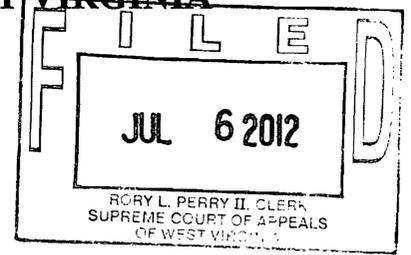


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 11-1445



**RONALD C. DAVIS,**  
PETITIONER,

V.

**STATE OF WEST VIRGINIA,**  
RESPONDENT.

Appeal from a final order  
of the Circuit Court of Jackson  
County (10-F-89)

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**PETITIONER'S BRIEF**

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## ASSIGNMENTS OF ERROR

1. THE MAGISTRATE COURT DENIED THE DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE MAGISTRATE REPEATEDLY SUSTAINED OBJECTIONS MADE TO THE DEFENDANT'S ATTEMPT TO PROPERLY INVESTIGATE THE STATE'S CASE DURING THE PRELIMINARY HEARING;
2. THE TRIAL COURT ERRED IN FAILING TO STRIKE THE TESTIMONY OF STATE WITNESS, ALVIN TURNER, AFTER MR. TURNER TESTIFIED THAT HE COULD NOT TELL WHETHER THE ALLEGED STATEMENTS ATTRIBUTED TO THE DEFENDANT WERE DIRECTED TO THE VICTIM, CATHY PARSONS, AND NOT SOME OTHER INDIVIDUAL;
3. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ALLOW THE DEFENDANT TO PRESENT TO THE JURY THE TAPED CONVERSATIONS BETWEEN THE DEFENDANT AND THE VICTIM, CATHY PARSONS, TO:
  - A. IMPEACH/REBUT/CONTRADICT THE TESTIMONY OF STATE WITNESSES ELTINA PARSONS HARPER AND ALLEN MICHAEL HARPER;
  - B. SHOW THAT ELTINA HARPER, THE ALLEGED EYEWITNESS, HAD A BIAS AGAINST THE DEFENDANT BY HAVING AN INTEREST IN THE ALLEGED VICTIM'S PROPERTY;
  - C. TO DEMONSTRATE THAT ELTINA PARSONS HARPER AND ALLEN MICHAEL HARPER HAD A MOTIVE FOR WANTING THE VICTIM DEAD;
4. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A MISTRIAL AFTER THE PROSECUTING ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT BY PROVIDING THE WITNESS WITH AN INCORRECT SUMMARY OF THE WITNESS' STATEMENT THAT HE PROVIDED TO THE POLICE, RESULTING IN PREJUDICIAL, FALSE TESTIMONY THAT WAS IMPOSSIBLE TO BE REMEDIED;
5. THE TRIAL COURT ERRED BY NOT SUPPRESSING THE DEFENDANT'S STATEMENT TO MEMBERS OF THE JACKSON COUNTY SHERIFF'S DEPARTMENT WHEN SUCH STATEMENTS WERE TAKEN IN VIOLATION OF THE DEFENDANT'S MIRANDA RIGHTS;
6. THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS THE STATE'S CASE ON GROUNDS OF SPOILIATION OF EVIDENCE WHEN THE SCENE WAS RAZED WITHIN DAYS OF THE FIRE;
7. THE COURT ERRED BY NOT GIVING THE JURY AN *OSAKALUMI* INSTRUCTION WHEN IT WAS BROUGHT TO LIGHT THAT THE STATE OF WEST VIRGINIA RAZED THE FIRE SCENE;

**8. THE LOWER COURT ERRED IN FORCING THE DEFENDANT TO CHOOSE WHETHER OR NOT HE WAS GOING TO TESTIFY PRIOR TO RULING UPON WHETHER THE DEFENDANT WOULD BE GRANTED A CONTINUANCE BASED UPON THE UNAVAILABILITY OF AN EXPERT WITNESS UNTIL THE FOLLOWING DAY OF TRIAL**

**STATEMENT OF THE CASE**

This is the Defendant, Ronald C. Davis's appeal from the Jackson County Circuit Court where, on the 8<sup>th</sup> day of September, 2011, a petit jury found that Ronald C. Davis was guilty of First Degree Murder and First Degree Arson.

On or about October 27, 2010, Ronald C. Davis was indicted on the charges of First Degree Murder and First Degree Arson resulting from a fire that took place on First Creek Road in Jackson County, West Virginia on the 23<sup>rd</sup> day of September, 2010, at the residence of Ronald Davis and his significant other and cohabitant, Cathy Parsons, who died as a result of the fire. The State of West Virginia asserted throughout the trial of this matter that Mr. Davis intentionally set the residence ablaze with the intention of killing Cathy Parsons. The Defendant, Ronald Davis, asserted that he had no knowledge as to the cause of the fire and that he would never intend to harm a woman for whom he cared so deeply. The Defendant, Ronald Davis, further contended that his ability to defend this matter was monumentally impaired by actions taken by agents of the State of West Virginia that resulted in the total destruction of the fire scene prior to any opportunity the Defendant might have had to employ investigators to survey the scene and deduce the true cause of the fire that took the life of his loved one.

Following seven (7) days of testimony, the jury returned guilty verdicts on the First Degree Murder and First Degree Arson charges. Ronald Davis received life without eligibility for parole for the First Degree Murder conviction and the maximum sentence of twenty (20) years imprisonment for the First Degree Arson charge to run consecutive to the murder sentence.

## SUMMARY OF ARGUMENT

Ronald C. Davis, or “Ronnie,” was the victim of a trifecta of mistakes made by the lower court regarding evidence in the trial that resulted in his convictions. The jury empanelled by the Circuit Court of Jackson County, West Virginia, no doubt, found Ronald C. Davis guilty of First Degree Murder and Arson, but they did so having been privy to evidence that was prejudicially biased against Mr. Davis and unfairly provided to them for their consideration. Evidence that was available to Mr. Davis that was pertinent to his theory of the case and relevant to the issues at hand was improperly excluded by the lower court. Finally, potential evidence that **could** have been used in Mr. Davis’s defense was destroyed with the permission of agents of the State of West Virginia before Mr. Davis could have it independently examined and without notice to him or his attorney. The lower court failed to give the jury the proper jury instructions in order to remedy an act that was both a statutory violation of a duty imposed upon fire investigators (as NFPA 921 has been adopted by the State of West Virginia as statute) and a travesty against justice and the due process clause. On top of all of the evidentiary issues that ultimately resulted in what was clearly an unfair trial of Ronald Davis, the Petitioner was crippled in his case from the onset when the Magistrate Court denied the Petitioner effective assistance of counsel by repeatedly sustaining objections made to the Petitioner’s attempt to properly investigate the State’s case during the preliminary hearing of this matter.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Your Petitioner asserts that oral argument in this matter is required by law under Rule 19. This Honorable Court may determine, in its discretion, that certain issues set forth herein qualify for Rule 20 oral argument as certain grounds herein have been asserted by the Petitioner to be that of first impression to this Court.

## ARGUMENT

### **1. THE MAGISTRATE COURT DENIED THE DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE MAGISTRATE REPEATEDLY SUSTAINED OBJECTIONS MADE TO THE DEFENDANT'S ATTEMPT TO PROPERLY INVESTIGATE THE STATE'S CASE DURING THE PRELIMINARY HEARING;**

From the onset of this matter, Ronnie Davis was determined to be guilty by the State of West Virginia and never had the opportunity to receive a fair trial. The State of West Virginia denied Mr. Davis the right to confront witnesses against him and to the effective assistance of counsel. During the preliminary hearing in this case, the State of West Virginia continuously objected to defense counsel's questioning of the State's witnesses in an effort to preserve testimony. The Petitioner was hindered from that point on from having a fair and complete trial. The United States Supreme Court states in *Coleman et al. vs. Alabama*, "plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead a magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at trial, or preserve testimony favorable to the accused who does not appear at trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet the case at trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Coleman et al. vs. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L.Ed. 2d 387 at 397. Defense counsel in this case attempted to ask pertinent questions as to the crime scene in this matter at the preliminary hearing upon learning it had been bulldozed to the ground:

Q. Did you at some point determine that this was in fact a crime scene?

A. Yes.

Q. When was that determination made by you—

PROSECUTOR: Your Honor, I'm going to object to this line of questioning at this point in time. I mean, this is a probable cause hearing, not for the purposes delving into issues of, you know, whether a crime scene was properly handled or anything of that nature. That's all for a later date.

DEFENSE COUNSEL: Your Honor, in response to that, there's a couple issues I have; first is while this certainly is a probable cause hearing and whether or not the officer believed a crime would be committed is certainly relevant to that finding. In addition, Your Honor, testimony, if the Court will allow me to elicit, is that crime scene has now been destroyed. That crime scene was destroyed actually the day after we were appointed and is no longer available to the defendant to interview, look at or do anything with, Your Honor, so I'd ask the Court certainly for some leeway since the crime scene has been bulldozed.

MAGISTRATE CASTO: Those might be issues for a later date so sustained.

(A.R. 17-18)

Later, counsel attempted to solicit information the State wished to secret:

Q. It's true, isn't it, that the scene of this fire has been bulldozed?

A. It is.

Q. That happened on Tuesday --

PROSECUTOR: Your Honor, I mean, we've been down this road once. It's the exact same question he tried to ask during the direct or during early in cross, excuse me, and we objected then. Your Honor sustained us.

MAGISTRATE CASTO: Sustained once again.

(A.R. 21)

And later:

Q. Have you received a report of any type, whether oral or written, from Mr. Baltic concerning --

PROSECUTOR: Your Honor, can I state that at his point --

DEFENSE COUNSEL: Can I ask the question first, your Honor? That might be appropriate.

Q. Did you receive any, whether oral or written, communication from Mr. Baltic concerning his belief in the cause of the fire?

PROSECUTOR: Now I'm going to object because he's trying to get into discovery at this point in time.

DEFENSE COUNSEL: We're here on an arson charge, so what caused the fire is pretty important as to the probable cause determination. If the cause of the fire was not arson, that's directly related to the probable cause determination whether this arson charge stands or whether even the murder charge stands.

If this officer has evidence to believe or has been told that the cause of this fire is undetermined or not arson, that's directly relevant to probable cause, Your Honor.

PROSECUTOR: Your Honor, we're going to be presenting a witness that's going to be talking about the issue.

MAGISTRATE CASTO: I was getting ready to say Mr. Baltic is here.

PROSECUTOR: We're going to do even better than that. We're going to present a witness who actually saw the defendant on the porch when the flames went up, so that's a direct, that's direct evidence that the defendant was involved in arson.

MAGISTRATE CASTO: Okay. Your objection is sustained. Continue please.  
(A.R. 24-15)

And again:

Q. Now, are there any manuals or anything like that you rely on during your investigations?

PROSECUTOR: Your Honor, I'm going to object to his line of questioning. He's trying to get into Mr. Baltic's background and really just discover about what his training is and that sort of thing and I just don't think it's relevant to a probable cause hearing.

DEFENSE COUNSEL: Your Honor, I learned to assume over the years simply because someone has a particular job title doesn't necessarily mean they're particularly qualified to that, Your Honor. If Mr. Baltic certainly weren't qualified, that would be directly related to probable cause, Your Honor.

PROSECUTOR: Your Honor, I called the witnesses who directly saw what happened. I didn't call Mr. Baltic. I mean, whether he's been to this school or that school really doesn't have anything to do with whether Ron Davis sat outside in from [sic] of that fire and lit the gasoline that blew up over his head.

DEFENSE COUNSEL: Your Honor, that's simply the State's contention. This is a probable cause hearing and certainly Mr. Davis has the presumption of innocence. At this point he's not been found guilty of anything, Your Honor, so I directly take contention with what the State's characterization at that point is that has not been proved and certainly isn't going to be proved here today, Your Honor.

MAGISTRATE CASTO: Okay. I think you've asked several questions at this point as to what his qualifications are as fire marshal. I don't see any reason for you to be trying to lay any kind of foundation for an expert witness or anything like that so, I mean, I think that at this point you might be able to move on.

(A.R. 56-57)

And finally:

Q. Did you take any samples at that time of evidence?

A. Yes.

PROSECUTOR: Your Honor, I'm going to object to this line of questioning. I think the defendant's getting into just discovery issues at this point in time rather than the issues that are the probable cause issue before the Court.

DEFENSE COUNSEL: I'd like to reiterate for the Court Your Honor, that the crime scene has been destroyed. We have no way of testing anything, Your Honor, so it's very important at this time to question the officers while the events are fresh in their mind so we can get some sort of a picture as to what that crime scene may look like.

To not allow this questioning would be foregoing some of that and I think that's prudent at this point considering the fire scene has been destroyed.

PROSECUTOR: By his admission, he's basically saying we're trying, that he's trying to raise an issue that would be properly raised at the motion stage for the circuit court.

DEFENSE COUNSEL: Seems to me the State would be just as interested in preserving as much evidence and as much testimony as possible considering we no longer have the scene, however, if they don't want me to do that, Your Honor.

PROSECUTOR: It's a probable cause hearing. The State's not trying to preserve any evidence at all. The State's trying to follow the West Virginia rules of criminal procedure that say it's a probable cause hearing and discovery is limited.

MAGISTRATE CASTO: Objection is sustained. Continue please. (A.R. 63-64)

Each time counsel for the defendant tried to do his job effectively under *Coleman*, the State of West Virginia thwarted it through objection sustained by the magistrate. *Coleman* outlines the purpose and effective assistance of counsel in preliminary hearings. The State objected any time the defendant attempted to delve into area dealing with the destruction of the crime scene in this case, the qualifications and training of the officer investigating the case, and the type and nature of evidence gathered by the State. The Petitioner was denied his right to confront the witnesses against him at a critical stage of this proceeding, thus denying him the ability to gather fresh information from witnesses where the crime scene was destroyed by permission of the State. He could not get a fair trial after having been biased at the first stage of when he is supposed to be afforded due process. Counsel's greatest investigative tools, cross-examination and confrontation, were routinely denied the defendant rendering his counsel ineffective and denying him due process of law.

**2. THE TRIAL COURT ERRED IN FAILING TO STRIKE THE TESTIMONY OF STATE WITNESS, ALVIN TURNER, AFTER MR. TURNER TESTIFIED THAT HE COULD NOT TELL WHETHER THE ALLEGED STATEMENTS ATTRIBUTED TO THE DEFENDANT WERE DIRECTED TO THE VICTIM, CATHY PARSONS, AND NOT SOME OTHER INDIVIDUAL**

Alvin Turner was an inmate with Ronald Davis at Huttonsville, from where Mr. Davis was released approximately four (4) weeks prior to the events that gave rise to the instant action. The State called Mr. Turner to testify about a conversation that he overheard between Ronald Davis and a third party (approximately two (2) weeks prior to Mr. Davis's release and six (6)

weeks prior to Ms. Parsons' death) in which he alleges that Mr. Davis stated, "Well, I'll kill the bitch and burn her house down." (A.R. 1099)

Although there was an unsuccessful pre-trial motion by the defense to suppress the testimony on other grounds, the defense moved to strike the witness's testimony based upon its prejudicial nature when, during cross examination, defense counsel asked Mr. Turner if he had "just heard that he wanted to kill a woman that's his wife?" and Mr. Turner responded, "He didn't say 'wife;' he just said that he was going to kill the bitch and burn her house down. I didn't know who he was talking about." (A.R. 1103)

The State's position was that there was a temporal proximity that made the statement relevant, despite the fact that the witness couldn't identify about whom the comment was made. The prejudicial nature of the statement relayed by the witness far outweighs the probative value when there is no identification attached. The lower court clearly struggled with the admissibility of the testimony and it simply landed on the wrong side of the fence.

The Court reasoned as follows,

"I want to make a ruling. You have to look at—in terms of admissibility of Alvin Turner's testimony, you have to look at the whole body of evidence that is before the jury. You will recall that the testimony of Christine Roth, who testified just over an hour or so ago, was that in July, 2006, the defendant made direct threats against the victim, Cathy; stated he was going to kill her, he wanted to burn her, she was a witch.

There is testimony from Harper, the first witness, that the defendant said when the fire got started and Turner approached him on a couple occasions, he laughed and said something to the effect that, 'I burned the bitch alive,' or something to that effect.

The defendant was in Huttonsville Correctional Center, certainly from 2006 until his release. According to some evidence here, it was approximately 30 days before the event in September of 2010. According to the witness Alvin Turner, the statement that he heard was made a couple of weeks before the defendant was discharged, which would be, give or take, approximately six weeks before the death of Cathy Parsons.

The threat that Turner had, it wasn't a generalized threat. It was pretty specific. It was, first, that he was going to kill the bitch, and second, burn her house down. And so we know he's talking about a female, and we know he's making another threat to burn her, burn her up, burn her house down.

So if you look at what Turner testified to in a vacuum, the defense argument is much better. It's a generalized, unidentified threat, but when you start adding the fact that it follows a similar threat made while during the same period of incarceration and it precedes by six weeks the death of Cathy Parsons.

According to the State's theory, of course, he was – the defendant committed arson and burned the house and killed her as a result of that.

Now the Court is going to deny the motion for mistrial, deny the motion to strike the testimony of the witness for a couple of reasons. I think it, by the narrowest of margins, meets the test of admissibility in terms of connection between the threat and the victim, Cathy Parsons.

Of more significance to this judge, however, is the fact that no objection was made to the testimony until it was completed and the jury and the defendant were gone. And there was no element of surprise with this testimony because the man's testimony is entirely consistent in this regard with the pretrial statement that he gave to Officer Faber, which was disclosed to the defendant, and the defendant knew all along -- or defendant's lawyers knew all along, and during the man's testimony, the defense counsel knew that Turner was unable to say who the defendant was referring to in this threat that he heard six weeks before the death of Cathy Parsons.

So I think there's a significant waiver involved here. Counsel have a duty to object to testimony that they know is inadmissible. It was suggested that that was raised pretrial, but I don't remember anything like that. I don't remember, you know, objection on the basis that it wasn't relevant because it didn't connect the threat with the victim, Cathy Parsons. And I don't think that was in the pretrial motion, and clearly, no such motion was made before, during, or after until after Turner testified. So I consider that waived. And I also believe that – as I said, that although there is some concern to me about the admissibility of it, I think that it is admissible.” (A.R. 1117-1120)

The Court's reasoning is flawed because the testimony is either admissible as being more probative than prejudicial or it is not. The Court used a statement that was allegedly made four (4) years prior to “connect” the threat and make it relevant. It is the Court's duty to filter what is inadmissible away from the jury, regardless of when the issue comes to rise. By permitting the testimony to go to the jury as a threat against Cathy Parsons, there having been no identification as to whom the threat was against, the Court committed reversible error.

**3. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ALLOW THE DEFENDANT TO PRESENT TO THE JURY THE TAPED CONVERSATIONS BETWEEN THE DEFENDANT AND THE VICTIM, CATHY PARSONS, TO:**

**A. IMPEACH/CONTRADICT THE TESTIMONY OF STATE WITNESSES ELTINA PARSONS HARPER AND ALLEN MICHAEL HARPER;**

- B. SHOW THAT ELTINA HARPER, THE ALLEGED EYEWITNESS, HAD A BIAS AGAINST THE DEFENDANT BY HAVING AN INTEREST IN THE ALLEGED VICTIM'S PROPERTY;**
- C. TO DEMONSTRATE THAT ELTINA PARSONS HARPER AND ALLEN MICHAEL HARPER HAD A MOTIVE FOR WANTING THE VICTIM DEAD;**

There is a simple fact that must be acknowledged. Your Petitioner, Ronnie Davis, contends and has always contended that he did not start the fire that killed Cathy Parsons. The State presented witnesses that contend that the fire was incendiary in nature and were permitted to testify to such in front of the jury that convicted the Petitioner. Because Ronnie Davis is forced to believe what the State of West Virginia sets forth (as agents for the State permitted the fire scene to be destroyed before Mr. Davis or his agents had an opportunity to investigate the same), he is placed in the position of having to believe that someone else started the fire, since it wasn't him.

In that same vein Ronnie Davis, knowing that he did not start the fire that killed Cathy Parsons, must look to the most likely culprits. Only two witnesses claimed to have seen Ronnie Davis coming off of the porch when the fire started: Eltina Parsons Harper and Allen Michael Harper. Eltina Harper testified that she actually saw the Petitioner light the porch on fire. (A.R. 1143) Since Ronnie Davis asserts that he did no such act, he is inherently saying that Eltina Harper is lying. What motivation would she have for lying other than to transfer blame?

In asserting his innocence, your Petitioner (again, based upon the fact that someone committing arson is the only available theory as the site was destroyed) is forced to assert that someone else had a motive for wanting Cathy Parsons dead.

Ronnie Davis had multiple conversations with the Cathy Parsons immediately prior to his release from Huttonsville in August, 2010. Many of them were concerning the debilitated state of Cathy Parsons' trailer. In fact, when asked, "Wasn't the trailer in, actually, pretty rough

condition whenever you left it and Cathy moved in?" Allen Michael Harper replied, "No, it was not." (A.R. 673) During direct examination, Mr. Harper talked about all of the things that he had fixed in Cathy Parsons' trailer. (A.R. 638-641) The telephone conversation that Cathy Parsons had with Ronnie Davis approximately three (3) weeks before he was released from prison painted a different picture.

Cathy: The windows is broke in it and there's holes in the floors, not big holes, little holes in the floor. I got to fix that. They got holes in the paneling. They was very disrespectful to it.

Ronnie: How in the hell did they knock the windows out?

Cathy: The little one throwing stuff.

Ronnie: Huh?

Cathy: Throwing stuff; kids throwing stuff.

Ronnie: Yeah, you talking about in the end of the trailer?

Cathy: No. I'm talking about all in the trailer. There's kitchen windows broke out, living room windows broke out, and in the bedrooms there's some broke out in the bedrooms, two of the bedrooms. They just destroyed. If I knew that I would have never let them live here. (A.R. 2377)

About two weeks before Ronnie Davis's release, the conversation went like this:

Cathy: Get your money started before you get in a house. I don't even got a kitchen table. They tore my kitchen table up and two of my chairs.

Ronnie: What?

Cathy: Hauled them off for John.

Ronnie: What?

Cathy: My kitchen table?

Ronnie: Yeah?

Cathy: They hauled it off for John because it's a metal table?

Ronnie: Yeah?

Cathy: And they hauled it off for John, claimed it tore up. Now he could...

Operator: Sixty seconds remaining.

Ronnie: What about...?

Cathy: How could a kitchen table tear up and it just sat in there.

Ronnie: Yeah? Well, happened to your table, kitchen table? You had it?

Cathy: Well, it collapsed too. They destroyed it when I've left that.

Ronnie: So you ain't got no kitchen table?

Cathy: No, I don't.

Ronnie: Well, that's crazy as hell. We'll get one, I guess. Get out. Well, it sounds to me like the done tore the fucking place down.

Cathy: They did. You wait till you see it. They destroyed it. I'm telling you, they tore the doors off my kitchen cabinets.

(A.R. 2390)

A substantial portion of both Allen Michael Harper and Eltina Harper's testimony was directed at how they had cared for Eltina's mother and how Mike had fixed up the trailer while he was there, fixing the paneling and the floors. Both Mr. and Mrs. Harper denied that Cathy Parsons had any issue with them wanting her property or the location of where they put their trailer, but Cathy Parsons apparently thought differently, and conveyed the same to Ronnie:

**Cathy:** Shit, I ain't moving to town. \_\_\_\_\_ get this this was my first home I had \_\_\_\_\_. I paid for this home. It's a just needs refloored and stuff \_\_\_\_\_ fixing it. Other than that it's fine. Still \_\_\_\_\_ now I got to help \_\_\_\_\_ they destroyed my \_\_\_\_\_ it got in this shape because of Raymond, when they lived here. They could have repaired it. Like I told the kids not nobody getting nothing from me until I'm dead and gone because Tina is wanting this up here \_\_\_\_\_ give or take \_\_\_\_\_. I told her long time she is knowing it's not hers. Now she is going around and sell it.

**Ronnie:** Oh yeah. \_\_\_\_\_ don't want to help herself.

**Cathy:** Right, I just learned to tell them no.

**Ronnie:** Well, yea.

**Cathy:** Well, when I talk to her she put the trailer \_\_\_\_\_ down in the yard. I'll be damned if she didn't put the thing right in the front yard and \_\_\_\_\_.

**Ronnie:** Yea that's crazy to put the trailer like that.

**Cathy:** Yea and my \_\_\_\_\_ face directly over top of it.

**Ronnie:** Does it?

**Cathy:** Yea, it does. Power company telling me for best interest to move it because in the winter when the ice storms come it will break the electric line off and it could cause damage if not death. (A.R. 2396-2397)

The Massachusetts Supreme Court rightfully held that, "The defendant has a constitutional right to present evidence that another may have committed the crime." See *Commonwealth v. Jewett*, 392 Mass. 558, 562 (1984). "A defendant may introduce evidence that tends to show that another person committed the crime or had motive, intent, and opportunity to commit it." *Commonwealth v. Lawrence*, 404 Mass. 378, 387 (1989) quoting *Commonwealth v. Harris*, 395 Mass. 296, 300 (1985). The Petitioner can acknowledge that if not for the extenuating circumstances, such a basis for the admission of the above-referenced telephone

conversations might be stretching relevancy. However, it must be acknowledged that the Petitioner is stuck with the state's theory and he should have been given ample leeway to present his case as a result of the same. Even if not presented for motive, the first two conversations clearly should have been relevant for the purposes of impeachment of the testimony of Michael Allen Harper who painted the picture that all was well with the trailer when Cathy Parsons moved back in and they had no issues regarding the placement of the trailer and the Petitioner should have been permitted to publish them to the jury for such purpose.

**4. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A MISTRIAL AFTER THE PROSECUTING ATTORNEY PROVIDED THE WITNESS WITH AN INCORRECT SUMMARY OF THE WITNESS' STATEMENT THAT HE PROVIDED TO THE POLICE, RESULTING IN PREJUDICIAL, FALSE TESTIMONY THAT WAS IMPOSSIBLE TO BE REMEDIED WITH INSTRUCTIONS**

James Parsons, the nephew of Cathy Parsons, testified during direct examination by the State that at some point during the chaos that was the trailer fire that he asked Ronald Davis where Cathy was and that he responded, "She's out here." (A.R. 1298-1299) Immediately after that, James Parsons testified that sometime after Mr. Davis indicated that Cathy Parsons was out of the house, James overheard Ronnie telling Mike Harper that "she was—she—something like—something like, um , ' I burned her alive' or something -- something in that category there. I overheard that go to – from Mr. Davis to Mike Harper." (A.R. 1299)

Defense counsel asked James Parsons to repeat what he had testified in direct examination to having overheard Mr. Davis say to Mike Harper and James Parsons replied that he had heard Ronnie Davis say "That she was burning alive." (A.R. 1312)

While the court took a brief recess to allow defense counsel to cue up Mr. Parsons' recorded statement for the purposes of impeachment as to having been inconsistent with his

testimony and upon return from the break it became obvious as to why Mr. Parsons testified that he had directly heard Mr. Davis say that “she was burning alive.”

The prosecution had prepared an outline to prepare their witnesses and through a “cut and paste” error (A.R. 1322), had included in James Parsons’ outline that he had personally heard Ronnie Davis respond to Mike Harper that Cathy Parsons “was burning alive” and that he “burned her alive.” Because Mr. Parsons cannot read, an assistant in the Prosecuting Attorney’s office, Megan Shockey, read the summary of his statement to him so that he would be prepared to testify and, in doing so, informed him that he had overheard those statements made directly. Thus, James Parsons testified that he had. During the break, James Parsons, realizing that they were getting ready to play his recorded statements, informed the Assistant Prosecutor that he did not overhear a statement to that effect given by Ronnie Davis and even used the word “hearsay.” The Assistant Prosecutor then informed the Court and the Court immediately conducted an interview with Mr. Parsons outside of the presence of the jury in which he reaffirmed what had happened. It then became clear that James Parsons had merely heard other family members say that they had heard Ronnie Davis say that he “burned her alive.” (A.R. 1317-1335)

The Court erred in not granting a mistrial upon defense counsel’s motion and, instead, put it upon counsel for the defense to clean it up on further cross-examination. (A.R. 1346-1351 & 1377) The Court further determined that it could remedy the situation with hearsay instructions that informed the jury that, after James Parsons acknowledged during further cross-examination that he did not, in fact, hear Ronnie Davis say those words directly so his testimony should be disregarded. (A.R. 1377, 1380) The damage was done. The Court didn’t take into account that in the witness’s testimony, he followed up his adopted statement with the following:

JAMES PARSONS: Mr. Davis was acting like it wasn’t no big deal. I mean, he actually walked over, and there was a slight bank. You’ve seen it – you seen it there from the

pictures. Well, in front of the trailer where the trailer sits, there was a slight bank there....And Mr. Davis had walked over there and squatted down and started whittling with a pocket knife. And you know, everybody was -- everybody had done tried to get Cathy out of the trailer. And the whole time while everybody was trying to get her out of the trailer, Mr. Davis sat on the bank, sat on the hill bank, whittling with a pocket knife.” (A.R. 1299)

The jury had already heard Mr. Parsons comment that he had heard Mr. Davis say that he had burned Cathy alive and then associated that mental picture with Mr. Davis whittling away. This was left for the jury to ponder over while the Court conducted two interviews outside of the presence of the jury and straightened the issue out with the Assistant Prosecutor. There is simply no way to erase that prejudicial image despite the efforts to do so and the only fair outcome would have been to declare a mistrial.

The State was permitted to effectively bolster another witness’s statement with improper testimony resulting from their own mistake and the Court, allowing them to do so, committed reversible error.

**5. THE TRIAL COURT ERRED BY NOT SUPPRESSING THE DEFENDANT’S STATEMENT TO MEMBERS OF THE JACKSON COUNTY SHERIFF’S DEPARTMENT WHEN SUCH STATEMENTS WERE TAKEN IN VIOLATION OF THE DEFENDANT’S MIRANDA RIGHTS**

This Court reviews questions of law and a trial court’s ultimate conclusion as to law enforcement action de novo. *State v. Lilly*, 194 W.Va. 595; 461 S.E. 2d 101 (1995). The trial court erred when it failed to suppress the Petitioner’s statement to members of the Jackson County Sheriff’s Department when said members utilized the “two stage” or “question first” interrogation procedure, in which said members questioned the Petitioner without administering Miranda warnings, gain a statement from the Petitioner, then administer Miranda warnings, and have the Petitioner basically repeat what he had related, with little interruption in time. In *Missouri v. Seibert*, 542 U.S. 600; 124 S.Ct. 2601; 159 L. Ed. 2d 643 (2004), the Court, in holding the “two stage” or “question first” interrogations practice violative of Miranda, held that

when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. By the same token, the Court went on, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle. *Id.* In determining whether a given set of interrogation constitutes a “two stage” coordinated and continuing interrogation, *Seibert* dictates that a reviewing court must consider the following:

- A. Completeness and detail of questions and answers in the first round of interrogation;
- B. Whether the Defendant was in custody during the first stage of interrogation;
- C. The overlapping content of the two statements;
- D. The timing and setting of the first and second interrogation;
- E. The continuity of police personnel;
- F. Whether the questions in the first and second interrogation overlapped;
- G. Whether the suspect was told that what he had said during the first interrogation could also be used against him or her.

When one analyzes the evidence herein in light of the above factors, it is clear the statements obtained from the Petitioner was pursuant to the very coordinated and continued interrogation practice condemned in *Seibert*.

**A. Complete and detailed questions were asked of the Petitioner during the first round of interrogation.** A review of the evidence shows that during this first phase, the Petitioner was clearly interrogated about his involvement in the fire. On their way to the fire scene, Deputies Metz and Roberts were informed by Jackson County 911 that Ronnie Davis had killed Cathy Parsons and set her trailer on fire. (A.R. 251, 256).

While at home, Captain Faber, the lead investigator, testified he was contacted by Deputies Roberts and Metz as they headed to the scene and that they informed him that the Petitioner had murdered Cathy Parsons. (A.R. 128) Upon their arrival, both Metz and Roberts

observed the trailer was fully engulfed. (A.R. 251) Both deputies were immediately informed Ronnie Davis was still on the scene and armed with a knife. (A.R. 251, 262, 904) Both men went straightaway to locate the Petitioner. On locating the Mr. Davis, Deputy Metz ordered him to stand and place his hands on his head. Deputy Metz testified that, on standing, he could tell immediately that Ronnie was intoxicated and had been beaten. (A.R. 251, 904) The Petitioner was patted down and a knife and a lighter were seized. (A.R. 212) After the items were seized, Deputy Metz testified he noticed the burn to the Petitioner's pant leg and the Petitioner's singed hair; then, with Deputy Roberts standing only inches away from the Petitioner's face, and without reading Mr. Davis his Miranda warnings, Deputy Metz began to interrogate Ronnie about his involvement in starting the fire. (A.R. 131,132, 212, 231, 257, 259) The evidence shows that deputy Metz skillfully interrogated and intoxicated Ronald Davis by asking, not just general questions which would be asked of any witness as the trial court found, but very detailed, psychologically manipulative questions designed to trip-up a drunken Petitioner and solidify that Ronnie Davis, from whom a lighter was recovered, had indeed killed Cathy Parsons and started the fire. For example, Deputy Metz's interrogation sought to establish the following:

- a. That the Petitioner was the last person to see the victim alive.
- b. That the Petitioner knew where in the trailer the victim's remains would be located;
- c. That the Petitioner was in or near the fire;
- d. How the Petitioner was involved in the fire;
- e. How the burn on the Petitioner's pant leg came about; and
- f. What the Petitioner was supposedly doing at the time the fire started. (A.R. 212-214 & 114-117)

Although this first interrogation of the Petitioner was unrecorded, Deputy Metz testified it lasted for approximately fifteen minutes and was very detailed in nature. (A.R. 256) Moreover, Captain Faber confirmed the questions were detailed and concerned the Petitioner's involvement in the fire. (A.R. 131)

After Captain Faber's arrival, Deputy Metz told Captain Faber, "Mr. Davis had provided different accounts of his experiences with the fire, **his involvement with it.**" (Emphasis added) (A.R.131) The following exchanges on cross examination illustrates just how manipulative and psychologically skillful Deputy Metz was in his interrogation of a drunken Ronnie Davis:

Q: Okay. So you were just talking to him freely and then – okay. Go ahead.

A: And then – he then stated that he only went up on the porch and rescued one small child that was standing on the porch near the – near the fire. **I asked him where Cathy was, and he said he didn't know where she was but he knew she wasn't in the trailer. I told him I needed to speak with Cathy, and I asked him again if she was in the trailer,** and he said – his quote was, "Cathy has a bigger heart than you or me." And that was his answer to that.

Q: What happened next?

A: **He repeated that statement to me several times while we were talking. And at that point, I asked him that if Cathy was still inside the trailer, where would she be, and his response was, "Probably in the bedroom."**

**I asked him how the bottom of his pants got burned. I noticed that the bottom of his pants leg appeared burned and his hair was singed. When I asked him that, he now told me that he was inside the trailer when the fire started and got burned while trying to escape the fire.** And, he said that although he was in the trailer when the fire started, he didn't know what part of the trailer that the fire started in or what caused it. He also said he didn't know where Cathy was when the fire started. Emphasis added (A.R. 213, 214)

Also, on cross examination, the following exchange occurred with Deputy Metz:

Q: And you said that he appeared to be intoxicated.

A: Yes.

Q: Now after – you started asking him questions, correct?

A: Yes.

Q: **And pretty detailed questions, correct, such as "Where's Cathy?"**

A: Yes. That was my main concern at that point is where is Cathy Parsons.

Q: You also asked him about a burn on his leg, too, isn't that right?

A: I did, yes.

Q: His pant leg, excuse me.

A: Yes.

Q: And he still appeared drunk to you at that time, didn't he?

A: Yes.

Q: You also asked him where Cathy would be located in the trailer, didn't you?

A: I asked him if --- **if Cathy was still inside the trailer, where would she be.** (Emphasis added) (A.R. 254, 255)

Although Deputy Metz further testified his interrogation was due to his concern for Cathy Parsons, this testimony lacks credibility since prior to his arrival he was informed by 9-1-1 dispatch that Cathy Parsons had been killed and the trailer set on fire by the Petitioner and, on arriving at the scene, he witnessed the trailer was on fire and none of those gathered at the scene indicated Cathy had indeed been alive. (A.R. 251) Moreover, just by the condition of the trailer at the time of his arrival, there was no opportunity for an attempted rescue of anyone by Deputy Metz. Accordingly, Petitioner's interrogation was not only detailed and concerned with the Petitioner's involvement with the fire, but was detailed, complete, manipulative and managed with psychological skill and precision by Deputy Metz.

**B. The Petitioner was in custody during the first stage of interrogation.** A review of the evidence shows that the Petitioner was subject to interrogation while in custody and was not afforded his Miranda rights. Deputy Metz indicated that when he interrogated Mr. Davis, Ronnie was not in custody because he was not in handcuffs. But this testimony by Deputy Metz missed the point. For, while Deputy Metz testified that the Petitioner was not in handcuffs, he readily admitted on cross-examination that the Petitioner was not free to walk away from the scene of the investigation. (A.R. 263) Specifically, Deputy Metz testified on cross-examination as follows:

Q: Now, one final question: Based on what you were told, what you heard from the witness as you traveled to the scene, and when you were told that Mr. Davis was armed with a knife and you found that knife, **and then you began your questioning**, would he have been free to leave the scene?

A: I didn't have him under arrest or in custody or in handcuffs.

Q: Not my question, Officer.

A: Would I have let him walk away from the scene at that point?

Q: Yes.

A: No.

Q: Thank you.

(Emphasis added) (A.R. 263)

This Court has long recognized that limited police investigatory interrogations are allowable when a suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go. Syllabus Point 2, *State v. Mays*, 172 W.Va. 486, 307 S.E. 655 (1983). In the instant case, Ronnie Davis, a clear murder and arson suspect from whom evidence was seized, and, by Deputy Metz's own admission, was in custody, was subjected to interrogation and was never informed he was not under arrest and was free to go. Accordingly, Mr. Davis was subjected to interrogation while in custody and was not afforded his Miranda rights.

*In arguendo*, even if we had lacked Deputy Metz's admission on cross-examination that the Petitioner was in custody, Deputy Metz's actions along with that of Deputy Roberts would have clearly conveyed to a reasonable person in the Petitioner's position that he was not free to leave the scene. In *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed. 2d 293 (1994), the United States Supreme Court noted, "An officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." *Id.*, at 326.

Here, Deputies Metz and Roberts clearly conveyed to a drunken Petitioner that he was in custody. They did so by not only ordering Mr. Davis to stand and place his hands on his head, but after seizing the Petitioner's knife and a lighter, possible instruments of murder and arson, the deputies pointed out the fire damage to Mr. Davis's clothing and hair, stood within inches of the Petitioner's face and questioned and challenged Mr. Davis about inconsistencies in his

statement, all the while, interrogating the Petitioner about his involvement in the fire. Undoubtedly, a reasonable person in Mr. Davis's position would certainly have believed that he or she was not free to leave or would consider his freedom of movement to have been restrained by the officers. Indeed, for the purposes of Miranda, Mr. Davis was in custody at the time he was interrogated about his involvement in the fire. Therefore, Ronnie Davis's unwarned statements to Deputy Metz and Roberts whereby the Petitioner placed himself with the victim inside the trailer just prior to the fire should have been found inadmissible by the trial court.

**C. The two statements provided by the Petitioner overlap.** A review of the evidence shows that both the questions and statements made during the unwarned and warned phases overlapped. As indicated earlier herein above, the Petitioner was initially interrogated by Deputy Metz without the benefit of Petitioner's Miranda rights. After that initial phase, Mr. Davis was interrogated by Captain Faber. Prior to starting his interrogation Mr. Davis, Captain Faber administered the Miranda warnings. However, on cross-examination, Deputy Metz admitted to an overlapping of the content of the statements of the content of the statements in both phases of their interrogation. Specifically, during cross, Deputy Metz testified as follows:

Q: You spoke to Mr. Davis without reading him his rights, correct?

A: Yes, I did.

Q: Okay. You had the – you received information from Mr. Davis with respect to the questions you asked.

A: Yes.

Q: Correct? Okay. Captain Faber came on the scene, correct?

A: Yes.

**Q: You, in that conversation with Captain Faber, told him the information that you had gathered from Mr. Davis, correct?**

A: Yes.

**Q: Okay. Captain Faber then read my clients his rights, correct?**

A: Yes, sir.

Q: And some of the questions and answers that you received in your conversation with Mr. Davis were repeated or asked to Mr. Davis by Captain Faber; isn't that correct?

A: **I would say, basically, the same line of questioning.**

Q: Thank you. (Emphasis added) (A.R. 260, 261)

Captain Faber agreed with Deputy Metz that there was an overlap. Specifically, Captain Faber testified as follows:

Q: And when you directed him and put him in the position that you wanted, did you begin your questioning then”

A: Yes.

Q: And did you read him his rights at that time”

A: Yes, sir.

Q: Is that the first thing you did?

A: Yes, sir.

Q: **Okay. As you proceeded to question Ronnie, isn't it true that you used some of the information that was given to you by Deputy Metz and/or Roberts?**

A: That is correct.

(Emphasis added) (A.R. 132)

Additionally, Deputy Metz indicated that during his interrogation of Mr. Davis, the Petitioner confessed to being in the trailer at the time of the fire. (A.R. 214) Likewise, during the warned phase of the interrogation, the Petitioner admitted to both men that he was in the trailer at the time of the fire. (A.R. 184-187) Thus, undoubtedly, there was an overlap in the questions and statements made by the Petitioner during both the unwarned and warned phases of interrogation.

**D. There wasn't an extended period of time between the unwarned and the warned phases of the interrogation and both interrogations occurred at the scene of the fire.** In *Seibert*, the warned phase of the interrogation took place after a break of approximately 15 to 20 minutes and involved the same officers in the same location. *Seibert* at U.S. 616. As in *Seibert*, here, the warned phase of the interrogation took place at the same location, the scene of the fire, involved the same officer, Deputy Metz, and occurred approximately six to ten minutes after the unwarned phase ended. According to Deputy Metz, “I spoke with him --- according to my times, it was between the time we arrived on the scene and the time Captain Faber arrived on the scene was about 21 minutes, so I may have spoke with Mr. Davis for 10 and 15 minutes.” (A.R. 256) At no time prior to the warned phase did any of the officers inform Petitioner that his statements during the unwarned phase could be used against him. Apparently, the only difference between the unwarned and warned phase is the addition of Deputy Faber, the injection of Petitioner's Miranda warning and the provision of a tape recorder. (A.R. 171) Since there was no pronounced break between the unwarned and the warned phase, a reasonable person in

the Petitioner condition would certainly be left with the impression that the interrogation begun by Metz was simply being continued, but this time, on tape.

**E. There was continuity of police personnel during both phases of the interrogation.**

The evidence shows that both Deputies Metz and Roberts were present during both phases of Petitioner's interrogation, especially Deputy Metz. While Deputy Metz did most, if not all the interrogation of Petitioner during the first unwarned phase, Deputy Metz and Roberts, especially Deputy Metz, joined lead investigator Faber in interrogating Petitioner during the second warned phase of the interrogation. (A.R. 170-192, 211, 212) For example, on direct examination, the following exchange occurred between the prosecutor and lead investigator:

Q: Now, I know there was an issue of a fight, and I am not talking about a fight, I am talking about from being drunk. Did he fall down or anything like that?

A: No, sir.

Q: Did he interact at times with others at the scene?

A: Yes. **Every time that Lieutenant Metz or I would ask him a question**, I mean, he was ---- immediately, he would respond. Again, the answer may or may not have been truthful, but he understood what was being asked, and he gave an answer that was the sort of answer that you would expect. (Emphasis added) (A.R. 121)

**F. There was clearly an overlap in the questions asked in the first and second interrogation.** As previously noted, the evidence shows a clear overlap in the questions asked during the first unwarned interrogation and the second warned interrogation. At the suppression hearing, the following exchange occurred during cross examination:

Q: Captain Faber came on the scene, correct?

A: Yes.

Q: You then talked to Captain Faber, correct?

A: Yes.

Q: You in that conversation with Captain Faber, told him the information that you had gathered from Mr. Davis, correct?

A: Yes.

Q: Okay. Captain Faber then read my client his rights, correct?

A: Yes.

Q: **And some of the questions and answers that you received in your conversation with Mr. Davis were repeated or asked to Mr. Davis by Captain; isn't that correct?**

A: **I would say, basically, the same line of questioning.**  
(Emphasis added) (A.R. 261)

It is clear there was an overlap in the questions asked during the first unwarned phase of the interrogation and the warned phase of the interrogation.

**G. The Petitioner was never told that what he had said during the first interrogation could also be used against him.** Although Captain Faber and Deputy Metz indicated they read Petitioner the Miranda warning prior to the start of the second phase of interrogation, the Petitioner was never advised that what he had said during the first unwarned phase of interrogation could not be used against him. Specifically, on direct, this exchange occurred between the prosecutor and lead investigator Faber:

Q: Did you read him his rights?

A: Yes, I did.

Q: And could you tell the Court how you did that?

A: I had a – I carry a Miranda rights advisement card in my pocket, and I used that to read Mr. Davis his rights. I read it from that card.

Q: And would you – do you have that card with you today?

A: I do.

Q: **And if you could, just for the record, tell the Court what you advised Mr. Davis of that night on September 23<sup>rd</sup>, 2010.**

A: **This is what I read to him. I said – I read, “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him or her present with you while you’re being questioned.”** (Emphasis added) (A.R. 112)

Indeed, based on the above exchange, Petitioner was undoubtedly left with the impression that there was no sense in not talking since he had already done so earlier with Deputy Metz. In light of the above, it is certainly clear Mr. Davis’ statement was obtained pursuant to an interrogation first method, the kind expressly condemned by Seibert. Accordingly, the trial court erred when it failed to suppress Mr. Davis’ statement to members of the Jackson County Sheriff’s Office.

**6. THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS THE STATE’S CASE ON GROUNDS OF SPOILIATION OF EVIDENCE WHEN THE SCENE WAS RAZED WITHIN DAYS OF THE FIRE**

Ronald C. Davis was arrested in the wee morning hours of September 24, 2010 for the alleged murder of Cathy Parsons by arson. Five days after his arrest and appointment of counsel, Deputy Fire Marshall Jason Baltic, after being contacted by Jackson County Deputy Sheriff Herb Faber, authorized the total destruction of the crime scene by Allen Michael Harper. A, non-

property owner, Allen Michael Harper, was allowed to bulldoze the alleged crime scene after he methodically went through the fire scene gathering items that could be sold for scrap metal. After he gathered items he chose to be destroyed at the scrap yard, he buried the remainder of the crime scene with a bulldozer. Deputy Fire Marshall Baltic authored three reports. (A.R. 2101-2120) His first report states that the cause of the fire is undetermined. (A.R. 2104) The defense hired an expert witness, Douglas Carpenter. Mr. Carpenter's report indicates that the investigation of the fire scene in this case failed to conform to the requisite standard of care, the fire scene no longer had the evidentiary value it had prior to its destruction, and no substitute evidence exists for which he can base a determination of the cause of the fire. (A.R. 2121-2136) After Mr. Baltic reviewed Mr. Carpenter's report, he changed his report to indicate the fire was incendiary in nature. (2105-2114) Mr. Baltic based his change of fire determination on witness statements, which indicate they saw Mr. Davis set the fire. The Petitioner contends that these statements are inaccurate. However, the defense could never fully investigate the veracity of the statements because the fire scene was bulldozed by the very witnesses upon which the state so heavily relied. Furthermore, the defendant was unable to fully cross-examine the State of West Virginia's witnesses during the preliminary hearing because the State uniformly objected on the basis the defendant is improperly engaging in discovery.

The Petitioner made a motion to dismiss the indictment in this matter and an evidentiary hearing was held on June 17, 2011. (A.R. 2149) The Circuit Court denied the motion and set the trial for August 30, 2011. The State of West Virginia stifled the Petitioner's ability to investigate his case from the beginning by allowing the complete and total destruction of the crime scene within five days of an alleged arson and first degree murder. After the destruction of the fire scene authorized by the agents of the State, a preliminary hearing was held and each time the

defendant asked pertinent questions designed to investigate the case against him he was met with an objection from the prosecution.

The West Virginia State Fire Marshall adopted National Fire Protection Association 921 Fire and Explosion Investigation Guide (2008) on July 1, 2010 as part of the fire code in 87 CSR 1 of the Code of State Regulations. (A.R. 2147-2148) The State investigators in this case disregarded NFPA 921. The state investigators attempted to reconstruct the fire investigation to conform into the scientific method required under NFPA 921. However, their investigation cannot be duplicated, which is the very hallmark of the scientific method. The evidence in this case was destroyed. NFPA 921 states:

**11.3.5 Spoliation of Evidence.** Spoliation of evidence refers to the loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation. **Spoliation of evidence may occur when the movement, change, or destruction of evidence, or the alteration of the scene significantly impairs the opportunity of other interested parties to obtain the same evidentiary value from the evidence, as did any prior investigator.** (emphasis added). (A.R. 2132)

**4.1 Nature of Fire Investigations.** A fire or explosion investigation is a complex endeavor involving skill, technology, knowledge, and science. The compilation of factual data, as well as an analysis of those facts, should be accomplished objectively and truthfully. The basic methodology of the fire investigation should rely on the use of a systematic approach and attention to all relevant details. The use of a systematic approach often will uncover new factual data for analysis, which may require previous conclusions to be reevaluated. With few exceptions, the proper methodology for a fire or explosion investigation is to first determine and establish the origin(s), then investigate the cause: circumstances, conditions, or agencies that brought the ignition source, fuel, and oxidant together. (emphasis added).

Fire scene investigation is a scientific endeavor. Being a scientific endeavor, it must conform to the constitutional rigor commensurate with scientific testing. Allowing for the wholesale spoliation of a crime scene, not fully documented, and unable to be reproduced, **violates** constitutional due process of law. Further, allowing the state to benefit through its destruction by mortally wounding any opportunity the Petitioner might have had to perform an investigation is unfair and prejudicial. Finally, by blocking the Petitioner's only opportunity to gather information under oath while the information is fresh and spontaneous at the preliminary

hearing thwarts any notion of fairness and fair dealing. Unscrupulous prosecutors aided by unscrupulous agents would be free to concoct any story to conform to their version of events with all evidence and any element of truth forever shielded under a veil of lawfulness that simply does not exist. The State Legislature felt it important enough to set forth in 87 C.S.R. 1 that “The State Fire Marshal shall make use of the standards and requirements within the incorporated publications [including N.F.P.A. 921] in all matters coming under his or her jurisdiction,” (A.R. 2147-2148). The failure to abide by those standards resulting in the overwhelming bias to the Petitioner must, at the very least, preclude the Prosecutor from being permitted to utilize the “evidence” of the fire scene they failed to protect. The lower court allowing the State to use the very evidence that the State permitted destroyed is, at the very least, reversible error but, in actuality should only logically result in a dismissal.

West Virginia courts have not uniformly addressed the issue as to whether or not National Fire Protection Association 921, Guide for Fire and Explosion Investigations (2008), commonly referred to as NFPA 921, is the recognized standard of care for fire investigation in the state of West Virginia. A multitude of courts around the country, however, recognize NFPA 921 as the requisite standard of care for fire scene investigation.<sup>1</sup> In fact in *McCoy v. Whirlpool*

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<sup>1</sup> See *Travelers Property & Casualty Corp. vs. GE*, 150 F. Supp. 2d 360; 2001 U.S. Dist. LEXIS 14395. (2001), *Chester Valley Coach Works vs. Fisher-Price, Inc.*, 2001 U.S. Dist. LEXIS 15902 (2001), *Snodgrass vs. Ford Motor Company*, 2001 U.S. Dist. 13421 (2002), *Royal Insurance Co. of America vs. Joseph Daniel Construction*, 208 F. Supp. 2d 423; 2002 U.S. Dist. LEXIS 12397 (2002), *Utah vs. Troy Lynn Schultz*, 2002 UT App 366; 58 P.3d 879; 460 Utah Adv. Rep. 21; 2002 Utah App. LEXIS 112 (2002), *McCoy vs. Whirlpool Corp*, 2003 U.S. Dist LEXIS 6901 (2003), *Tunnell vs. Ford Motor Co.*, 330 F. Supp. 2d 707, 2004 U.S. Dist. LEXIS 24594 (2004); *Ind Ins. Co. vs. GE* 2004 U.S. Dist. LEXIS 13400 (2004); *TNT Rd. Co. vs. Sterling Truck Corp.* 2004 U.S. Dist. LEXIS 13463 (2004); *Abon, LTD. Vs. Transcontinental Ins. Co.* 2005 Ohio 3052, 2005 Ohio App. LEXIS 2847 (2005); *Workman vs. AB Electrolux Corp.* 2005 U.S. Dist. LEXIS 16306 (2005). *of America vs. Joseph Daniel Construction*, 208 F. Supp. 2d 423; 2002 U.S. Dist. LEXIS 12397 (2002), *Utah vs. Troy Lynn Schultz*, 2002 UT App 366; 58 P.3d 879; 460 Utah Adv. Rep. 21; 2002 Utah App. LEXIS 112 (2002), *McCoy vs. Whirlpool Corp*, 2003 U.S. Dist LEXIS 6901 (2003), *Tunnell vs. Ford Motor Co.*, 330 F. Supp. 2d 707, 2004 U.S. Dist. LEXIS 24594 (2004); *Ind Ins. Co. vs. GE* 2004 U.S. Dist. LEXIS 13400 (2004); *TNT Rd. Co. vs. Sterling Truck Corp.* 2004 U.S. Dist. LEXIS 13463 (2004); *Abon, LTD. Vs. Transcontinental Ins. Co.* 2005 Ohio 3052, 2005 Ohio App. LEXIS 2847 (2005); *Workman vs. AB Electrolux Corp.* 2005 U.S. Dist. LEXIS 16306 (2005).

*Corp.*, 214 F.R.D. 646 (D.C. Kan. 2003), the court states the "gold standard" for fire investigations is codified in NFPA 921, and its testing methodologies are well known in the fire investigation community and familiar to the courts." In addition, the State Fire Marshal through 87 CSR 1, adopts NFPA 921 as part of the fire code as provided for by W. Va. Code §29-3-5.<sup>2</sup> Finally, W. Va. Code §29-3-27(d) provides penalties for fire marshals failing to perform any duty required of him/her by the provisions of the state fire code, "Any officer who fails to perform any duty required of him or her by this article or who violates any of its provisions is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than fifty dollars for each failure or violation." Yet, the trial court in this case concludes NFPA 921 is merely a guide and not a standard and the Petitioner contends that this is clearly erroneous. Had NFPA 921 been intended merely as a guide, a criminal penalty would not have been provided for in the West Virginia Code. (The record discusses NFPA 1033 which runs parallel with NFPA 921, both standards have been adopted by statute)

In *State vs. Lanham* 219 W. Va. 710; 639 S.E.2d 802; 2006 W. Va. LEXIS 134, the West Virginia Supreme Court dealt with the preservation of an entire crime scene. The facts of *Lanham* are clearly different than the facts in this matter. First, in *Lanham*, the nature of the investigation is entirely different than the arson investigation in this case. In *Lanham*, the case dealt with bullet trajectory and blood spatter evidence. In this case, the state authorized the complete and utter destruction of the crime scene. In *Lanham*, the evidence was in fact documented well enough to give the defendant the same evidentiary value as the prosecution. In this case, expert testimony is that the evidence preserved is not a substitute for the scene as the

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<sup>2</sup> W.Va. Code 29-3-5(a) states in pertinent part "the state fire commission shall have the power to promulgate, amend and repeal regulations for the safeguarding of life and property from hazards of fire and explosion pursuant to the provisions of chapter twenty-nine –a of his code. Such regulations, amendments or repeals thereof shall be in accordance with standard safe practice for fire prevention and protection and shall have the full force and effect of law in the several counties, municipalities and political subdivisions of the state.

scene was not fully and accurately documented as the standard of care would require. (A.R. 2121-2137) The family in *Lanham* could not inhabit the mobile home in its condition. In this case, while inconvenient, the family who destroyed the fire scene lived in another mobile home on the property and could in fact inhabit their residence. Finally, the witnesses in this case provided information through statements that cannot be tested against the physical evidence to determine their accuracy thereby preventing the defendant from being able to fully and completely exercise his right to cross-examine them.

Contrary to the trial court's ruling, this case is much more like *State v. Thomas*, 187 W. Va. 686, 421 S.E.2d 227 (1992) and *State v. Osakalumi*, 194 W.Va. 758, 461 S.E.2d 504 (1995). In syllabus point three of *Thomas* the Court indicates "a prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." In addition, syllabus point four states "When the government performs a complicated test on evidence that is important to the determination of guilt, and in so doing destroys the possibility of an independent replication of the test, the government must preserve as much documentation of the test as is reasonably possible to allow a full and fair examination of the results by a defendant and his experts." The testimony of the Petitioner's expert indicates he was unable to perform a replication of the investigation with the information left to him. (A.R. 2300-2303)

In syllabus point two of *Osakalumi*, the West Virginia Supreme Court relates a test for preservation of evidence:

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material,

whether that duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at trial to sustain the conviction.

Furthermore, *Lanham* states "we do, however, recognize that some crime scenes must be preserved for lengthy periods of time based upon the specific circumstances of a particular crime and the ability to adequately preserve a specific piece of evidence." *Id.* at 716, 808. If an arson investigation is not such a case, these words are hollow.

No West Virginia case deals directly with spoliation of evidence during a fire investigation, it is illustrative to look how it is handled in the civil arena, bearing in mind that in the civil court the central focus is monetary loss only, not the loss of liberty for the rest of their lives. In *Workman vs. AB Electrolux Corporation* 2005 LEXIS 16306, the Kansas District court in a civil products liability action, acknowledged that NFPA 921 was the recognized standard of care in fire scene investigation. The Kansas District Court states "a litigant has a duty to preserve evidence that he knows or should know is relevant to imminent or ongoing litigation. This duty is heightened for an insurer because it is a sophisticated entity experienced in litigation. Such preservation may not be "selective" saving only the evidence supporting a theory of liability and impeding the examination of another theory." *Id.* at 17. The Court also stated in no uncertain terms that "a manufacturer of a product that is allegedly responsible for causing a fire is prejudiced if it cannot have its own cause and origin expert inspect the fire scene for other potential causes." *Id.* at 19. In West Virginia, "there are two prongs of sustaining a conviction of arson when the evidence is circumstantial: (1) proof of the corpus delicti of arson requires that the fire was of an incendiary origin; and (2) the State must connect the defendant with the actual commission of the crime." Syllabus point 5, *State vs. Mullins v. Rodas*, 181 W.

Va. 415; 383 S.E.2d 47 (1989). Therefore, to sustain a conviction for arson is uniquely like proving a products liability case in that all other causes for the fire must be shown affirmatively to be false, not that one possibility might be true and should be taken as such. Ronald Davis's own experts are unable to view this arson scene and show alternative causes of the fire because it was destroyed. To accept the trial court's ruling in this case allows for the "selective" saving of only the evidence supporting a theory of origin of the State and impedes the examination of any other theory by the defendant. It is plainly wrong.

The test set for in *Osakalumi* and *Lanham* is simply not conducive to arson investigation. Rather, the Court needs to adopt the *Workman* test to bring parity between civil and criminal sanctions. Surely, it is not just to have lower standards in civil proceedings than in criminal proceedings. NFPA 921 outlines in detail the investigators duty to preserve evidence. That duty was clearly breached by the State's "professional" fire investigators. A remedy needs fashioned that levels the playing field and in this case, upon these facts, it should have been dismissal.

The trial court misinterpreted the scientific nature of fire investigation under NFPA 921. The trial court operated under the assumption that no scientific testing was performed to which Ronnie is entitled when it states "there was no scientific test of the remains of the fire scene that was unpreserved or destroyed that implicates the Defendant, Ronald Davis." (A.R. 2094) This is clearly incorrect. The investigation of the fire scene in the first instance by the Asst. State Fire Marshall is a scientific test. The court pointed out one of the fire marshal's duties is to determine the origin of fires when asking counsel about the statutes outlining the duties of the fire marshal.

The Court: What's the code section? What's the applicable code section?

Defense Counsel: 29-3-12, your Honor.

The Court: Hold on a minute. Well, in that section, paragraph F, the fire marshal's authorized by the state to investigate the origin or circumstances in a fire or explosion. One of the duties of the fire marshal is the suppression of arson. The

prevention of fires – okay. And your argument is since he’s not been qualified as an expert in circuit court, then he’s not –

Defense Counsel: Oh, no, it goes to expertise, your Honor. And simply because his duty is to investigate – it’s investigation – I mean, a police officer’s duty is to investigate also, but they’re not necessarily expert investigators. I think that’s a very different – so

The Court: Well, did the man issue a report as to – well, I’ve heard he’s issued a report –Mr. McHugh: He did.

The Court: as to the origin of the fire

Mr. McHugh: He did, your Honor.

The Court: Is he required to do that?

Mr. McHugh: I believe he is, your Honor. I believe he is. (A.R. 2339, 2340)

The trial court went on to allow ASFM Baltic to testify as an expert witness having produced a report of the cause and origin of the fire and his training. As the trial court pointed out, training/education requirements of a fire marshal are beyond that of a normal investigator, and since one duty is to determine the origin of fires and to suppress arson, then arson investigation is not a simple process performed by just anyone. It is scientific test for which specific training and qualifications are needed. Thus, the mere act of permitting the fire marshal’s report indicating that the fire was incendiary in nature, was the result of a test that “implicates the defendant, Ronald Davis.”

The Petitioner’s expert, Douglas Carpenter, testified and submitted a report on the gathering of information at the original fire scene failed to follow the scientific method. (A.R. 2121-2137) When asked if the state’s fire investigation followed the methodologies and procedures in NFPA 921 he states, “They did not follow it.” (A.R. 2290) And when asked in what way NFPA 921 was not followed the expert testified “Well, there’s a number of things, but I think most importantly, they did not allow other subsequent investigators to have the same evidentiary value. But there’s other things that they did in their investigation that, because the scene was destroyed, didn’t give the benefit to any subsequent investigations.” (A.R. 2290).

Also, Mr. Carpenter stated the investigators didn't collect all of the data or all of the relevant data at the fire scene. The failure to take soil samples is simply one example. The trial court seemed to hang its hat on soil samples, which are certainly illustrative and exceptionally relevant, but not the end all be all of the Petitioner's argument. For instance, Mr. Carpenter was asked "Did the state's investigation include taking samples of fire debris at their hypothesized area of origin?" His response "No" (A.R. 2294). In addition, the trial court takes as fact that the jury can assume no ignitable liquids were present. However, according to the Petitioner's expert, the methodology used to make that determination was itself, unscientific. The state's own witness, ASFM Baltic, the lead fire marshal investigator, admitted he was wrong previously in this very investigation when attempting to use an unaccepted scientific method of using one's own human nose to determine the presence or non-presence ignitable liquids. He testified:

Q. Other than the few items listed in your report, you didn't recover anything else from the fire scene?

A. The piece of cloth. I did list that, I believe, the piece of cloth from underneath the victim's knee area.

Q. And I assume you collected that because you thought it might have some sort of evidentiary value?

A. Yes.

Q. How did you make that determination as to whether or not that particular piece of evidence would have or would not have evidentiary value?

A. While removing the debris on or around the victim, there was an unusual smell that came from that cloth, and so we took it as a sample.

Q. And subsequently the testing on that cloth came back that it was negative?

A. Yes, sir. . . . (A.R. 2246, 2247)

In addition, ASFM Domingo testified under cross examination regarding the testing for ignitable liquids in and around the porch area of the mobile home where the state offers hypotheses as to the cause of origin of the fire.

Q. And did you have any indication of the amount and/or types of liquid used in this case whenever you were at the front porch?

A. When I was at the front porch, I had no indication that ignitable liquid was used.

Q. Okay. So at the time you had no indication that ignitable liquids was used. Since that time have you been provided with information that ignitable liquid was used?

A. Was used? Could have been used.

Q. Okay. Or could have been used. So if you have ignitable liquid that could have been used, that's a hypothesis, right?

A. Yes, sir.

Q. And then you would want evidence to be able to test that hypothesis, correct?

A. Yes, sir.

Q. And part of testing that hypothesis, you would go the front porch and probably get a soil sample, wouldn't that be right?

A. You could, yes, sir.

Q. And then that would either test—that could at least be some conclusion or data as to whether that hypothesis is sustainable or unsustainable, right?

A. Yes, sir.

Q. And that's absolutely impossible to do whenever the scene's been bulldozed over the hill and the soil's all gone; you would agree with that too, wouldn't you?

A. Yes, sir. (A.R. 2357-2359)

Alleged witnesses place Mr. Davis at the source the Prosecution claimed to be the origin of the fire. However, their story as to what happened is quite exaggerated. Cross-examination of these witnesses was absolutely vital to the Petitioner's case. The destruction of the crime scene made it impossible to thoroughly and effectively cross-examine these witnesses. Proving from the fire scene that witnesses are not being honest about rooms being rearranged was not possible because the evidence wasn't available. Ronald Davis was precluded from having his own expert determine a cause of origin with the same evidence that was available to the State.

There are other facts to which witnesses have given statements which could not be tested against the destroyed data at the crime scene. For instance, at the preliminary hearing, an alleged eyewitness for the State, Allen Michael Harper, testified to the following:

“At that point I realize that the bedroom is completely rearranged, nothing was the way it was supposed to be. Her bed was actually against the window when it had a three foot distance in between it. I felt around. I could not see at this point. The only part of the house that was on fire was still just the living room and the front porch.”  
(A.R. 39)

The fire scene was not preserved. Therefore, from the onset, the Petitioner was unable to test the validity of this statement with the remains and location of items at the scene. While the State and the trial court characterized the evidence as a “total burn,” the testimony elicited at the hearing on the Defendant’s motion to dismiss indicates items were left, including metal items, which were taken to a junk yard and sold for scrap. (A.R. 2230-2232). Metal objects from the bedroom would indicate whether the furniture had in fact been rearranged as the witness indicated. The same witness was permitted to testify to having heard pounding noises, insinuating that the Petitioner had boarded up doors and windows, as other witnesses testified that they believed there was OSB board over some of openings. Surely, if a washing machine and dryer survived this “total burn” fire, the forged metal head of a hammer would have also.

While the court pointed out that, as the evidence stood, the State was stuck with an absence of ignitable liquids, that is not really true. What actually occurred was that the Prosecution ended up with “bulletproof” witnesses as to any sort of scientific testing of their story based on the physical evidence at the scene of the fire. If testing was performed and no ignitable liquid was found, it would be positive evidence contrary to witness accounts. This is precisely why an adverse inference instruction would not have been the proper remedy in this case and it should have been dismissed. The trial court, however, granted absolutely no relief, including no adverse inference instruction.

During the hearing to dismiss for spoliation of evidence and the destruction of the crime scene the defendant’s expert Douglas Carpenter was asked a series of questions regarding substitute evidence to the actual fire scene.

Q. And you’ve also reviewed the photographs in this case?

A. Yes

Q. Are those suitable substitute evidence to actually looking at the fire scene?

A. They represent – what they do, they’re overall views of the fire scene. But it doesn’t – I mean fire scene investigation requires excavation, it requires reconstruction, and that all requires documentation as you do that. So to be able to go through and look at, you know, what is there at the fire scene, the photos do – first of all, don’t replicate everything because they didn’t dig through it, so they don’t know what’s there. None of us know what’s there at this point. And the second part of it is the photos wouldn’t replicate samples being sent for GCMS analysis. (A.R. 2308-2309)

Counsel for the Petitioner later asked Mr. Carpenter a series of questions regarding alternative evidence found at fire scenes:

Q. Is there – glass or other evidence found at the fire scene, would that be indicative of causes or types of fire? I mean, is that relevant evidence that –

A. It’s relevant data and evidence that can help you test your hypotheses related to origin.

Q. Okay. In what way?

A. Well, one of the things that you need to do when you do – if read the origin chapter and understand how it works, you use the scientific method. The general principle is if you hypothesize a fire origin and you – at that point – you’re going to probably have a hypothesize what the first fuel ignited is – you can take that and you can say, if I ignite that fire, do I get the spread?

You do what’s called a spread analysis, and you decide, you know, based on fire dynamics, if that is going to produce the result that you got. In other words, is it going to produce, you know, melting of certain materials? Is it going to spread smoke to certain areas? Is it going to produce CO in certain areas?

So a lot of the physical evidence that you would be looking for, such as glass, hinges, those things, carries some of the history of the fire, and they’re able to determine, you know, if that becomes an issue in you analysis. In other words, does the fire spread differently and would there be different outcomes. You need to know that. (A.R. 2310-2312).

Additionally, other physical evidence was described by Michael Harper at the preliminary hearing and in the trial:

Q. At some point did you also determine that there was a gasoline container missing?

A. Yes, sir.

Q. Where had that gasoline container been?

A. If you’re standing on First Creek Road looking toward my house, it was underneath the bathroom which is directly beside my bedroom. I got a water faucet that sets there. I had a two gallon can mixed gasoline for a chain saw. There’s a gallon of oil and a five gallon can of gas which was not completely full, but it was pretty close.

(A.R. 43)

Mr. Carpenter testified to a reasonable degree of scientific certainty that based on the witness statements he would expect to find gasoline at the origin of the fire. This is in large part based on the fact that the witness strongly insinuates nearly two gallons of gasoline was poured on a wooden deck in front of the trailer. The logic is that decks have boards, boards have spaces, and gas, being liquid, is going to go through those spaces and absorbed into the soil below. Clearly, prior to the complete and utter destruction of the crime scene by bulldozing it under the ground and over the hill after sorting out large pieces of debris suitable for junking, there was physical evidence that survived the fire, namely door hinges and glass.

All of this is set forth to illustrate what should be abundantly clear. At no stage during the Petitioner's case was he afforded a fair proceeding because at every stage, the State's witnesses were permitted to testify about: (a) potential causes of the fire; (b) physical conditions of the residence during and after the fire; (c) the nature of the development of the fire; and (4) incriminating circumstances around the time of the fire. All of which, the Defendant, should he have been given the opportunity to conduct an investigation of the fire scene, could potentially have rebutted. There is no instruction to a jury that is going to overcome being left completely in the dark and thus the lower court erred in not dismissing this action per the Petitioner's motion.

**7. THE COURT ERRED BY NOT GIVING THE JURY AN *OSAKALUMI* INSTRUCTION WHEN IT WAS BROUGHT TO LIGHT THAT THE STATE OF WEST VIRGINIA RAZED THE FIRE SCENE;**

If nothing else, the lower court should have clearly given the jury an *Osakalumi* instruction of some sort and the failure to do so is, without question, reversible error. In *Osakalumi*, the trial court provided the following instruction to the jury, "The Court instructs the jury that the State has introduced evidence gleaned from a couch which no longer exists. The reason this couch no longer exists is because the officers of the Bluefield City Police Department destroyed it after conferring with the Prosecuting Attorney's Office. In considering this

evidence, you should scrutinize it with great care and caution. This destruction of evidence occurred before the defendant could examine it. This destruction of the couch may very well have deprived the defendant of evidence crucial to his defense and which may in fact have exculpated him.” *State v. Osakalumi*, 194 W.Va. 758, 461 S.E.2d 504 (1995). The lower court in this matter determined that this case was more like *Lanham*, than *Osakalumi* or *State v. Thomas*, 187 W.Va. 686, 421 S.E. 2d 227 (1992). That is simply not the case.

In this case, the State’s witnesses admit to having failed to even “dig out” the scene. They didn’t properly document the layers of debris that led to the discovery of the body. They didn’t make note of the location and condition of crucial pieces of evidence like door hinges other items, which the Petitioner’s expert indicates on multiple occasions can be vital in determining, not only the location of the origin of the fire, but how the fire traveled throughout the structure and whether certain doors were opened or closed. Clearly, had a complete and thorough investigation of the scene been conducted, it would be a closer call, but an extremely poor investigation is the same as no investigation whatsoever. That is what likens this case more to *Osakalumi* and why Ronald Davis’s conviction should be reversed and remanded and there be no reference to the debacle that was the fire marshal’s investigation. But again, at the very least, the jury should have been given a cautionary instruction that was similar to that in *Osakalumi* and the failure to do so by the lower court is reversible error.

**8. THE LOWER COURT ERRED IN FORCING THE DEFENDANT TO CHOOSE WHETHER OR NOT HE WAS GOING TO TESTIFY PRIOR TO RULING UPON WHETHER THE DEFENDANT WOULD BE GRANTED A CONTINUANCE BASED UPON THE UNAVAILABILITY OF AN EXPERT WITNESS UNTIL THE FOLLOWING DAY OF TRIAL**

On the penultimate day of testimony, the following discussion took place between the Court and the Petitioner after counsel for the Defendant had indicated to the Court that their

second expert fire witness was not going to be arriving in at the Charleston airport until the following morning (the Court had not yet ruled on whether it was going to grant a continuance until the next day to allow John Lentini to testify):

**The Court:** Okay. Ronnie, your lawyers – you just heard them – indicated that they’re going to – they want to call an expert witness on the gasoline issue, and then they’re done, according to what they’re telling me. By that, that is an indication that the defense is not going to present your testimony during this trial. Have you decided to stay off the stand and exercise your right to remain silent?

**Mr. Davis:** Not at this time, your Honor. I would like to see what the expert says about the – the – supposed to be—

**The Court:** I can’t hardly hear you, Ronnie.

**The Defendant:** Uh ---

**The Court:** Can you stand up? Your lawyer can stand up with you.

**The Defendant:** Not at this time. I just want to see what the expert has to say about the – what’s supposed to be the gasoline on my shoe.

**The Court:** Well, here’s how it works: You need to decide right now whether you are going to testify or not, because if you are going to testify, we’re going to proceed with your testimony; if you’re not, we’re going to take up the question of whether the trial ends right now.

So have you talked to your lawyers about whether you should testify or remain silent?

**The Defendant:** Yeah, I’ll testify.

**The Court:** You want to testify?

**The Defendant:** Yeah. (A.R. 1805-1806)

This monumental decision was clearly unfairly and prematurely thrust upon the Defendant. The lower court had before it a motion to continue the trial until the following morning to await the arrival of John Lentini, a critical witness to the defense that rebutted the finding of the State’s expert who had testified that there was a trace amount of gasoline found on the Petitioner’s shoe. Mr. Davis was obviously going to be the last witness of the day and he had a clear right of due process that was violated by forcing him to decide in advance of his last witness as to whether it was in his best interest to testify. As the Court plainly put it, a decision was not going to be afforded Mr. Davis regarding his last witness until Mr. Davis decided whether or not he was going to take the stand. There was no reason why the lower court couldn’t have pronounced its ruling before making Mr. Davis decide and at least it would have been a

completely informed decision. Not permitting the continuance would likely have been an issue on appeal, based upon Mr. Lentini's demanding schedule and the complete lack of prejudice it would have had on either party. The State had already announced that it would have rebuttal witnesses, so the jury would have necessarily been present for another day of testimony regardless. The plain and simple truth of the matter is that forcing the Petitioner's decision as to whether he was going to testify before he knew precisely what evidence was going to be before the jury wasn't fair and that in and of itself should be grounds for a new trial, regardless of the preceding seven grounds.

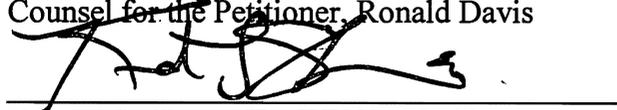
### **CONCLUSION**

The lower court committed reversible error which can be corrected by this Court on appeal. Your Petitioner, Ronald Davis asserts that numerous evidentiary errors were committed by the Circuit Court which resulted in an unfair trial and wrongful convictions for First Degree Murder and First Degree Arson. In addition, Mr. Davis was, on numerous occasions, deprived of due process, all of which has been set forth above.

### **REQUEST FOR RELIEF**

Your Petitioner asks this Court to reverse the convictions of Ronald Davis and remand this matter back to Circuit Court for dismissal or a new trial.

RESPECTFULLY SUBMITTED  
Counsel for the Petitioner, Ronald Davis



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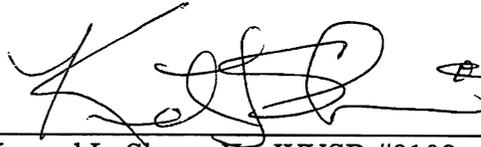
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## CERTIFICATE OF SERVICE

I, Kennad L. Skeen, II, counsel of record for Ronald Davis, do hereby certify that on this 6th day of July, 2012, I served a copy of the foregoing Petitioner's Brief on all parties/counsel in this case, as listed below, by hand-delivering or mailing, first-class, postage prepaid, a true copy thereof.

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