



CORSICANA FIRE DEPARTMENT

AN EQUAL OPPORTUNITY EMPLOYER

September 29, 2009

Leigh Tomlin, Commission Coordinator
Texas Forensic Science Commission
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College of Criminal Justice
Box 2296, 816 17th Street
Huntsville, Texas 77341-2296

Re: Willingham Matter

Dear Ms. Tomlin:

Thank you for providing me with a copy of Dr. Craig Beyler's report on the Willingham and Willis criminal arson cases. I have not studied his findings regarding the Willis case. You have asked that the Corsicana Fire Chief's office respond to the report and, to the extent that I am able, I will do so. However, because of my lack of firsthand knowledge of the incident, I don't believe my response will be as complete or thorough as you might want.

I have been the Corsicana Fire Chief since January 1999. I wasn't employed by the City of Corsicana at the time the Willingham incident occurred or at the time it went to trial. My knowledge of the case is very limited. I have only recently (after we received your letter of August 31, 2009) attempted to review the trial transcripts and the witness statements involved in the investigation. I don't have access to Fire Marshal Vasquez's report, Assistant Chief Fogg's report, the physical evidence or the video and audio tapes. The video tapes and photographs might be very helpful. Because of the short time I was given to respond, I had to get some assistance in drafting this response. I will focus on Assistant Chief Fogg, but may comment from time to time on issues regarding Fire Marshall Vasquez.

GENERAL OBSERVATIONS

1. Dr. Beyler is correct that NFPA 921 is a reliable source of information for the documenting and investigating incidents involving fire and arson (p. 1-2 of his report). But, by Dr. Beyler's own admission, NFPA 921 wasn't published until after the Willingham incident (and trial) occurred. Dr. Beyler says that even though NFPA 921 was well established by 1995, it was not universally acknowledged until more than three years after that. That is probably true. Therefore, it is not remarkable that the investigators did not employ a methodology that was not yet

published or accepted. Having said that, it may very well be that the fire investigators did use many or some of the principles stated in NFPA 921, since some of those specific principles were known in 1991.

2. Dr. Beyler continually uses the phrase “standard of care.” NFPA 921 speaks in terms of Recommended Practices and Standards. As I understand it, the phrase “standard of care” is usually used by lawyers and judges when talking about medical care. Corsicana runs an EMS service and that phrase is used to describe what a reasonably prudent EMT (or nurse or physician) would do under the same or similar circumstances based on accepted medical practices. The use of the phrase in this context leaves the impression that Dr. Beyler’s report is being written much like an expert witness report in a lawsuit – that is, Dr. Beyler is assuming the role of an advocate and not acting as an objective, independent voice. Given some of Dr. Beyler’s distortions of the trial record, as described below, it may be that he has assumed the role of an advocate.
3. On page 2 of his report, Dr. Beyler says that Assistant Chief Fogg and Fire Marshal Vasquez admitted there were other possible hypotheses that were consistent with the facts of the case, but those alternative hypotheses did not “alter” the investigator’s opinions. A fair reading of the trial testimony establishes that the investigators were asked about alternative causes of the fire. And, in fairness to the investigators, they gave reasons as to why those alternative causes were considered to be remote.
4. Dr. Beyler makes the statement that because the Willingham case was “finalized” in 2004, it is appropriate to examine the case using “current and contemporaneous” standards. (p. 5). Is he suggesting that it is appropriate to judge the adequacy of the 1991 investigation using 2009 methodology?
5. Although Dr. Beyler talks a great deal about a “contemporaneous standard of care,” the attorneys who defended Willingham have stated in newspaper stories that they were unable to find an expert who would contradict Fire Marshal Vasquez. Thus, the “contemporaneous standard of care” in 1991 referred to by Dr. Beyler appears in the real world to have supported Assistant Chief Fogg and Fire Marshal Vasquez, not contradicted them.
6. Although Dr. Beyler concludes that the fire investigators did not satisfy the “contemporaneous standard of care” (p. 51), Dr. Beyler nowhere succinctly states what the contemporaneous standard of care is, if there is such a thing. He simply makes a conclusory statement. I haven’t undertaken the research necessary to establish what the “standard of care” was in 1991.

7. Contrary to what has been reported in the media, Dr. Beyler did not conclude that the cause of the fire was accidental or natural and he didn't conclude that the fire was not arson. In addition, Dr. Beyler did not prove (or apparently attempt to prove) that Todd Willingham did not murder his children.
8. Dr. Beyler's suggestion, which he makes several times, that fire investigation prior to NFPA 921 was "folklore" seems a bit strong (p. 3). If that were the case, every arson case investigated prior to the late 1990s would be without a scientific basis. I don't believe that to be the case. In addition, the assertion that the science was "folklore" is inconsistent with his assertion that there was a "contemporaneous standard of care." I guess he would call it a contemporaneous standard of "folklore?"
9. Also, I have been told that since 1991, the United States and Texas Supreme Courts have held that expert opinions in a wide variety of cases have to pass certain milestones or meet certain criteria to be admissible. Those cases include: *Daubert v. Merckell Dow*, 509 U.S. 579 (1993) and *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995), and many others. These cases apply these evidentiary rules to all cases, not just fire science cases, and they provide a way for a lawyer to challenge expert evidence the lawyer believes is unreliable. If Mr. Willingham were tried today, there would be a procedural way for him to challenge the admissibility of an expert's testimony in order to make sure it is reliable and scientifically sound.
10. I have no way of knowing whether Dr. Beyler's assertion regarding opinions being phrased in terms of "more likely than not" as opposed to "beyond a reasonable doubt" has any impact or bearing on this particular case (p. 3). I did find in my review of the trial transcript that the investigators' opinions were **not** phrased in terms of "more likely than not." It is an interesting legal question whether every opinion offered in a criminal case has to be "beyond a reasonable doubt" or whether the entirety of the evidence offered at a criminal trial needs to prove guilt "beyond a reasonable doubt." I must leave that for criminal lawyers and District Attorneys to argue. It isn't a fire science issue, although Dr. Beyler comments on it.
11. I agree in general that fire investigation has in the past relied upon a process of elimination to identify a cause or causes of a fire. And, of course, the elimination of accidental and natural causes is part and parcel of that process. What constitutes "elimination" is, to some degree, a matter of the investigator's judgment, which I believe should be based on reasonable scientific principles.
12. On page 9 of the report, Dr. Beyler cites a National Fire Academy study which found

that burning on bottom edges of doors is “unusual” in accidental fires. From that, Dr. Beyler concludes that it is not a strong indicator of an arson fire. That sentence seems confusing. If burning on the bottom edges of doors is unusual in accidental fires, then, conversely, the presence of burning on the bottom edge of a door suggests that the fire might not be an accidental fire. If it isn’t accidental, it is intentional.

13. Dr. Beyler goes to great lengths to argue that V-patterns, floor patterns, crazed glass, spalling, low burn, burn intensity and ventilation effects **are not necessarily** indicative of arson or the use of accelerants. Modern fire science validates that conclusion. On the other hand, the presence of those effects is sometimes found in cases involving arson, including cases of arson where accelerants are used.
14. In several places, Dr. Beyler takes exception to statements by Fire Marshal Vasquez to the effect that “a fire does not lie,” and the “fire tells a story,” etc. These comments aren’t necessarily “mythologizing” or comments characteristic “of mystics or psychics” (p. 49). They may simply be a colloquial way of expressing what physical facts can tell an experienced investigator about what happened during a particular fire. When Dr. Beyler refers to Vasquez as a fortune teller or mystic, he may be demonstrating a personal bias. It is not hard to be critical of a man who is no longer alive to explain his statements and what he intended by those statements.
15. Dr. Beyler’s criticism of Fire Marshal Vasquez for testifying that Todd Willingham intentionally set the fire to kill his children has more validity. A witness testifying from a fire science perspective is not a mind reader. At least one of the bits of that testimony appears to be in the context of a heated exchange between Fire Marshall Vasquez and a defense attorney. Things sometimes are said in a trial that witnesses and lawyers later wish were handled differently. Perhaps Fire Marshal Vasquez reached that conclusion because he relied on other evidence which does tend to prove that the fire was intentionally set by Todd Willingham, perhaps to kill his children. But I agree Fire Marshal Vasquez could not read Todd Willingham’s mind.

FACTUAL STATEMENTS IN DR. BEYLER’S REPORT

16. Dr. Beyler’s factual descriptions of the Willingham incident appear to overlook or contradict many of the known facts regarding this incident. Some of those facts were known to Fire Marshal Vasquez and Assistant Chief Fogg and may (or may not) have been part of the basis for these opinions. Dr. Beyler doesn’t quite capture the import of the eye witness statements which he reviewed in his report. Because the fire investigators would likely have had access to this evidence as part of their investigation, it is worth summarizing some of those statements:

- a. Mary Barbee said on 12/27 that before the house became engulfed, Mr. Willingham stayed on the front porch of the house. When the fire engulfed the house, she heard “electricity started popping.” That is when Mr. Willingham ran up to the porch and pushed his car back out of the way. To Ms. Barbee’s knowledge, Mr. Willingham “did not try and go back in the house.” Later, on the day of the fire, Ms. Barbee heard Mr. Willingham say that “he came out the back door” after his 2 year old daughter woke him up. She said that he said his 2 year old daughter then ran back into the twins’ room and he was unable to find her.
- b. Brandice Barbee said on 12/27 that she told Mr. Willingham in his front yard to “go get the babies” because when she was there, all she could see was smoke coming from the house and she thought there was still time to rescue the children. After that, Mr. Willingham said “Oh no, my car” and then he went and moved the car. She says that “not once” did Mr. Willingham attempt to go back into the house and get his children.
- c. George Monaghan stated on 12/31 that Mr. Willingham was wearing only pants when Mr. Monaghan arrived. Mr. Monaghan was a volunteer chaplain who stayed with Mr. Willingham while the firemen were putting out the fire. When the fire was out, or about out, Mr. Monaghan had to restrain Mr. Willingham from going back into the house. Mr. Monaghan also believes that when he first arrived and escorted Mr. Willingham to the rear of the fire truck, before the firemen had found the bodies of the children, he said “his babies were dead.”
- d. Ron Franks said on 12/30 that he was the first fireman on the scene. When he got there, flames were rolling out of the front door, front windows and the porch and a window on the northeast corner of the building. The porch ceiling was fully involved. Fireman Franks put on his SCBA gear and entered the front room through a window. Thereafter he exited the same way and went in through the front door. He went down the hall to the back of the house and found the back door blocked by a refrigerator. When Fireman Franks entered the children’s room, they were lying face down next to the entrance hall doorway leading into the bedroom. Several days after the fire, Mr. Willingham told Fireman Franks that he thought the fire started on the south wall of the children’s bedroom because when he came in, the fire was “over there” and “on the ceiling.” Mr. Willingham also told Fireman Franks that day that he tried to go out “the front door, but the heat and smoke was too bad.” He then said he went out through the kitchen.

Fireman Franks also said that after the fire, Mr. Willingham came back to his house and poured a large bottle of British Sterling cologne on the floor from the bathroom to the room in which the twins had died and said that if any more samples were taken from the floor, those samples would have cologne on them.

- e. Jason Grant stated on 12/31 that when he saw Mr. Willingham at the scene of the fire, he was wearing only a pair of pants and no shirt or shoes. At that time, Mr. Willingham was yelling he wanted to see his baby girl (Amber, the 2 year old). He told Officer Grant that he woke up after hearing his little girl scream "Daddy, Daddy". He also told Officer Grant that after searching for his children, he found the front door and escaped.
- f. Todd Willingham said on 12/31 that at 9:20 a.m., he got out of bed to give the twins a bottle. He then put them back down by leaving them on the floor in the same room as Amber, his 2 year old, who was in her bed.

He then says the next thing he heard was "Daddy, Daddy" and he woke up with the room full of smoke. He says he told Amber to get out of the house and that he found a pair of trousers he had on the night before. He says he went out of the bedroom into the hall and then down and opened the kitchen door. He says he found there wasn't as much smoke there. From the kitchen, he could look back down the hall towards the front of the house and he said it was "worse" towards the front door. He said the same thing in his interview with the fire investigators.

He then says he went back towards the front of the house and into the twins' room. He said at that time, his hair caught on fire and he got down on his hands and knees and felt "all around the room." He says he couldn't find his children and he exited the room and went to the front door. He then says he yanked at the front door several times and then went out the front door and down the steps. He then says he attempted to reenter the home but could not. Then he broke out two windows. The fire got worse and he then went to the neighbors to get help. He then claims to have stood by a telephone pole for a few minutes until the fire department got there. He says that when he saw his 2 year daughter on the ground being attended to by the firemen, he tried to get to her and had to be restrained.

- g. His mother-in-law, Mildred Kuykendall said on 1/3 that Mr. Willingham told her he was asleep when he heard his 2 year daughter calling "Daddy, Daddy."

He said he didn't know where her voice was coming from and that he had to go outside because of the heat. Ms. Kuykendall also said Mr. Willingham told her that he tried to kick the front door open "but it was on fire." She interpreted that to mean that he tried to kick the door open when he was trying to get back in. Remarkably, Mr. Willingham also told his mother-in-law that the firemen had found "unusual marks on Amber's neck and guessed that they would say that he choked her and let her burn up."

- h. His father-in-law, J. D. Kuykendall, said on 1/3 that Todd told him that Amber came into the bedroom and woke him up and that he told Amber to get out the door. He also told his father-in-law that in order to get out, he kicked the front door down and that the door was on fire.

Mr. Kuykendall says that Mr. Willingham later told a different story. He said that Amber called him and that he jumped up and couldn't find her and the house was full of smoke. So, he ran out the back and went around the front and tried to kick the front door in trying to get back in.

- i. Fireman Ricky Crenshaw, said on 1/4 that it wasn't until Mr. Willingham saw his 2 year old daughter, that he had to be restrained. Later, while assisting in the fire investigation, Mr. Willingham told Fireman Crenshaw that he overheard people at the funeral home saying "I wonder if he (Todd) had done this." At the same time, he told Fireman Crenshaw that he couldn't figure out what "caused the fire to be burning so bad in the children's bedroom."
- j. Mary Barbee said on 1/4 that when she first came out of her daughter's house, she saw Todd Willingham crouched down with his arms folded across the front of his chest yelling "my babies are burning." She says she saw smoke coming from the front of the house and it was not real thick. At that time, the smoke was coming from "lower down" on the front of the house and was not coming out around the top or eaves of the house. She then went back inside for a moment and when she came back out, Mr. Willingham had not moved.

She then ran down the street to get someone else to call 911 and then when she came back, Mr. Willingham was still holding his arms in front of him. Mrs. Barbee then says she asked Mr. Willingham "Where are the babies?" Mr. Willingham responded that "Amber woke me up and the house was full of smoke and she ran into the twins' room and I couldn't find them." She says that Mr. Willingham then said "I ran out the back." Even at this time,

Mrs. Barbee says she could not see any flames, but there was heavy black smoke. She and her daughter then approached the Willingham house to see if they could get in and when they approached, a large fire suddenly bellowed out from around the front of the house and the windows blew out and she heard a crackling sound. It was at that time that Mr. Willingham ran back to his driveway in order to move his car away from the fire. She says from the time she came out of her house until the time the fire department arrived, she never saw Mr. Willingham attempt to enter the house. Mr. Willingham's eyebrows and hair were singed and his eyes were red. He was wearing pants but his feet were white and did not appear to be burned or smoky. The next day, Mr. Willingham said that while Mrs. Barbee was trying to get help down the block, that was when Mr. Willingham "went back into the house."

- k. Burvin Terry Smith said on 1/4 that he first heard the call on the scanner at 10:34 a.m. He arrived on the fire scene two minutes later and saw fire coming out of the front door. He said the fire "appeared to come from the bottom or close to the floor and went up to the ceiling." The fire did not "go to the right or the left of the door." He also saw that there was fire "very low between the door and window on the porch." While he was there, he never saw Mr. Willingham try to go inside the house.
- l. Brandice Barbee said on 1/4 that when she saw him standing in his front yard before the Fire Department arrived, she told him to go back in and get his babies. He didn't reply. She thought at that time that he had time to go back because there were no flames, just smoke.
- m. Kimberly King says Mr. Willingham told her that he was asleep and Amber woke him up screaming "Daddy, Daddy." Mr. Willingham said he woke up, and grabbed the 2 year old but the 2 year old jerked away and he lost her in the smoke.
- n. Curtis McAfee said on 1/9 that Mr. Willingham told him that his daughter Amber woke him up by yelling "Daddy, Daddy" and that he grabbed her by the arm but that she got away.
- o. Randy Petty and his wife Penny said on 1/9 and 1/10 that Mr. Willingham told them the cause of the fire was "probably electrical because he smelled wires burning." He also told them that he kicked the door open and got out.
- p. Margot Hess said on 1/10 that Mr. Willingham told her that after he gave the

twins' their bottles and went back to bed, a short while later, his 2 year old woke him up by "getting on my bed."

- q. Lisa Brinkley said on 1/10 that Mr. Willingham told her that after putting the twins on the floor to go to sleep, he asked the 2 year old if she wanted to sleep with him or in her own bed. She chose to sleep in her own bed. He awoke when Amber yelled "Daddy, Daddy."
- r. Multiple witnesses say Todd Willingham told them that while he was on his hands and knees in the children's room, he was able to find stuffed animals while he was searching on the floor but couldn't find the twins or Amber.
- s. Sherry Cooley said on 1/15 that Mr. Willingham told her that after he was awakened by his 2 year old, he made his way to the twins' room and that as he was stepping over the gate, he leaned against the door and was burned. He then left the twins' room and had to kick the front door open to get out of the house. She also said that Mr. Willingham told her that he thought that the fire started electrically because sparks were coming out of the sockets.
- t. Shelby Minyard said on 1/16 that Mr. Willingham told her that he originally thought Amber woke him up but now he wasn't so sure and that it could have been one of the twins.
- u. Eugenia Willingham said on 1/16 that Mr. Willingham told her that they put the children in the twins' room with a child gate and that he went back to sleep. All the children were in the twins' room at that time. He also said that he woke up when his 2 year old daughter yelled "Daddy, Daddy" and that when he woke up, the room was filled with smoke. He also told his stepmother that he wasn't sure if it was his 2 year old that woke him up or one of the twins.
- v. Gene Willingham said on 1/16 that Todd Willingham told him that after being woken up, he yelled to Amber to get out and that he stepped over child's gate going into the twins' room and crawled around on the floor. He said Todd Willingham also said that he couldn't find any of his children and that pieces of the ceiling began to fall and that he had to get out. He said Mr. Willingham told him he then went out the front door and after getting some fresh air, he tried to get back inside but couldn't.
- w. Jerry Long said on 1/21 that on the morning of the fire, he heard Todd

screaming. When he went around to the front of Mr. Willingham's house, Mr. Willingham said that his children were inside the home and that the home had been having electrical problems. Mr. Long never saw Mr. Willingham attempt to go back in the house. When he said he was having electrical problems, he pointed to his electrical meter.

- x. Fireman Steve Vandiver said on 1/22 that the call first came in at 10:34 a.m. and he responded with his engine to the location. Fireman Vandiver discovered Mr. Willingham's 2 year old child in Mr. Willingham's bed in the middle bedroom. She was lying face down in the bed and had the sheet pulled up around her shoulders. He picked her up and carried her out and handed her over to EMS personnel who started CPR on her. He then went back into the house and sprayed a fine mist over the front bedroom and saw the bodies of the twins.
- y. Fireman Charles Ray Dennis said on 1/23 that he entered the structure with Fireman Vandiver and that when he entered the front hallway, the hallway was "fully involved" about halfway down (the hallway) in addition to one room to the left. He knocked the fire down so Vandiver could get to the back of the house and then he backed up and entered the room that was fully involved. He knocked most of the flames down and found the two children on the floor under what looked like a spring to a baby crib.
- z. Mr. Willingham gave an interview to Doug Fogg and Manuel Vasquez on December 31, 1991. At that time, he was not under arrest and was not a suspect in any criminal action. Mr. Willingham said that his wife left the house at 9:13. He got up, gave the twins a bottle, leaving them on the floor, and left his 2 year old daughter in her bed in the same bedroom. The next thing Mr. Willingham remembers was hearing "Daddy, Daddy" and that when he woke up, the house was full of smoke. He said he put his pants on and then hollered to Amber to get out of the house. Mr. Willingham said he knew that Amber was in her bedroom and that was the first place he tried to get to. He also said that the burning smell was like electrical wiring and that the plug ins and light switches and stuff were popping. He eventually made his way to the twins' room by crouching down. While in the twins' room, he says he called his 2 year old's name and tried to find the babies but couldn't. He found a baby bottle but could not find the children. He says he went back out of the twins' room and went to the front door, which was already smoking and was about to catch fire. He says he got out of the front door and screen and into the front yard. He said he was unable to get back into the house

because of the flames and smoke. Mr. Willingham further stated that he never had trouble with the gas and the only electrical trouble he had in the house was from a fuse in the kitchen.

Mr. Willingham also said in response to a question asking “where did you go,” that after he searched the room and things began falling off the ceiling, he made his way back to the front door and checked to see whether the door handle was hot. It wasn’t, so he yanked it and ripped the door open and went through the screen outside the house. He then says he went back up to the porch but couldn’t get back inside because of flames and smoke. He then busted out a window in the bedroom, which caused flames to come through.

In answer to specific questions, he replied that he stepped over the child’s gate getting into the room and that he also stepped over the child’s gate coming back out of the room. He says he remembers because he burned his hand when he came out.

He claims that he searched the room, touching the dresser, the slide, his 2 year old’s bed, and other areas.

On January 7th, Mr. Willingham was re-interviewed by police officers. He told the police officers that after he left the children’s room, he went to the front door of the house, took hold of the door knob on the front door, which was not hot, and opened the front door and went out through the screen door. During that interview, Mr. Willingham suggested someone else could have possibly come in and set the fire while he was sleeping but Mr. Willingham could not give any ideas as to who would want to do such a thing.

- aa. On that same day, the fire investigators interviewed Stacy Willingham. In answer to the question of what Todd Willingham told her, she replied, in part, that he went out through the front door. She also said that he said he kicked the front door down. She described the door saying that if you are in the house, the door opens to the inside. She also told the fire investigators that he kicked the door down because he couldn’t open the door, it was on fire. She then said that Mr. Willingham said he kicked it down and went through it.

She later told police detectives the same story – that Mr. Willingham had said he kicked the front door down while it was on fire.

17. Some aspects of the trial testimony were not recognized or emphasized by Dr. Beyler. The following are of at least of some importance:

- a. Johnny Webb, a Navarro County jail inmate, testified that Mr. Willingham told him he started the fire. He also testified that he was not working for a law enforcement agency when the statement was made. He wasn't asked to find out what Mr. Willingham knew about the crime and that no one threatened or coerced him in any way to give his testimony. He did not receive any sentencing deal for giving his testimony.

He said Mr. Willingham told him that one of the babies was injured or dead and that the fire was set to hide the injury. He also testified that Mr. Willingham told him that he didn't go back in the house when he had the chance because he knew that he would find out that one of the children was injured. Mr. Webb also testified that Todd Willingham told him that he poured the lighter fluid on the floor in the children's room in an X-pattern (which may be consistent with the diagram of the Willingham house prepared by Fire Marshal Vasquez and displayed on p. 34 of Dr. Beyler's report). Nothing in the record suggests that Mr. Webb had seen Fire Marshal Vasquez's drawing of the bedroom. Mr. Webb was the first witness who testified in the trial.

- b. Mary Diane Barbee testified that she was unable to convince Mr. Willingham to go back into the house and try to rescue his children. At that time, there were no flames coming out of the house, only smoke, including smoke from the lower part of the structure. Ms. Barbee also testified that Willingham told her Amber woke him up and she jumped off the bed and he couldn't find her. He also told her that he ran out the back of the house, not the front.
- c. Brandice Barbee, Diane Barbee's daughter testified that she came out of her house after her mother alerted her that the Willingham's house was on fire. She was present at the scene and never saw Todd Willingham attempt to go back into the house at any time. She didn't notice that Mr. Willingham was coughing or injured.
- d. Doug Fogg testified that during his investigation he eliminated all potential electrical and gas causes of the fire by examining wiring and testing gas lines. The gas to the space heater was in the "off" position and the line was tested for leaks but none were found. He also described what he called pour patterns and puddling effects. They were interlinked beginning at the

threshold of the front door into the hallway and then into the front bedroom. He says they were "interlinked." After identifying the interlinking pour patterns on the floor, he looked at all the contents in the room to determine whether they could have left that impression. He went through the debris on the floor and found clothes and toys and determined that they had not melted to produce the pour patterns.

He also was able to identify a burn area that was underneath the threshold plate on the front door. He attributed that to a liquid that had dripped down and ran under the threshold plate. He thought this was very unusual because the threshold plate should have protected the floor from the flame under the baseplate.

Assistant Chief Fogg also conceded that a child starting the fire was a remote possibility. He also testified that he didn't believe that the glue or the tar paper were responsible for the puddling effect.

- e. Fire Marshal Vasquez testified that deep charring or a complete burning through of the flooring is not per se indicative of an accelerant and that investigators must eliminate other possible causes of the deep charring. Marshal Vasquez testified that falling and burning debris lying on a floor can sometimes cause patterns and marks that could be mistaken for accelerant puddles and trails. Vasquez didn't testify that the brown stains on the concrete were charcoal lighter fluid. The lawyer's question assumed that the brown stains on the concrete were where charcoal lighter had been. Marshal Vasquez testified that there was a flash over in the bedroom, which Dr. Beyler concurs with. Vasquez testified that he eliminated the accidental causes, including electrical and gas.

Also, it was in answer to argumentative cross examination questions that Chief Vasquez talked about always being right. He was asked the question had he ever been wrong in a conclusion he made. His answer was "not to my knowledge." The next question asked was "So you're always right?" He answered by saying "I said not to my knowledge."

- f. Unless it appears in a picture which I don't have access to, there was no evidence that the barbecue grill was on the front porch. The only evidence regarding the barbecue grill was that it was turned upside down in a picture. There was no evidence of any grilling activity (recent or otherwise) on the porch or that the firefighters moved the grill.

18. Dr. Beyler's reliance on Todd Willingham's testimony and statements is puzzling because Mr. Willingham gave materially inconsistent accounts of what happened:
 - a. He said he went out the front door. He also said he went out the back door. He said he went out the front door by kicking it in (against the jamb, which would be very difficult to do) and by opening the front door. He also stated he went out the back door, came around the front and kicked the front door in from the outside.
 - b. He says that the front door was on fire when he exited the house. He kicked it in (against the jamb) because it was on fire. But then he says that the door knob was not hot when he touched it to open the door (which seems inconsistent).
 - c. He says he woke up when he heard his 2 year old daughter crying and that he was certain that she was in the other bedroom. He also says he woke up when the 2 year old jumped on his bed and woke him up and that he tried to hold on to her but she ran off.
 - d. He says he tried to go back in the house to rescue the children but the eyewitness accounts do not support it. The eyewitness accounts seem to support the idea that he tried to get to his 2 year old daughter after she was brought out of the house while the fire was about out.
 - e. No one has been able to explain how the 2 year old got out of the bedroom with the child's gate being in place. Mr. Willingham said he stepped over it going into the child's room and he stepped over it coming back out of the child's room. He was certain his 2 year old daughter was in the children's bedroom when the fire started (except when he says she woke him up by jumping on his bed) but her body was found in the master bedroom.
 - f. No one has been able to explain how Mr. Willingham did not sustain injuries to his feet (although his 2 year old daughter did) even though he was in the hall and, according to at least one of the versions of his escape, he kicked the front door down **while it was burning** in order to get out of the house.
 - g. Prior to January 3rd, Mr. Willingham was already telling his mother-in-law that he thought he was going to be blamed for Amber's death because of some unusual marks on her neck. Also, Mr. Willingham told Fireman Crenshaw on or before January 4th that he had overheard people at the funeral

home wondering whether Todd had “done this.”

- h. He says he saw sparks coming out of the electrical outlets, but Assistant Chief Fogg examined the electrical wiring and didn’t find any problems (plus, if the wiring was on fire, the breaker would likely have been tripped – hence no sparks).

OTHER POINTS

- 19. The liquid pour patterns in the front hallway could not have been melted children’s toys because Willingham indicated that the only thing in the front hallway were pictures and decorations.
- 20. Dr. Beyler is critical of the fire investigators because both the Assistant Chief and the Fire Marshal admitted that there were other possible causes of the fire. If any crime, including arson, had to be proven with absolute certainty, criminal convictions could not be obtained. The alternative theories suggested by Dr. Beyler are the sorts of things that fire professionals can readily discount. For example, neither the Assistant Chief nor the Fire Marshal believes that the fire could have been started by Amber, the Willingham’s 2 year daughter. In support of his position, Dr. Beyler notes that cigarette lighters were found in the house. It is not an issue of fire science to decide whether a 2 year old is capable of finding a lighter, and lighting it so that a serious fire results. But, importantly there is no evidence that the lighters were found anywhere near the area where the fire burned or near where the 2 year old child was found. The fire investigators were free to discount that particular theory as being remotely possible, but not likely. The jury could evaluate that evidence. Also, the fire investigators could not completely discount the possibility that an unknown third party ran into the house, unbeknownst to the occupants, and started the fire – either with or without the use of accelerants. However, there is simply no evidence that such a thing occurred and Mr. Willingham refused to cooperate in answering questions on that issue.

The fire investigators discounted the possibility of a natural gas source. The gas to the space heater was in the “off” position and the line was tested for leaks but none were found. Similarly, the fire investigators noted that there were no problems with wiring that could have been a cause of the fire. Assistant Chief Fogg inspected the wiring and didn’t find any problems. Dr. Beyler attempts to make much of the fact that appliances weren’t mentioned. Based on the limited information I have available to me, I am unable to discern if there were appliances located anywhere near the burned area and, if so, what those appliances were. Mr. Willingham didn’t list them

as contents of the room or hallway when he was asked about it. It is reasonable to conclude that the appliances, **if there were any**, were examined at the same time the wiring was examined and it was concluded that an appliance malfunction was not the cause of the fire. Finally, although Mr. Willingham attributed the cause of the fire to “squirrels” in his attic, the investigative reports reveal that the fire never propagated into the attic.

21. Dr. Beyler also mischaracterized much of the actual testimony, for reasons known only to him. For example:
 - a. Assistant Chief Fogg testified that he eliminated all contents of the room as being the cause of the pour patterns that he saw. Dr. Beyler simply ignores that statement.
 - b. Contrary to what Dr. Beyler says on page 44 of his report, Assistant Chief Fogg did not testify that the plastic toys “had not melted.” He testified that “to eliminate the plastic toys melting and running, we looked at the area around the **remains** of the plastic toys to determine whether they had ran and produced [these pour patterns] and we found that they had not.” Obviously, the toys melted and Assistant Chief Fogg determined that the melted plastic did not cause the pour patterns.
 - c. Assistant Chief Fogg didn’t testify that glue only causes puddle patterns once poured on the floor, as Dr. Beyler asserts. In context, his testimony is that the glue was uniformly applied and it was a very thin layer of glue and those two facts caused him to conclude that the burning of the glue wouldn’t have caused the puddle configurations he saw.
 - d. I don’t have the photographs to know exactly what the attorneys and witnesses were talking about, but it appears that Assistant Chief Fogg ruled out the possibility that charcoal fluid could have been spilled on the porch and then migrated under the threshold into the hallway. The testimony seems to describe the house as being a wood frame house with a concrete front porch. Based upon the testimony, there appears to be a significant gap or hole between the front porch and the front door. Any spilled lighter fluid flowing from the front porch would have traveled down between the gap between the concrete and the doorjamb, not into the house. In any event, Assistant Chief Fogg also said he observed water (from fire fighting) on the porch flowing away from the threshold and toward the front of the porch. So the charcoal lighter fluid, if it were spilled, would have flowed away from the

fire, not towards it.

- e. Contrary to Dr. Beyler's statement, Chief Fogg did not opine that latex paint "isn't flammable." The context of the testimony on cross examination is when Assistant Chief Fogg is being questioned as to whether the threshold was painted. He testified he didn't recall seeing any paint on the threshold itself. He was then asked whether paint will burn "off" wood – without actually consuming the wood itself (the threshold didn't burn up). Assistant Chief Fogg testified that an oil based paint could burn or blister and could "burn off" the wood. On the other hand with respect to latex paint (water based paint), Assistant Chief Fogg said he didn't think the paint would burn "off." He doesn't, however, testify that latex paint won't burn or that a wood surface painted with latex paint would not itself burn, which is the impression Dr. Beyler leaves in his report.
- f. On page 33 of his report, Dr. Beyler says that the door between the kitchen and hallway was closed. The trial testimony does not support that conclusion. And, the witness statement given by Todd Willingham suggests the opposite – he said from the kitchen, he could look back down the hallway towards the front door. It is unclear to me where Dr. Beyler gets information that the door between the kitchen and the hallway was closed during the fire. Willingham said he opened it.
- g. Dr. Beyler says on page 36 of his report that Todd Willingham was restrained from reentering his home. That is not exactly what the witnesses said. On balance, it appears that witnesses described that Mr. Willingham had to be restrained from going to his 2 year old daughter when they brought her out as the fire was being extinguished. Prior to that time, several witnesses appear to have encouraged Mr. Willingham to reenter the home before the smoke and flames got very bad, but he wouldn't do it.
- h. Dr. Beyler says that an arriving witness noted low fire on the porch between the door and the window. Dr. Beyler is unclear about whether the witness was referring to the child's bedroom window or the window from the living room onto the porch. In context, the low fire and smoke were probably coming from underneath the window to the children's room. It doesn't appear from the materials I have reviewed that the front living room was ever fully involved.
- i. On page 38, Dr. Beyler says Mr. Willingham heard a loud crash while he was

on the porch and Mr. Willingham thought it was the ceiling fan falling from the children's bedroom ceiling. Mr. Willingham did not list a ceiling fan as being one of the contents of the child's bedroom and he doesn't mention it in his written statements. In one of his statements, he was asked to list the contents of the room and he did not list the ceiling fan or any other appliances. Also, Assistant Chief Fogg has said there was no ceiling fan. And, it is highly unlikely that the ceiling fan would actually be in use (to be a fire source, it needed to be on) in a drafty wood frame house in December. According to an Internet site, the temperature in Corsicana at 9:00 a.m. that day was around 50° Fahrenheit. Also, Mr. Willingham said the fire in the children's room was high on the south wall and ceiling, not in the center of the room where a ceiling fan would be located, if it existed.

- j. On page 41 of his report, Dr. Beyler is critical of Vasquez for not ruling out gas or the space heaters as being a potential cause of the fire. During the trial, it was established that Assistant Chief Fogg ruled out gas and the gas heaters on the day of the fire. So, Dr. Beyler's criticism of Fire Marshal Vasquez really is that he didn't say he was relying upon Assistant Chief Fogg's inspection of the scene on the day of the fire. The gas to the space heater in the children's bedroom was "off" and the line was later tested for leaks, with none being found.
- k. On page 42 of his report, Dr. Beyler is critical of Fire Marshal Vasquez for not being aware that there was a charcoal grill on the front porch at the time of the fire "that was moved away during operations by the fire department." There is no evidence in the trial record that the grill was moved away. The only testimonial reference to the grill is that it was behind a fireman in a picture and turned upside down. I don't have the picture so I don't know where the grill was located, but there is no evidence that the grill was moved during the fire fighting operations.
- l. On page 45 of his report, Dr. Beyler is critical of Assistant Chief Fogg for not mentioning or examining any electrical appliance or the ceiling fan in the children's bedroom. No electrical appliances were identified in Mr. Willingham's description of the contents of the room. And, as mentioned above, no ceiling fan was listed either and none was found by Assistant Chief Fogg. There was no evidence at trial that the ceiling fan ever existed. Assistant Chief Fogg said he went through all the contents of the room. Plus, according to Tod Willingham, the fire was on the south wall and ceiling, not in the center of the room where a ceiling fan would be found. To be a fire

source, the fan would have to be “on” which is not likely on a 50° December day.

- m. Dr. Beyler is critical of Assistant Chief Fogg for not taking samples of the concrete for analysis and for further testing. Perhaps he should have.
- n. Dr. Beyler incorrectly states that there was evidence that the charcoal lighter would have been used routinely on the porch to ignite a grill. There was no testimony regarding the use of the charcoal grill on the front porch, if it ever was used. The only mention of grilling is in a hypothetical question posed by defense counsel about the fact that “someone could have been barbecuing.” Dr. Beyler makes it sound as though there was evidence in the trial record that the Willingham’s regularly barbecued on the front porch using their charcoal grill. There is no such evidence in the record.
- o. Dr. Beyler also implies on page 46 that a spill of charcoal lighter fluid on the concrete front porch could account for the presence of lighter fluid under the threshold in the house. The testimony regarding the slope of the porch (away from the front door) and the fact that there was a hole or crack separating the concrete porch from the front door appears to rule out that possibility.
- p. Dr. Beyler is critical of Assistant Chief Fogg because he could not rule out evidence that an outsider was the one who started the fire. There was no evidence that an unknown third party was the cause of the fire and, in his statement, Mr. Willingham refused to cooperate in identifying people who could testify about that.
- q. Also, Dr. Beyler is critical of Assistant Chief Fogg for not completely ruling out the hypothesis that Amber could have started the fire. Assistant Chief Fogg said that it is a remote possibility. But the notion that she started the fire doesn’t appear to be supported by the facts. No lighters were found near Amber or near where the severely burned areas were found. And, exactly where Amber was before and during the fire is open to a great deal of speculation. Mr. Willingham was sure she was in the twins’ bedroom, sleeping when he went back to bed. Later, she was found in his bed even though there was a child’s gate blocking exit from her bedroom. Hypothesizing that a 2 year old child did start the fire simply requires the assumption of too many facts that have no basis in the trial record.
- r. Once again, Dr. Beyler is critical of Assistant Chief Fogg for allegedly

testifying that the toys in the children's bedroom had not melted. As described above, that was not Assistant Chief Fogg's testimony at all. Dr. Beyler grossly distorts Assistant Chief Fogg's testimony.

- s. Dr. Beyler is critical of Assistant Chief Fogg for allegedly testifying that glue could not have thermally decomposed without direct access to air. That is not what Chief Fogg said. He testified that the glue wouldn't **burn** in the absence of air. Thermal decomposition wasn't mentioned.
 - t. Again, on page 47, Dr. Beyler asserts that Assistant Chief Fogg testified that water based paints are not flammable. That is a gross distortion of what he said. As mentioned above, what he said was that the latex will not burn "off" of wood, leaving the wood unburned itself. In that series of questions, the defense attorney appears to be attempting to establish that the threshold may have been painted and that fire had "burned off" the paint. Assistant Chief Fogg simply testified that he didn't know if the threshold had ever been painted. Oil based paint can burn "off" a piece of wood but that would not happen with a water based paint. That makes sense because with water based paint, the paint is actually absorbed into the wood. The painted wood would burn, but the paint would not burn "off" the wood and leave the wood charred or unburned.
22. Dr. Beyler suggests that the fire may have started in the bedroom, growing to involve the hallway. Dr. Beyler doesn't offer any support for why the fire turned right, rather than left, if it started in the front bedroom. The presence of an accelerant in the hallway is certainly some explanation as to why the fire, if it did start in the bedroom, turned right rather than left when it entered the hallway. Traces of an accelerant were found in the front door area, under the threshold. And, according to Todd Willingham, there was fire in the hallway before he opened the front door. The front door was on fire. So, the fire had already turned right into the hallway before the front door was opened. And, Mr. Willingham said he had already opened the hallway door into the kitchen. Why did the fire turn right and not left, or not burn in both directions?
23. If I had the video tapes and pictures I could offer more insight into the cause or causes of the pool or puddle configurations and the trailers identified in a diagram on p. 34 of Dr. Beyler's report. At this point, I have a hard time concluding that a flash over could have caused what is described on the diagram. And, I have doubts about whether a flash over could have caused the fire and damage to the floor of the hallway. The firefighters said the floor was burning when they entered the house

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which is unusual. Fire burns up, not down. I also would be interested in seeing what the ceiling looked like in the hallway and the bedroom. I don't know what the ceiling was made of or whether pieces of burning ceiling could have dropped to the floor and caused patterns on the diagram. The use of an accelerant would explain the findings on the diagram and the path of the fire.

While I understand the job the Texas Forensics Science Commission has to do, I hope you will appreciate the difficulty I had in trying to comment upon an event that happened eighteen years ago, without having access to the physical evidence, the audio and video tapes and the photographs. It would also have been especially helpful to be able to question Fire Marshal Vasquez to better understand some of the things he said and why he said them. It would also have been helpful to have access to all of the test results from the samples taken in the front bedroom and front hallway. The only one mentioned in detail in the trial record is the sample taken near the threshold. I don't know if it is possible or not, but it might be worthwhile to try to determine whether the samples from the hallway and the front bedroom are still existence, and if so, apply 2009 testing techniques to those samples. Perhaps newer testing methods might provide additional information which would be helpful.

In summary, I hope the foregoing comments have been helpful. I encourage the Commission to read the trial testimony and police report (with witness statements) to establish the actual testimony. Please keep in mind that I did not have access to the tapes, photos or physical evidence and that my responses are based upon a reading of Dr. Beyler's report, the police report and file and the trial testimony.

Very truly yours,

A handwritten signature in black ink, appearing to read "Donald McMullan", with a stylized flourish at the end.

Donald McMullan, Fire Chief
City of Corsicana