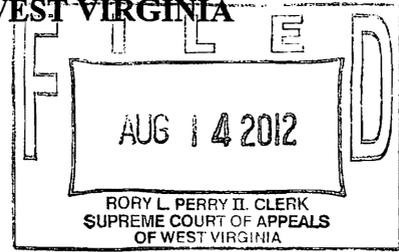


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1445



RONALD C. DAVIS,

*Petitioner,*

v.

STATE OF WEST VIRGINIA,

*Respondent.*

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**BRIEF OF THE RESPONDENT,  
STATE OF WEST VIRGINIA**

---

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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RONALD C. DAVIS,

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---

**BRIEF OF THE RESPONDENT,  
STATE OF WEST VIRGINIA**

---

The Petitioner, fresh out of the penitentiary where he had just completed a fifteen year sentence for the manslaughter of his brother,<sup>1</sup> ended his relationship with Cathy Parsons in a most spectacular way: by setting her trailer on fire and allowing her to perish in the inferno. As Cathy's relatives frantically tried to gain ingress – which had been blocked by OSB board put up behind the windows, it was later discovered – the Petitioner stood by, laughing and cackling and doing a little whittling.

I.

**ASSIGNMENTS OF ERROR**

1. At the Petitioner's preliminary hearing, the Magistrate properly kept the focus on the only issue before the tribunal: did probable cause exist to send the case to a grand jury for consideration. In that regard, the Magistrate prohibited defense counsel from utilizing the proceeding for purposes of discovery unrelated to the probable cause issue determination.

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<sup>1</sup>It appears that the Petitioner served 7½ years, the maximum with credit for good time. See App. V, p. 2067.

2. Under the facts and circumstances of this case, the trial court did not abuse its discretion in refusing to strike the testimony of witness Alvin Turner.

3. Under the facts and circumstances of this case, the trial court did not abuse its discretion in refusing to admit certain tape recorded conversations between the Petitioner and the victim, the late Cathy Parsons.

4. Under the facts and circumstances of this case, the trial court did not abuse its discretion in refusing to grant a mistrial after a witness' testimony was shown to be inaccurate; further, the corrective measures taken by the court were sufficient to remedy any prejudice.

5. The trial court correctly refused to suppress the Petitioner's statements to the police, as such statements were not obtained in violation of the Petitioner's constitutional rights.

6. Under the facts and circumstances of this case, the trial court did not abuse its discretion in refusing to dismiss the case on grounds of spoliation of evidence.

7. The trial court did not err in failing to *sua sponte* give an *Osakalumi* [*State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995)] instruction to the jury.

8. The trial court did not err, or abuse its discretion, in requiring the Petitioner to decide whether or not he would testify on his own behalf; nothing in the circumstances presented suggests that the Petitioner's choice was the product of judicial coercion or duress.

## II.

### STATEMENT OF THE CASE

The facts of this case are horrific. Viewed in the light most favorable to the prosecution, Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), they are as follows:

On September 23, 2010, the Petitioner spent some part of his day hitching a ride into Ripley to buy a fifth of whiskey. (App. III, p. 1011.) According to what he later told police, he arrived home at about 5:00 p.m. (*Id.*)

Somewhere between 9:00 - 10:00 p.m., Allen Michael Harper heard noises, pounding, loud talk and then a scream coming from the trailer of Cathy Parsons, his mother-in-law. (App. II, pp. 625-26.) Cathy's trailer was situated about 15 feet from Mr. Harper's trailer. (App. I, p. 612.) Mr. Harper testified that the Petitioner was on the front porch of the trailer, and that he (Harper) saw a ball of flame "come directly off the front porch over top of Mr. Davis' head." (App. II, pp. 626-27.) In response to Mr. Harper's cry of "Ronnie, what's going on?", the Petitioner laughed and said that "he'd burned [Cathy] alive." (App. II, pp. 633-37, 651-53.)

Eltina Harper, Mike Harper's wife and Cathy Parsons' daughter, was also alerted by pounding and screaming coming from her mother's trailer. She went to the back door of her home and "saw [the Petitioner], bending over at the porch. And he struck a lighter, and the flames were everywhere." (App. III, pp. 1141, 1143.)

Word of what was happening spread quickly through the area, and relatives and friends rushed to the scene to try to rescue Cathy Parsons. What happened next is like something out of a horror movie: as Mike Harper, John Parsons, James Parsons, Larry Parsons and Jeremy Hackney frantically tried to get into the trailer through the back door and/or windows, they realized that ingress into the trailer was blocked: the door was jammed, and the windows were backed up by strategically placed OSB board. (App. II, pp. 644-47; App. III, pp. 1245-53, 1300-04, 1428-37, 1450-53.)

The relatives were never able to get in, and Cathy Parsons died in the inferno. The Medical Examiner determined that the cause of her death was thermal burn injuries and smoke and soot inhalation. (App. II, pp. 880-81.)

While all this was going on, the Petitioner was slumped against the side of a truck and/or sitting on a bank, laughing and whittling and howling like a dog. (App. II, pp. 651-54, 1255, 1403, 1412, 1456-58.) He told several of the family members – while laughing – that “she’s burning” or “I burned her alive.” (App. II, pp. 651-52, App. III, pp. 1255, 1261-62, 1412, 1447-48.)

When first responders arrived at the scene, the Petitioner’s only concern was whether he could get a ride with them when they left. (App. III, p. 1229.)

When the first two law enforcement officials arrived at the scene, they observed that the Petitioner had a burn hole in his pants and that the hair on the front of his head was singed. (App. II, p. 906; App. III, p. 1003.)<sup>2</sup> The Petitioner was drunk and his eye was swollen shut. (App. II, pp. 905-06; App. III, p. 1003.) The Petitioner told multiple inconsistent stories in response to Lt. Christopher Metz’ questions:

... when he returned from Ripley, he saw a “flash of fire” and thereafter found the trailer on fire, but didn’t go near it;

... no, he did go near it to make sure everyone was out;

... no, he actually went in and rescued two children;

... no, he just went onto the porch and rescued one child on the porch;

... no, he was asleep inside when the fire started and ran out while it was burning.

(App. II, pp. 907-08, 913; App. III, pp. 1009-10.)

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<sup>2</sup>Pictures of the Petitioner’s appearance were admitted into evidence as State’s Exhibits 32A-I. (App. II, pp. 931-35.)

The cause of the fire was initially classified as “undetermined” by the Fire Marshal, who is required by law to have a report prepared within 24 hours. (App. V, pp. 2101-04.) However, after further investigation, including review of eyewitness statements given to the police, the fire marshal concluded that the cause of the fire was incendiary in nature. (App. I, pp. 65-66; App. V, pp. 2235-36.)

Soon after the fire, Cathy Parsons’ son-in-law, Mike Harper, requested permission from Deputy Faber to clean up the fire scene because his wife, Ms. Parsons’ daughter, “would not return to the scene of her mother’s brutal murder, until the stark reminder of the burned out shell of a mobile home had been removed. Mr. Harper did not want to expose the children to a constant reminder of their grandmother’s death.” (App. V, pp. 2086, 2207-08, 2228-29.) On or about September 29, 2010, Deputy Faber contacted an assistant fire marshal and received permission to release the scene, after which Mr. Harper hired a bulldozer and completed the cleanup. (App. V, pp. 2209-10, 2228-33.) This action was the basis of the Petitioner’s spoliation of evidence claim, discussed in detail at Argument F, *infra*.

On October 20, 2010, the Petitioner was indicted by a Jackson County Grand Jury on one count of First Degree Murder, W. Va. Code § 61-2-1, and one count of First Degree Arson, W. Va. Code § 61-3-1. (App. I, p. 101.)

On April 15, May 15, June 17 & June 21, 2011, the trial court held extensive hearings on all of the Petitioner’s pre-trial motions. (App. I, pp. 103-139, 140-314; App. V, pp. 2149-2373.)<sup>3</sup> Of significance to this appeal, the court held, *inter alia*, that the case would not be dismissed on grounds

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<sup>3</sup>The transcript of the June 21, 2011 transcript is not included in the Appendix and does not appear to be relevant.

of spoliation of evidence, and that the Petitioner's statements to police were admissible in evidence. (App. V, pp. 2084-97.)<sup>4</sup>

On August 25, 2011, the Petitioner filed a Petition for Writ of Prohibition in this Court, No. 11-1216, raising both the spoliation issue and the issue of alleged improper rulings by a magistrate in the preliminary hearing. The State filed responsive pleadings the same day. On August 26, 2011, this Court denied the Petition.

On August 30, 2011, the Petitioner's trial began. Thirty-eight witnesses testified for the State in its case in chief and nine testified for the Petitioner; then one State witness was recalled in rebuttal. The State not only had the evidence set forth at pp. 3-5, *infra* – eyewitnesses, “earwitnesses” to the Petitioner's unbridled glee at the scene, and the Petitioner's ever-changing story to the police, but also: evidence of prior threats made by the Petitioner to kill Cathy Parsons, specifically, to “burn” her because she was a witch (App. III, p. 1087) and to “. . . kill the bitch and burn her house down . . . .” (App. III, pp. 1099, 1103); photographs showing that the Petitioner had singed hair and a burn hole in his pants (App. II, pp. 906, 931, 934-35; App. III, p. 1003; App. IV, p. 1539);<sup>5</sup> evidence that there was a trace of gasoline on one of the Petitioner's boots (App. II, pp. 935-36; App. IV, pp. 1894-1507); and the results of toxicology and pathological testing showing

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<sup>4</sup>The Petitioner does not give a citation to where in this voluminous Appendix the trial court's ruling on the second issue may be found, and undersigned counsel is unable to locate it. On information and belief, the court issued a written order on all suppression issues, and if said order is located, the State will file a motion to supplement the Appendix.

<sup>5</sup>At the scene, when Deputy Chief Lori Pierson of the Southern Jackson County Volunteer Fire Department observed the burns to Petitioner's face, singeing of his hair and burn to his clothing, she asked him if he was okay – to which he responded, “Never better” – an interesting reaction from someone whose girlfriend was perishing in a fire a few feet away. (App. IV, 1539.)

that Cathy Parsons was alive when the fire began (App. II, pp. 821-22, 851, 869-71) and died of thermal burn injuries and smoke and soot inhalation (App. II, pp. 880-81).<sup>6</sup>

In short, the State's case was strong; in fact, is fair to say that the evidence was overwhelming.

Not surprisingly, the gist of the Petitioner's defense was that the State's fact witnesses were lying, its experts were unqualified and just plain wrong, and its agents had destroyed the Petitioner's ability to prove his innocence when the fire marshal permitted the scene to be razed five days after the fire.

Two of the defense witnesses gave expert testimony that is material to this appeal. Douglas Carpenter, the Petitioner's fire expert, testified that NFPA is a standard, not a guide, and that the state fire marshal's investigation violated various provisions thereof; that if the State's eyewitnesses were to be believed, gasoline should have been found in soil samples taken from underneath the trailer – but soil samples were not taken and the scene was razed,<sup>7</sup> thereby undermining the credibility of the fire marshal's conclusion that the fire originated on the front porch; that the fire actually originated in the bedroom of the trailer, not on the porch; and that the Petitioner sustained his injuries in a backdraft when he opened the front door, letting in oxygen and causing an explosion.<sup>8</sup> (App. IV, pp. 1679-80, 1707-09, 1723, 1734, 1737-38, 1741-72.) John Lentini, from

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<sup>6</sup>Faithful to the mandate of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the State called every toxicology lab worker (seven in all) who so much as touched the samples of Cathy Parsons' liver which the State's Chief Toxicologist had sent to NMS Labs for analysis.

<sup>7</sup>Mr. Carpenter admitted on cross-examination that the "smell test" utilized by the fire marshal on the soil is routine, and that even if soil samples had been taken, there might not be any trace evidence of gasoline found in a total burn situation. (App. IV, pp. 1749-51, 1744-45.)

<sup>8</sup>Mr. Carpenter's testimony greatly expanded the scope of his report, which had identified  
(continued...)

Scientific Fire Analysis, Florida, testified that the opinion of the State's expert as to traces of gasoline on the boots was unworthy of belief, because the State's expert hadn't utilized sufficient controls and "lost his objectivity." (App. IV, pp. 1892-1906.)

The Petitioner testified on his own behalf, after Mr. Carpenter but before Mr. Lentini, following a *Neuman* [*State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988)] colloquy with the trial court. (App. IV, pp. 1805-16.) He went with the 'I was in the trailer' story (his fifth to Lt. Metz, it will be recalled), testifying that he was passed out on the couch and didn't know what happened or how the fire started. He then proceeded to demolish the testimony of his own expert, Mr. Carpenter, by testifying that he rolled off the couch and out the door, which was open. (App. IV, pp. 1824, 1831.) He said it three times; so much for Carpenter's claim that the Petitioner's injuries were sustained when he opened the front door in order to get out of the trailer and thereby set off an explosion and backdraft.

The Petitioner also testified that he had not tried to rescue Cathy Parsons himself because of his "bad hand" (App. IV, pp. 1824-25), and then contradicted himself in trying to explain his burn injuries by claiming that he tried to get back into the trailer but was physically prevented from doing so by Michael Harper. (App. IV, pp. 1825, 1830.) He hung out by the truck, he said, while everyone else tried to get into the trailer to rescue Cathy, because he was choking, drunk and "about dead." (App. IV, pp. 1825-26, 1830.)

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<sup>8</sup>(...continued)  
the failure to take soil samples as the only shortcoming in the fire marshal's investigation. (App. IV, pp. 1741-42.)

Finally, the Petitioner testified that he didn't even recall talking to Lt. Metz, and that although he recalled talking to Captain Faber, he didn't remember what he said to Faber. (App. IV, pp. 1835-38, 1843-46.)

On September 8, 2011, the jury convicted the Petitioner of both first degree murder<sup>9</sup> and arson. (App. V, pp. 2037-38.) The jury did not add a recommendation of mercy to its verdict. (*Id.*)

On September 16, 2011, the trial court denied the Petitioner's post-trial motions and sentenced him to a term of life imprisonment without mercy on the first degree murder charge, and a term of twenty years on the arson charge, such sentences to run consecutively. (App. V, p. 2071.)

This appeal followed.

### III.

#### SUMMARY OF ARGUMENT

The magistrate's rulings at the preliminary hearing did not violate the Petitioner's rights, as the defense line of questioning – whether the fire marshal was qualified, and whether his decision to raze the scene violated standards of practice – was “. . . unrelated to the task of evaluating probable cause.” *Coleman v. Burnett*, 477 F.2d 1187, 1201 (D.C. Cir. 1973). Further, the Petitioner suffered no prejudice, as during discovery he had access to every bit of the evidence upon which the State relied, including physical evidence, witness statements, and the reports of the State's experts. Finally, the Petitioner has waived this issue failing to bring it to the attention of the court below, despite this Court's admonition in *Desper v. State*, 173 W. Va. 494, 502, 318 S.E.2d 437, 445-46

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<sup>9</sup>The jury had been instructed on both first degree murder and felony murder; it convicted on the former. (App. V, p. 2038.)

(1984), that “. . . it is more appropriate to leave the nature of [any] relief to the discretion of the circuit court.”

The court below did not abuse its discretion in refusing to strike the testimony of witness Alvin Turner, or to grant a mistrial, on the basis of the witness’ testimony that the Petitioner had made the statement: “I’ll kill the bitch and burn her alive.” The court weighed the arguments of the parties, concluding that the close temporal relationship between the threat and Cathy Parsons’ death, which occurred in exactly the manner suggested by the threat, together with the existence of another, similar threat made earlier, swung the pendulum in favor of admissibility. Additionally, the court correctly considered the fact that although the defense had known in advance exactly what the witness was going to say, it never made a pre-trial motion to exclude the testimony and in fact never made the in-trial motion until after the testimony was completed and the witness was gone.

The court below did not abuse its discretion in refusing to admit into evidence twenty tape recorded conversations between the Petitioner and the victim, Cathy Parsons. Defense counsel had already played one of the tape recordings, which was virtually unintelligible. Thereafter, the trial court, concluding that the tapes were all being offered for a limited evidentiary purpose, instructed the defense to find the three most relevant tapes and play those – which, it should be pointed out, the defense never did. Although defense counsel attempted to argue a more expansive purpose for admission of the tapes – that they would show some sort of attenuated motive on the part of Cathy Parsons’ daughter and son-in-law to murder Ms. Parsons, this was and is unavailing. There was no evidence whatsoever to support a theory that either Eltina or Mike Harper committed matricide, and no possibility exists in this case that the trier of fact, having listened to tape recorded conversations between the Petitioner and Cathy Parsons, “. . . might possibly and reasonably believe that [the

Harpers] might have committed the crime instead of the defendant.” *State v. Whitt*, 220 W. Va. 685, 694, 649 S.E.2d 258, 267 (2007).

The court below did not abuse its discretion in refusing to grant a mistrial after a witness’ testimony was shown to be inaccurate. The witness, James Parsons, testified that he heard the Petitioner tell Michael Harper that “I burned her alive,” when the fact was that Mr. Parsons had only heard about the statement from others. After an evidentiary record was made outside the presence of the jury, the court concluded that there was no manifest necessity for a mistrial, as the witness was available to re-take the stand and freely admit his mistake. The witness did indeed re-take the stand and admitted that he had not heard the statement from the Petitioner; thereafter, the court issued a strong curative instruction, telling the jury that the statement “. . . is hearsay, which means it is inadmissible. It is not reliable. It is inadmissible. So the jury should disregard the statement . . . .”

The court below correctly refused to suppress the Petitioner’s statements to the police, taken during the first twenty minutes after police had arrived at the still-chaotic scene of the crime. This was a typical ‘on the scene’ investigation, to which *Miranda v. Arizona*, 384 U.S. 436 (1966), safeguards were never intended to apply. See *Damron v. Haines*, 223 W. Va. 135, 141, 672 S.E.2d 271, 278 (2008). The Petitioner was not in custody; the questioning was short (no more than twenty minutes, and probably less); the nature of the questioning was investigatory, not accusatory; and the primary focus of the investigation at the time was to determine whether someone was in the burning trailer, which the Petitioner had denied. See, e.g., *State v. Wickline*, 184 W. Va. 12, 399 S.E.2d 42 (1990). There was no force, no intimidation, no threats, and no promise of benefit or reward. The Petitioner did not confess; he just gave a constantly changing version of where he had been, and

what he had done, when the fire began.<sup>10</sup> All of the factors set forth by this Court in Syl. Pt. 2, in part, *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006), militate in favor of the State and support the decision of the court below: that the Petitioner's rights were not violated.

The court below did not abuse its discretion in refusing to dismiss the case on grounds of spoliation of evidence, where the fire scene was released to the family and razed five days after Cathy Parsons' death. The testimony given at an extensive evidentiary hearing on this issue demonstrated that the authorities did not act in bad faith; release of a fire scene within four days is routine, and in this case the scene was released so that the traumatized victims (Cathy Parsons' daughter, son-in-law and four grandchildren) could return to their home. Further, there was no forensic evidence from the scene that was used against the Petitioner, because this was a "total burn." Rather, the State relied on eyewitness testimony; before-the-fact threats and after-the-fact behavior on the part of the Petitioner; scientific tests run on the Petitioner's clothing and boots; the Petitioner's inconsistent and wholly unbelievable statements to the police; and toxicological and pathological evidence establishing the victim's death in the fire. "During the trial, the [Petitioner] was able to cross-examine every witness who implicated him in the [crime] in order to reveal any facts that may have exonerated him. In addition, the [Petitioner] offered his own expert witness[es] who testified about proper crime scene procedure." *State v. Lanham*, 219 W. Va. 710, 715, 639 S.E.2d 802, 807 (2006).

The court below did not err in failing to *sua sponte* give an *Osakalumi* [*State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995)] instruction to the jury. First, defense counsel did not request an *Osakalumi* instruction, notwithstanding the fact that the law of spoliation is well

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<sup>10</sup>At trial, the Petitioner went with Version Five in his testimony.

established in this Court's jurisprudence. Additionally, the court's failure to *sua sponte* give such an instruction did not implicate the integrity of the judicial proceedings, as the court allowed the Petitioner to put on his defense and to argue his spoliation theory to the jury, notwithstanding the court's ruling – a correct one – that spoliation had not been established by the evidence.

The court below did not err, or abuse its discretion, in requiring the Petitioner to decide whether or not he would testify on his own behalf. The record of the *Neuman* [*State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988)] colloquy conducted by the court reveals that the Petitioner's decision to testify was not coerced. The timing of the colloquy was within the court's broad discretion to manage the conduct of the trial. *Barlow v. Hester Industries, Inc.*, 198 W. Va. 118, 127, 479 S.E.2d 628, 637 (1996).

#### IV.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The State contends that this case should be placed on the Court's Rule 19 docket, and that oral argument is not necessary. All of the issues herein may be resolved by the application of settled legal principles to the facts of record.

#### V.

#### **ARGUMENT**

- A. AT THE PETITIONER'S PRELIMINARY HEARING, THE MAGISTRATE PROPERLY KEPT THE FOCUS ON THE ONLY ISSUE BEFORE THE TRIBUNAL: DID PROBABLE CAUSE EXIST TO SEND THE CASE TO A GRAND JURY FOR CONSIDERATION. IN THAT REGARD, THE MAGISTRATE PROHIBITED DEFENSE COUNSEL FROM UTILIZING THE PROCEEDING FOR PURPOSES OF DISCOVERY UNRELATED TO THE PROBABLE CAUSE DETERMINATION.**

Standard of review: The relief to which a defendant is entitled resulting from the failure of a magistrate to allow testimony or evidence at a preliminary hearing is within the sound discretion

of the circuit court. *Desper v. State*, 173 W. Va. 494, 502, 318 S.E.2d 437, 445-46 (1984). Inasmuch as this issue was never brought to the court below for resolution, the standard of review on appeal is plain error.

A review of the preliminary hearing transcript in this case reveals that the State put on a straightforward showing of probable cause, calling the arresting officer and one eyewitness to the crime as witnesses, while defense counsel attempted to expand the hearing into a discovery proceeding involving alleged spoliation of evidence by the fire marshal. (App. I, pp. 1-71.) To that end, defense counsel called the fire marshal as a witness and asked numerous questions about his qualifications and/or the razing of the fire scene within a week after the crime was committed; the magistrate sustained most of the State's objections to this line of questioning. (App. I, pp. 54-57, 63-65.)

It is noteworthy that the Petitioner's argument on this issue contains not one single citation of authority, undoubtedly because this Court's precedents do not support his position. Pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure, the purpose of a preliminary hearing is to determine whether "... there is probable cause to believe that an offense has been committed and that the defendant committed it." In explaining and interpreting the rule, this Court has held that:

A preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure serves to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it; the purpose of such an examination is *not* to provide the defendant with discovery of the nature of the State's case against the defendant, although discovery may be a by-product of the preliminary examination.

In challenging probable cause at a preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure, a defendant has a right to cross-examine witnesses for the State and to introduce evidence; the defendant is *not* entitled during the preliminary examination to explore testimony solely for discovery purposes. The magistrate at the preliminary examination has discretion to limit such testimony to the probable cause issue, and the magistrate may

properly require the defendant to explain the relevance to probable cause of the testimony the defendant seeks to elicit.

Syl. Pts. 1 & 2, *Desper v. State, supra* (emphasis provided).

In this case, the magistrate's rulings did not violate the Petitioner's rights, as the defense line of questioning – whether the fire marshal was qualified, and whether his decision to raze the scene violated standards of practice, was “. . . unrelated to the task of evaluating probable cause.” *Coleman v. Burnett*, 477 F.2d 1187, 1201 (D.C. Cir. 1973). *See also Rex v. Sullivan*, 194 Colo. 568, 571, 575 P.2d 408, 410 (1978) (“The right to cross-examine and to introduce evidence may be curtailed by the presiding judge consistent with the screening purpose of the preliminary hearing”); *State v. Prevost*, 118 Ariz. 100, 103, 574 P.2d 1319, 1322 (1977) (“The purpose of a preliminary hearing is not to give defendants an opportunity for discovery but to determine probable cause to hold defendant to answer. Any discovery resulting from a preliminary hearing is incidental and not a right of defendant”); *United States v. Permisohn*, 339 F. Supp. 52, 56 (S.D. N.Y. 1971) (“the purpose of a preliminary hearing . . . is not to provide a defendant with a preview of the Government's case against him . . .”). *See also* W. Va. Rule Crim. P. 5.1(a)(3), which clearly distinguishes between evidence relevant to the probable cause determination and evidence relevant to suppression issues: “Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination.”

Second, there is no question in this case that the magistrate's refusal to turn the preliminary hearing into a discovery proceeding was not prejudicial to the Petitioner. During the course of discovery in this case, defense counsel had access to every bit of the evidence upon which the State intended to rely, including physical evidence, witness statements, and the reports of its experts; and

the defense was given the time and the state-funded resources to develop its own evidence and to retain two experts.

Third, the Petitioner ignores the fact that subsequent to the preliminary hearing, he was indicted by a grand jury. (App. I, p. 101.) There is no attack in this case on the legitimacy of the indictment,<sup>11</sup> and it is well established in our jurisprudence that “[e]xcept for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency.” Syl. Pt. 1, *State v. Layton*, 189 W. Va. 470, 432 S.E.2d 740 (1993). *See also State v. Bonham*, 184 W. Va. 555, 558, 401 S.E.2d 901, 904 (1990) (even where Court concluded that the chief investigating officer’s grand jury testimony was improper, “. . . the State did introduce substantial legal and competent evidence upon which the grand jury reasonably could have found the indictment against the defendant”).

Finally, in any event, even assuming *arguendo* that the magistrate’s failure to permit the defense to explore the issue of spoliation was error, which the State denies, the record does not disclose that the Petitioner *ever* brought this issue to the attention of the court below, either before or after he sought a writ of prohibition in this Court.<sup>12</sup> In *State v. Desper, supra*, 173 W. Va. at 502, 318 S.E.2d at 445-46, a mandamus action in which this Court found that the magistrate’s refusal to

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<sup>11</sup>The Petitioner did make a motion to dismiss based on allegations that the grand jury had been improperly informed of his previous conviction and that there was a procedural flaw in the grand jury proceedings, but these issues have not been raised on appeal.

<sup>12</sup>The Petition for Writ of Prohibition, No. 11-1216, which focused primarily on the spoliation issue, was the first and only place the Petitioner raised the preliminary hearing issue. In the prohibition proceeding the State took the position, in reliance on *Desper*, that the issue was one for circuit court resolution. After this Court refused the Petition, the Petitioner did not raise the issue in the court below.

permit the defendant to call witnesses was error, the Court nonetheless refused to fashion a remedy, holding that “. . . it is more appropriate to leave the nature of the relief to the discretion of the circuit court.”

Here, since the Petitioner never sought a remedy in the court below, he has waived his right to assign as error any alleged defects in the conduct of the preliminary hearing. Per *Desper*, the circuit court was the proper forum in which to seek relief, and the Petitioner chose to bypass that forum.

**B. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO STRIKE THE TESTIMONY OF WITNESS ALVIN TURNER.**

Standard of review: “Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.” Syl. Pt. 1, *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011); Syl. Pt. 1, *State v. Shrewsbury*, 213 W. Va. 327, 582 S.E.2d 774 (2003); Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

Witness Alvin Turner knew the Petitioner when both were prison inmates. He testified as to a statement he had heard the Petitioner make several weeks before his (the Petitioner’s) release, i.e., about six weeks before the death of Cathy Parsons: “I’ll kill the bitch and burn her house down.” (App. III, pp. 1099-1100.)

Thereafter the defense moved for a mistrial on the ground that the witness did not know whether “the bitch” was in fact the victim, Ms. Parsons; and, in the alternative, the defense moved to strike the testimony. (App. III, p. 1105, 1112.) The court below denied both motions, holding that although admissibility was a close question, the evidence was admissible and “. . . there’s a

significant waiver involved here . . . .” (App. III, pp. 1117-20.) Specifically, the court pointed to the fact that:

[N]o 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 ... 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 – of Turner testimony 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.

(App. III, pp. 1119-20.)

As was the case with respect to the first assignment of error, the Petitioner cites absolutely no authority in support of his position that the ruling of the court below was reversible error. The trial court carefully weighed the arguments on the Turner issue, correctly concluding that the close temporal relationship between the threat and Cathy Parsons’ death, which occurred in exactly the manner suggested by the threat, together with the existence of another, similar threat (which admittedly occurred much earlier), swung the pendulum in favor of admissibility.

Additionally, although the court did not ultimately rely on waiver in deciding the issue, it was entitled to take into account the fact that (a) the defense failed to raise this issue prior to trial, despite knowing (from discovery) exactly what the witness was going to say, then (b) waited until after the witness was gone to move for a mistrial and/or to strike, in denying relief.

In short, under the facts and circumstances of this case, and in light of the way this issue unfolded at trial, the ruling of the court below was well within the exercise of its discretion.

**C. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT CERTAIN TAPE RECORDED CONVERSATIONS BETWEEN THE PETITIONER AND THE VICTIM, THE LATE CATHY PARSONS.**

Standard of review: “Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.” Syl Pt. 1, *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011); Syl. Pt. 1, *State v. Shrewsbury*, 213 W. Va. 327, 582 S.E.2d 774 (2003); Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

At the outset, it should be noted that the Petitioner does not frame the issue of the excluded tape recordings as a constitutional issue; rather, he argues it as a straightforward admissibility question within the discretion of the trial court.

The Petitioner claims that the court below erred in refusing to admit into evidence tape recorded conversations between the Petitioner and the victim, Ms. Parsons. He claims that these conversations would have impeached witnesses Mike and Eltina Harper, by showing that they wanted Ms. Harper’s trailer for themselves and thus, by extension, that they had a motive to murder Ms. Parsons. Putting aside for a moment the improbability of this theory – even the Petitioner admits that it “might be stretching”<sup>13</sup> – the Petitioner has not given this Court a fair representation of exactly what this tape issue is all about and how it unfolded at trial.

Following the testimony of defense witness Sandra Houser, defense counsel sought, and was granted, leave to play a tape recording. (App. IV, pp. 1655-56.) After the tape was played, a jury

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<sup>13</sup>Petitioner’s Brief at pp. 12-13. Acknowledging that the motive-for-murder theory is thin, the Petitioner claims that the conversations on the tapes “. . . 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 [Michael and Eltina] had no issues regarding the placement of the trailer . . . .”

asked “. . . is there any way we can make this more understandable . . .,” and the answer was no. (*Id.*) At that point the court asked the defense how many more calls there were and was told there were twenty in all. (*Id.*) The court said, “I want you to find three . . . Find three that you want the jury to hear. If you object to that, show me why more than three are particularly relevant. It is almost impossible to make out anything that anybody is saying.” (App. IV, pp. 1656-57.)

Following a recess, defense counsel indicated that he had transcripts of the conversations and that he wanted to admit six of them. The court stuck to its guns, i.e., three tapes, stating:

Okay. I am not going to permit that. I’d indicated three tapes, but we have listened to this for 30 minutes, and three tapes. And each tape is 15 minutes, I think, so maybe we listened to it 45 minutes. I’m not really sure about that, but at this point in time – I mean, the relevancy that was explained to me was – is the fact that there was not an – there was not an acrimonious relationship between the defendant and the victim. And I think you’ve shown that with what has been played so far.

(App. IV, p. 1659.)

Thereafter, the defense argued its theory of motive: that statements made on the tapes by the victim, Ms. Parsons, would show that the Harpers wanted her property (the trailer). The court correctly held that this would be inadmissible hearsay. (App. IV, pp. 1661-65.)

The Petitioner cites two Massachusetts cases, *Commonwealth v. Jewett*, 392 Mass. 558, 562, 467 N.E.2d 155 (1984), and *Commonwealth v. Lawrence*, 404 Mass. 378, 387, 536 N.E.2d 571 (1989), for the proposition that “[a] defendant may introduce evidence that tends to show that another person committed the crime or had motive, intent, and opportunity to commit it.” The State does not disagree with this as a general proposition, but believes that the general rule is limited by the proviso that the evidence sought to be introduced must be sufficient “. . . so that any trier of fact might possibly and reasonably believe that the proposed witness might have committed the crime

instead of the defendant.” *State v. Whitt*, 220 W. Va. 685, 694, 649 S.E.2d 258, 267 (2007), quoting *Gray v. State*, 368 Md. 529, \_\_\_, 796 A.2d 697, 716 (2002).<sup>14</sup>

Neither *Jewitt* nor *Lawrence* can take the Petitioner as far as he wants to go. Other than the victim’s hearsay statements on the tapes, which at best would suggest a half-baked motive for Michael and Eltina Harper, there was no evidence whatsoever to support a theory that either Mr. or Mrs. Harper committed matricide. In this regard, the only corroborating evidence proffered by defense counsel during argument on the tapes issue, that someone named Laramy Lewis would testify “. . . he saw Mike Harper got (sic) in his truck and try to flee the scene . . .,” never materialized since the defense did not call Mr. Lewis as a witness. (App. IV, p. 1663.)

On the facts of this case, it can confidently be said that no trier of fact, having listened to some tape recorded conversations between the Petitioner and the victim, Cathy Parsons, “. . . might possibly and reasonably believe that [Michael and Eltina Harper] might have committed the crime instead of the defendant.”

Therefore, the court below did not abuse its discretion in refusing to permit the defense to play endless, unintelligible tapes of conversations between the Petitioner and the victim; and did not err in concluding that the out-of-court statements of the victim were not admissible in any event to prove motive on the part of Michael and Eltina Harper. In this latter regard, defense counsel never suggested any applicable exception to the most basic of hearsay rules: that the out-of-court statements of a declarant are not admissible to prove the truth of the matter asserted.

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<sup>14</sup>In *Whitt*, the trial court refused to allow the defendant to call a witness who had actually confessed to others that she, not the defendant, had committed the murder. Not surprisingly, this Court held that the trial court had committed reversible error by excluding “. . . testimony [that] provides a *direct link* to someone other than the defendant [committing the crime].” *Id.*, 220 W. Va. at 697-98, 649 S.E.2d at 270-71 (emphasis supplied), citing *State v. Harman*, 165 W. Va. 494, 499, 270 S.E.2d 146, 150 (1980).

**D. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL AFTER A WITNESS' TESTIMONY WAS SHOWN TO BE INACCURATE; FURTHER, THE CORRECTIVE MEASURES TAKEN BY THE COURT WERE SUFFICIENT TO REMEDY ANY PREJUDICE.**

Standard of review: "The decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court." Syl. Pt. 8, *State v. Davis*, 182 W. Va. 482, 388 S.E.2d 508 (1989); *State v. Holmes*, No. 11-0436 (W. Va., Nov. 10, 2011) (Memorandum Opinion), Slip Opinion at p. 3. "A trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict. W. Va. Code §62-3-7 (1977 Replacement Vol.)." *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983).

Witness James Parsons testified during the State's case in chief that he had heard the Petitioner tell Michael Harper that "I burned her alive." (App. III, p. 1299.) At the conclusion of Mr. Parsons' direct examination, there ensued a long discussion between the court and counsel as to the substance of Parsons' recorded witness statement, which did not contain these words. (App. III, pp. 1315-28.) The prosecuting attorney, who checked his records as a result of the discussion, told the court that his office had prepared the witness for his testimony utilizing a typewritten summary that may not have been a completely accurate recap of the witness' statement. (App. III, pp. 1321-22.)

Thereafter, the court excused the jury and allowed the defense to make an evidentiary record on the issue. (Vol. III, pp. 1328-81.) James Parsons, when questioned, testified that he had not actually heard the Petitioner make the statement about which he (Parsons) had just testified, but rather had heard about it from other family members. (App. III, pp. 1331-33, 1335.) Megan

Shockey, an employee of the prosecutor's office, testified that she had prepared Mr. Parsons for his testimony by reading his witness statement to him – as he either did not read or did not read well – and that he had corrected only one thing, changing “she’s burning alive” to “she’s a burning.” (App. III, p. 1341.) Deputy Farber testified that his notes, taken during his interview of Mr. Parsons, did not clarify whether the witness was recounting things he’d personally heard or recounting hearsay. (App. III, pp. 1363-64.) In light of the testimony and after reviewing the exhibit, the court below found as a fact that no one in the prosecutor’s office ever suggested or told Parsons to say that in his testimony, either purposefully or even by accident. (App. III, p. 1376.)

During and then again at the conclusion of the evidentiary proceeding the Petitioner moved for a mistrial. (App. III, pp. 1346-47, 1357.) This was denied by the court, on the ground that:

A mistrial is only granted where there is manifest necessity. Now, this witness is still on the stand. He has testified this morning from hearsay, but he testified as if it was personal knowledge. He is here to be cross-examined on that. He is going to freely admit that in his cross-examination.

(App. III, p. 1349.)<sup>15</sup>

Thereafter James Parsons re-took the witness stand, whereupon the following exchange took place:

Q: Mr. Parsons, I believe where we left off is, I believe you said that you heard Ronnie say to Mike Harper, “I burned her alive.” Did you hear Ronnie tell Mike Harper, “I burned her alive?”

A: No, I did not hear it from Ronnie, not from Ronnie.

Q: Thank you. All right.

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<sup>15</sup>Defense counsel continued to argue the point after the court’s ruling, and the court ultimately ruled again: “I’m of the opinion that could be clarified on cross-examination, and the Court can provide a cautionary instruction to the jury telling them that this is hearsay, of no evidentiary value, and they are to disregard that entirely.” (App. III, p. 1377.)

THE COURT:

Hold on a second now.

Ladies and gentlemen of the jury, witnesses, generally, are only permitted to speak from or to testify from personal knowledge, all right? This witness has just indicated that what he told you this morning that he heard Ronnie say, ‘I burned her alive,’ he didn’t actually hear that from Ronnie. He heard it from someone else, apparently. That means it is hearsay, which means it is inadmissible. It is not reliable. It is inadmissible.

So the jury should disregard the statement, the testimony from this particular witness regarding what he heard Ronnie Davis say about “I burned her alive,” all right?

Okay. Continue, please.

(App. III, pp. 1381-82.)

Once again, the Petitioner’s brief on this issue is devoid of any legal authority in support thereof. It has long been established in this jurisdiction that “[t]he decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court.” Syl. Pt. 8, *State v. Davis*, 182 W. Va. 482, 388 S.E.2d 508 (1989). On the facts of this case, it is clear that the court below acted well within its discretion in denying the motion for mistrial. There was no manifest necessity therefor, *State v. Williams, supra*, where (a) there was no prosecutorial misconduct involved in the witness’ earlier testimony, (b) the witness was still available to take the stand and clarify that the earlier testimony was erroneous, (c) the witness did take the stand and so clarify, and (d) the court then gave a strong curative instruction to the jury, telling him that the earlier testimony was hearsay; “. . . which means it is inadmissible. It is not reliable. So the jury should disregard [it] . . . .”

**E. THE TRIAL COURT CORRECTLY REFUSED TO SUPPRESS THE PETITIONER'S STATEMENTS TO THE POLICE, AS SUCH STATEMENTS WERE NOT OBTAINED IN VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS.**

Standard of review: “On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.” Syl. Pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994); Syl. Pt. 3, *State v. Juntilla*, 227 W. Va. 492, 711 S.E.2d 562 (2011) (per curiam).

At the outset, the State takes issue with the Petitioner’s characterization that Lt. Christopher Metz, to whom he gave his multiple inconsistent statements, *see* p. 4-5, *infra*, utilized any “two stage” or “question first” interrogation procedure as defined in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the Court addressed the then-common practice of a “question first, warn later” custodial interrogation strategy being utilized by many police departments. The strategy was, of course, to obtain a confession during custodial interrogation at the station, and *then* warn the suspect and re-take the confession. *Id.* at 606. Significantly, the Court did not overrule *Oregon v. Elstad*, 470 U.S. 298 (1985), where the suspect’s first statement was taken at his home, just after he was placed in custody, and the second statement was later taken at the police station. On those facts, the *Elstad* Court found no Miranda violation.

What we have here is questions asked of the Petitioner by the first officer on the scene – while the fire was still burning and it was unclear whether there was even a victim<sup>16</sup> – not a situation

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<sup>16</sup>In this regard, it will be recalled that the Petitioner told Lt. Metz that Cathy Parsons *was not inside* that burning inferno. (App. II, p. 908.)

where “. . . Miranda warnings are inserted in the midst of coordinated and continuing interrogation.” (Petitioner’s Brief at p. 16.) When Captain Herbert Faber, Lt. Metz’ superior, arrived at the scene at 11:53 p.m., some 20 minutes later, he talked briefly to Michael Harper and Lt. Metz and then proceeded to read the Petitioner his rights. (App. II, p. 1000; App. III, pp. 1003-04.) Thereafter, he asked the Petitioner questions while Metz took notes. (App. I, pp. 170-92; App. III, p. 1008.)

Additionally, it should be noted that the Petitioner’s statements to Lt. Metz were not inculpatory; he did not confess, and in fact admitted nothing. What made the statements damning, from an evidentiary standpoint, is that they were internally contradictory, i.e., the stories kept changing, and they also contradicted the testimony of eyewitnesses.

It is well established in this Court’s jurisprudence that “. . . the *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] safeguards were never intended to apply to the typical ‘on the scene’ investigation.” *Damron v. Haines*, 223 W. Va. 135, 141, 672 S.E.2d 271, 278 (2008). In that regard, the United States Supreme Court in *Miranda* made it clear that “[o]ur decision is not intended to hamper the traditional function of police officers in investigating crime . . . [g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.” *Miranda v. Arizona, supra*, 384 U.S. at 477.

The thrust of the Petitioner’s argument on this issue is twofold: first, that Lt. Metz should have mirandized the Petitioner before questioning him because Metz already had enough information to consider the Petitioner a suspect and admitted that he would not have let him leave;<sup>17</sup>

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<sup>17</sup>On the way to the scene, Lt. Metz was informed by Jackson County 911 that the Petitioner had killed Cathy Parsons and set her trailer on fire. (App. II, p. 901.) Upon arrival at the scene, Metz was informed that the Petitioner was belligerent and armed with a knife. (App. II, p. 904). The Petitioner was patted down and a knife and a lighter were seized. (*Id.*) The officer noted that the Petitioner had a burn on his pants leg and that his hair was singed. (App. II, p. 906.)

and second, that the Petitioner would have reasonably considered himself to be in custody, because he was drunk, had been subjected to a *Terry*<sup>18</sup> patdown, and was asked about the fire damage to his clothing and hair.

First, the fact that Lt. Metz may have received information on the way to the scene that inculpated the Petitioner is not dispositive of this issue. The test for determining the existence of custody is an objective one and does not depend on the officer's subjective intentions. See *Davis v. Allsbock*, 778 F.2d 168 (4th Cir. 1985). And even if Lt. Metz had taken the Petitioner into custody, which he did not, his on-the-scene questioning cannot be termed "interrogation."

[T]he special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

*Rhode Island v. Innis*, 446 U.S. 291, 300 (1980).

In the instant case, we have neither custody nor custodial interrogation; what we have is a police officer conducting his initial investigation upon arrival at the scene. That scene was chaotic, with the fire still burning and hysterical relatives milling around; the length of Lt. Metz' questioning of the Petitioner was short (no more than twenty minutes, and probably less; the nature of the questioning was investigatory, not accusatory; and the primary focus of the investigation at that time was to determine whether someone was in that burning trailer, which the Petitioner had denied.

The facts of this case are similar to those in *State v. Wickline*, 184 W. Va. 12, 399 S.E.2d 42 (1990), where police arrived at about 3:34 a.m. to a crime scene (a mobile home park) where a body

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<sup>18</sup>*Terry v. Ohio*, 392 U.S. 1 (1968). A Terry frisk is not an arrest and is a temporary action taken to ensure the safety of the officer. It is not coercive and does not require Miranda warnings. See *Berkemer v. McCarthy*, 468 U.S. 420 (1984).

had been found beneath a car. Sometime before 5:00 a.m., the police began to interview the decedent's wife, and during the interview the wife disclosed that she had killed her husband. Thereafter, the police mirandized the wife and began taking a written statement.

This Court found that at the time the statement was made, the wife was not under arrest and had not been subject to custodial interrogation; therefore, the statement was admissible in evidence. Citing Syl. Pt. 1, *State v. Johnson*, 159 W. Va. 682, 226 S.E.2d 442 (1976), *overruled on other grounds*, *State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981), the Court held:

A spontaneous statement by a defendant made prior to any action by a police officer and before an accusation, arrest or any custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an in camera hearing.

*State v. Wickline*, *supra*, 184 W. Va. at 15, 399 S.E.2d at 45.

With respect to the issue of custody, real or apparent, this court has held that “[t]he factors to be considered . . . include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect’s verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest.” Syl. Pt. 2, in part, *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006); Syl. Pt. 4, in part, *Damron v. Haines*, 223 W. Va. 135, 672 S.E.2d 271 (2009). With this in mind, let us examine the circumstances of the Petitioner’s statements to Lt. Metz.

a. Location and length of questioning. Lt. Metz asked questions for no more than twenty minutes before Captain Faber arrived, and Faber mirandized the Petitioner almost immediately thereafter. See *State v. Wickline*, *supra*.

b. The nature of the questioning. Lt. Metz asked when and how the Petitioner had first become aware of the fire, and how he had burned his clothing and his hair. This was not an “under the lights” grilling; the officer was conducting an on-the-spot investigation of an event that was still ongoing, at a time when it was still unclear whether there was even a victim. In this regard, it will be recalled that the Petitioner told Metz he didn’t know where Cathy Parsons was but she was not in the trailer. (App. III, p. 908.)<sup>19</sup>

c. The number of police officers present. Although Lt. Metz arrived at the scene with another officer, who was present or at least nearby during Metz’ questioning of the Petitioner, nothing in the record indicates that the other officer participated in the questioning. This was not a situation where the Petitioner was surrounded by hostile law enforcement officers and interrogated by bombardment.

d. The use or absence of force or physical restraint. Although the Petitioner was initially ordered to stand and place his hands on his head, and was then patted down, he was thereafter not handcuffed or restrained in any way. Further, there is no indication that any force, threats, intimidation, or promise of benefit was employed by Lt. Metz. *See State v. Singleton*, 218 W. Va. 180, 624 S.E.2d 527 (2005).

e. The suspect’s verbal and nonverbal responses to the police officers. The Petitioner answered Lt. Metz’ questions and never indicated in any way that he did not wish to do so. *See State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994) (defendant did not affirmatively assert his

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<sup>19</sup>The Petitioner argues that this testimony by Metz “lacks credibility” (Petitioner’s Brief at p. 19), but on appeal “. . . it does not matter how we might have interpreted or weighed the evidence. Our function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt.” *State v. Guthrie, supra*, 194 W. Va. at 668, 461 S.E.2d at 174.

right to remain silent). Metz testified that the Petitioner appeared to understand the questions and to be able to formulate his responses thereto. (App. II, p. 992.) In that regard, it must be noted that the Petitioner, although mentioning several times in his brief that he was drunk at the scene, does not challenge the voluntariness of his statement on that ground. Such a challenge would be unavailing, as the Petitioner failed to put on any evidence, either during the suppression hearings or at trial, from which it could be concluded that he was “. . . intoxicated at the time of the confessions to such an extent that as a matter of law he was not capable of intelligently waiving his rights.” *State v. Hickman*, 175 W. Va. 709, 722, 338 S.E.2d 188, 200 (1985). *See also State v. Hall*, 174 W. Va. 599, 328 S.E.2d 206 (1985); *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984); *State v. Haller*, 178 W. Va. 642, 363 S.E.2d 719 (1987); *State v. Hambrick*, 177 W. Va. 26, 350 S.E.2d 537 (1986).

f. The length of time between the questioning and formal arrest. Lt. Metz questioned the Petitioner for no more than twenty minutes, after which Captain Faber arrived and almost immediately mirandized him.

Taking all of the *Middleton/Damron* factors into account, it is clear that the court below correctly found the Petitioner’s on-site statements to the police to be admissible in evidence. The Petitioner’s rights were not violated when he was briefly questioned at the scene, shortly after the police arrived and at a time when the Petitioner was not in custody; nothing in this record indicates that the police were employing some sort of “question first, warn later” technique.

**F. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DISMISS THE CASE ON GROUNDS OF SPOILIATION OF EVIDENCE.**

Standard of review: A spoliation issue must be evaluated in the context of the entire record, utilizing a three part analysis: (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 the trial to sustain the conviction. *State v. Osakalumi*, 194 W. Va. 758, 766, 461 S.E.2d 504, 512 (1995).

On June 17, 2011, the court below held a lengthy evidentiary hearing on the spoliation issue (App. V, pp. 2049-2373), and thereafter issued a detailed Order containing nineteen unassailable findings of fact. (App. V, pp. 2084-2097.)<sup>20</sup> Specifically, the court found that:

... The reason the fire marshal granted permission for the Harper family to clean up the scene was that “Mrs. Harper would not return to the scene of her mother’s brutal murder [situated 15 feet from her own home], until the stark reminder of the burned out shell of a mobile home had been removed. Mr. Harper did not want to expose the children to a constant reminder of their grandmother’s death.” (App. V, p. 2086, ¶ 4.)

... There was no evidence that the actions of either the Sheriff’s Department or the State Fire Marshal’s office were taken in bad faith or were undertaken to limit the Petitioner’s access to

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<sup>20</sup>Significantly, nowhere in the Petitioner’s brief does he contend that any of the court’s nineteen findings of fact were clearly erroneous. Rather, he argues that the court erred in its legal conclusion that the facts of this case are similar to those in *State v. Lanham*, 219 W. Va. 710, 639 S.E.2d 802 (2006) because “[i]n the instant case, there was no scientific tests of the remains of the fire scene that was unpreserved or destroyed that implicates the Defendant, Ronald Davis ... all of the evidence submitted for scientific testing has been preserved and is available for the defendant (Defendant’s boots and clothes; samples of the victim’s tissues; urine taken from the victim during the post-mortem as part of the Report of Death Investigation of the State Medical Examiner).” (App. V, p. 2094.)

evidence. For a variety of reasons, it is normal practice to release a fire scene to family members soon after a fire. (App. V, pp. 2086-2087, ¶¶ 6-8.)

... The assistant fire marshals who investigated the scene did not take any soil samples from under Cathy Parsons' trailer because he did not detect any odor in that area consistent with ignitable fluids. (App. V, p. 2087, ¶10,)

... The assistant fire marshals have investigated an estimated 1,900 fire scenes between them. In their opinion, because the scene in question was a "total burn," even if they had been able to detect the presence of any accelerants they would not have been able to correlate them to any identifiable area. (App. V, pp. 2090-2091, ¶ 19.)

... Although the Petitioner's expert testified at length that in his opinion, based on NFPA 921, the fire marshal's investigation did not meet the applicable standard of care by failing to take soil samples from under the victim's trailer and thereafter using mass spectrometry to determine whether the fire was of incendiary origin, and by permitting the destruction or loss of burned metal items from within the trailer, NFPA 921 is a guide, not a standard. (App. V, pp. 2088-2091, ¶¶ 13-19.)

... There was no scientific test of any unpreserved or destroyed remains of the fire scene that implicated the Petitioner. All of the evidence submitted for scientific testing was preserved and made available for the Petitioner to examine and/or test, including the Petitioner's boots and clothes; samples of the victim's tissues; urine taken from the victim during the post-mortem as part of the Report of Death Investigation of the State Medical Examiner. Additionally, there were numerous photographs <sup>21</sup>taken of the scene. (Exhibits 3, 5, 10; Diagrams 9A-D, 9F-G.)

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<sup>21</sup>There were 139 photographs in all.

On these facts, the court below did not abuse its discretion in concluding that the Petitioner had failed to establish his spoliation claim: the State had not acted in bad faith, the “missing evidence” was not critical because the State’s case did not rest on forensic evidence from the fire scene, and the other evidence offered at trial was sufficient to sustain a conviction. (App. 1-14.)

**a.**

At the outset, the State must address the Petitioner’s claim that the National Fire Protection Association (NFPA) 921 Guide (App. V, pp. 2147-48) is a “standard,” not a “guide” as the court below found. In that regard, 87 C.S.R. § 87-1-4 states, in relevant part, that:

Incorporating of National Standards and Codes. – The standards and requirements as set out and established by the 2009 edition of “The National Fire Codes” published by the National Fire Protection Association . . . have the same force and effect as if set out verbatim in this rule and are hereby adopted and promulgated by the State Fire Commission as a part of the State Fire Code. The State Fire Marshal shall make use of the standards and requirements within the incorporated publications in all matters coming under his or her jurisdiction.

If NFPA921 is a standard, the Petitioner argues, then he was entitled to dismissal of the charges as a matter of law because his experts testified that the West Virginia Fire Marshal failed in several respects to meet the standard, which has the force and effect of law.

This argument is without merit. First, without putting too fine a point on it, NFPA 921 is titled “Guide.”

Second, NFPA 921 § 1.3 specifically provides that “[d]eviations from these procedures, however, are not necessarily wrong or inferior but need to be justified.” In the instant case, the assistant fire marshals who testified fully justified what were alleged to be their two failures: they did not take soil samples because (a) the “smell test” did not indicate the presence of any accelerants in the ground, and (b) based on their knowledge, experience and training, they would not have

expected to find any accelerants at the scene of a total burn; and they released the scene because (a) that is their typical practice,<sup>22</sup> and (b) in this case there was a grieving family that was unable to return to their home until the smoldering reminder of their mother's death was removed.

Third, although the Petitioner gives a lengthy string cite of cases in which courts have recognized NFPA 921 as the standard of care for fire scene investigation (Petitioner's Brief, p. 27 & n.1), none of these cases stand for the proposition that failure to meet a 921 standard, without more, requires dismissal of a case. There is a vast difference between a "standard" in the sense that the Petitioner uses it – a hard-and-fast statutory directive – and a "standard of care," which is simply one of the factors a jury takes into consideration in determining whether or not a professional did a good job. In the instant case, the assistant fire marshals testified that they had done everything required, while the Petitioner's experts testified that they (the fire marshals) lacked the sterling credentials the experts had,<sup>23</sup> and that they (the fire marshals) should have taken soil samples and held the scene. All this makes for a classic jury question: whose opinions do we accept?

Fourth, and critically, the fire marshal's failure to collect soil samples, and/or to preserve the scene so that the Petitioner's experts could collect such samples, caused no prejudice to the Petitioner since this left the State without any physical evidence other than that seized from the Petitioner. Had there been soil samples taken which were negative for the presence of an accelerant, this would have put the Petitioner no further ahead than he already was by virtue of the State's

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<sup>22</sup>The fire marshal can hardly be faulted for releasing a scene that was open to the elements and had already been disturbed both by firefighters and by relatives frantically trying to break in to rescue Cathy Parsons. Further, in the case of a total burn that could not be secured with a padlock, in the absence of a twenty-four-hour a day guard there would be no way to ensure that the scene was not contaminated or that evidence was not tampered with.

<sup>23</sup>Apparently the assistant fire marshals' training and experience – 1,900 fire investigations between them – didn't count.

absence of accelerant evidence. This is an especially compelling argument where, as here, the Petitioner's own testimony destroyed his expert's theory regarding the fire. See p. 8, *infra*.

**b.**

This leads us into a discussion of the law upon which the lower court relied: *State v. Lanham*, 219 W. Va. 710, 715, 639 S.E.2d 802, 807 (2006). In *Lanham*, this Court concluded, after reviewing the evidence utilizing the test first established in *State v. Osakalumi*, 194 W. Va. 758, 766, 461 S.E.2d 504, 512 (1995), that “. . . there was no scientific test that implicated the appellant. Moreover, the State did not rely on a missing piece of evidence, like the blood sample in [*State v.*] *Thomas* [187 W. Va. 686, 421 S.E.2d 227 (1992)], or the couch in *Osakalumi*, to convict the appellant. Instead, the State relied on eyewitness testimony . . . .”

*State v. Lanham* is materially indistinguishable from the instant case. Here, as in *Lanham*, there was no physical evidence from the scene – although there was plenty from the Petitioner himself, i.e., burnt clothing, shoes with trace evidence of gasoline, singed hair – that inculpated the Petitioner. The State's case rested on eyewitness testimony, before-the-fact threats and after-the-fact behavior on the part of the Petitioner, the Petitioner's inconsistent and wholly unbelievable statements to the police, and toxicological and pathological evidence establishing the victim's death in the fire.

Additionally, as in *Lanham*, the undisputed testimony was that the fire scene was released and razed because the Harper family had been constructively evicted from their home by the fire. They could not abide the looming presence of Mrs. Harper's mother's death scene, and were staying with relatives whose strained resources to accommodate the couple and their four children were quickly used up.

In this case, we are dealing with the dwelling house of people of obviously limited means ... The Moores needed to get back to their home and pick up the pieces of their lives after this brutal murder and it simply would not have been reasonable to have excluded them from their home indefinitely nor is that the law of this State.

*State v. Lanham, supra*, 219 W. Va. at 715, 639 S.E.2d at 807.

Finally, the case upon which the Petitioner relies, Syl. Pt. 3, *State v. Thomas*, 187 W. Va. 686, 421 S.E.2d 227 (1992), stands for the long-established proposition that “. . . a prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the United States Constitution.” No one argues with this; however, the general principle articulated in *Thomas* just does not take the Petitioner where he needs to go. In *Thomas*, the State had used up an entire bloodstain sample in its testing, leaving the defendant with no opportunity to have his own expert perform an independent electrophoresis analysis. The State had also failed to preserve the results of the test it performed by taking photographs of its electrophoresis results. Thus, the only evidence left for presentation to the jury was the oral testimony of the State’s expert and some “difficult-to-decipher” lab notes. On these facts, this Court found that the lower court had erred by failing to suppress the results of the State’s test, and that the appellant had been deprived his right to a full and fair cross-examination of the State’s expert. *Id.* at 694, 421 S.E.2d at 235.

But in *State v. Lanham, supra*, 219 W. Va. at 715, 639 S.E.2d at 807, this Court later distinguished *Thomas*, as well as *Osakalumi*, on the basis of facts and circumstances that are directly on point with those in the instant case.

In the case at hand, however, there was no scientific test [from the crime scene] that implicated the appellant. Moreover, the State did not rely on a missing piece of evidence, like the blood sample in *Thomas*, or the couch in *Osakalumi*, to convict the appellant. Instead, the State relied on eyewitness testimony that clearly indicated that the appellant was at the crime scene acting in a belligerent and threatening manner. During the trial, the appellant was able to cross-examine every witness who

implicated him in the burglary of the Moore trailer in order to reveal any facts that may have exonerated him. In addition, the appellant offered his own expert witness who testified about proper crime scene procedure.

Finally, there is no evidence whatsoever in this case from which it could be inferred that the State acted in bad faith in releasing and razing the crime scene. The uncontradicted testimony was that fire scenes are routinely released within four days, and that the scene in this case was released at the specific request of traumatized family members who did not want to live fifteen feet from where their loved one had perished in a fire.

**G. THE TRIAL COURT DID NOT ERR IN FAILING TO *SUA SPONTE* GIVE AN *OSAKALUMI* INSTRUCTION TO THE JURY.**

Standard of review: “[T]he question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Syl. Pt. 1, in part, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

“An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 8, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007), citing Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

The Petitioner’s brief argument on this issue omits one critical fact: that defense counsel never asked for an *Osakalumi* [*State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995)] instruction. Thus, review of the issue by this Court is limited to plain error. *State v. Miller*, 194

W. Va. 3, 17, 459 S.E.2d 114, 128 (1995). In this regard, no exceptions to the plain error rule apply in this case. The Petitioner's failure to seek an *Osakalumi* instruction was "obvious," as the governing law was clearly established in both *Osakalumi* and *State v. Lanham*, 219 W. Va. 710, 639 S.E.2d 802 (1992). *State v. Marple*, 197 W. Va. 176, 475 S.E.2d 176 (1996); *State v. Hinkle*, 200 W. Va. 281, 287-88 & n.27, 489 S.E.2d 257, 264-65 & n.27 (1996). Further, the failure to give an *Osakalumi* instruction did not implicate the integrity of the judicial proceedings; the court below allowed the Petitioner to put on his defense and to argue his spoliation theory to the jury, notwithstanding his (the court's) ruling that spoliation had not been established. *Jones v. Warden, W. Va. Penitentiary*, 161 W. Va. 168, 173, 241 S.E.2d 914, 916, *cert. denied*, 439 U.S. 830 (1978).

And, in any event, the ruling of the court below on the substance of the *Osakalumi* issue was correct, as set forth in Argument F, *infra*; therefore, the court did not err in failing to *sua sponte* give an *Osakalumi* instruction where no such instruction was requested by the defense.

**H. THE TRIAL COURT DID NOT ERR, OR ABUSE ITS DISCRETION, IN REQUIRING THE PETITIONER TO DECIDE WHETHER OR NOT HE WOULD TESTIFY ON HIS OWN BEHALF; NOTHING IN THE CIRCUMSTANCES PRESENTED SUGGESTS THAT THE PETITIONER'S CHOICE WAS THE PRODUCT OF JUDICIAL COERCION OR DURESS.**

Standard of review: "[A] trial judge has broad discretion in managing his or her docket, including trial procedure and the conduct of trial . . . We, therefore, are required to examine the record with a view of whether the ruling of the trial court constituted an abuse of the discretion afforded judges in managing their dockets, including trial management and the conduct of the trial itself." *Barlow v. Hester Industries, Inc.*, 198 W. Va. 118, 127, 479 S.E.2d 628 (1996). *See also* Syl. Pt. 2, in part, *B. F. Specialty Company v. Charles M. Sledd Company*, 197 W. Va. 463, 475 S.E.2d 555 (1996) ("[t]rial courts have the inherent power to manage their judicial affairs that arise during proceedings in their courts . . .").

This issue is properly relegated to last place in the Petitioner's brief. He cites no law in support of his argument.

After the defense had called all of its available witnesses – there was one expert who would not get in until the following morning – the trial court engaged in a colloquy (App. IV, pp. 1805-16) with the Petitioner in conformity with the dictates of Syl. Pt. 7, *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988):

A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.

Asked about his intention to testify, the Petitioner indicated that he wanted to wait to make this decision until after hearing the testimony of the still-in-transit expert, but the trial court responded: "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." (App. IV, p. 1806.) The Petitioner decided to take the witness stand, although he wavered for a bit after his attorneys put on the record that this decision was taken against their advice. (App. IV, pp. 1806, 1812, 1816.)<sup>24</sup>

The trial court's action was well within its broad discretion to manage the trial. The anticipated testimony of the expert witness (who did indeed testify the following day) was limited:

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<sup>24</sup>Nothing said during the *Neuman* colloquy indicates that the advice of the Petitioner's counsel had anything to do with the issue of timing, i.e., that their advice would have been any different after their final expert, whose testimony was limited to whether there were trace elements of gasoline on the Petitioner's shoes, had testified.

he was called to refute the testimony of the State's expert about whether there were trace elements of gasoline on one of the Petitioner's shoes, by questioning his methodology. (App. IV, pp. 1898-1929.) Nothing in the expert's testimony was affected by, or had any effect upon, anything the Petitioner had to say in his own defense.

VI.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the judgment of the Circuit Court of Jackson County, West Virginia, should be affirmed. The State presented an overwhelming case against the Petitioner, which the Petitioner had a full and fair opportunity to rebut with vigorous cross-examination, with lay witnesses, and with dueling experts. At the end of the day, the jury found beyond a reasonable doubt that the Petitioner had committed a truly heinous crime – that he threatened to do it, did it, and laughed about it afterwards. He has had his day in court, and the jury's verdict should stand.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*

By counsel

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



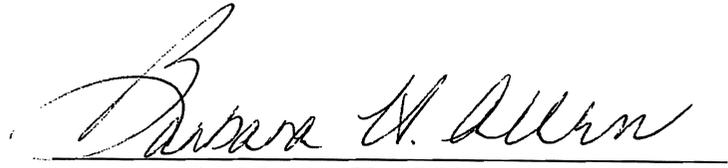
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**CERTIFICATE OF SERVICE**

I, Barbara H. Allen, counsel for the State of West Virginia, do hereby certify that I have served true copies of the foregoing "Brief of the Respondent, State of West Virginia" upon the following by depositing said copies in the United States mail, with first-class postage prepaid, on this the 14th day of August, 2012, addressed as follows:

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