STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

- File No. K3-07-003854

State of Minnesota,

Plaintiff,

v. **ORDER**

Aaron Walter Foster,

Defendant.

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The above-entitled matter came on for hearing before the Honorable Edward J. Cleary, a Judge of District Court, on March 20 and 24, 2008, upon the motions of the Defendant to dismiss the indictment for the denial of his right to a speedy trial and to due process of law, and for the destruction of exculpatory evidence. Defendant also sought to suppress evidence obtained by search and seizure, including evidence seized from a residence he shared with the decedent; evidence seized from his person; and a statement taken from him by a police officer.

Andrew Johnson and Deidre Aanstad, Special Assistant Ramsey County Attorneys, appeared on behalf of the State of Minnesota. Earl Gray, Esq., appeared on behalf of the Defendant.

The Court, having reviewed all of the files and records herein, and having heard testimony and the arguments of counsel, and being fully advised of the premises, hereby makes the following:

ORDER

IT IS HEREBY ORDERED that**:**

1. The motion of the Defendant to dismiss the indictment for denial of Defendant's right to a speedy trial and to due process of law is **DENIED**.

2. The motion of the Defendant to dismiss the indictment for destruction of exculpatory evidence is **DENIED**.

3. The motion of the Defendant to suppress evidence obtained by search and seizure at 368 Dorland is **GRANTED IN PART**.

4. The motion of the Defendant to suppress evidence obtained by search and seizure of the Defendant is **DENIED**.

5. The motion of the Defendant to suppress a statement made by the Defendant is **GRANTED IN PART**.

6. The attached memorandum is incorporated herein and made a part of this order and constitutes findings of fact and conclusions of law to the extent required by Rule 52.01 of the Minnesota Rules of Civil Procedure.

7. A copy of this Order shall be served by U. S. Mail upon attorneys for Plaintiff, Andrew Johnson and Deidre Aanstad, Special Assistant Ramsey County Attorneys, Anoka County Government Center, 2100 Third Avenue, Anoka, MN 55303-2265, and upon attorney for Defendant, Earl Gray, 332 Minnesota Street, Suite W-1610, St. Paul, MN 55101, and said service shall constitute due and proper service for all purposes.

IT IS SO ORDERED.

BY THE COURT:

/s/

Dated: April 16, 2008

Edward J. Cleary
Judge of District Court

CHRONOLOGY

- **05/08/81** At approximately **12:17 a.m.**: Maplewood police officers dispatched to 368 Dorland Road on reports of a "domestic" and glass breaking. One minute later a call reports a shooting at the same address.
- **05/08/81** At approximately **12:23 a.m.**: Maplewood Police Officers Heinz and Mettler arrive at the address simultaneously. Aaron Foster, a resident of that address, appears in front of the residence and is described by one officer as being "hysterical" and by another as appearing "distraught and anxious." He leads Heinz and Mettler to a third-floor bedroom, where Barbara L. Winn is laying on the floor. Later, the officers note that a second floor kitchen window was broken and that glass is in the driveway. Officer/Paramedic Melander arrives shortly thereafter and finds no pulse or heartbeat in the body of Ms. Winn. She had suffered a gunshot wound to the middle of her chest (Exhibit 1 and 7).

  Officer Ryan and Officer Becker, also paramedics, arrive at the scene and Ryan is directed upstairs by Foster, who Ryan notices has blood on his hands, apparently from cutting them on the broken window. Signs of an altercation are found in the bedroom. Officer Atchison arrives and notes a bent curling iron sitting on the dresser, and plastic pieces on the floor. Ryan, along with others, ascertains that no handgun has been located. Sergeant Cahanes arrives. Officer Ryan goes downstairs and bandages Foster's right hand. Ryan and others decide "to hold the male party" while the scene is investigated. He asks Foster to empty his pockets, and Foster does so. In addition to his wallet, keys, and money, Foster pulls out a "red folding pocket knife" and four cartridges. These items are later turned into the Maplewood Police Property Department on 05/08/81 (Exhibit 13), and to the St. Paul Police Crime Lab on 05/22/81. Foster receives permission to call his mother and indicates to her that he is a "murder" suspect. Ryan tells Foster's mother that "if they have a family attorney, they should contact him." Foster is put in the back of the squad car and questioned. No Miranda warning is given. When asked where the handgun involved in the shooting was located, Foster tells Ryan "he threw it out of the car window when he drove to the 7-11" to call for an ambulance. Witness confirms Foster's request for a call from the 7-11 for an ambulance.
- **05/08/81** At approximately **1:15 a.m. – 1:45 a.m.**: Sergeants Collins and Green arrive and Sergeant Green takes statements from the children of the deceased: Randy Winn, age 15, and Tammi Winn, age 13. Also present at the home was Tyrone Winn, age 12, who is later interviewed by Officer Atchison. After the medical examiner comes and goes, Green, apparently looking for a suicide note, opens the dresser drawer in the bedroom shared by Barbara Winn and Aaron Foster, and finds an undated two-page letter that the Winn children confirm is in their mother's handwriting (Exhibit

16). Green confiscates the letter but does not turn it into the Maplewood Police Property Department until three days later. Green takes Foster to the St. Paul Crime Lab for gunshot residue testing (GSR) at approximately 4:00 a.m.. Foster is booked at the St. Paul Police Station. Back at 368 Dorland, various officers, including Sergeant Collins, take photos of evidence found at the scene of the shooting. Officer Mettler takes statements from the neighbors of 368 Dorland. Officer Atchison submits a tape of the call for an ambulance in "photo locker." The weapon is recovered by Officer Mettler and Sergeant Collins on the ground near 2292 Londin Lane.

- **05/08/81** At approximately **4:00 a.m.**: Foster's gunshot residue samples and handgun turned into the St. Paul Police Crime Lab. The weapon is later turned in to the Maplewood Police Property Department at 4:35 a.m. (Exhibit 12). In addition, Foster's jacket and shirt are turned in to the Maplewood Police Property Room at 6:47 a.m. (Exhibit 13).
- **05/08/81** At approximately **10:00 a.m.**: Gunshot residue samples from the decedent, along with her clothes, are received by St. Paul Police Crime Laboratory.
- **05/08/81** At approximately **11:00 a.m.**: An autopsy of Barbara Winn is conducted by Medical Examiner Dr. Michael McGee. McGee concludes that the cause of death is "exsanguination" first, and "gunshot wound to thorax," second. The manner of death is classified as "pending investigation."
- **05/08/81** At approximately **3:00 p.m.**: Sergeant Green, Officer Atchison and Sergeant Collins return to secured crime scene without a warrant, using a lockbox to gain entry. They seize a notepad (found "in chest"), a broken curling iron with box (Exhibit 6), and a hairnet (Exhibit 19). All "turned into the St. Paul Police Crime Lab for processing."
- **05/10/81** Foster is released pending a decision by the Ramsey County Attorney's Office as to whether prosecution will occur.
- **05/11/81** At approximately **2:45 p.m.**: Sergeant Green takes recorded statements from Randy and Tyrone Winn with their father's permission.
- **05/11/81** A letter is sent by Foster's attorney requesting the preservation of evidence and is received 05/12/81 by Maplewood Police.
- **05/11/81** A torn photo and the undated two-page letter seized from a drawer in the decedent's bedroom is turned in to the Maplewood Police Property Department by Sergeant Green (Exhibit 12). Later, on 05/15/81, the items are tested by the St. Paul Police Crime Lab and fingerprint impressions found do not match either Winn or Foster.
- **05/11/81** A curling iron box and a broken curling iron are submitted to the St. Paul Police Crime Lab. No identifiable impressions are found. Foster's shirt and jacket are also submitted to the lab.
- **05/14/81** Confirmation is received that the recovered .38 caliber revolver recovered and identified was legally purchased by Aaron Foster in 1973.
- **05/19/81** A statement is taken of Eugene White by Sergeant Green concerning the evening of 05/07/81 at the Elks' Club.

- **05/20/81** The Ramsey County Attorney's Office declines to charge the case or take the case to the grand jury, stating "Insufficient evidence to charge. Evidence, if anything, especially in light of crime lab report, appears to substantiate def's version of what happened."
- **07/08/81** FBI lab analysis of gunshot residue on Foster and Winn finds conclusive evidence as to Winn and inconclusive evidence as to Foster. The report cautions that the result does not preclude the discharge of a firearm by Foster.
- **09/24/81** All evidence held by the St. Paul Police Crime Lab is returned to the Maplewood Police Department (Exhibit 14). Existing Maplewood Police Department Property records confirm original receipt of evidence in May of 1981, but offer no explanation as to whereabouts after retrieval of the evidence by Sergeant Collins from the crime lab in September of 1981 (Exhibit 17). Evidence in case disappears; it may be destroyed or lost when Maplewood Police Department moves to a new building in 1986/1987.
- **2002** Maplewood police conduct further investigation into the death of Barbara Winn. The only items of evidence from the original investigation found are crime scene photographs (Exhibits 1 through 11) and a copy of the undated two-page letter (Exhibit 16).
- **2006** Ramsey County Sheriff's Department reopens investigation in May of 2006. Interviews are conducted of former Maplewood Police Officer Laura St. George (f/k/a Watczak) in July, and Jean Tatum, the sister of Barbara Winn, in December.
- **2007** Further interviews are conducted of retired Maplewood Police Officer Ryan, and Kellen Gustafson, former girlfriend of Aaron Foster in January; retired Maplewood Police Officers Green and Collins in February; and Brenda Kaye Jones, a friend of Barbara Winn, and Grady Meadows, a former bar owner, in March.
- **2007** Aaron Foster is indicted by a grand jury for Third Degree Murder in November.

MEMORANDUM

I. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT FOR DENIAL OF HIS RIGHT TO A SPEEDY TRIAL AND FOR HIS RIGHT TO DUE PROCESS.

(A) Defendant's Right to a Speedy Trial.

Barbara Winn died as a result of a gunshot wound to the chest in the early morning hours of May 8, 1981. At the scene, Maplewood Police took Aaron Foster into custody and held him for 48 hours, after which time they released him without charges. Twelve days later, the Ramsey County Attorney's Office declined to charge the case or take it to the grand jury, based on insufficient evidence. Approximately twenty-six and a half years later, Mr. Foster was indicted by a grand jury on a charge of Third Degree Murder for the death of Barbara Winn.

Defendant now seeks dismissal of the indictment based on his belief that his right to a speedy trial and to due process under law, specifically under Article I, Sections 6 and 7, of the Minnesota Constitution, and under the United States Constitution's Sixth, Fifth, and Fourteenth Amendments, have been violated.

The threshold consideration for the Court is the length of the delay. If the delay is long enough to be considered " presumptively prejudicial," the Court then applies the remaining factors found in *Barker v. Wingo*, 407 U.S. 514 (1972). In order to consider the issue of "delay," the Court must determine initially when the speedy trial right attaches. In *United States v. Marion*, 404 U.S. 307 (1971), the United States Supreme Court held that the right to a speedy trial applies only after a person has been accused of a crime. In further defining "accused," the Court held that this occurs by way of "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge…" *Id*. at 463. Defendant argues that an arrest, in and of itself, implicates the right to a speedy trial. While conceding that

the Supreme Court in *Marion* appear to be referring to an arrest with continuing incarceration, the Defendant suggests this Court should interpret the case otherwise. In this instance, the Defendant was held for 48 hours and released without charges. He was neither arrested nor charged for this offense for the next twenty-six and a half years. He was not incarcerated, nor was he ever asked to post bail or meet other conditions of release at any point following his 48-hour detention after the death of Ms. Winn in May of 1981, leading up to his indictment in November of 2007.

In *U.S. v. MacDonald*, 456 U.S. 1 (1982), the Court went further in holding that the time between the dismissal of an initial charge filed against the accused and a subsequent indictment, should not be considered in assessing a speedy trial claim. In that case, the Court conceded that Dr. MacDonald had been subjected to an ongoing criminal investigation for five years following the dismissal of the initial charge, and that such an ongoing investigation inevitably resulted in a stressful and disruptive impact on his life. However, the Court placed great emphasis on the fact that without outstanding charges, there was no continuing restraint on MacDonald's personal liberty during this period. Nevertheless, the Defendant here argues that an arrest, even without outstanding charges, extended incarceration, or conditions of release, should implicate the right to a speedy trial due to the anxiety and stress felt by the Defendant. The Supreme Court has rejected that argument in the *MacDonald* case and the Court does so here as well.

The cases cited by the Defendant in support of his argument that an arrest implicates the right to a speedy trial, including *Dillingham v. United States*, 423 U.S. 64 (1975), where the defendant was on bond between the time of his arrest and indictment, and *Doggett v. United States*, 505 U.S. 647 (1992), where an indictment existed a number of years before the defendant was arrested, are clearly distinguishable. Despite Defendant's attempts to analogize an arrest

without continuing incarceration or any conditions of release, with an arrest followed by such a restraint, the case law clearly distinguishes between the two.[1] Likewise, Defendant's argument that he was worse off being released without charges, than if charges had been filed and dismissed, also fails. Dismissal of charges previously filed by the prosecuting authority, followed by a continuing investigation, as was the case in *MacDonald*, does not appear to this Court to be any more of an exoneration than release without charges, and reflects a more active prosecution. The Court agrees with the State's argument that there is no logical reason why this Defendant should have greater speedy trial rights than one whose charges were filed and dismissed but later reinstated.

In apparent recognition of the flawed argument the Defendant offers in support of his motion for dismissal based on a violation of his speedy trial right, Defendant invites this Court to "apply and interpret the Minnesota Constitution's Article I, Section 6, speedy trial clause," to conclude that the Defendant's arrest triggered his right to a speedy trial. In support of that request, the Defendant suggests that the U.S. Supreme Court has "sharply deviated" from its past precedents and that Minnesota needs a "better constitutional rule." While the Court understands the Defendant's point that the "probable cause allegation inherent in the arrest" remains by virtue of his initial 48-hour detention, and that the Defendant, arguably, has faced the possibility of prosecution for over two and a half decades, the Court declines the invitation to read into the Minnesota Constitution a right not currently recognized. Courts in Minnesota have historically applied the right to a speedy trial under our own Constitution in the same manner as under the Federal Constitution. Whether or not the decisions in the 1980s issued by the United States Supreme Court were a "sharp break," or an evolution of the court's thinking, the result is the

[1] For further support of the State's position see *U.S. v. Loud Hawk*, 474 U.S. 302 (1986).

same. The Court is not convinced that Defendant's suggestion constitutes the better rule of law. There is no statute of limitations for homicide in Minnesota. To suggest that a 48-hour detention, followed by a release for insufficient evidence to prosecute, starts the clock running for the application of the constitutional right to a speedy trial as it pertains to a charge of homicide, effectively creates a statute of limitations where none now exists. The Defendant has offered insufficient grounds for interpreting the speedy trial clause under the Minnesota Constitution more broadly than the Sixth Amendment right to a speedy trial recognized under the United States Constitution.

Given the Court's determination that there has been no "presumptively prejudicial delay" due to the fact that the Defendant was never charged or indicted, or held to answer to such a charge or indictment, the Court need not balance the remaining factors listed in *Barker v. Wingo*, 407 U.S. 514, 530 (1972).[2] Defendant's motion to dismiss the indictment for a violation of his speedy trial right under the Minnesota and United States Constitutions is denied.

(B) Due Process Claim.

The Fifth Amendment's Due Process Clause requires dismissal of an indictment when a pre-indictment delay: 1) causes substantial prejudice to the Defendant's right to a fair trial; and 2) when the delay was an intentional device used by the government to gain a tactical advantage over the Defendant. *Marion*, 404 U.S. at 324.

1. Prejudice to Defendant's right to a fair trial.

The parties agree that the Defendant must show actual, rather than speculative, prejudice to meet this requirement. The State cites caselaw from other jurisdictions to suggest that the

[2] See also *State v. Huddock*, 408 N.W.2d 218, 220 (Minn.Ct.App. 1987), citing *Barker v. Wingo*: "The length of the delay is the threshold issue; without presumptively prejudicial delay, it is unnecessary to inquire into the other factors of the balancing test."

length of delay does not, and should not, lead to an assumption of prejudice. As to the missing evidence, the State argues that the opportunity for forensic testing has been lost by both the State and the Defendant, and that the Defendant cannot show that the evidence, even if one accepts his uncorroborated version of events, would likely have been exculpatory. Yet the State concedes, as it must, that the focus is on the impact of the pre-indictment delay on the Defendant, not on the State.

In response, the Defendant again emphasizes that the physical evidence in the case no longer exists and asserts, without providing foundation, that it was destroyed "apparently intentionally." After detailing the missing evidence, the Defendant suggests that he has been put to a great disadvantage because this missing evidence would have been subject to testing and, he argues, would have confirmed his uncorroborated version of the events leading up to the death of Ms. Winn. As an example, the Defendant's long-sleeved shirt and jacket are no longer available. Defendant suggests that if they were available, they would corroborate Defendant's argument that he had no gunshot residue or the blood of Ms. Winn on him at the time of the arrest. Perhaps, but gunshot residue samples were taken from the Defendant's hands the morning of May 8, 1981, and the FBI lab analysis of that residue confirmed several months later that no gunshot residue (GSR) was found. Even if that result is not conclusive, it favors the Defendant. Thus the prejudice alleged to have been suffered by the Defendant, because he does not have his shirt or jacket to test, does not preclude his argument of a lack of gunshot residue on his hands.[3] Nevertheless, it cannot be disputed that evidence of probative value no longer exists, and that the Defendant has suffered prejudice as a result.[4]

[3] The Defendant also offered testimony regarding blood splatter analysis, but as the State argues, the benefits of testing for blood on the clothes are "inextricably" linked to the Defendant's version of events while other explanations, equally plausible, would explain any lack of blood on his clothes after Ms. Winn's shooting.

[4] As an example, the original tape recordings of witnesses no longer exist, so the Defendant does not have access to these prior statements as a resource for cross-examination of adverse witnesses.

While the Defendant argues that the missing evidence has resulted in substantial prejudice, he also suggests that the delay has enabled "political considerations to play a role in the re-opening and urging prosecution of a decades-old case," leading to an "improper motivation" for re-opening the case. While the Court is aware of the high profile nature of this case and the fact that several public officials have commented on this case both within the confines of a political campaign and after the completion of that campaign, the Court does not see this as a factor to be considered in analyzing the "substantial prejudice" component of this review. The focus here is on the impact of the pre-indictment delay on the Defendant's right to a fair trial, and not on a public official who may have encouraged prosecuting authorities to seek an indictment years after the death of Ms. Winn.

Arguably, the State is correct in suggesting that the prejudice shown by the Defendant as a result of the pre-indictment delay is primarily speculative, rather than actual. However, the delay did result in the loss of the evidence while it was in the possession of the police, and while that evidence is no longer available to either side, the focus in this analysis is on the Defendant. The Court finds the pre-indictment delay, and the consequent loss of the evidence while it was in the possession of the police, did cause substantial prejudice to the Defendant's right to a fair trial.

2. Whether the pre-charge delay was an intentional device used by the government to gain a tactical advantage.

Whether or not the destruction of the evidence prejudiced the Defendant's right to a fair trial, he must still show that the delay was both intentional and done to gain tactical advantage over him. However, nothing in the record and nothing in the chronology, as the State argues, suggests that the delay was intentional and used by the State to gain tactical advantage over the Defendant. One can take issue with the prosecutor's decision not to charge the case or to take it to a grand jury in 1981, and with the failure of the police officers to conduct further

investigation. One can certainly severely criticize the handling and storing of property, particularly evidence involved in a possible homicide, by the Maplewood Police Department in the early 1980s.[5] Yet there is nothing in the record to suggest that the delay in obtaining an indictment against this Defendant throughout the 1980s and 1990s, leading up to the return of the indictment in November of 2007, was intentional or done to gain tactical advantage over the Defendant. The fact that the indictment may have been returned after prosecuting authorities had been subjected to comments made by a public official does not change that conclusion.

The Defendant appears indirectly to accept this finding and instead invites the Court to ignore the "intentional" standard, and instead adopt a "culpable negligence" standard or a "reckless disregard of the circumstances" standard in analyzing the State's pre-indictment conduct. The Defendant argues specifically that law enforcement officials, by not pursuing the investigation or by not seeking further review by the charging prosecutor, within a reasonable period of time, created "an appreciable risk that any subsequent, extended delay would impair the Defendant's ability to defend himself." On the contrary, the record before the Court suggests that creating a risk for the Defendant at some later date was never considered by the law enforcement officials involved in the investigation. Indeed, the failure to follow up the initial investigation appears to have resulted solely from the Maplewood Police Department's lack of interest in pursuing the matter.

The Court does not believe "culpable negligence" or "reckless disregard" are proper standards in analyzing the pre-indictment delay under the due process clause. The Defendant's motion for dismissal pursuant to a violation of his right to due process under the Fifth

[5] A police witness at the hearing described the "property room" as a "corner of the police garage" that was held together by "2 x 4's and chicken wire." Evidence was stored in unlocked bins designated by the name of the officer involved, as opposed to designation by investigation, which resulted in: a) the commingling of evidence from different crime scenes; and b) access to all bins by anyone in the "room".

Amendment of the United States Constitution is denied. The evidence provided is insufficient for the Court to conclude that the pre-indictment delay was an intentional device used by the State to gain tactical advantage over the Defendant.

II. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT FOR DESTRUCTION OF EXCULPATORY EVIDENCE.

As noted in the previous section examining the due process claim of the Defendant, none of the physical evidence that was seized in this case still exists, with the exception of crime scene photographs and a copy of a two-page letter. The evidence that was seized, but no longer exists, includes evidence accumulated at the scene (the firearm, a broken curling iron with a box, a hairnet, a notepad, the original two-page letter, and a torn photo); the Defendant's long-sleeved shirt and jacket and decedent's clothes, short curly hairs found in Ms. Winn's hand, and parts of her fingernails. The Defendant's blood sample is also missing, as are the items found on his person at the scene, including four .38 cartridges and a folding knife.[6] Finally, the original tape recordings of witness statements have also been lost or destroyed.

What does exist are 11 photos of the crime scene, including 3 photos of the decedent, as well as photos of the broken curling iron and the hairnet (Exhibits 1 through 11), and a copy of an undated two-page letter, ostensibly written by Ms. Winn, seized from a dresser in the bedroom (Exhibit 16).

The Defendant suggests that the State violated his right to due process when it destroyed the evidence in this case. There are a number of factors that must be considered in determining whether the destruction of evidence constitutes such a violation of due process. In examining the Defendant's claim, the Court considers: 1) whether the destruction of the evidence was

[6] It should be noted that on May 11, 1981, the attorney for Aaron Foster sent a letter to the Maplewood Police Department requesting that they "preserve all evidence regarding the death of Ms. Barbara Winn."

intentional, and if it was intentional, whether the Defendant can show bad faith on the part of the police. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *State v. Bailey*, 677 N.W.2d 380, 391 (Minn. 2004)(where the Court found that the destruction of the evidence was "intentional" but not done in bad faith, i.e. "to avoid discovery of evidence beneficial to the defense."); 2) whether the exculpatory value of the evidence was apparent and material; and 3) whether the evidence was of such a nature that the Defendant would be unable to obtain comparable evidence by reasonably available means. *California v. Trombetta*, 467 U.S. 479 (1984).

The evidence that went missing after release from the St. Paul Crime Lab in September of 1981 may or may not have been destroyed intentionally. The Defendant would have this Court believe that the evidence was destroyed intentionally, apparently with a nefarious purpose in mind. An equally logical explanation appears to be that the evidence was returned to the poorly documented Maplewood Police property "room" (Exhibit 17), and lost or destroyed when the Maplewood Police Department moved its headquarters in 1986 or 1987. Despite the Defendant's allegations, the Court finds no evidence that the items seized above were intentionally destroyed by public officials. Further, even if they had been destroyed intentionally, there is simply no evidence to suggest that the police acted in bad faith in failing to preserve this evidence, or that they destroyed the evidence "to avoid discovery of evidence beneficial to the defense." The Defendant does not offer any persuasive evidence of any intentional destruction, much less evidence of bad faith on the part of public officials who failed to preserve this evidence.

The Defendant also argues that the exculpatory value of the evidence was apparent and material. However, the Court agrees with the State that the exculpatory value of evidence cannot be immediately apparent to law enforcement officials when the forensic tests that would now be

helpful did not exist at the time the evidence was available. Most of the evidence was examined at the St. Paul Police Crime Lab at the time. The Defendant would have the Court accept his uncorroborated version of events in evaluating the exculpatory value of the evidence. However, as the State argues, it may be the State that is at a disadvantage at this time given the advancements in forensic testing with the result that the evidence may have had inculpatory, rather than exculpatory, value. In any case, even if the Court were to accept Defendant's argument that the evidence possessed exculpatory value that was evident, and that he is unable to obtain comparable evidence by reasonably available means, there has been no showing of bad faith on the part of the State in losing, or destroying, the evidence.

Given that the Defendant has not shown that the police officials acted in bad faith when the evidence was lost or destroyed, and given further that the exculpatory value of the evidence is not immediately apparent in terms of the forensic testing available in 1981, the Defendant's motion for dismissal based on the destruction of evidence resulting in a violation of due process is denied.

III DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED BY SEARCH AND SEIZURE.

The Defendant has moved to suppress evidence seized from the residence he shared with the decedent at 368 Dorland Road in Maplewood; evidence seized from the trunk of his motor vehicle; and evidence seized from his person.

Prior to the hearing on these motions, the State conceded that the search of the trunk of the Defendant's motor vehicle conducted by Maplewood police officers on May 8, 1981, was done in violation of the Defendant's constitutional rights, and the evidence seized from that part of the investigation is suppressed by stipulation.

(A) Search of 368 Dorland Road.

As noted previously, the physical evidence seized from 368 Dorland on or about May 8, 1981, is missing and presumed lost or destroyed. The issue remains, however, as to the admissibility of the seized evidence through photos of the scene and/or testimony concerning the evidence seized.

In the absence of a warrant, a search is per se unreasonable and the evidence must be suppressed unless it comes within a defined exception. *Katz v. United States*, 389 U.S. 347 (1966). Law enforcement officials never obtained a warrant to search 368 Dorland Road, although they had the opportunity to do so after securing the premises, leaving the area, and returning later in the day on May 8, 1981. There is no clear explanation for this failure of the Maplewood Police Department to obtain a search warrant.

Following the emergency phone call to the police that reported a "domestic" and "glass breaking" at 368 Dorland Road shortly after midnight the morning of May 8, 1981, followed closely by a call reporting a shooting at the same address, a number of Maplewood police officers arrived at the scene. The State argues that the Defendant consented to a search of 368 Dorland Road. A Defendant can waive Fourth Amendment rights by consenting to a search. *State v. Gilbert*, 262 N.W.2d 334 (Minn. 1977). However, the burden is on the prosecution to show by a preponderance of the evidence that the consent was freely and voluntarily given and was not the product of duress or coercion, expressed or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The voluntariness of consent must be determined by an examination of a totality of all of the circumstances. Here it does appear that the Defendant consented to the entry of several law enforcement officers/paramedics to the bedroom where Barbara Winn had been

shot. The Defendant suggests that even if the consent was valid, it had a limited purpose, namely to allow the paramedics/officers to respond to the shooting of Ms. Winn.

The scope of a search is limited by the terms of its authorization. *Walter v. United States*, 447 U.S. 649, 656 (1980). A search that exceeds the authorized consent is unreasonable and violates the Fourth Amendment. *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971). Here the officers/paramedics were shown the room where Ms. Winn was laying on the floor. Once inside the residence, law enforcement officers observed, in plain sight, a number of items and made a number of observations. In the course of a lawful intrusion, property in plain view may be seized if it is "immediately apparent" (defined as probable cause to believe) that the property is contraband or evidence of criminal activity. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Consequently, police may seize an item under "plain view" if they were lawfully in the position from which they viewed the object; if the object's incriminating character was immediately apparent; and if the officers had a lawful right of access to the object. An officer may seize contraband, an instrumentality of the crime, fruits of the crime, evidence of the crime, and objects dangerous in themselves. *Id.*; *Warden v. Hayden*, 387 U.S. 294 (1967).

As to the photographs, "since the police officers were validly in the room, they could properly view everything in plain sight in that room….If the officers could validly view the inside of the room at all, they could validly photograph that which was in plain sight, and the photographs were properly admitted in evidence." *State v. Fulford*, 187 N.W.2d 270, 273 (Minn. 1971). Here, the Court finds that the officers were "validly in the room" when the photographs were taken pursuant to the Defendant's consent, and under *Fulford*, the officers did not need further consent from the Defendant to photograph that which was in "plain sight." The items that were photographed were not seized by the officers until they returned to the secured crime

scene 11 or 12 hours later, which suggests that their incriminating character was not immediately apparent.[7] In the interim, there is no evidence that the Maplewood Police Department sought to obtain a search warrant to seize property at the scene. Certainly the Defendant did not consent to a return to the property by the police once it was ascertained that Ms. Winn was deceased; once she had been removed from the residence; and once the Defendant was no longer on the premises. The State would ask the Court to accept that the children of the deceased, all juveniles, somehow consented to the return trip. Such consent, if it was given, is insufficient for the seizure of the property at approximately 3:00 p.m., almost 14 hours after initial entry.

As to the undated two-page letter and torn photo seized by Sergeant Green and held three days before it was turned into evidence, they were seized from a drawer of a dresser in the bedroom where the Defendant resided with Ms. Winn, and clearly were not in "plain view."

In determining whether a defendant can bring a claim asserting a violation of his or her Fourth Amendment rights, the issue is whether the disputed search has infringed an interest of the defendant which the Fourth Amendment was designed to protect. *State v. Carter*, 569 N.W.2d 169, 174 (Minn. 1997). The Defendant can seek the protection of the Fourth Amendment only if the Defendant demonstrates that his Fourth Amendment rights, and not those of a third person, have been violated by the challenged search or seizure. *United States v Padilla*, 508 U.S. 77 (1993). Given that the Defendant resided in that bedroom with Ms. Winn, he had a legitimate expectation of privacy "in the invaded space." *State v. McBride*, 666 N.W.2d 351, 361 (Minn. 2003).[8] The Court finds that he has standing to object to the search of the

[7] "Immediately apparent" in this context means apparent without further action or intrusion by the officer; further action or intrusion is a search requiring separate justification, usually probable cause. *Arizona v. Hicks*, 480 U.S. 321 (1987). Here the officers did not seize the items when they were in the bedroom by consent of the Defendant.
[8] In *McBride*, the Court considered "whether a defendant had a legitimate expectation of privacy in an item located (in a nightstand) in the defendant's residence when the item is owned by a third person," and concluded that the defendant did have a legitimate expectation of privacy under such circumstance, and thus had standing to challenge the search of the nightstand.

dresser in the bedroom without a warrant. As to the earlier consent, "a limited voluntary consent does not authorize 'indiscriminate rummagings' into a person's possessions." *State v. Powell*, 357 N.W.2d 146, 150 (Minn.Ct.App. 1994). As the Defendant points out, the evidence seized (other than the weapon, the Defendant's shirt and jacket, and the decedent's clothes which were properly taken into evidence), was not seized until the Defendant had made statements, had been taken into custody, and an autopsy of Ms. Winn had been conducted. The Maplewood police officers involved should have obtained a search warrant before returning to seize the evidence at 368 Dorland.

In summary, the photographs taken by the officers in the bedroom of the residence, after the Defendant had consented to their presence, are admissible subject to proper foundation. The items seized by the officers when they returned to the premises would not be admissible if the evidence still existed. Therefore, no testimony will be allowed as to the items seized later in the day. The undated two-page letter and torn photo seized from the drawer of the dresser are clearly not admissible, since they were not in plain view and were seized without a warrant. Consequently, Exhibit 16 is not admissible, nor is testimony admissible related to the letter or the torn photo. Defendant's motion to suppress evidence seized in the search of 368 Dorland is consequently granted in part.

(B.) Search of the Defendant's Person on May 8, 1981.

After arriving at the scene, Officer Ryan was told by Sergeant Cahanes that the black male that he had observed near the garage entrance wanted to make a statement. After he initially talked to the man later identified as the Defendant, Ryan returned to the bedroom and, along with others, did a cursory and unsuccessful search for a weapon. He then returned to the garage where the Defendant was present, along with Sergeant Cahanes. Noticing that the

Defendant had cuts primarily on his right hand, Ryan used a first aid kit to bandage that hand. Ryan then, along with others, "decided to hold the male party while we started to investigate the scene. I asked the black male his name, and he told me it was Aaron Foster…I asked him to empty his pockets which he did. Foster had some change and paper money along with some keys in his front pockets. He also removed four cartridges from his pocket – all four were marked '.38 SPL Super Vel'. He also removed a red folding pocket knife and a wallet with misc. papers and I.D.. The cartridges and knife I retained and the other contents of his pockets were returned to him." (Foster App. p. A5). The Defendant now moves to suppress the items seized from him that night, specifically the red folding pocket knife and the four .38 cartridges.

The State mischaracterizes the exchange between Officer Ryan and the Defendant in its brief by suggesting that "Officer Ryan asked the Defendant if he had anything in his pockets, and the Defendant voluntarily emptied his own pockets." This conflicts with the report prepared by Officer Ryan on May 8, 1981, wherein he states that "I asked him to empty his pockets which he did." (Foster App. p. A5). Consequently, the Court concludes that a search did take place shortly after the decision was made to hold the Defendant, and the Court cannot conclude that the Defendant consented to voluntarily empty his pockets simply based on his acquiescence to the directive of Officer Ryan.

At oral argument, the State argued that if the Court were to find that a search did take place: 1) that since the Defendant was being held, the officer had a right to do a patdown search for officer safety purposes; 2) that the "plain feel" doctrine would apply as to the seizure of the knife and bullets; and 3) that in any case, the inevitable discovery exception would apply, since later that night the evidence would have been properly seized pursuant to an arrest. Finally, in regards to the "plain feel" doctrine and the inevitable discovery doctrine, the State takes the

position that although these doctrines were specifically recognized after 1981, they should be applied in this case retroactively.[9]

The Defendant argues that Officer Ryan had no basis to compel the Defendant to empty his pockets, suggesting that at most the officer could have frisked the Defendant, stating, "a search of his pocket would not have been permitted absent feeling an object that could be a weapon." He argues persuasively that while he was surrounded by police officers in a highly stressful situation, who appeared determined to hold him while the scene was investigated, he had no reason to believe that he had the right to refuse the officer's directive. The Defendant further notes that the items seized are no longer available, and that apparently no photographs of the evidence were taken. Consequently, the remaining issue before the Court is whether to allow testimony concerning what was seized from the Defendant, which he argues would be "derivative evidence of the primary illegality."

At the time Officer Ryan and others decided to hold the Defendant while the scene was investigated, they were aware that there was a gunshot victim and that they had been unable to locate the gun. Given these circumstances, and given the Defendant's presence at the scene in an agitated state, a reasonably prudent person under the circumstances would be warranted in the belief that the safety of self or others was at risk. *Terry v. Ohio*, 392 U.S. 1 (1968). Officer Ryan need not have been reasonably certain that the Defendant was armed. The Court concludes that Officer Ryan could have conducted a limited protective patdown search for weapons of the Defendant since there existed a reasonable suspicion, based on articulable facts, that he was armed and dangerous. *Id.* Generally, a frisk is limited to a patdown search of the outer clothing

[9] At the close of the first hearing date, March 20, the Court invited letter briefs from both sides on the issue of retroactivity due by the next hearing date, March 24. The State submitted a one-page letter brief. The Defendant chose not to offer any submissions or specific arguments against retroactive application of these doctrines.

of the suspect to discover weapons that may be used to assault the officer or others. However, in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the Court held that in the course of a lawful patdown, if the officer feels an object whose contour or mass makes its identify as contraband immediately apparent (defined as probable cause), its warrantless seizure would be justified by the same practical considerations that exist in the plain view context. This "plain feel" exception to the warrant requirement is recognized under the Minnesota Constitution. *State v. Burton*, 556 N.W.2d 600 (Minn. Ct. App. 1996). The theory of the "plain feel" doctrine is that the seizure of an item whose identity is already known occasions no further invasion of privacy.

No foundation exists for the use of the plain feel exception here, as the evidence actually seized from the Defendant, the folding knife and bullets, apparently no longer exists. Further, because the Defendant was directed to empty his pockets, there is no evidence concerning the officer's patdown, or his basis for concluding that the items' "contour or mass" made their identity immediately apparent as contraband and therefore subject to seizure. The Court is left to speculate as to what type of a patdown the officer would have engaged in, and whether there was sufficient foundation for the seizure.

In the alternative, the State offers the argument that the items found on the Defendant's person on May 8, 1981, would have been discovered "inevitably" since he was taken into custody and held for 48 hours. It does appear that a decision had been made to hold the Defendant while the scene was investigated, prior to the directive to empty his pockets. It also appears from a review of the police reports, that after that decision had been made, evidence other than the items found on the Defendant's person would have led to his being taken into custody. That evidence was the Defendant's own statements, statements of the Winn children, the location of the gun, apparently disposed of away from the premises by the Defendant, and the

need to get a lab report on the gunshot residue (GSR) analysis of the Defendant's hands. All of these factors, as well as the fact that the decision to hold the Defendant was made prior to his emptying his pockets, and that he was held until he was booked and then held for an additional 48 hours, weigh in favor of the State's position on inevitable discovery. Consequently, even if the Court were to conclude that the evidence was subject to exclusion since the emptying of the pockets was not done voluntarily, and because there is inadequate foundation for the Court to accept the plain feel exception to the exclusionary rule, "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means…the deterrence rationale has so little basis that the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 444 (1994). The United States Supreme Court recognized this exception on the theory that "exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix* at 446. The Court finds that based on the testimony and documents submitted, the State has established by a preponderance of the evidence that the items the Defendant took out of his pockets that night at the directive of Officer Ryan would have been inevitably discovered either before, or during, booking when he was held for two days before being released.

The Court is aware, as the defense has argued, that left unchecked, the inevitable discovery doctrine would swallow the exclusionary rule. The Court agrees. However, the application of that doctrine to the facts before the Court in this case does not present the potential for such an abuse of police power. Evidence other than the items removed by the Defendant from his person was sufficient to lead to his lawful arrest while the matter was investigated further. In addition, there is a straight line between the decision of the officers to "hold" the Defendant, and his arrest and booking at the jail.

The United States Supreme Court formally recognized the inevitable discovery doctrine in 1984, three years after the death of Ms. Winn in 1981. *Id.* However, the Minnesota Supreme Court cited "the likelihood that the evidence would have been discovered by legal means" as a factor in considering suppression of evidence as far back as 1980. *State v. Seefeldt*, 292 N.W.2d 558 (1980). Minnesota went on to recognize the inevitable discovery doctrine as outlined by the United States Supreme Court shortly after that Court's decision in *Nix*. *State v. Eppler*, 362 N.W.2d 315 (1985). In addition, the Minnesota Supreme Court has held that "generally our rulings are given retroactive effect." *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002), citing *Baker v. State*, 590 N.W.2d 636, 640 (Minn. 1999). To apply such a doctrine non-retroactively, three factors would have to be satisfied and they are not satisfied here.[10] The Court finds that the inevitable discovery doctrine does not establish a new principle of law, as evidenced by the Minnesota Supreme Court's recognition in 1980 of the factor in considering the application of the exclusionary rule. Consequently, the Court finds that the inevitable discovery doctrine is applicable in this situation.

In summary, as to the search of the Defendant's person, the Court finds that the Defendant emptied his pockets solely at the directive of the police officer, rather than voluntarily; that the officer would have had the right to patdown the Defendant for officer safety purposes; that he did not do so, and that therefore the plain feel exception is unhelpful in this case without further foundation; but that in any case, the inevitable discovery doctrine does apply. The Defendant's motion to suppress the evidence from the Defendant's person is denied and testimony will be allowed as to that evidence.

[10] Referred to as the "special circumstances test," it requires that three factors be satisfied for a decision to apply non-retroactively: First, whether the decision establishes a new principle of law; second, whether, based upon the prior history of the rule and its purpose and effect, retroactivity of the rule will further or retard its operation; and, third, whether a retroactive application will provide an inequitable result. *Baird* at 111.

IV DEFENDANT'S MOTION TO SUPPRESS STATEMENTS OBTAINED IN VIOLATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

At the outset it should be noted that the State conceded at oral argument that the statements given by the Defendant to Officer Heinz, Sergeant Cahanes, Sergeant Green, and Sergeant Collins were obtained in violation of his constitutional rights. Consequently, those statements are suppressed by stipulation. The State has given notice to the defense that they intend to use these statements for impeachment purposes should the Defendant choose to testify, as the Defendant did not challenge the voluntariness of those statements to the law enforcement officers.

This leaves, however, the statement made to Officer Ryan shortly after the officers arrived at 368 Dorland Road. As noted earlier, Officer Ryan arrived at the scene and was directed upstairs where he learned that Ms. Winn was deceased. Sergeant Cahanes then directed Ryan downstairs because he said that "the guy downstairs wanted to make a statement." Officer Ryan went downstairs and found the Defendant leaning face down over the roof of the car in the garage. He asked the Defendant what happened and the Defendant replied "she shot herself." Based on the Defendant's continuing concern regarding Ms. Winn, Officer Ryan then returned to the bedroom and saw Officers/Paramedics Becker and Melander attempting to verify their determination that Ms. Winn was deceased. Officer Ryan and other officers made a cursory search of the surroundings but could not locate a weapon. Officer Ryan then returned downstairs at which time he bandaged the Defendant's right hand; asked him to empty his pockets; allowed him to call home; and took the phone and advised the listener that if the Fosters had a family attorney, they should contact him. The Defendant was then accompanied to the squad car and put in the backseat. There was no means of escape from the backseat of the squad car, given that there were no inside handles on the doors.

The State concedes that a *Miranda* warning is required if an individual is in custody when interrogated. *Miranda v. Arizona*, 384 U.S. 436 (1966). The test for determining custodial status is whether the person questioned was deprived of freedom of action in any significant way. *Oregon v. Mathiason*, 429 U.S. 492 (1977). The State argues that the Defendant could not have reasonably believed that he was in custody under these circumstances, in part because he was not handcuffed and because he had been allowed to make a telephone call. However, events leading up to the detention of the Defendant in the backseat of the squad car contradict the State's position. The determination had already been made to "hold" the Defendant; he had been directed to empty his pockets; and a law enforcement officer had advised family members to call an attorney. Finally, the Defendant was being held in the backseat of a squad car without any means of exiting the squad car on his own. The Court concludes that a reasonable person in the place of the Defendant would in fact believe that he was in custody and that the Defendant was deprived of freedom of action in a significant way. Therefore, the *Miranda* warning should have been given to the Defendant prior to questioning.

Anticipating that the Court might make this finding, the State argues alternatively that the "public safety exception" to the *Miranda* warning applies, to the extent that the Defendant's statement addressed the location of a firearm.

The requirement that a *Miranda* warning be given before a suspect's answers may be admitted into evidence does not apply to a situation in which police officers ask questions reasonably prompted by a concern for public safety. *New York v. Quarles*, 467 U.S. 649 (1984); *State v. Provost*, 490 N.W.2d 93 (Minn. 1992). The availability of the exception does not depend on the motivation of the individual officer involved and the exception will be narrowly circumscribed by the exigencies which justify its application.

At the time Officer Ryan inquired of the Defendant as to the whereabouts of the firearm, he knew the following: 1) that Ms. Winn had died from a gunshot wound; 2) that a cursory search of the scene of her death had not turned up the weapon; and 3) that the Defendant was not carrying the firearm. At that point, the officer had a legitimate basis to ask questions prompted by a concern for public safety and the possibility that other lives were in danger. At this stage he had no idea where the gun was located, if the gun was loaded, and who had access to it. Further, the questioning occurred on the scene within a short time after the death of Ms. Winn. Applying this narrow exception to the facts in this case, the Court agrees with the State that Officer Ryan was "faced with the immediate necessity of locating the gun because (the Defendant) could have discarded it in a nearby public area," as indeed he did. *State v. Caldwell*, 639 N.W.2d 64, 68 (Minn.Ct.App. 2002). The Court finds that the public safety exception is applicable in this instance. Further, the Court finds that the public safety exception acknowledged by the United States Supreme Court in 1984 is applicable to this case retroactively. The basis for this application is that, first, as noted earlier, the Minnesota Supreme Court has generally held that its rulings are given retroactive effect. *Baird* at 110; second, although the Defendant indicated at oral argument that he opposed application of the public safety exception generally, he has not offered any argument, orally or in any brief submitted, that specifically opposes the retroactive application of this exception; and, third, as the United States Supreme Court recognized in *New York v. Quarles*, "the doctrinal underpinnings of *Miranda*" do not apply "to a situation in which police officers ask questions reasonably prompted by a concern for the public safety" at 656, and thus the application of the public safety exception does not establish a new principle of law (*Miranda* was decided in 1966) under the "special circumstances test." See *State v. Baird*, 654 N.W.2d 105, 111 (Minn. 2002). This Court concludes that the public safety exception to the

Miranda warning should be applied retroactively to May of 1981 when the Defendant was questioned.

In summary, the Court suppresses the statement given by the Defendant to Officer Ryan on May 8, 1981, with the following exceptions. Only these statements of the Defendant are admissible in the State's case in chief:

a) Field interrogation: Officer Ryan's initial approach to the Defendant when he asked him what had happened and the Defendant replied, "she shot herself," is admissible because at that stage the Defendant was not in custody, and the officer was entitled to engage in general on-the-scene questioning as part of the fact finding process; and

b) Public safety exception: This exception provides for the admissibility of the following questions and answers: Officer Ryan asked the Defendant where the firearm was now, and the Defendant told him he threw it out of the car window when he drove to the 7-11 store. Officer Ryan then asked the Defendant how he had thrown it out and where, and the Defendant told him he had thrown it out the passenger side window, but he was not sure of the location.

CONCLUSION

Almost 27 years ago, Barbara Winn died as the result of a gunshot wound to her chest. The shooting occurred in the bedroom of a residence she shared with the Defendant and her three children. Those who initially responded to the emergency calls, police officers, officers/paramedics, and fire department personnel, were understandably concerned with the welfare of Ms. Winn. It is what happened after Ms. Winn's death had been confirmed that has led to a number of unanswered questions.

These questions primarily revolve around the action and inaction of members of the Maplewood Police Department in 1981 and thereafter. Officers did not properly advise the Defendant of his constitutional rights; they did not obtain a search warrant before seizing evidence from the residence, despite having had the opportunity to do so; once the Ramsey County Attorney's Office declined prosecution, they did not conduct additional investigation when the evidence and witnesses were still available; and, finally, they lost or destroyed evidence relating to a possible homicide, a crime for which there is no statute of limitations. The conduct of the Maplewood Police Department, as it pertains to the investigation of the death of Barbara Winn, was unprofessional, irresponsible, and inexplicable. The public in general, and the members of Ms. Winn's family in particular, deserved better.

Nevertheless, for the reasons stated, the Court is denying the Defendant's motions to dismiss and granting, in part, Defendant's motions to suppress evidence.

EJC