to give “affirmative testimony that the defendant could not have been the shooter” which would have had a significant impact on the jury’s deliberations. *Id.* The same cannot be said about Perdue’s testimony here.

Here, this was not as weak case as the defendant would have this Court believe. The conviction does not rely solely on Harvey Chandler’s testimony. Defense counsel’s strategy at trial, was to attack the Trooper Scott’s conclusions through cross-examination by highlighting the deficiencies in his investigation, including: that Scott seemed to jump to a conclusion this was intentionally set fire; he was only at the fire scene for few hours; that he did not preserve or collect any samples or do any tests; he only dug in a small area near the spot he believed was the origin point; did not perform thorough interviews with witnesses or firefighters before coming to his conclusion about the origin; did not consider electrical or gas malfunctions as a cause, among other things. The defense also called its own expert, Keaveney, to attack Scott’s investigation and conclusions and to provide an opposing opinion that the origin and cause could not be determined based on the limited investigation and evidence. The defense approach that there was not sufficient evidence to establish that the fire was intentionally set was reasonable.

In addition, defense counsel cross-examined other witnesses who were are the party to question their credibility and he also cross-examined Harvey Chandler and attempted to get across the point that he was not credible and there was feud between the Chandler and Cascone families. Also, Cascone testified in his own defense and denied confessing to Charles Chandler or having any conversation of that sort. Through the defendant’s testimony, the jury also heard about the

feud between the Chandler and Cascone families and that Cascone's brother testified against Charles in his rape trial.

Because this is not a "weak case" this Court should consider Perdue's questionable credibility as part of the prejudice assessment. See *Diaz Perez*, 484 Mass. at 79. Perdue's testimony would not likely be a "real factor in the jury deliberations." *Id.* It is not entirely clear from his affidavit that he would have added much, if anything, to the defense, or how well he would have performed during cross-examination by the prosecutor. If he testified to what was in his affidavit, he would have suggested to the jury that Charles Chandler had approached him to say that Cascone, a person he barely knew or talked to, confessed to him and that he did not want to along with that "scheme" and that he did not. Perdue would not be implicating another person. It cannot be fairly said that Perdue, who is not a credible witness, would "eviscerate" the credibility of Harvey Chandler. D. Memo 96. Perdue's testimony would not suggest that someone else set the fire and it is not overwhelming that his testimony would have been a real factor in the jury's deliberations. See *Diaz Perez*, 484 Mass. at 77-78. Without that showing, a new trial is not warranted.

Whether Charles Chandler had a motive for revenge against Cascone is not clear from the limited information involving Perdue, especially at the time of the trial. At both grand jury and through a statement to police, Perdue denied that Cascone ever told him that he set the North Adams fire. The defendant overstates the significance of Perdue's potential testimony. Counsel's failure to investigate Perdue's testimony did not deprive Cascone of the "only realistic defense" that he had. See *Commonwealth v. Alcide*, 472 Mass. 150, 167 (2015), citing *Commonwealth v. Haggerty*, 400 Mass. 437, 441 (1987). Nor is this a case where some issue of fact "could have been but was not exploited in the original proceedings" due to counsel's failures. *Id.* citing *Saferian*, 366 Mass. at 98. Arguably, Perdue's testimony, if credible, would have provided some additional

information for the jury to consider as to the credibility of Harvey Chandler, who was already exploited through cross-examination and the defendant's own testimony. But, Perdue was not going to testify that there was a third-party culprit or provide any suggestion that someone else had motive, intent, opportunity to commit this crime. Contrast *Alcide*, 472 Mass. at 163 (finding counsel was ineffective for, among other deficiencies, failing to investigate and call a witness who would have provided third-party culprit evidence). To suggest Perdue's testimony would have been a "real factor in the jury's deliberations" or that the outcome would have been different in light of all the other evidence, is an overstatement. *Diaz Perez*, 484 Mass. at 79.

The defendant compares his case to that of *Alcide*, but this overlooks the fact that in that case the Court found "the practices of the defendant's counsel in preparing for trial . . . unacceptably remiss." 472 Mass. at 159. So "remiss" in fact, the Commonwealth conceded the point. *Id.* And, without going into detail, the Court listed out several things that defense counsel failed to do, including: becoming familiar with discovery materials provided by the Commonwealth; examining physical evidence that was available for inspection; investigate certain aspects of the case and, if necessary drawing on experts or investigators for help; and filing any appropriate motions to suppress evidence. *Id.* at 160. Defense counsel here should not be compared to counsel in *Alcide* where counsel here did more than the bare minimum that would be expected of an attorney. Counsel here put on a strong defense for his client that there was no evidence that the fire was intentionally set, and that if it was there was no connection to the defendant, through reasonable tactical decision making; proper preparation and examination of the evidence of the fire scene; appropriate and thorough cross-examination of the Commonwealth's witnesses; and the use of expert testimony.

Even if the court determines that defense counsel should have interviewed Perdue before trial, which the Commonwealth does not concede, it should not conclude that counsel was constitutionally ineffective and should not order a new trial on these grounds.

### CONCLUSION

Based on the foregoing, the Commonwealth agrees that the developments in fire science and the expert opinions derived from the NFPA 921 protocols are newly discovered evidence for purposes of Mass. R. Crim. P. 30(b) review. An evidentiary hearing would be beneficial to more fully address the defendant's arguments and the Commonwealth requests that it be granted the opportunity to supplement its response following that hearing and that the Court reserve its ruling until after that hearing.

As to the remaining issues, the Commonwealth does not agree that defense counsel was constitutionally ineffective, and that even if there were some minor missteps, in hindsight that could have been addressed differently at the time of trial, the defendant does not show that he was prejudiced. Finally, the prosecutor's closing was not prejudicial and is not grounds for a new trial in this case

Respectfully submitted,

ANDREA C. HARRINGTON  
DISTRICT ATTORNEY FOR  
THE BERKSHIRE DISTRICT

/s/ Jennifer K. Zalnasky

JENNIFER K. ZALNASKY  
Chief of Appeals  
Berkshire County District Attorney's Office  
7 North Street  
Pittsfield, MA 01201  
Tel. 413-443-5951 X137  
[jennifer.k.zalnasky2@mass.gov](mailto:jennifer.k.zalnasky2@mass.gov)  
BBO# 650762

Date: August 3, 2022

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT

Docket No. CR86-0010-CR86-0013

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COMMONWEALTH OF MASSACHUSETTS

v.

WILLIAM CASCONI

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**AFFIDAVIT OF SARGENT PAUL HORGAN, MSP, FEIU**

I, Sargent Paul Horgan, under oath do depose and state the following:

At the request of Jennifer Zalnasky, Chief of Appeals, I reviewed the report of Craig Beylor, Ph.D. in order to assist the Berkshire District Attorney's Office in its initial assessment of the above-captioned case. I did not review any other records from the underlying investigation, trial, or appeal. Based on my limited review of Beylor's report, I offer the following opinion:

1. Beylor provides a very thorough examination of the entire investigation conducted by MSP Investigators and subsequent prosecution, including; scene exam, bldg. construction, witness interviews / testimony, timeline and fire-spread theories.
2. Although it is highly likely that Cascone most probably set the fire while in a drunken rage (spite and revenge are the top motive for arson), a re-trial could be a difficult endeavor to overcome because of the developments in arson science and the evidence relied on at the original trial.
3. I agree that the NFPA 921, established in 1992, is a "standard of care" for fire investigators conducting origin and cause investigations in today's environment. There was no NFPA 921 back in 1984, and investigators conducted their investigations on the information, training, and experience that was available to them at that period of time.

4. I believe Troopers Scott and Smith conducted their investigation in good faith and concluded that the fire was incendiary based upon the totality of the information and circumstances that they had available to them at that time.
5. As Beylor points out, there were clearly some shortcomings in the origin and cause examination performed in this case. First of all, Beylor theorizes that the investigators determined the fire originated on the wrong floor. Scott and Smith determined that the area of origin was the southwest corner of 2<sup>nd</sup> floor porch. Beylor speculates that the fire originated on the 3<sup>rd</sup> floor porch. I am inclined to believe that the fire investigators had determined the right area for the origin of the fire, however, I agree that the investigation, as a whole, was inadequate.
6. Based on the summary is Beylor's report, these investigators did not do a thorough job in conducting an origin and cause investigation. Presuming that they did have the right "area of origin" for this fire, they spent very little time examining, digging, and delayering that area either for evidence of incendiarism or to eliminate accidental scenarios. It appears that the investigation did not thoroughly eliminate all potential accidental causes, including such things as: electrical wiring, improper disposal of smoking materials, possible natural gas issues, and spontaneous combustion (floor sanding debris).
7. Despite the structural damage to the building, there was heavy equipment on scene that could have been utilized to help clear safety hazards from the presumed area of origin. This would have allowed for better and safer access for the investigators. It also would have allowed them to perform a more thorough examination of the area to search for potential evidence of a cause.
8. The investigators should have examined the electrical panel of the building and considered other utilities as the cause of the fire. There was no mention in the report of the investigators utilizing their Hydrocarbon Detector in this case.
9. The improper disposal of a large number of smoking materials, was probably not a viable cause for the fire, but this was not thoroughly investigated despite many statements of occupants and visitors who were smokers and were smoking that night.
10. I believe that the investigators could have done a better job of documenting their investigation, which included witness interviews, in their attempt to eliminate smoking or discarded floor-sanding debris (that was located near the area of origin of the fire) as the cause of this fire.
11. The defense expert, James Keaveney, opined at trial that the cause of the fire should have been categorized as "undetermined." Keaveney stated, "since all accidental causes could not be eliminated, the fire cannot be determined to have been arson."

12. Common accidental causes of fire include the following: chemicals, cooking, trash or combustibles too close to a heat source, electrical, gas or heating appliances, lightning or natural causes, children (Juvenile) under 13 YOA, spontaneous combustion, and smoking. Based on the report, these were not sufficiently investigated and eliminated as possible causes of this fire.
13. Although it does appear from Baylor's report that Cascone did have the motive, means and opportunity to set this fire, and he puts himself near the area of origin, and discovering the fire, during the incipient stages, the scene itself needs to stand on its own. In this case, there was no confession or admission of guilt by Cascone to law enforcement. In my opinion, the circumstantial evidence from the fire scene alone, is not likely to be strong enough to overcome an aggressive and scientific challenge from the defense, which will be based on NFPA 921 standards of care and the developments of arson science.

Signed under the pains of perjury on this \_\_\_\_ day of August 2022.

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Sgt. Paul Horgan  
Massachusetts State Police  
Fire & Explosion Investigative Unit

**CERTIFICATE OF SERVICE**

I, Jennifer K. Zalnasky, Assistant District Attorney, hereby certify that on this day a copy of the *Commonwealth's Response to Defendant's Motion for New Trial* by email upon the attorneys for the defendant:

Charlotte Whitmore: [charlotte.whitmore@bc.edu](mailto:charlotte.whitmore@bc.edu)

David J. Grimaldi: [david@attorneygrimaldi.com](mailto:david@attorneygrimaldi.com)

Sarah Elkins: [carlows@bc.edu](mailto:carlows@bc.edu)

/s/ Jennifer K. Zalnasky

Jennifer K. Zalnasky  
Assistant District Attorney

Date: August 3, 2022