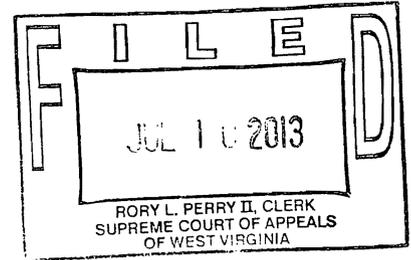

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0144



STATE OF WEST VIRGINIA,

Respondent,

v.

CURTIS JOSEPH KIMBLE,

Petitioner.

BRIEF OF RESPONDENT

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v.

CURTIS JOSEPH KIMBLE,

Petitioner.

BRIEF OF RESPONDENT

I.

STATEMENT OF THE CASE

On January 4, 2012, a Mason County Grand Jury returned a true bill of indictment charging Curtis Joseph Kimble (“Petitioner”) with Wanton Endangerment Involving a Firearm (W. Va. Code § 61-7-12). (J.A. 6.) On June 12, 2012, following a day-long jury trial (Nibert, J.), a Mason County petit jury found the Petitioner guilty of Wanton Endangerment as charged. (Case No. 12-F-20.) (J.A. 261.) On June 21, 2012, defense counsel W. Dan Roll filed a post-trial Motion for Judgment of Acquittal, Motion for Stay of Execution, Notice of Intent to Appeal, and Motion to Withdraw. (J.A. 2.) The trial court convened an evidentiary hearing on September 5, 2012, and by order entered September 7, 2012, denied all of Petitioner’s motions. (J.A. 2.) The court continued Petitioner’s sentencing until October 1, 2012.

At Petitioner's October 5, 2012, sentencing hearing, the trial court denied Petitioner's Motion for Probation and/or Home Confinement and sentenced him to five years determinate, with an effective sentencing date of December 28, 2011.¹

II.

SUMMARY OF ARGUMENT

Although the Petitioner has raised four assignments of error, each has the same theme and is intertwined with the previous one. Apart from the trial court's final rulings, he does not offer this Court any cogent arguments as to why he is entitled to a new trial applying the law to the facts. He simply believes that, given the facts of the case, the jury came to the wrong conclusion. What he now wants is a new trial in which this Court substitutes its judgment for the jury's. This Court does not have the power to afford him this remedy. This is an appeal, not a second trial. The jury has already done its job. Relitigating this case would not only run afoul of the law, but would be a waste of scarce judicial resources. The Petitioner received a fair trial, before an unbiased jury, and a neutral decision maker. He enjoyed the assistance of counsel, the right to file motions he believed necessary to advance his cause, the right to call and cross-examine any witnesses he chose, and received well-thought out decisions by both the trial court and the jury.

All of the issues before this Court were litigated below, all of the facts were before the jury, yet they still found him guilty. They were not coerced, or improperly influenced; they were free to

¹The Petitioner must serve a quarter of his sentence before he is eligible for parole, and day for day in order to discharge his sentence. Thus, he should be released from custody on June 28, 2014. W. Va. Code § 62-12-13(b)(1)(A). According to the Division of Corrections, Mr. Kimble is currently on parole, and his sheet states that his last parole hearing was March 28, 2013. His maximum parole discharge date is September 21, 2015, over a year after he has filled his sentence if he receives good time. See <http://www.wvdoc.com/wvdoc/OffenderSearch>.

deliberate for as long as they needed. Their verdict was just and correct. Petitioner's bizarre behavior constituted a substantial threat to the community, he is exactly where he should be.

The Petitioner's brief assigns four errors on appeal: (1) the trial court erred in failing to suppress evidence obtained in the unlawful arrest of the Petitioner and any evidence flowing therefrom; (2) the trial court erred in failing to suppress the unlawful search of the Petitioner's residence when he was already in custody, the police had no warrant and no exigent circumstances existed; (3) the trial court erred when it permitted the jury to receive testimony of a tainted and suggestive identification of the prisoner.

There can be no doubt that the law enforcement officers seized the Petitioner when they ordered him out of his home at gunpoint. But the Fourth Amendment to the United States Constitution only prohibits unreasonable arrests or detentions, not all arrests and detentions. Whenever a law enforcement officer accosts an individual and restrains his freedom to walk away, he has seized that person. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Thus, an actual full blown arrest, a "stop and frisk," and a stop of an individual merely to obtain information are all considered seizures under the Fourth Amendment.

A valid warrantless arrest must be supported by probable cause. There is no universally agreed upon definition of the term. "In dealing with probable cause . . . , as the very name implies, we deal with probabilities; they are legal and factual practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Brinegar v. United States*, 338 U.S. 160 (1949). In *Beck v. Ohio*, 379 U.S. 89 (1964) the Supreme Court held:

The existence of probable cause depends on whether, at the moment the warrantless arrest was made, the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the arrestee had committed or was committing an offense.

In order to perform a *Terry* stop, an officer must possess reasonable suspicion. “In determining whether reasonable suspicion exist[s], courts must look to the totality of the circumstances.” *United States v. Dapolito*, 713 F.3d 141, 148 (2013). No individual factor should be afforded determinative status. (*Id.*)

An officer effectuating a *Terry*² stop is not limited to reasonable suspicion of potential criminal activity or criminal activity in progress. The Supreme Court has held that, “officers are not automatically shorn of authority to stop a suspect in the absence of probable cause merely because the petitioner has completed his crime and escaped from the scene.” *United States v. Hensley*, 469 U.S. 221, 228 (1985). Instead, the Court adopted a balancing test. In one pan lies the intrusiveness of the state’s conduct; in the other the importance of the government interest. *Hensley*, 469 U.S. at 228. Officers effectuating a *Terry* stop to investigate an already completed offense have the same interests as those investigating imminent crime or crime already in progress. (*Id.*)

An officer’s ability to detain and question a suspect in the absence of probable cause furthers the State’s substantial interest in investigating, and solving crimes. (*Id.*) This is especially true when the officers are investigating crimes which threaten public safety, such as the Petitioner’s irresponsible and criminal use of a firearm, an inherently dangerous and potentially deadly weapon.

Thus, if police possess a reasonable suspicion, grounded in specific and articulable facts, that an individual was involved in a completed felony, then the officers possess the authority to execute a *Terry* stop to further investigate their suspicion. (*Id.*)

²In *Terry v. Ohio*, 392 U.S. 1 (1968) a veteran police officer who had patrolled the same Cleveland neighborhood for thirty years observed the defendant and another individual standing on the street. He did not recognize them and later testified that, “they didn’t look right to [him].” *Terry*, 392 U.S. at 4.

Deputies Wilson and Rhodes responded to a shots fired call coming from the same location as the Petitioner's home. Deputy Wilson had responded to similar calls in the past. When he arrived, the deputy ordered the Petitioner to come outside and lie down, he then handcuffed him for officer safety. There was an unaccounted firearm at the time. Mere handcuffing does not amount to a full scale arrest, it is simply a means of controlling a suspect until law enforcement has an opportunity to conduct an investigation.

After the Petitioner told the Deputy where the firearm was, he walked to the house and saw it sitting there in plain sight. Had Deputy Wilson simply walked to the front door and knocked, he would have seen the same thing. Thus, the gun's discovery was inevitable. Given the totality of the circumstances, the officer dispatched on a shots fired call, told by the Petitioner that "the shotgun" was in his home and he observed it lying against the front door in plain sight, he had sufficient information for a search warrant. Thus, recovery of the shotgun was inevitable, even if the Deputy applying for the warrant left the Petitioner's statement out.

Upon recovering the shotgun, the officers transported the Petitioner to the victim's home. The victim testified that, although he did not know who he was, he had seen him on several other brief occasions. He walked to the side of the cruiser where the Petitioner was sitting in the back seat, cuffed, and immediately identified him as the one who shot at him. This was twenty to twenty-five minutes after the incident. The Petitioner did not object, or imply that the victim had the wrong guy; instead, he sat in the back of the cruiser whistling and calmly threatened to kill the victim and his family when he got out of jail. Not the typical conduct of a wrongly accused man.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents no issues of first impression. Nor does it require a complex analysis of already existing case law. Therefore, oral argument is not necessary. *See* W. Va. R. App. P. 18(a)(1).

IV.

STATEMENT OF FACTS

On November 12, 2001, Deputy Wilson of the Mason County Sheriff's Department arrested the Petitioner and charged him by criminal complaint with one count of Wanton Endangerment Involving a Firearm. *See* W. Va. § 61-7-12. On January 4, 2012, a Mason County Grand Jury returned a single count indictment charging the Petitioner with Wanton Endangerment. The Honorable David Nibert of the Circuit Court of Mason County arraigned the Petitioner on January 10, 2012, and appointed counsel, W. Dan Roll. The trial court held consideration of Petitioner's bond, and motion for a forensic examination in abeyance.

The Petitioner, by counsel, filed pre-trial motions to suppress his statement, a motion to suppress the victim's pre-trial identification of the Petitioner, and a motion to suppress a shotgun recovered from the Petitioner's trailer the day of the incident. (J.A. 9-15.) The trial court convened a pre-trial suppression hearing on June 7, 2012. (J.A. 16.)

1. The Suppression Hearing.

Defense counsel argued that the Mason County Deputies had come to his home, ordered him out, made him lie on the ground, and cuffed him without probable cause. They also questioned him while he was in custody without administering *Miranda* warnings, and violated his rights under both

the federal and state prohibitions against illegal search and seizure by entering his trailer without his consent, or a warrant, and recovering Petitioner's shotgun.

The State's first witness was Mason County Sheriff C.A. Rhodes. (J.A. 19.) On November 12, 2011, at 3:43 p.m., both he and Deputy Wilson responded to a shots fired dispatch at the intersection of Poindexter Road and Ashland Upland Road in Southern Mason County, West Virginia. The Petitioner's trailer was located at that intersection. Dispatch informed the officers that the victim had heard shots fired in his direction and had observed a shirtless individual wearing jeans and a black hat following him. Although the dispatcher told the officers where the incident took place, the Petitioner's name was never mentioned. (J.A. 21.)

The officers drove directly to the scene of the crime.³ As they approached the Petitioner's trailer, Deputy Wilson announced that he was from the Sheriff's Department, pulled his gun⁴, ordered the Petitioner out of his home, and told him to lie on the ground. The Petitioner fully cooperated. Once he was on the ground, Deputy Rhodes cuffed him. At the suppression hearing, the State stipulated, and the trial court agreed, that the Petitioner was in custody. (J.A. 31, 32-33.) When he walked out of his house, the Petitioner was wearing a shirt but not the black baseball hat. He was also wearing blue jeans.

While lying on the ground in handcuffs⁵ Deputy Wilson asked him where the shotgun was. (J.A. 29.) The Petitioner told him it was just inside the front door, next to the door itself. Deputy Wilson

³Each was in his own cruiser. Deputy Wilson arrived first.

⁴Upon his arrival, Deputy Rhodes also drew his gun.

⁵Once they had cuffed him, the officers stood him up.

entered the Petitioner's home⁶, secured the shotgun, and unloaded the weapon.⁷ He then informed Deputy Rhodes that the gun's barrel was still warm, as if it had been recently fired.⁸ (J.A. 23.)

After they had secured the shotgun, the Deputies placed the Petitioner in the back seat of the police cruiser and drove to the victim's house. The victim identified himself as Daniel Granger. The Petitioner was sitting, cuffed in the back seat of Deputy Rhodes' cruiser. The victim approached the cruiser, looked closely at the Petitioner, and identified him as the person who had shot at him. At the time the Petitioner was wearing a shirt and shoes.

When asked why he believed that the Petitioner was the one firing the shotgun at Mr. Granger, Deputy Rhodes testified that Deputy Wilson had "prior incidents" with the Petitioner shooting guns near his residence⁹ and at the intersection of Poindexter and Upland. (J.A. 26.) The 911 dispatcher never mentioned the Petitioner's name, and Deputy Rhodes was not familiar with the intersection between Poindexter and Upland. He simply followed Deputy Wilson to the scene of the crime.

The State next called the victim, Daniel Granger. (J.A. 35.) Mr. Granger testified that he was familiar with the Ashton Upland Road area of Mason County.¹⁰ At approximately 3:30 p.m.,

⁶Deputy Rhodes testified that he couldn't remember whether the Petitioner had consented to the entry. (J.A. 29.)

⁷He also recovered the black hat. (J.A. 24.)

⁸Deputy Rhodes corroborated this at the suppression hearing. (J.A. 23.) At trial, Deputy Rhodes testified that the gun had been fired once. He received the dispatch at 3:43 p.m. and arrived at the Petitioner's home at 4:14 p.m. (J.A. 162.) The Deputies did not conduct a gunshot residue test on the Petitioner's hands.

⁹Deputy Rhodes testified that the Petitioner's trailer was the only one between Poindexter and Upland. (J.A. 27.)

¹⁰Mr. Granger used that road to drive to and from work. (J.A. 37.)

Mr. Granger drove home from his job in Hurricane down Poindexter/Trace Creek Road.¹¹ As he turned right on to Upland Road, Mr. Granger noticed a trailer sitting off the right side of the road. As he made the turn onto Upland, Mr. Granger noticed a shirtless man wearing a black hat and blue jeans making an obscene gesture in his direction. He was standing about twenty-five to thirty feet away. (J.A. 47.) The victim ignored him and kept on driving. When he looked in his rear-view mirror, he saw the same man running behind him holding a shotgun. He had never seen this man before, and did not know who he was. (J.A. 40, 49.) The Petitioner fired a single shot from his shotgun at Mr. Granger's car.

The victim called 911 from his cell phone and stated that a shirtless man wearing a black hat and blue jeans had just fired a shotgun in his direction. He told the operator the shooter had a stocky build. About twenty to twenty-five minutes later, Mr. Granger was sitting in his yard with his wife when Deputy Wilson pulled up in his cruiser with the Petitioner in the back seat, handcuffed. (J.A. 41.) The Petitioner was wearing a black t-shirt, and no hat; but was wearing the same jeans. Before identifying him, Mr. Granger walked up to the rear window of Deputy Wilson's cruiser. The Petitioner was sitting in the back seat whistling. When Mr. Granger identified him, the Petitioner threatened his life. Mr. Granger described the entire experience as unsettling. (J.A. 51.)

When he first saw him, Mr. Granger was not happy that they had brought the Petitioner to his home. Mr. Granger testified that he had previously seen someone at the Petitioner's trailer performing household chores. Although he did not know who this person was, he was "consistent" with the Petitioner. (J.A. 44.)

¹¹Poindexter dead ends at Upland. At this intersection Poindexter has a stop sign. (J.A. 39.)

As Deputy Wilson was living in Mississippi, he did not testify at the hearing or the trial. (J.A. 143.) After Mr. Granger's testimony, the State rested. The trial court solicited argument from both sides. The court agreed that the Petitioner was under arrest when he told the officers where the shotgun was, that there was no probable cause or exigent circumstances present to justify the search of Petitioner's trailer. (J.A. 54-55.)

The State argued that the Deputies were dispatched to the Petitioner's trailer. Deputy Wilson, although never called, had been to the same location before for the same reason. (J.A. at 57.) Counsel for the State then argues that the officers asked the Petitioner to come out, and detained him to ensure officer safety.¹² Once the officers recovered the firearm, there was no reason to worry about officer safety¹³; thus, the encounter turned from a mere detention to a full-blown arrest. (J.A. 57.)

The State conceded that the show-up was unduly suggestive, but argued that Mr. Granger had seen the Petitioner before performing household chores around his trailer four times earlier. Mr. Granger had also seen the Petitioner when he picked up his children and drove them to sports practice. The act of giving him the middle finger also branded the Petitioner's identity into his mind, although the description relayed by 911 did not identify the person's race, height, weight, or distinguishing remarks such as tattoos, scars, or body hair.

Defense counsel compared the officer's conduct to Nazi storm troopers. Defense counsel completely blunted the effectiveness of his probable cause argument with his buffoonish behavior. His comparison was offensive and the trial court should have immediately admonished him. Instead,

¹²Both officers had their guns drawn.

¹³The shotgun was sitting next to the front door. Officer Wilson barely entered the Petitioner's home. He had no idea if there was anyone else present, or whether they were armed. The officers would have been negligent if they had not swept the trailer.

the court abandoned his responsibility to maintain a civil atmosphere by requiring counsel to apologize to the other members present in the courtroom for his cheap rhetoric.¹⁴

The trial court, without explanation, denied the Petitioner's motion, but afforded defense counsel an opportunity to call witnesses on his behalf. His first witness was the Petitioner. Mr. Kimble testified that the Deputies arrived at his trailer while he was asleep, ordered him out of the house, and forced him to his hands and knees. (J.A. 61.) He had no idea why the officers were cuffing him. Once they had gotten him up, the officers asked the Petitioner where the shotgun was. Although the Petitioner claimed he had nothing to do with the incident, he knew what they were talking about and was able to tell them where it was. (J.A. 63.) The Petitioner did not consent, nor did the officers have a search warrant to authorize entering his home. After they had recovered the gun, the deputies transported the Petitioner to Mr. Granger's house.

The Petitioner was the defense's only witness. Counsel for the State did not cross-examine him. After hearing argument from both sides, and considering the evidence presented, the trial court made the following findings: (1) the Petitioner lived at the scene of the crime; (2) the officers were dispatched to this location in response to a shots fired call; (3) in the interest of officer safety the officers made a reasonable decision to call the Petitioner out of his home, tell him to lie on the ground and cuff him; and, (4) the officers also had a legitimate reason to enter the Petitioner's home and secure the shotgun.

¹⁴Regardless of this case's outcome, this Court must make it clear that such comparisons are not welcome in any judicial proceedings, and should admonish this trial court judge for tolerating the use of this word in his court room. Indeed, such comparisons are tolerated all too often in West Virginia court rooms.

These law enforcement officers did not initiate an aggressive war which resulted in the death of millions of innocent people, nor did they establish a series of camps used to exterminate an entire group of individuals because of their religious beliefs. Until defense counsel can offer the trial court these facts to support his argument, he should keep that filthy word out of his mouth.

The court found that, although the show-up identification was overly suggestive, the witness possessed sufficient independent knowledge of the Petitioner's appearance to make an in-court identification. (J.A. 66, 70.) Thus, the identification was admissible.

2. The Trial.

The Petitioner's trial began on June 12, 2002. He was represented by Mr. Roll and the State was represented by Monroe County Prosecutor Damon Morgan. After resolving a juror issue, and an issue involving the shotgun, before opening statements, Counsel for the State informed defense counsel that the shotgun was lost. After opening, State's counsel told the defense that the shotgun had been found. (J.A. 133.) In his opening, defense counsel had told the jury that the State would not produce the gun as evidence. (J.A. 131.) The trial court delivered an instruction informing the jury that defense counsel did not know that the State had the shotgun until after he had delivered his opening. (J.A. 139.)

Once again, the State's first witness was Mason County Deputy Sheriff Rhodes. (J.A. 140.) His testimony tracked what he had testified to at the suppression hearing. After receiving the shots fired dispatch, he met Deputy Wilson at the Petitioner's trailer located at the intersection of Poindexter and Upland. The 911 CAD sheet stated that a shirtless individual wearing a black hat and blue jeans was standing by a trailer at the intersection of Poindexter and Upland, where the Petitioner's trailer is located, firing at a car driving by. (J.A. 142.)

Both the State and the defense extensively questioned Deputy Rhodes about the recovery of the Petitioner's shotgun the day of trial. (J.A. 148, 163-65.) The State introduced the evidence log sheet for this incident which listed the same serial number as the shotgun retrieved from the Petitioner's house. (J.A. 151.)

Deputy Rhodes also testified that, upon recovery of the shotgun from the Petitioner's trailer, the barrel was still warm indicating that it had just been fired. (J.A. 151.) He also testified that Mr. Granger identified the Petitioner the day of the incident as the Petitioner that sat in the back seat of Deputy Rhode's cruiser. (J.A. 154.)

The State also introduced pictures of a sign located in the Petitioner's front yard. (J.A. 80-82.) These were not described in the record. On cross-examination, Deputy Rhodes conceded that he had only been a Deputy for a month at the time of the incident, and had not attended the academy. He did not know Mr. Kimble, and had never seen him before. (J.A. 160-61.)

When asked what the link between the Petitioner's shotgun and the victim was, Deputy Rhodes testified that the gun was found in the Petitioner's home, at the location the victim reported the shots were fired. The barrel was also warm when the officers recovered it. (J.A. 170-71).

The State's next witness was Deputy C.S. Stearns. Deputy Rhodes found the Petitioner's shotgun in Stearn's office after both sides had delivered their opening statements earlier that day. Deputy Stearns testified that he was placed in charge of the Mason County Sheriff's Department's evidence room on November 12, 2011. He testified that he found the gun in his office the afternoon of the first day of trial. "I was just sitting in there and happened to look over and I saw a gun." (J.A. 176.) He could not recall seeing the gun before that day.

Deputy Wilson, who was no longer employed with the Mason County Sheriff's Office, previously told Stearns that he recovered the shotgun, and either placed it in the evidence locker, or the trunk of his cruiser. The gun was never logged into evidence, or transferred to the evidence room. (J.A. 177.)

The State then called Mr. Granger. Again his testimony was consistent with the testimony he gave at the suppression hearing. On November 12, 2011, the Petitioner was driving home from

work. It was sometime between 2:30 and 3:30 p.m. While turning right at the intersection of Upland and Poindexter Roads he saw the Petitioner standing at the front of his driveway, giving Mr. Granger the middle finger. (J.A. 183, 197.) He was approximately twenty to thirty feet away. (J.A. 185.) Mr. Granger testified that, given the odd circumstances, he got a good look at the Petitioner.¹⁵ (J.A. 139.) While driving on Upland he passed a second driveway when he heard a bang; he looked through his rear view mirror and saw the Petitioner chasing him with a gun in his hand. It appeared to be a shotgun. Later, Mr. Granger testified that the words Joe K. were carved on the shotgun's stock. (J.A. 197.) After Petitioner shot at Mr. Granger's car, he continued to run towards him. This afforded Mr. Granger a second opportunity to observe him and to call 911. (J.A. 186, 197.)

Mr. Granger testified that the entire incident went by very quickly. He did not have much time to observe the shooter. He had never been introduced to the Petitioner, but did recognize him. (J.A. 181.) He had seen the same man at the same location a few times before. He never spoke to him. He had driven the Petitioner's mother to the Petitioner's trailer once before. The Petitioner came outside, nodded his head, and took his mother inside. This brief encounter occurred a couple of years before the incident. (J.A. 182.) The State introduced the same photos they had introduced during the suppression hearing. The photos depicted the Petitioner's driveway, and the pick up truck the Petitioner was leaning against when he raised his middle finger to Mr. Granger. (J.A. 184.)

In what Mr. Granger described as a short time after the incident, Deputy Wilson and Deputy Rhodes arrived at his house. As the cruisers pulled up, Mr. Granger noticed the Petitioner sitting in the back seat of Deputy Rhodes cruiser. (J.A. 187.) Mr. Granger was not happy. He did not want

¹⁵Apparently, the Petitioner keeps chickens and ostriches in his front yard. (J.A. 199.) This tends to attract attention.

the very same man who had given him the middle finger and shot at him to know where he and his family lived. He made this clear to the officers as he walked towards Officer Rhodes' cruiser. Once he reached the side passenger window he positively identified the person in the back seat as the one who fired the shotgun at him. (J.A. 187.) The Petitioner was wearing a shirt, and did not have the hat on. After he identified him, the Petitioner stated that he knew where he lived and would be out to get him. The deputies were standing next to the cruiser when the Petitioner made this threat. (J.A. 188.)

On cross-examination Mr. Granger testified that he had spoken with counsel for the State prior to the suppression hearing, and prior to the preliminary hearing. Both times the conversations were brief. He also spoke with a victim's advocate. Defense counsel's private detective also phoned Mr. Granger. He told the detective that he wished to consult legal counsel¹⁶, and would call him back. He never did.

Before this incident, Mr. Granger had never met the Petitioner face-to-face, but had seen him at the same trailer in passing. (J.A. 205.) There was no bad blood between the two. Mr. Granger did not confront the Petitioner when he made the rude gesture, he simply kept on driving.

The State rested after Mr. Granger's testimony. (J.A. 208.) Defense counsel made a motion for a judgment of acquittal pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure. He did not argue in support of his motion. The trial court denied counsel's motion. The trial court then instructed the Petitioner of his rights under *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988). (J.A. 211.) The Petitioner chose not to testify; the defense rested.

After a brief review of the jury charge¹⁷, administration of the jury instructions by the trial court, and summation, the jury retired to deliberate. Upon due consideration of the evidence,

¹⁶He considered the State of West Virginia his counsel. (J.A. 193.)

¹⁷The trial court also instructed the jury on the elements of the lesser included offense of brandishing. (J.A. 229.)

including the witness' testimony, documents, and photographs, the petit jury found the Petitioner guilty of Wanton Endangerment. (J.A. 255.) Neither the State nor the Defense asked the court to poll the jury. The trial court afforded defense counsel ten days to file any post-trial motions, and ordered adult probation to prepare a presentence report.

Defense counsel filed a Motion for a Judgment of Acquittal and a Motion for a New Trial. (J.A. 263-64.) By post-trial order entered September 7, 2012, the trial court denied both motions. By On October 1, 2012, the trial court sentenced the Petitioner to five years determinate with credit for time served. The Petitioner appeals this order.

V.

ARGUMENT

A. **THE TRIAL COURT'S RULING DENYING THE PETITIONER'S MOTION TO SUPPRESS WAS CORRECT.**

1. **The Standard of Review.**

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

[A] circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of law, or, based on the entire record, it is clear that a mistake has been made.

Syl. Pt. 2, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

2. **The Petitioner was not arrested until Deputy Wilson found the shotgun.**

The Petitioner first claims that the officers' conduct and commands upon arriving at his home resulted in the officers unlawfully seizing him. The Petitioner argues that he was under arrest when the officers first arrived at his trailer in response to the shots fired dispatch. The Petitioner is simply wrong.

As stated above, police-citizen encounters typically fall into three categories that balance the degree of intrusiveness on a citizen's liberty with the degree of justification for the intrusion. First, a police-citizen encounter without any restraint of liberty (*e.g.* mere conversation, a non-coercive encounter) is not a seizure and requires no justification. A seizure occurs when a police officer temporarily restrains a person's liberty justified by reasonable suspicion of the citizen's criminal activity. A seizure of a person occurs upon arrest, justified by probable cause to believe that the person arrested has just committed a crime. These three categories of police-citizen interaction are, by no means, exhaustive. They are meant as guidelines only.

In the case-at-bar, the Petitioner assumes too much. A mere recitation of the officers' conduct does not, in and of itself, establish that the Petitioner was under arrest immediately after the officers arrived at his home. In order to determine the nature of the encounter, a trial court must engage in a, "fact specific inquiry into the totality of the circumstances of the particular case." Here, two law enforcement officers were responding to a inherently dangerous, potentially fatal, dispatch involving an individual's use of a firearm. Thus, the State's interest in officer safety was substantially elevated. Although Mr. Granger did not know the Petitioner's identity, he was able to tell dispatch that the shooter was standing in the Petitioner's front yard, leaning up against his truck, when he flipped Mr. Granger the bird. There is no evidence that Mr. Granger was engaged in any sort of behavior to warrant such conduct. As he drove away from the Petitioner's trailer, he heard the Petitioner fire his shotgun and his car. Although he did not slow down in order to nail down his description of the Petitioner, he did see him chasing his car from his rear view mirror. The fact that Mr. Granger had never been formally introduced to the Petitioner, or did not know his name is irrelevant. Most crime victims do not know the name of the person or people who victimized him.

The fact that these two parties did not know each other, that they had never formally met, that there was no pre-existing relationship between them, only shows how unbalanced and dangerous the Petitioner's behavior was. He was willing to fire a shotgun at the car of a total stranger.

Nor did the officers lack cause to stop by the Petitioner's home. According to Mr. Granger, the individual who made the obscene gesture was standing in the Petitioner's driveway. That same individual then shot at his car. This was not a crowded city block or residential area, it was a virtually deserted area of a rural West Virginia County that could not even maintain the consistency of its street names.

Nor did Officer Wilson's familiarity with the Petitioner's history of committing prior, similar offenses detract from his decision to question the Petitioner. In fact, Officer Wilson's consideration of this fact was consistent with the law. "The fact that an arresting officer had, on a prior occasion, apprehended the defendant on another charge is a factor which properly relates to the existence of probable cause." *People v. Serrano*, 647 N.Y. S.2d 546, (N.Y.A.D. 1996).

The Petitioner's argument that the Petitioner's reputation tail wagged the probable cause dog is also without merit. Deputy Wilson's decision to drive to the Petitioner's home was not arbitrary. The original 911 dispatch informed both officers that the shooting occurred at the intersection of Poindexter and Upland roads. Because Deputy Wilson had responded to similar calls at that same location, he knew the area, including the proclivities of its residents. *Forrest v. Jewish Guild for the Blind*, 546 N.Y. S.2d 326, 328 (N.Y.A.D. 1989) (narcotics officer can draw upon prior experience and training, including arrests of same defendant at same location for same offense, to determine the presence of probable cause). Thus, the Petitioner's identity did not motivate Deputy Wilson's conduct, the location of the incident did. By driving to the Petitioner's home, Deputy Wilson was not intent on "rounding up the usual suspects." He was intent on getting to the scene of the crime as quickly as possible.

The officer's conduct upon arriving at the Petitioner's home is more problematic, counsel for the Petitioner concedes that, due to the nature of the call, ordering the Petitioner to come out of his house was a reasonable way of ensuring officer safety. Moreover, calling the Petitioner outside, as opposed to going up to his front door and knocking, was to the Petitioner's advantage. During the suppression hearing, Deputy Rhodes testified that the shotgun was leaning up against the front door. Deputy Wilson barely had to enter the Petitioner's home to retrieve it. The shotgun was in plain view. (J.A. 23.)

An item in plain view can be seized without a warrant if three prerequisites are satisfied: (1) the officer must not have violated the Fourth Amendment in arriving at the place from which the item can be plainly viewed; (2) the officer must have a lawful right of access to the object itself; and, (3) the item's incriminating character must be immediately apparent. *Horton v. California*, 496 U.S. 128 (1990). Officer Williams would not have violated the Petitioner's Fourth Amendment rights if he had walked up to his front door and knocked, instead of calling him out. The nature of the evidence, a loaded shotgun, created an exigency sufficient to justify a minimal warrantless entry into the Petitioner's home to retrieve the firearm and secure it. *See United States v. Jones*, 239 F.3d 716 (5th Cir. 2001) (police officer conducting a "knock and talk" at home of suspected drug dealers faced an exigency sufficient to justify a warrantless entry of the home when he saw handgun on the table through the screen door).

Given the nature of the call, the nexus between the shotgun and the crime was immediately apparent. Deputy Wilson did not rummage through the Petitioner's closets or medicine chests searching for contraband. He was responding to a shots fired call at that location, and found a shotgun matching the description provided by the victim sitting out in the open. The officer had no duty to look the other way, or to further endanger officer safety by taking the time to obtain a search warrant for an item just inside the home. *See Texas v. Brown*, 460 U.S. 730, 739 (1983).

Nor does the officer's decision to place the Petitioner in handcuffs change the encounter from a detention into a full blown arrest. There is no bright-line rule holding that application of handcuffs by law enforcement elevates an encounter from a detention to a full-blown arrest. "It would make little sense to permit an officer to detain pursuant to an investigatory stop and yet deny him the right to use force necessary to effectuate the detention." *People v. Bujdud*, 532 N.E.2d 370 (Ill. App. 1988); *Reid v. State*, 51 A.3d 597, 600 (Md. 2012) (once officers have articulable suspicion to stop and frisk defendant they are permitted to use reasonable force to effectuate the stop including handcuffing suspect). "Police officers are not required to risk their safety by assuming that a suspect will submit peacefully to questioning." *People v. McGowan*, 370 N.E.2d 537 (Ill. 1977). Given the nature of the call, Deputy Wilson's decision to cuff the Petitioner was well within the bounds of reason.

The Petitioner also claimed that his Fifth Amendment right against self-incrimination was violated when the officer's failed to *Mirandize* him before asking where the gun was. Initially, a defendant is only entitled to *Miranda* warnings when he is under arrest. At the time Deputy Wilson asked the Petitioner about the gun, the Petitioner was merely detained. Thus, he had no right to *Miranda* warnings.

More importantly, even if this Court were to find that the Petitioner was under arrest, Deputy Wilson's conduct falls squarely within the limits of the public safety exception.¹⁸ Because law enforcement was not asking the question for investigatory purposes, they were permitted to question the defendant regarding the firearm prior to *Mirandizing* him if it was for the limited purpose of protecting themselves and the public. *New York v. Quarles*, 467 U.S. 649, 657 (1984) (post-arrest questioning of defendant justified by immediate necessity of ascertaining whereabouts

¹⁸If this Court were to find that the officer's had detained the Petitioner before he told them where the gun was, the *Miranda* question would be academic.

of gun which he had discarded in grocery store).¹⁹ In *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994) the Fourth Circuit ruled that law enforcement may question a suspect under this doctrine after he has invoked his right to counsel.

The Court did not craft this exception solely to protect the public, but also to keep law enforcement safe. The nature of the officer's conduct should not be analyzed in light of the subjective motives of the questioner, but from the objective presence of a public danger. Since the public safety exception is a post-arrest doctrine, it makes no sense to argue that there is no exigency if the suspect is free to move about. The exigency does not depend upon the suspects ability to reach for a gun, or other dangerous weapon: the exigency depends on the totality of the circumstances.

In this case, the officers arrived at the Petitioner's house in response to a shots fired dispatch. One of the officers had been at the Petitioner's home on other occasions. The location of the incident was a rural area of Mason County; it was not a densely populated city block. The Petitioner's home was located at the intersection of Poindexter and John's Creek. Once the victim arrived at the traffic intersection, the Petitioner made an obscene gesture. The victim testified that he shrugged it off and kept driving. He then heard an explosion, looked in his rear view mirror and saw the petitioner running after him with a shotgun.

The Officers arrived at the Petitioner's home knowing, from previous experience, that he was armed. They also suspected that he had fired his shotgun at a total stranger as he drove past Petitioner's home. Although the Petitioner cooperated with the officers, they had no idea if anyone

¹⁹For instance, before frisking a suspect it is common practice for law enforcement officers to ask him or her, if there is anything dangerous in their pockets. They are not required to *Mirandize* them first.

else was in his home.²⁰ Deputy Wilson asked the Petitioner where the shotgun was. He then went to the front of the house and saw it standing by the front door in plain view. (J.A. 23.) He took possession of the gun, unloaded it, and secured it.

But, recovering the gun was not dependent upon the Petitioner's cooperation. Had Deputy Wilson walked to the front door, he would have seen it in plain view. (J.A. 23.) Even if he could not enter the home without a warrant, considering the totality of the circumstances, the officers had sufficient evidence to obtain a search warrant. Since the gun was in plain sight, the only issue would be whether the officers had a legal right to enter the home when they seized the weapon.

If this Court were to find that the Petitioner was under arrest from the time he exited his house, and that the arrest was illegal, the public safety exception would not apply. Thus, the Petitioner's admission that the gun was in his home would not be admissible. This leaves two key issues: (1) would the magistrate have issued the search warrant if he or she had not been told that the officers found the gun because the Petitioner told them where it was; and, (2) would the law enforcement officers have sought a search warrant without the illegally obtained information.

The first issue should not present this Court with much to think about. Had one of the law enforcement officers presented a neutral and detached judicial officer with an affidavit stating that someone had shot at the victim while he was driving in that location, that the Petitioner had engaged in the same conduct before, and that the officer had seen a shotgun standing at the Petitioner's front door in plain view, it is certainly reasonable to believe that the judicial officer would have issued the warrant.

The second issue is far more thorny, but it is the Respondent's position that the officers would have sought a search warrant even if the Petitioner had not told them that the shotgun was in

²⁰There is no evidence that the officers conducted a protective sweep of the Petitioner's home. *United States v. Brathwaite*, 458 F.3d 376, 382 n.8 (5th Cir. 2006) (law enforcement could not use public safety exception after conducting two post-arrest sweeps of defendant's home).

his home. The officers were dispatched on a shots-fired call; they knew the location of the incident; and had seen a shotgun sitting next to the front door of the only home located at the intersection of Poindexter and John's Creek. In order to find that the officers would not have sought a warrant, this Court would have to find that they were dispatched, arrived at the location, and saw the shotgun in plain view. (J.A. 23.) It should not be seriously argued that they would not have approached the home if they had not ordered the Petitioner to come out. *See Murray v. United States*, 487 U.S. 533, 539-540 (1988) (evidence recovered during a legal search will not be excluded at trial even if it was first discovered during an illegal search if the illegal search played no role in its recovery).

B. THE VICTIM'S IDENTIFICATION TESTIMONY WAS SUFFICIENTLY RELIABLE AS IT WAS SUPPORTED BY PRIOR INTERACTIONS BETWEEN THE PETITIONER AND THE VICTIM.

1. The Standard of Review.

The trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification the judge must disallow the presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence, ordinarily, will be admitted, and the jury will ultimately determine its worth.

Manson v. Braithwaite, 432 U.S. 98, 122 (1977).

2. Given the prior interactions between the victim and the Petitioner and the circumstances surrounding the incident, the victim's pre-trial identification was sufficiently reliable.

In this portion of her brief, counsel for the Petitioner points out inconsistencies in the victim's testimony, assumes that the inconsistencies work in her client's favor, and then gives the Court a lecture on the law regarding eyewitness identification. (Appellant's petition at 17-19.) What counsel expects this Court to do is to reweigh the victim's testimony, ignore the jury's credibility determinations, and substitute its judgment for theirs. Counsel does not argue the law; she argues that facts and expects a different outcome. Her expectations run contrary to the law.

The key to the admissibility of any out-of-court identification testimony is reliability. Ordinarily, a trial court will consider: (1) the witness' opportunity to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the suspect; (4) the level of certainty demonstrated by the witness at the time of the identification; and, (5) the length of time between the incident and the identification. *People v. McTush*, 410 N.E.2d 861, 869 (Ill. 1980).

A prompt showing of a detained suspect at the scene of arrest has a very valid function: to prevent the mistaken arrest of innocent persons. *United States v. Bautista*, 23 F.3d 726 (N.Y. 1994) (citations omitted). "Indeed, this court has instructed law enforcement officials that where an officer has 'or should have doubts whether a detained suspect is in fact the person sought, the officer must make immediate reasonable efforts to confirm the suspect's identity.'" (*Id.*) In this case, the victim identified the Petitioner twenty to twenty-five minutes later. (J.A. 41.)

Although he said he didn't know the Petitioner, the victim also testified that he saw the Petitioner make an obscene gesture from about thirty feet while he was at the stop sign between Poindexter and John's Creek²¹, that he had seen him feeding his chickens²², and that he had driven members of his family to his home on one occasion and seen his face then. (J.A. 42-46, 47, 52, 185.) When asked whether the person he saw feeding chickens at the Petitioner's house was consistent with the person he saw shooting at him he responded, "very much so." (J.A. 186.) He saw him shoot his gun from about fifty feet. (J.A. 44.) Although the Petitioner was wearing a shirt by the time he identified him, he was wearing the same jeans. (J.A. 50.)

²¹On cross-examination he testified that when he made the turn, "[Y]ou're right there parallel almost putting you against [the Petitioner's] yard. (J.A. 196.)

²² He drove past the Petitioner's home every day he went to work.

The Petitioner told the jury that he did not want the Petitioner near his house, and that he was unhappy at the way the police had handled the situation. The victim walked up to the cruiser and took a close look at the Petitioner. (J.A. 51.) He was absolutely sure it was him. (J.A. 53.) After he identified him, the Petitioner threatened him and his family. (J.A. 188.) He did not say anything like, "You got the wrong man" or words to that effect. He simply threatened him.

VI.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Mason County should be affirmed by this Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL

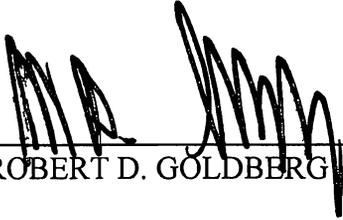


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CERTIFICATE OF SERVICE

I, Robert D. Goldberg, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Brief of Respondent* upon the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 10th day of July, 2013, addressed as follows:

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