No. ___

IN THE

# Supreme Court of the United States

ENNIS C. PAYNE, II,

*Petitioner,*

v.

WEST VIRGINIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court of Appeals of West Virginia**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Ennis C. Payne, II, was a frequent overnight guest at the home of his friend, Timothy Starks. Payne would stay in the living room area of the Starks home when he needed a place to sleep.

On January 13, 2010, Payne arrived at Starks's home in the early morning hours. When Starks awoke later that morning, Payne was gone, but he had left behind a jacket, which hung on a chair in the foyer of the home.

Two days later, a police officer visited the Starks home inquiring about Payne's whereabouts. Starks did not know where Payne was, but mentioned that Payne's jacket was hanging on the chair in his foyer. Starks signed a consent-to-search form for the first floor of his residence.

At the time of the search, the officers were aware that the jacket belonged to Payne and not Starks. Nevertheless, the officers undertook a warrantless search of Payne's jacket pockets and found an ammunition magazine containing four .25 caliber cartridges and court documents bearing Payne's name. The officers seized the jacket and its contents. The trial court denied Payne's motion to suppress, and the evidence was ultimately used at Payne's trial.

The question presented is:

Whether the Fourth Amendment prohibits a warrantless search of a guest's container found inside a home or vehicle searched by officers relying on consent given by the home or vehicle owner, who lacked actual authority to consent to the search of the container.

## PARTIES TO THE PROCEEDING

Ennis C. Payne, II was the defendant in the trial court and the petitioner below. The State of West Virginia was the plaintiff in the trial court and the respondent below.

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**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

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**OTHER AUTHORITIES**

Petitioner Ennis C. Payne, II, respectfully submits this petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia.

## OPINIONS BELOW

The Supreme Court of Appeals of West Virginia's opinion is unreported, but is available at 2016 WL 6835733, and is reproduced at Pet.App.1a. The trial court's opinion on the motion to suppress is unreported and is reproduced at Pet.App.43a.

## JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on October 19, 2016. On January 10, 2017, Chief Justice Roberts extended the time for filing this petition to and including March 17, 2017. *See* No. 16A674. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

## STATEMENT OF THE CASE

### A. Factual Background

**1.** This case concerns the warrantless search of Payne's jacket pockets by law enforcement without his consent and the failure of the trial court to suppress the unlawfully-obtained evidence discovered therein.

During the evening of January 12, 2010, Darnell Bouie, Michael Thomas, and Michael Moran traveled to the Ordinary Bar in Clarksburg, West Virginia. Pet.App.9a. At 12:51 a.m. on January 13, 2010, security cameras captured Payne entering the same bar wearing a Pittsburgh Pirates "P" baseball hat and dark Timberland-type boots. *Id.*

At around 3:00 a.m., Payne, Bouie, Moran, and Thomas left the bar traveling in two vehicles, and were joined by Leonard Hickey on their way to the Quarry Apartments. *Id.* After arriving, Payne and Bouie exited the vehicles, while the other men waited inside. *Id.*

**2.** Jennifer Hall, the girlfriend of Jayar Poindexter, testified that she awoke on January 13, 2010, to find Poindexter and another person, whom she could not see, struggling at the bedroom window. Pet.App.10a. Poindexter stopped struggling and fell to the floor. *Id.* Hall hid on the floor in an attempt to conceal herself, and called 911 at 3:30 a.m. *Id.* Poindexter died of a gunshot wound to his chest, but Hall neither recalled seeing a gun nor hearing a gunshot. *Id.*

**3.** At 3:35 a.m., a surveillance camera at a nearby Go-Mart captured the arrival of Payne and his companions. Pet.App.11a. The video footage shows

Payne wearing what appear to be dark boots and a jacket with white stripes, but without the Pittsburgh Pirates "P" hat. *Id.*

At around 4:00 a.m., Payne was dropped off at the home of his friend, Timothy Starks. Payne was a frequent guest in the Starks family's home, and Payne stayed in their first floor "living room area" when he needed a place to sleep. Starks testified that Payne was carrying two guns when he arrived. Pet.App.11a-12a.

**3.** Officers responded to Hall's 911 call. Photographs and cast molds were taken of footprints in the snow outside Poindexter's bedroom window. Pet.App.10a. Officers discovered that Poindexter's bedroom window was half-raised with the screen "cut or torn." Pet.App.11a. A .25 caliber bullet casing was recovered at the scene. *Id.* Police also recovered a Pittsburgh Pirates "P" baseball hat on the grounds of the Quarry Apartments later that morning. *Id.*

**4.** When Starks awoke later in the morning on January 13, 2010, Payne was gone. Payne left behind a cell phone and a "Carhartt-type" jacket on a chair in the foyer of Starks's home. Pet.App.12a. This Carhartt-type jacket was a different jacket than the striped jacket Payne was wearing in the Go-Mart surveillance footage shortly after the murder. Pet.App.12a-13a.

**5.** Two days later, on January 15, 2010, Clarksburg Police Officer Mike Fazzini went to Starks's home to inquire about Payne's whereabouts. Pet.App.12a. Although Starks did not know Payne's whereabouts, he asked Fazzini whether he should keep or dispose of Payne's jacket that was on the

chair in his foyer. *Id.* Fazzini told Starks that he should "hang onto" the jacket and then contacted Detective Wygal. *Id.* Detective Wygal traveled to Starks's residence, and Starks thereafter signed a consent-to-search form for the first floor of his home. *Id.*

Despite Starks's statement that the jacket belonged to Payne, Fazzini performed a warrantless search of the jacket, including its pockets. *Id.* Inside one pocket, Fazzini found an ammunition magazine containing four .25 caliber cartridges and court documents bearing Payne's name. The officers seized Payne's jacket and its contents. Pet.App.12a-13a.

The police used these seized items, in part, to apply for and receive a search warrant for Payne's permanent residence. Pet.App.33a. Also included in the affidavit to support probable cause was the uncorroborated, and ultimately determined untrue, hearsay statement that "[a]ccording to an individual, EC Payne had throughout the night attempted to make contact with the victim by phone." Pet.App.32a-33a. Among other things, officers found a pair of size 10.5 Timberland boots during the search of Payne's home. Pet.App.13a.

### B. The Proceedings Below

**1.** In Fall 2012, Payne and Bouie were arrested in connection with the death of Poindexter. On May 7, 2013, a grand jury returned an indictment charging Payne with first degree murder and conspiracy to commit burglary. Pet.App.7a.

By order entered May 16, 2014, the trial court denied Payne's motion to suppress evidence seized at Starks's residence.[1] Pet.App.76a-77a. The trial court determined that Payne "enjoyed a legitimate expectation of privacy in the Starks' residence" because he was "more than a 'casual visitor'" due to his periodic stays at the residence. Pet.App.74a. Nevertheless, the court held that Starks's permission to search the first floor living area of his home was sufficient to authorize Officer Fazzini's search of Payne's jacket pockets. Pet.App.76a.

Payne's trial took place in November 2014. The jury returned its verdict finding Payne guilty of first degree murder with a recommendation of mercy and conspiracy to commit burglary. Pet.App.21a.

**2.** Payne appealed his conviction to the Supreme Court of Appeals of West Virginia. *Id.* On his Fourth Amendment claim related to the warrantless search and seizure of his jacket pockets in Starks's home, the court held that Payne did not have a reasonable expectation of privacy in the contents of his jacket because Starks's general consent to search the premises was sufficient to allow officers to search and seize Payne's jacket and its contents. Pet.App.30a.

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[1] In addition to the items seized from Starks's residence, Payne also sought to suppress evidence seized from his own residence. Notably, the affidavit used to obtain the search warrant for his home was insufficient to support probable cause, in part because it relied on the .25 caliber bullet casings recovered from his jacket pockets in Starks's home, and thus were the fruits of an illegal search. Pet.App.33a.

The court began its analysis by recognizing that an "overnight guest has a legitimate expectation of privacy in a host's home." Pet.App.24a. Citing *Minnesota v. Olson*, however, the court reasoned that from "the overnight guest's perspective, . . . his possessions will not be disturbed by anyone but his host *and those his host allows inside*. 495 U.S. 91, 99 (1990) (emphasis added); Pet.App.24a. The court then stated that, based on this observation from *Olson*, "[c]ourts have found . . . that an overnight guest cannot challenge a search and seizure under the Fourth Amendment when their host has consented to the police search." *Id.*

The court further explained that "the right to challenge the legality of a search depends not upon a person's property right in the invaded place or article of personal property, but upon whether the person has a legitimate expectation of privacy in the invaded place or thing." Pet.App.25a. The court ultimately held that Payne did not have a reasonable expectation of privacy in the contents of his jacket pockets, in part, because he had "relinquished possession of his jacket" by "leaving it in the foyer" of Starks's home for two days without leaving "instructions with regard to the jacket." Pet.App.29a. Thus, according to the court below, Starks's general consent to search the first floor of his home was sufficient to authorize the search and seizure of Payne's jacket pockets and their contents.

This petition for certiorari followed.

## REASONS FOR GRANTING THE PETITION

Review is warranted for four reasons.

*First*, the decision below exacerbates an existing division in the federal appellate courts and state courts of last resort regarding whether the search of a closed container located in a home or vehicle is constitutional, when the home or vehicle owner consents to the search of the premises, but lacks actual authority to consent to the search of the container. Broadly, six circuit courts and four state courts of last resort have held that such a container search is unconstitutional, while three circuit courts and three state courts of last resort have found similar searches constitutional.

The split encompasses two subdivisions of authority, which result from the searching officer's level of knowledge at the time of the search. One subdivision exists in cases where the *searching officer affirmatively knows* that the searched item does not belong to the consenting home or vehicle owner at the time of the search. In those circumstances, four circuit courts and one state court of last resort have found a container search unconstitutional, and two circuit courts and two state courts of last resort have found such a search constitutional.

Another subdivision exists where the searching officer *does not know, but has reason to know*, that no consent was provided by the owner of the container. In those circumstances, two circuit courts and three state court of last resort have found a container search unconstitutional, and two circuit courts and one state court of last resort have found such a search constitutional.

*Second*, this is an important and recurring issue that this Court should address. The question of an individual's right to avoid a warrantless search of his container located in a third party's home or vehicle is relevant to nearly any person who travels outside of his home. For this reason, this issue frequently recurs before lower courts. Moreover, as the use of home- and ride-sharing services like Airbnb, Uber, and Lyft continues to increase, the need for clarity on the issue of an individual's Fourth Amendment rights while in another person's home or vehicle is critical.

*Third*, this case is a perfect vehicle for resolving the constitutional question presented. Indeed, the State concedes that Officer Fazzini knew that the jacket belonged to Payne and not to Starks before Fazzini searched the pockets of Payne's jacket. Furthermore, the suppression issue is likely dispositive in this case, where the other evidence against Payne raised at trial was circumstantial and physical evidence and eyewitness testimony were lacking.

*Fourth*, the court below erred in holding that Payne lacked a reasonable expectation of privacy in his jacket such that Starks's general consent to search Starks's home was sufficient for officers to undertake a warrantless search of Payne's jacket pockets. To the contrary, as a frequent guest in Starks's home, Payne had a legitimate expectation of privacy in his possessions located there such that Starks's general consent to search the home did not extend to Payne's jacket pockets. Accordingly, the search was unconstitutional and the evidence should have been suppressed.

## I. THE DECISION BELOW EXACERBATES SPLITS OF AUTHORITY AMONG CIRCUIT COURTS AND STATE COURTS OF LAST RESORT REGARDING A HOST'S CONSENT OVER A GUEST'S CLOSED CONTAINER

The Supreme Court of Iowa noted only last year that "[t]he [United States] Supreme Court has yet to apply the doctrine of consent by apparent authority to a closed container found within a home [or vehicle] under these circumstances." *State v. Jackson*, 878 N.W.2d 422, 431 (Iowa 2016). Because this Court has not yet weighed in on the issue, there is no "agreement among the federal circuit courts of appeals [and state courts of last resort] concerning how the apparent-authority doctrine applies under such circumstances." *Id.*

The decision below exacerbates this split of authority. Broadly, six circuit courts and four state courts of last resort have held that a search of a closed container located in a home or vehicle is unconstitutional, when the home or vehicle owner consents to the search of the premises, but does not have actual authority to consent to the search of the container. Three circuit courts and three state courts of last resort have found such a search constitutional.

The split encompasses two subdivisions of authority, which result from the searching officer's level of knowledge at the time of the search:

- *First*, in circumstances where the *searching officer affirmatively knows* that the searched item does not belong to the consenting home or vehicle owner at the time of the search, four circuit courts and one state court of last resort have found a container search unconstitutional, and two circuit courts and

two state courts of last resort have found such a search constitutional.

- *Second*, in circumstances where the searching officer *does not know, but has reason to know*, that no consent was provided by the owner of the container, two circuit courts and three state court of last resort have found a container search unconstitutional, and two circuit courts and one state court of last resort have found such a search constitutional.

### A. Police May Only Constitutionally Search an Overnight Guest's Property With Appropriate Consent.

#### 1. Guests Have a Legitimate Expectation of Privacy in a Host's Home.

The Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Thus, "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* To determine whether an individual may assert a Fourth Amendment violation, a court must undertake a two-part inquiry. First, the person must "have exhibited an actual (subjective) expectation of privacy" and, second, the expectation must be "one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). In applying this analysis, this Court has determined that individuals may have a reasonable expectation of privacy outside of their own home, including in a glass telephone booth, *see id.* at 359, in a hotel room, *see United States v. Jeffers*, 342 U.S. 48, 51-52 (1951), and in an office, *see O'Connor v. Ortega*, 480 U.S. 709, 741 (1987).

This Court has likewise determined that an overnight guest has a "legitimate expectation of privacy in his host's home." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). The guest "seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Id.* at 99. Although the host has ultimate control of the home, social custom renders it "unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest." *Id.* at 99. The key "is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Id.* In other words, social custom compels a host to respect the wishes of his guest.

**2. Absent Actual or Apparent Authority, a Host May Not Consent to the Search of a Guest's Property.**

This Court has also examined the ability of a third-party to consent to a warrantless search of an individual's personal property. For example in *United States v. Matlock*, this Court held that to justify a warrantless search, the prosecution "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. 164, 171 (1974). Common authority rests on "mutual use of the property by persons generally having joint access or control for most purposes[.]" *Id.* at 172 n.7. If the consenting

individual does not have actual authority over the premises or effects to be searched, then the consenting individual must have apparent authority to authorize a search. Apparent authority requires a *reasonable belief* by law enforcement that the person consenting to the search "had general access to or control over" the premises or effects to be searched. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

This Court has also examined the question of third-party consent to search in the context of overnight guests. In *United States v. Karo*, Justice O'Connor explained in concurrence that "[a] homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home" because consent to search is only effective when "given by one with 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" 468 U.S. 705, 725 (1984) (O'Connor, J., concurring) (quoting *Matlock*, 415 U.S. at 171). Thus, "[a] homeowner who entirely lacks access to or control over a guest's closed container would presumably lack the power to consent to its search" under *Matlock*. *Id.* at 723-24. Implicit in this determination is the principle that the guest retains a legitimate expectation of privacy in their container, even when it is located in the host's home.

Despite the Fourth Amendment framework set out above, there is a broad split of authority and two subdivisions of authority in circuit courts and state courts of last resort regarding the question presented, which require resolution by this Court.

### B. Courts Are Split on the Constitutionality of a Container Search Where the Searching Officer Affirmatively Knows That the Container Does Not Belong to the Consenting Home or Vehicle Owner at the Time of the Search.

#### 1. 4 Circuit Courts and 1 State Court of Last Resort Have Held That A Warrantless Search of a Guest's Closed Container Is Unconstitutional Where the Searching Officer Affirmatively Knows at the Time of the Search That the Searched Item Does Not Belong to the Home or Vehicle Owner.

In each of the following cases, the circuit court or state court of last resort held that the search of a closed container was unconstitutional because the officer *affirmatively knew at the time of the search* that the consenting home or vehicle owner did not own the container.

**The First Circuit**. In *United States v. Infante-Ruiz*, officers pulled over a vehicle in which Infante was a passenger. 13 F.3d 498, 500 (1st Cir. 1994). After arresting Infante based on an outstanding warrant, the driver of the vehicle gave consent to its search. *Id.* In the trunk, the officer discovered two briefcases—one belonging to the driver and one belonging to Infante. The driver *informed the officer that one of the briefcases belonged to Infante*, yet the officer opened the unlocked briefcase without Infante's consent and found various documents and a loaded pistol. *Id.*

The trial court denied Infante's motion to suppress, but the First Circuit reversed, holding that the warrantless search of Infante's briefcase violated his Fourth Amendment rights. *Id.* at 501. The court determined that although Infante had left his briefcase unlocked in the truck of a third-party's vehicle for several days (even when he was not in the vehicle) and had allowed others to place possessions inside his briefcase, Infante did not "expose" the briefcase to the public. *Id.* at 501. To the contrary, the driver's identification of the briefcase as Infante's "indicated that, among his friends, the case was still believed to belong to Infante." *Id.* Thus, Infante did not expose the briefcase "to the public generally nor did his actions betray an intention to forego an owner's normal right to exclude those he wished to exclude." *Id.* at 501-02. Thus, Infante did not "repudiate his privacy interest in the briefcase." *Id.* at 502.

The First Circuit further determined that the driver's blanket consent to search the vehicle and the trunk did not extend to the briefcase that the driver specifically identified as belonging to Infante. *Id.* at 505. Thus, the First Circuit held that the trial court erred in failing to suppress the evidence obtained from the briefcase. *Id.*

**The Fourth Circuit.** In *United States v. Block*, officers arrived at the home of Mary Block to arrest a wanted drug trafficker named James Wade McGee. 590 F.2d 535, 537 (4th Cir. 1978). While performing a general search of the home, Mrs. Block identified the room of her son William. *Id.* While the room belonged exclusively to William, Mrs. Block had access to the room for cleaning and other household purposes. *Id.* at 538. Upon entering William's room, offic-

ers saw paraphernalia associated with marijuana trafficking, and a closed footlocker trunk sitting at the foot of William's bed. *Id.* at 537. *Mrs. Block told officers that the locked trunk belonged to her son William*. *Id.* Yet without William Block's consent, officers exerted force on the trunk to open it and found heroin inside. *Id.* at 538.

The trial court denied William Block's motion to suppress, but the Fourth Circuit reversed, holding that Mrs. Block's authority to consent to the search of her home did not extend to her son's footlocker, which officers knew did not belong to her at the time of the search. *Id.* at 541.

**The Fifth Circuit.** In *United States v. Jaras*, a police officer stopped a car that he observed swerving on the highway. 86 F.3d 383, 385 (1996). The officer became suspicious that the vehicle was transporting narcotics. *Id.* at 386. The driver gave consent to search the car. *Id.*

In the trunk, the officer found two suitcases and a garment bag. The driver claimed ownership of the garment bag, *and explained that the suitcases belonged to Jaras*. The officer searched the suitcases without Jaras's consent, and discovered a large quantity of marijuana. *Id.*

The district court denied Jaras's motion to suppress. The Fifth Circuit reversed, holding that Jaras "had a reasonable expectation of privacy with the respect to the content of his suitcases," and that the driver did not have actual or apparent authority over the suitcases because he "clearly informed [the officer] that the two suitcases did not belong to him and that they belonged to [Jaras]." *Id.* at 389.

**The Tenth Circuit.** In *United States v. Salinas-Cano*, Salinas-Cano left his suitcase at his girlfriend Shirley Garcia's apartment, where he stayed several nights each week. 959 F.2d 861, 862 (10th Cir. 1992). After police arrested Salinas-Cano following a controlled drug purchase, they asked Garcia's permission to search her apartment. *Id.* *The officers specifically told Garcia that they were interested in Salinas-Cano, and she took them to the area where he kept his belongings.* *Id.* The police searched Salinas-Cano's closed but unlocked suitcase, and inside they discovered cocaine. *Id.*

At the suppression hearing, the searching officer admitted that he knew at the time of the search that the suitcase belonged to Salinas-Cano and not Garcia, yet the district court denied Salinas-Cano's motion to suppress. *Id.* at 863. The Tenth Circuit reversed, explaining that "when a guest in a private home has a private container to which the homeowner has no right of access . . . the homeowner . . . lacks the power to give effective consent to the search of the closed container." *Id.* (quoting *Karo*, 468 U.S. at 725-26). Because the officer "correctly believed . . . that the [suitcase] belonged to Mr. Salinas-Cano," any belief that Garcia had "apparent authority" to authorize the search was unreasonable. *Id.* at 866.

**Maryland.** In *Owens v. State*, the Court of Appeals of Maryland reversed the denial of a motion to suppress, holding that the owner of a zippered bag stored in another person's apartment had an "expectation of privacy in the bag" *due to an attached luggage tag giving the owner's name and address*, and the apartment owner's statement before the search that the luggage belonged to someone else. 589 A.2d

59, 65-66 (Md. 1991). The tag indicated that the homeowner obviously "did not possess common authority over [the] bag and had no other sufficient relationship to its contents," therefore the warrantless search violated the bag owner's Fourth Amendment rights. *Id.* at 67.

### 2. 2 Circuit Courts and 2 State Courts of Last Resort Have Held That A Warrantless Search of a Guest's Closed Container Is Constitutional Where the Searching Officer Affirmatively Knows at the Time of the Search That the Searched Item Does Not Belong to the Home or Vehicle Owner.

In each of the following cases, the circuit court or state court of last resort held that the search of a closed container was constitutional, even though the officer knew at the time of the search that the consenting home or vehicle owner did not own the container.

**The Seventh Circuit.** In *United States v. Goins*, Goins's girlfriend, Kalina Bratton, gave police officers consent to search Goins's apartment. 437 F.3d 644, 647 (7th Cir. 2006). Bratton had a key to Goins's apartment, and often stayed there, but explained to officers that she had a separate residence. *Id.* Upon executing a warrantless search of the apartment, officers found marijuana in various places in the apartment, including in a *man's coat pocket* hanging inside a closet that *contained only male clothing*. *Id.*

The district court denied Goins's motion to suppress, among other things, the marijuana found in his coat pocket. *Id.* at 648. The Seventh Circuit affirmed, holding that "police took sufficient precautions to assure themselves of the truth of Bratton's statements, and a reasonable person would have believed that Bratton had authority over" the apartment, such that her consent provided valid consent to search the apartment, including the man's jacket hanging in the closet. *Id.* at 649.

**The Eighth Circuit.** In *United States v. Buckles*, Buckles and two companions spent the night at the home of Dee Eutzy. 495 F.2d 1377, 1381 (8th Cir. 1974). Officers asked Eutzy for consent to search her home, and during the search arrested Buckles and his companions. As officers were leaving the house, police seized two jackets, *which Eutzy stated were not hers*. In one of the jackets, police found two missing American Express money orders. *Id.*

The trial court denied the motion to suppress, and the Eighth Circuit affirmed, holding that Buckles's argument that Eutzy could not consent to the search of his jacket, and that officers knew that at the time of the search, had "no validity because Mrs. Eutzy had the primary right to the occupation of the premises[.]" *Id.*

**Alaska.** In *Ingram v. State*, two hours after Ingram's arrest, a police investigator returned to an apartment where he had previously seen Ingram. *See Ingram v. State*, 703 P.2d 415, 419 (Alaska Ct. App. 1985), *aff'd*, 719 P.2d 265 (Alaska 1986). A tenant of that apartment, Thomas Heriford, gave written consent to its search for "LSD and buy-money." *Id.* at 423. On the living room floor, near that area

where Ingram stood before his arrest, the investigator saw a gun in a shoulder holster, a jacket, and a zipped wallet. *Id.* *The investigator recognized the jacket as the one worn by Ingram when he first entered the apartment,* and Heriford "disclaimed ownership" of the items. *Id.* at 423-424. Inside the wallet was $9,000 in cash, $6,000 of which was marked money used in a drug buy, and a prescription bottle with Ingram's name on it was in jacket pockets. *Id.* at 420.

The Alaska Supreme Court summarily affirmed the appellate court, which held that, under the circumstances, "Ingram must be held to have assumed the risk that Heriford might consent to the search of the property." *Id.* at 425. Thus, the jacket, wallet, and holster "were encompassed within Heriford's general consent" to search the apartment. *Id.* at 426.

**West Virginia.** As explained in greater detail above, in this case, the Supreme Court of Appeals of West Virginia affirmed the trial court's denial of Payne's motion to suppress. The court below held that an officer's warrantless search of Payne's jacket pockets did not violate his Fourth Amendment rights, even though the searching officer affirmatively knew that Payne, and not Starks, was the owner of the jacket at the time of the search. Pet.App.30a.

### C. Courts Are Split on the Constitutionality of a Container Search Where the Searching Officer Does Not Know, But Has Reason to Know, That No Consent Was Provided By the Owner of the Container.

#### 1. 2 Circuit Courts and 3 State Courts of Last Resort Have Held That A Warrantless Search of a Guest's Closed Container Is Unconstitutional Where the Searching Officer Does Not Know, But Has Reason to Know, That No Consent Was Provided By the Owner of the Container.

In each of the following cases, the circuit court or state court of last resort held that the search of a closed container was unconstitutional where the searching officer did not know, but had reason to know, that no consent was provided by the owner of the container.

**The Sixth Circuit.** In *United States v. Waller*, Waller asked his friend Riley Howard if Howard could store Waller's luggage, garbage bags of clothes, and food, in Howard's one-bedroom apartment. 426 F.3d 838, 842 (2005). Waller stored most of the belongings in Howard's living room, bedroom, or bathroom closets. *Id.* Waller did not sleep in the apartment, and Howard did not know the contents of his luggage or plastic bags. *Id.*

In June 2002, Waller was arrested in the parking lot of Howard's apartment complex. *Id.* The detective and another police officer then secured Howard's consent to search his apartment. In the course of the

search, the officer located Waller's zipped luggage and opened it, finding two firearms. *Id.* The detective then asked the other apartment occupants whether they owned the firearms, but they denied ownership.

The district court denied Waller's motion to suppress, but the Sixth Circuit reversed, holding that Waller retained a "legitimate expectation of privacy" in his zipped luggage bag, and Howard's consent to search the apartment did not extend to the luggage because he lacked both actual and apparent authority over the luggage. *Id.* at 844-49. The court reasoned that "*the circumstances made it unclear* whether Waller's luggage bag was subject to mutual use by Howard and therefore the officers' warrantless entry into that luggage without further inquiry was unlawful." *Id.* at 847 (quotations omitted) (emphasis added)

**The D.C. Circuit.** In *United States v. Peyton*, officers told Martha Mae Hicks, Davon Peyton's great-great-grandmother, that they believed there might be drugs in the apartment that she shared with Peyton. 745 F.3d 546, 549 (D.C. Cir. 2014). Hicks signed a consent-to-search form for the entire apartment, and showed officers the "part of the living room . . . *where Peyton ke[pt] his personal property*." *Id.* (internal quotations omitted) (emphasis added). One of the officers saw a closed shoebox next to Peyton's bed and opened it. Inside, he found marijuana, crack cocaine, and $4000 in cash. *Id.* at 549-50.

The district court denied Peyton's motion to suppress, but the D.C. Circuit reversed, holding that "Hicks could not lawfully permit the police to search [Peyton]'s closed shoebox." *Id.* at 550-51. The court

explained that "[w]hile authority to consent to search of a common area extends to most objects in plain view, it does not automatically extend to the interiors of every enclosed space within the area." *Id.* at 552 (quoting *Donovan v. A.A. Beiro Construction Co.*, 746 F.2d 894, 901-02 (D.C. Cir. 1984)). The court acknowledged that the living room area where Peyton slept "remained a common area, with a diminished expectation of privacy for things left there," and that Peyton "took no special steps to hide or protect the shoebox." Nevertheless, the court determined that in light of Hicks's clear statement that one area of the living room was not hers, "it was not reasonable for the police to believe that Hicks shared use of the closed shoebox," and thus the search was unconstitutional. *Id.* at 553-54.

**California.** In *People v. Cruz*, the searching officer was given general consent to search the apartment by its lessee, and was informed that suitcases located therein generally belonged to one of "several" people. 395 P.2d 889, 891 (Cal. 1964). Nonetheless, the officer searched the suitcases *without further inquiry regarding each suitcase's specific ownership*, and found marijuana seeds and debris in Cruz's suitcase. *Id.*

The Supreme Court of California held that "[t]he general consent given by [a lessee] that the officers could 'look around' did not authorize [the officer] to open and search suitcases and boxes that he had been informed were the property of third persons." *Id.* at 892. Thus, the search of Cruz's suitcase violated his Fourth Amendment rights. *Id.*

**Indiana.** In *Krise v. State*, officers arrested Jewell Krise at her home. 746 N.E.2d 957, 960 (Ind.

2001). Charles Tungate, Krise's co-tenant, gave officers his consent to search the home. *Id.* at 960. While in the bathroom, one officer noticed a purse lying on top of the commode and opened it. *Id.* Inside the purse, the officer found marijuana and methamphetamine. *Id.*

The trial court denied Krise's motion to suppress, and the appellate court affirmed. *Id.* at 972. The Indiana Supreme Court reversed, however, holding that the State failed to justify the search because at the time of the search, the officer "*knew that the handbag was a woman's purse and that Krise was the only woman living in the house*." *Id.* at 971 (emphasis added). Therefore, without evidence showing that Tungate told police that he had joint access to the purse, "the mere fact that the purse was located in the common area of the house did not render reasonable a belief that Tungate had the requisite authority to consent to the search of Krise's purse." *Id.*

**Iowa.** In *State v. Jackson*, one tenant of an apartment granted an officer general consent to search his bedroom, but told the officer that "his cousin" *Marvis Jackson was sleeping therein*. 878 N.W.2d 422, 426 (Iowa 2016). The officer searched a closed backpack located in that bedroom and found a black handgun inside. *Id.* at 427.

The Supreme Court of Iowa held that where an officer is faced with "ambiguity" about the ownership of a container, but nonetheless "searches a closed container without a warrant and without inquiring enough to clarify whether the person who consented to the premises search had authority to consent to the search of the container," the search is unlawful because the government cannot "demonstrate [that]

an officer reasonably relied on apparent authority" to authorize the search. *Id.* at 438.

**2. 2 Circuit Courts and 1 State Court of Last Resort Have Held That A Warrantless Search of a Guest's Closed Container Is Constitutional Where the Searching Officer Does Not Know, But Has Reason to Know, That No Consent Was Provided By the Owner of the Container.**

In each of the following cases, the circuit court or state court of last resort held that the search of a closed container was constitutional, even though the officer did not know, but had reason to know, that no consent was provided by the owner of the container.

**The Second Circuit.** In *United States v. Snype*, officers forcibly entered an apartment belonging to Jennifer Bean and arrested Vernon Snype. 441 F.3d 119, 126-27 (2d Cir. 2006). *On the floor of the bedroom where officers found Snype*, they saw a knapsack, a red plastic bag, and a teller's box. The box was open, and bundles of cash were plainly visible inside. After removing Snype from the apartment, the officers seized the knapsack, the plastic bag, and the teller's box, and found, cash and firearms. *Id.* at 127.

The district court concluded that Bean, as the apartment owner, could consent to the search of Snype's belongings. The Second Circuit affirmed, holding that Bean, as the "resident" of the apartment, had authority to consent to the search of the premises, and thus "her open-ended consent would permit the search and seizure of any items found in the

apartment with the exception of those 'obviously' belonging to another person." *Id.* at 136. The court determined that the items did not "obviously" belong to Snype because although they were located in the room where officers found him, "[n]o officer ever saw Snype carrying the knapsack or red plastic bag" and "[n]o marks on the bags linked them to him." *Id.*

**The Seventh Circuit.** In *United States v. Melgar*, officers arrested four men on charges of passing counterfeit dividend checks. 227 F.3d 1038, 1039 (7th Cir. 2000). Following a lead obtained from the suspects' car, officers drove to a hotel and knocked on the door of Room 136. Joel Mejia answered the door, and three other people were inside. *Id.* Using Mejia as a translator, the officers asked everyone present for consent to search their wallets or purses, and everyone agreed. *Id.*

Shortly thereafter, three more women arrived at the hotel room, including Zoila Melgar and Rita Velasquez, the woman renting the room. *Id.* An officer searched Velasquez's purse and jacket, found a counterfeit check, and arrested her. *Id.* An officer asked Velasquez if police could search the hotel room, and she gave permission. *Id.* At that point, the officers arrested and handcuffed everyone else in the room, and sent them to the police station. *Id.* at 1040.

Officers began their search of the room, and *found a floral purse between the mattress and box springs* of one of the beds. *Id.* Inside the purse, the officer found an identification form with Melgar's photo on with the name "Diana Lopez," and a counterfeit check payable to Diana Lopez. *Id.*

The district court denied Melgar's motion to suppress. The Seventh Circuit affirmed, stating that Velasquez, as the room's renter, gave her consent to search, and "[g]enerally, consent to search a space includes consent to search containers within that space where a reasonable officer would construe the consent to extend to the container." *Id.* at 1041 (citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). The court reasoned that the police "had no reason" to know that the purse did not belong to Velasquez because "there were no exterior markings on the purse that should have alerted them to the fact that it belonged to another person." *Id.* at 1041-42. Thus, the search was held to be constitutional.

**Virginia.** In *Glenn v. Virginia*, officers arrived at the home of Ernest Brooks, and arrested his grandson, Keith Glenn. 654 S.E.2d 910, 911-12 (Va. 2008). After the arrest, Brooks consented to the search of his home, and Glenn identified two bedrooms where he slept, but did not provide consent to search them. *Id.* at 912. In one bedroom, an officer located a zipped backpack, in which he discovered a robbery victim's cell phone and Glenn's identification. *Id.*

The Supreme Court of Virginia held that facts were sufficient such that an "objectively reasonable police officer" could have believed that Brooks had authority to consent to the search of Glenn's backpack. *Id.* at 917. The court acknowledged that "some ambiguity attended the ownership and ability to access the backpack as the police officer seized and searched it," but citing the Seventh Circuit's decision in *Melgar*, the court determined that "it was objectively reasonable for the police to conclude that . . . Brooks[] appeared to have the authority to authorize

the search of the backpack within the rooms open to him in his own home." *Id.* at 915-16.

* * *

The two related subdivisions of authority set forth above demonstrate the urgent need for this Court's guidance on the constitutional bounds of a warrantless search of a guest's closed container pursuant to a host's consent to search his or her home or vehicle. The court's decision below further exacerbates the conflict, and intervention by this Court is necessary to establish uniformity among circuit courts and state courts of last resort.

## II. THE SCOPE OF AN INDIVIDUAL'S FOURTH AMENDMENT RIGHTS IN THEIR CLOSED CONTAINERS LOCATED IN THE HOME OR VEHICLE OF A THIRD-PARTY IS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS RESOLUTION BY THIS COURT

Certiorari should also be granted because the question presented is important and recurring. Indeed, as the Iowa Supreme Court recently noted, because this "Court has yet to apply the doctrine of consent by apparent authority to a closed container found within a home [or vehicle] under these circumstances," there is no "agreement among the federal circuit courts [or state courts of last resort] concerning how the apparent-authority doctrine applies under such circumstances." *Jackson*, 878 N.W.2d at 431. Resolution of this issue is critical for several reasons.

**1.** The third-party consent issue presented in this case is relevant to any person who travels in the vehicle of a third-party or takes public transportation,

stays in a hotel or the home of a third-party, rents a storage facility, or allows third-parties to store or borrow their possessions. In short, anyone who carries or stores their possessions outside of their own home or vehicle has a stake in the resolution of this issue.

Because of the number of people affected, courts below must frequently decide issues regarding the Fourth Amendment rights of guests in their containers. Indeed, Westlaw searches reveal that *Olson* has been cited in 841 reported cases since it was decided in 1990. Moreover, since the year 2000, circuit courts and state courts of last resort have decided dozens of reported cases that address an overnight guest's Fourth Amendment rights in his belongings.[2]

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[2] *See, e.g.*, *United States v. Casey*, 825 F.3d 1 (1st Cir. 2016); *United States v. Cortez-Dutrieville*, 743 F.3d 881 (3d Cir. 2014); *United States v. Peyton*, 745 F.3d 546 (D.C. Cir. 2014); *United States v. Pettiway*, 429 Fed. App'x 132 (3d Cir. 2011); *United States v. Wiest*, 596 F.3d 906 (8th Cir. 2010); *United States v. Kimber*, 395 Fed. App'x 237 (6th Cir. 2010); *United States v. Washington*, 573 F.3d 279 (6th Cir. 2009); *United States v. Bell*, 218 Fed. App'x 885 (11th Cir. 2007); *United States v. Taylor*, 482 F.3d 315 (5th Cir. 2007); *United States v. Snype*, 441 F.3d 119 (2d Cir. 2006); *United States v. Waller*, 426 F.3d 838 (6th Cir. 2005); *United States v. Davis*, 332 F.3d 1163 (9th Cir. 2003); *United States v. Dunning*, 312 F.3d 528 (1st Cir. 2002); *United States v. Gamez-Orduno*, 235 F.3d 453 (9th Cir. 2000); *State v Jackson*, 878 N.W.2d 422 (Iowa 2016); *State v. Peoples*, 378 P.3d 421 (Ariz. 2016); *Schmuck v. Commonwealth*, No. 2015-SC-000511-MR, 2016 WL 5247755 (Ky. Sept. 22, 2016); *Commonwealth v. Copney*, 11 N.E.3d 77 (Mass. 2014); *Commonwealth v. Magri*, 968 N.E.2d 876 (Mass. 2012); *State v. Campbell*, 714 N.W.2d 622 (Iowa 2006); *People v. Schmeck*, 118 P.3d 451 (Cal. 2005); *State v. Cuntapay*, 85 P.3d 634 (Haw. 2004); *State v. Hess*, 680 N.W.2d 314 (S.D. 2004).

Furthermore, since the year 2000, at least dozens more reported cases have dealt with the search of closed containers within vehicles.[3] Because so many individuals are affected by this Fourth Amendment issue, it will continue to recur with regularity throughout courts below.

**2.** The need for a resolution of this issue has become increasingly important with the explosive growth of home- and ride-sharing apps like and Airbnb, Uber, and Lyft. *See, e.g.*, Russell Haythorn, *Airbnb reports explosive growth in Colorado* (ABC television broadcast Feb. 20, 2017), http://www.thedenverchannel.com/news/local-news/airbnb-reports-explosive-growth-in-colorado (reporting that "[s]ome cities in Colorado have seen more than 100 percent growth year-over-year" in Airbnb usage); Regina Garcia Cano, *Airbnb Sees Explosive Growth in Nevada As Hosts Take in $47M*, Las Vegas Rev. J. (Feb. 17, 2017), http://www.reviewjournal.com/business/airbnb-sees-explosive-growth-nevada-hosts-take-47m ("More than 340,000 people passed on Nevada's hotel rooms last year and opted instead to book a place to stay using the home-sharing service Airbnb."); N. Craig Smith, *Who's Responsible? The Ethics of the Sharing Economy*, Huffington Post Blog (Feb. 1, 2017, 1:40 p.m. ET), http://www.huffingtonpost.com/alliance-for-

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[3] *See, e.g.*, *United States v. Davis*, 576 F. App'x 292 (4th Cir. 2014) (per curiam); *State v. Daniels*, 848 N.W.2d 670 (N.D. 2014); *State v. Caulfield*, 995 N.E.2d 941 (Ohio 2013); *Johnson v. United States*, 7 A.3d 1030 (D.C. 2010); *State v. Groshong*, 135 P.3d 1186 (Kansas 2006); *State v. Roe*, 90 P.3d 926 (Idaho 2004); *State v. Boyd*, 64 P.3d 419 (Kansas 2003).

research-on-corporate-sustainability-/whos-responsible-the-ethi_b_14553878.html ("In the seven years since its inception, [Uber] has grown from an implausible Silicon Valley start-up to become one of the most highly-valued privately-held companies in the world, with operations in over 500 cities and $US10 billion in equity funding."). As individuals (and their containers) spend more time in spaces owned or controlled by third-parties, questions regarding the apparent authority of third-parties to consent to searches of their guests' possessions will arise with even more frequency.

## III. THIS CASE PRESENTS AN IDEAL VEHICLE TO DECIDE THIS IMPORTANT CONSTITUTIONAL QUESTION

This petition presents an ideal vehicle to decide the question presented. The Supreme Court of Appeals of West Virginia squarely ruled on the issue below, and did so incorrectly, warranting reversal.

### A. The Question is Squarely Presented.

There is no doubt that the question is squarely presented by the decision below.

**1.** As Supreme Court of Appeals of West Virginia set forth in its decision, Officer Fazzini and Detective Wygal knew prior to the search of Payne's jacket pockets that the jacket belonged to Payne and not Starks. Pet.App.12a. Nevertheless, the court held that there was "no error in the admission of the evidence seized" from Starks's home. Pet.App.30a. Thus, the scope of Starks's apparent authority over items in his home can be squarely addressed because the extent of the officers' knowledge at the time of the search is undisputed.

**2.** The suppression issue is dispositive in this case, and the constitutional error below was not harmless; nor did the court below ever suggest that the error was harmless. Besides the .25 caliber bullets found in Payne's jacket pocket, the only evidence used to convict Payne at trial was thin and circumstantial. For example, the State introduced surveillance video footage from before the murder at a local bar, showing Payne wearing a Pittsburgh Pirates "P" hat and dark Timberland-type boots, and surveillance video footage from a gas station after the murder showing Payne without the hat. Pet.App.31a. Police found a Pittsburgh Pirates "P" hat at the Quarry Apartments the morning after the murder. Pet.App.11a. DNA tests run on fibers inside the headband of the hat were inconclusive as to Payne's ownership of the hat, let alone any role in Poindexter's murder. Pet.App.83a-84a.

In addition, officers took photographs and molds of footprints found in the snow leading to and from Poindexter's bedroom window. Pet.App.10a. At trial, an expert for the State testified that Payne's size 10.5 Timberland boots[4]—the most common shoe size for an American man[5]—fit the impression of the boot

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[4] Officers seized Payne's size 10.5 Timberland boots while searching his personal residence pursuant to a search warrant. Pet.App.13a. The affidavit in support of that search warrant listed the .25 caliber ammunition seized from Payne's jacket pocket at Starks's residence as support for a determination of probable cause. Pet.App.33a. Thus, as Payne argued below, the later search of Payne's personal residence was tainted by the illegal search of his jacket pockets. Pet.App.31a.

[5] *See* Dawn Turner Trice, *Americans' Feet Getting Bigger, But Shoe Choices Slim*, Chi. Trib. (Apr. 13, 2014),

taken at the crime scene, but he could not determine whether Payne's boot *actually* made the impression given the absence of any distinguishing characteristics in the boot print. Pet.App.13a-14a.

Therefore, Payne was convicted of killing Poindexter without any fingerprint evidence, without any eyewitness testimony, without any surveillance footage *of the crime or the scene of the crime*, and without conclusive DNA or footprint evidence. Thus, the admission of the ammunition seized from Payne's jacket was not harmless beyond a reasonable doubt. *See, e.g.*, *United States v. Starnes*, 501 F. App'x 379, 390 (6th Cir. 2012) (holding that admission of illegally seized items related to robberies was not harmless error where government otherwise relied primarily on "surveillance footage taken at each robbery" and the eyewitness testimony at trial); *People v. Levan*, 464 N.E.2d 469, 471-72 (N.Y. 1984) (introduction into evidence of items seized pursuant to an illegal search, including murder weapon, was harmful error requiring reversal). To the contrary, the search and seizure of Payne's jacket and its contents was critical in this case.

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(continued…)

http://articles.chicagotribune.com/2014-04-13/news/ct-big-feet-met-20140413_1_larger-size-shoes-expanding-feet-larger-shoes ("The National Shoe Retailers Association announced in late 2012 that the most popular shoe sizes have increased over the last 30 years . . . from size 9½ to 10½ for men.").

### B. The Decision of the Supreme Court of Appeals of West Virginia is Wrong.

The question presented deserves uniform resolution regardless of the outcome, but this vehicle is also appropriate because the Supreme Court of Appeals of West Virginia's decision is wrong and should be reversed.

**1.** The Supreme Court of Appeals of West Virginia wrongly held that Officer Fazzini's search and seizure of the contents of Payne's jacket pockets did not violate his Fourth Amendment rights. The court's holding is erroneous for several reasons.

First, it is well-established that "society recognizes that a household guest has a legitimate expectation of privacy in his host's home." *See, e.g.*, *Olson*, 495 U.S. at 98. Thus, "[a] homeowner who entirely lacks access to or control over a guest's closed container would presumably lack the power to consent to its search[.]" *Karo*, 468 U.S. at 723 (O'Connor, J., concurring, in part). Here, where officers unquestionably knew at the time of the search that the jacket did not belong to the consenting homeowner Starks, it was unreasonable for the officers to continue with the warrantless search of Payne's jacket pockets without his consent. *See, e.g.*, *United States v. Whitfield*, 939 F.2d 1071, 1074 (D.C. Cir. 1991) (holding that agents could not reasonably have believed that a mother had authority to consent to the search of her son's jacket pockets).

**2.** Second, the court below's subsidiary reasoning that Payne "relinquished possession of his jacket" because he deposited it on the chair in Starks's foyer for two days without leaving "instructions with re-

gard to his jacket" makes no sense. Pet.App.29a. The case law holds that individuals retain an expectation of privacy in personal objects left in a home or car of another person for an extended period of time. *See, e.g.*, *Infante-Ruiz*, 13 F.3d at 501-02 (defendant did not "repudiate his privacy interest" in his unlocked briefcase stored in the trunk of a friend's car for "some days," even when defendant allowed others to use the briefcase); *United States v. Basinski*, 226 F.3d 829, 837-38 (7th Cir. 2000) (affirming suppression of evidence obtained from search of a locked briefcase left for safekeeping at the defendant's friend's house in another state for over a year and a half).

Indeed, if leaving an item unattended for two days is enough to surrender all Fourth Amendment rights in the item, then anyone who unintentionally leaves a personal item at a friend's house, in a taxi, or on the subway runs the risk of intrusive searches of that item's interior compartments by law enforcement.

**3.** The court's reasoning that Payne had a diminished expectation of privacy in his jacket because he "could not reasonably have expected that no one would ever touch or handle his jacket" is contravened by this Court's precedent. Pet.App.29a. In *Bond v. United States*, this Court explained that "[w]hen a bus passenger places a bag in an overhead bin, he . . . clearly expects that his bag may be handled." 529 U.S. 334, 338 (2000). Yet that same passenger "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338-39. In *Bond*, this Court held that an officer's physical manipulation of the

defendant's carry-on bag violated his Fourth Amendment rights.

Similarly here, Payne may have expected that leaving his jacket in Starks's foyer for two days would result in Starks moving it to another location within his home. But Payne would not reasonably expect that Starks would rifle through his jacket pockets and examine their contents—or allow law enforcement to do so. Thus, the warrantless search of Payne's jacket "far exceeded the casual contact [Payne] could have expected" from leaving his jacket for less than two days in Starks's foyer. *Id.* at 338.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2017

# APPENDIX

# APPENDIX A

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

September 2016 Term

No. 15-0289

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent
v.
ENNIS C. PAYNE II,
Defendant Below, Petitioner

Appeal from the Circuit Court of Harrison County
Honorable James A. Matish, Judge
Criminal Action No. 13-F-112-3

AFFIRMED

Submitted: September 20, 2016
Filed: October 19, 2016

| | |
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JUSTICE LOUGHRY delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the *W*est Virginia Constitution is a question of law that is reviewed *de novo*. . . . Thus, 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 the 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. "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).

3. "'Where a person voluntarily and knowingly consents to a search of his premises, such a search may be conducted in the absence of a search warrant.' Syllabus Point 1, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976)." Syl. Pt. 1, *State v. Hambrick*, 177 W.Va. 26, 350 S.E.2d 537 (1986).

4. "The State and Federal Constitutions prohibit only unreasonable searches and seizures and there

are numerous situations in which a search and seizure warrant is not needed, such as . . . property that has been abandoned, as well as searches and seizures made that have been consented to." Syl. Pt. 1, in part, *State v. Angel*, 154 W.Va. 615, 177 S.E.2d 562 (1970).

5. "'The Fourth Amendment of the *United States Constitution*, and Article III, Section 6 of the *West Virginia Constitution* protect an individual's reasonable expectation of privacy.' Syl. Pt. 7, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981)." Syl. Pt. 1, *Wagner v. Hedrick*, 181 W.Va. 482, 383 S.E.2d 286 (1989).

6. "Both the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation." Syl. Pt. 3, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

7. "Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. It is not enough that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend solely upon individual

facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances." Syl. Pt. 3, *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995).

8. "A search warrant affidavit is not invalid even if it contains a misrepresentation, if, after striking the misrepresentation, there remains sufficient content to support a finding of probable cause. Probable cause is evaluated in the totality of the circumstances." Syl. Pt. 2, *State v. Lilly*, 194 W.Va. 595 461 S.E.2d 101 (1995).

9. "'To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.' Syl. pt. 2, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946)." Syl. Pt. 2, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

10. "Widespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial." Syl. Pt. 1, *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982).

11. "One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but

whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant." Syl. Pt. 3, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

12. "Whether a change of venue is warranted rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that such discretion has been abused." Syl. Pt. 2, *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982).

13. "A criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire." Syl. Pt. 2, in part, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

14. "A criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints." Syl. Pt. 3, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979).

LOUGHRY, Justice:

The petitioner, Ennis C. Payne II, appeals the January 29, 2015, order of the Circuit Court of Harrison County through which he was sentenced to life imprisonment with mercy for his first degree murder conviction to be followed by one to five years imprisonment for his conspiracy to commit burglary conviction. Seeking to set aside his convictions, the petitioner challenges the denial of his motions to suppress evidence and to change venue; his appearance in the courtroom in jail attire and restraints during jury voir dire; and cumulative error. Following a careful review of the briefs, the arguments of counsel, the record submitted, and the applicable law, this Court finds no reversible error and affirms the petitioner's convictions.

**I. Facts and Procedural Background**[1]

In the early fall 2012, the petitioner and Darnell Bouie were arrested in connection with the death of Jayar Poindexter. On May 7, 2013, a Harrison County grand jury returned indictment No. 13-F-112-3 charging the petitioner[2] with first degree murder in violation of West Virginia Code § 61-2-1 (2014)[3] and

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[1] The facts and procedural background as set forth herein have been gleaned from the transcripts of the suppression hearings and trial.

[2] Also charged in the indictment was Darnell Bouie. Bouie's trial occurred in the Spring of 2014. This Court affirmed Bouie's felony-murder and conspiracy to commit burglary convictions in *State v. Bouie*, 235 W.Va. 709, 776 S.E.2d 606 (2015).

[3] West Virginia Code § 61-2-1 provides, in part:

> Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in

conspiracy to commit burglary in violation of West Virginia Code §§ 61-3-11 (2014) [4] and §61-10-31 (2014). [5] They were tried separately. [6] The petitioner's trial occurred over the course of five days in November 2014 during which the State proceeded on a theory of felony-murder with the predicate felony being the conspiracy to commit burglary. The State presented the testimony of thirty-two witnesses and seventy-three of its exhibits were admitted into evidence.[7] The petitioner presented the testimony of

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the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree.

[4] West Virginia Code § 61-3-11 provides, in part:

(a) Burglary shall be a felony and any person convicted thereof shall be confined in the penitentiary not less than one nor more than fifteen years. If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of burglary.

[5] West Virginia Code § 61-10-31 provides, in part:

It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State if . . . one or more of such persons does any act to effect the object of the conspiracy. . . .

Any person who violates the provisions of this section by conspiring to commit an offense against the State which is a felony . . . shall be guilty of a felony.

[6] *See* n.2, *supra*.

one witness, and his five exhibits were admitted into evidence. The petitioner did not testify.

The evidence at trial demonstrated that during the evening of January 12, 2010, Darnell Bouie, Michael Thomas, and Michael Moran traveled to the Ordinary Bar in Clarksburg, West Virginia. At approximately 12:51 a.m. on January 13, 2010, security cameras in the area captured the petitioner, Ennis Payne, entering the same bar. At that time, he was wearing a Pittsburgh Pirates "P" baseball hat and dark Timberland-type boots.

Around 3:00 a.m., the petitioner, Bouie, Moran, and Thomas left the Ordinary Bar traveling in two vehicles, a car belonging to Thomas and a truck that Leonard Hickey had loaned to Bouie that evening at the Ordinary Bar. Although Hickey had left the bar earlier that evening, he later rejoined the group, after which the men traveled in the two vehicles to the Quarry Apartments located on Overlook Drive in Clarksburg, West Virginia. After arriving at the Quarry Apartments, where the victim resided, the petitioner and Bouie exited the vehicles, while the other men waited inside the vehicles for their return. Moran testified that after waiting for some time, he exited Thomas' car to see where the petitioner and Bouie had gone but, after walking for only a few

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[7] The State's exhibits included various photographs of the crime scene, surveillance videos, screen shots taken from surveillance videos, shoe castings taken at the crime scene, the .25 caliber bullet taken from the victim, the .25 caliber casing found at the crime scene, an ammunition magazine containing four .25 caliber cartridges, and other evidence, as discussed *infra*.

seconds, he saw the petitioner and Bouie walking quickly back to the vehicles.

Jennifer Hall, the victim's girlfriend at the time of his death, testified that she had been asleep in bed on the night in question when she awoke to find the victim and another person, whom she could not see, struggling at the bedroom window. She stated that the victim stopped struggling and fell to the floor in a "frog-like" position.[8] In an effort to conceal herself, Ms. Hall hid on the floor near the bottom of the bed. Her call to 911 was made at 3:30 a.m. that morning. She testified that she did not alter the crime scene or anything else in the apartment prior to the arrival of the Clarksburg Police. The victim died of a gunshot wound to his chest.[9]

Officers responded to the crime scene. Photographs and cast molds were taken of footprints[10] discovered in the snow leading both to and from the victim's bedroom window. [11]

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[8] Hall testified at trial that she could not recall either seeing a gun or hearing a gunshot.

[9] One of the petitioner's relatives testified that the petitioner came to see him a couple of days after the murder; that the petitioner told him that he shot the victim in a "robbery gone bad"; that he did not think anyone was home at the victim's apartment; and that someone "ended up dead." When asked whether the petitioner had indicated the purpose of the robbery, the relative stated, "Money, drugs, money, I don't know."

[10] Surveillance video footage showed that Bouie was the only person in the group wearing sneakers on the night in question. An expert witness for the State identified one of the sets of footprints as belonging to a Nike tennis shoe.

[11] The petitioner's trial counsel stated during closing arguments that Moran killed the victim, citing Moran's ownership of footwear within one size of the petitioner's shoe

Photographs were also taken of the victim's bedroom window, which the officers discovered half-raised with the screen "cut or torn." A .25 caliber casing was recovered at the scene. Later that day, a resident of the apartment complex informed police that he had observed a Pittsburgh Pirates "P" baseball hat on the grounds of the apartment complex around 7:30 a.m. that morning. The police recovered the hat. Surveillance video taken prior to the crime on January 13, 2010, showed the petitioner near the Quarry Apartments wearing a baseball cap.

The evidence at trial showed that after the petitioner and the other men left the Quarry Apartments, they traveled to a nearby Go-Mart, where security cameras captured their arrival at 3:35 a.m. The gas station video depicts the petitioner wearing what appears to be dark boots and a jacket with white stripes, but without the Pittsburgh Pirates hat that area surveillance cameras had captured him wearing earlier that evening. Thereafter, the petitioner was dropped off at the home of his friend, Timothy Starks, where Starks resided with his wife and children. The petitioner had been staying "off and on" in the first floor "living room area" of Starks' home over a fairly short period of time, "crashing there when he needed to."[12] Starks testified that when the petitioner arrived around 4:00

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size and similar to the footprints found outside the victim's bedroom window. The petitioner's counsel also noted the possible presence–as documented in police photographs–of a cigarillo filter on the victim's exterior windowsill. Both Moran and the petitioner were known to smoke cigarillos.

[12] This particular testimony was given by Starks during a suppression hearing.

a.m. that morning, the petitioner was carrying two guns. When Starks awoke later that morning, the petitioner was gone without any indication as to whether he would return. The petitioner left behind a cell phone and a Carhartt-type jacket[13] slung over a chair in the foyer of the first floor living area of Starks' home.

On January 15, 2010, Clarksburg Police Officer Mike Fazzini[14] went to Starks' home[15] to inquire as to the petitioner's whereabouts. Starks did not know where the petitioner was, but asked whether he should keep or dispose of the petitioner's Carhartt jacket that the petitioner had left behind on a chair in the foyer of Starks' home. Fazzini told Starks that he should "hang onto" the jacket and then contacted Detective Wygal, who came to Starks' residence. Thereafter, Starks signed a consent-to-search form for the first floor living, kitchen, and downstairs bathroom of his home. Upon executing the search, Starks confirmed that the Carhartt jacket on a chair in the foyer of the lower living area belonged to the petitioner. Inside a jacket pocket, Fazzini found an ammunition magazine containing four .25 caliber cartridges and court documents bearing the

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[13] This jacket is referred to as both a "Carhartt jacket" and a "Carhartt-type jacket." For ease of reference, we refer to it as either a "Carhartt jacket" or "jacket" for purposes of this opinion.

[14] Because nearly five years passed between the victim's murder and the petitioner's trial, many officers with the Clarksburg Police Department had changed ranks or jobs. For purposes of this opinion, we use their ranks and titles at the time of the victim's murder.

[15] The record indicates that Fazzini and Starks were friends, having known each other since childhood.

petitioner's name. The officers seized the jacket and its contents.

On January 24, 2010, Clarksburg Police Sergeant Joshua Cox, the lead detective on the case, filed an Affidavit and Complaint for Search Warrant (hereinafter "affidavit") for a "white one story residence" located at 118 Anderson Street, Clarksburg, West Virginia, which is where the petitioner resided.[16] The items sought by Sergeant Cox were a "black jacket with white stripes on the sleeve and white stripes around the collar, boots or shoes, and any .25 caliber firearm, .25 caliber ammunition or container, knife, box cutter, cell phone, pager, any clothing bearing blood stains and any gray shirts." A circuit court judge issued the search warrant and, during the execution of the warrant, officers discovered and seized, among other items, two pairs of Timberland boots-one black pair (size 10.5) and one tan pair (size 8.5)–and a pair of white Nike tennis shoes (size 9). During trial, an expert for the State testified that the petitioner's size 10.5 Timberland boots fit the impression of the boot taken at the crime scene, although he could not determine whether the petitioner's boots actually made the

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[16] When questioned during a suppression hearing as to how he knew the petitioner's address, Sergeant Cox testified, as follows:

> Q. How were you aware that 118 Anderson Street was, in fact, the residence of the defendant?
>
> A. Because I've known E.C. [Ennis Payne] practically all of my life and also we - - I ran his driver's license or his ID number and it came back to 118 Anderson Street.

impression given the absence of any individual features in either the boots or the impression.

In November 2010, Sergeant Cox traveled to a federal correctional facility[17] to execute a search warrant for the petitioner's DNA[18] and to ascertain the petitioner's foot size. Sergeant Cox advised the petitioner that his DNA was being obtained to compare it to DNA recovered from the Pittsburgh Pirates hat found at the Quarry Apartments. The petitioner admitted the hat belonged to him, but added that other persons also wore the hat. While Sergeant Cox was measuring the petitioner's foot, the petitioner volunteered that he wore a "ten something."

During pretrial hearings held on February 12 and 18, 2014, the trial court received evidence on the petitioner's motions to suppress the Carhartt jacket and the ammunition magazine, which had been seized at Starks' residence, as well as the evidence seized during the execution of the search warrant at the petitioner's home. Sergeant Cox recited the evidence recovered at the crime scene, the images that had been captured on the night in question by various surveillance cameras, and the evidence recovered through the execution of the search warrant at the petitioner's residence, including boots and tennis shoes.[19] Sergeant Cox testified that his

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[17] The petitioner was incarcerated in the facility on unrelated federal firearms charges.

[18] Investigators wanted a sample of the petitioner's DNA to compare with DNA that was taken from the shoes seized at the petitioner's home and from the Pittsburgh Pirates hat recovered at the Quarry Apartments.

[19] Sergeant Cox also described telephone communications made by the petitioner while he was incarcerated at the North

affidavit seeking the search warrant for the petitioner's residence contained facts within his personal knowledge and was based upon probable cause. Officer Fazzini and Detective Wygal testified regarding their search of the first floor of Starks' home with Starks' written consent during which the petitioner's Carhartt jacket and the .25 caliber ammunition magazine were found. Starks' testimony corroborated that given by Fazzini and Wygal, including his consent to the search of his residence.

By order entered on May 16, 2014, the trial court denied the petitioner's motions to suppress. Regarding the evidence seized at Starks' residence, the trial court found that Starks had authority to consent to the search of the first floor of his home where the petitioner had stayed and where the jacket and ammunition magazine were found. Regarding the evidence seized from the petitioner's residence, the trial court found that under the totality of the circumstances, particularly the surveillance video that placed the petitioner near the victim's residence at the time he was murdered, there was sufficient information in Sergeant Cox's affidavit to support a finding of probable cause for the issuance of the search warrant.

The record reflects that throughout this criminal proceeding, the petitioner refused to appear in court for hearings and other proceedings, refused to leave his jail and/or courthouse holding cell,[20] refused to

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Central Regional Jail during which he threatened witnesses, including Starks, who confirmed the threat during his testimony.

[20] During a pre-trial hearing held on May 27, 2014, the trial judge observed

meet with his counsel, and made threats towards his counsel and their families, as well as witnesses.[21] He also previously threatened courtroom security[22] when

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> Well, there has been a history of Mr. Payne . . . refusing to come out of his cell, refusing to appear in court, and as the Court recalls at least on one occasion, he battered an inmate, I hear, in the holding facility when he was scheduled for a court appearance in this case.

[21] The petitioner repeatedly sought new counsel, which resulted in four attorneys being removed from his case, new counsel being appointed, and five trial dates being continued. The petitioner also filed several pro se motions requesting new counsel, claiming counsel had a conflict of interest because he had threatened their lives and the lives of their families.

[22] An example of the petitioner's recalcitrance and disrespect is reflected in the following exchange that took place during the May 27, 2014, pre-trial hearing after defense counsel advised the trial court that the petitioner did not wish to proceed in court that day:

> Judge: Any suggestions you [defense counsel] have to resolve this matter?
>
> Defense Counsel: . . . My primary concern is that Mr. Payne receive a fair trial.
>
> Judge: Well, that the Court's concern and that's been the Court's concern all along. And the Court's advised Mr. Payne previously on the record that he's his own worst enemy, that he needs to cooperate with his attorney.
>
> Petitioner: Motherf--ker, I have been cooperating with my Goddamn attorney.
>
> Judge: Mr. Payne, you be quiet.
>
> Petitioner: I ain't got to hear that shit. I'll say what the f--k I want.
>
> Judge: You be quiet.

he indicated that if he did not get want he wanted, he would grab a deputy's gun.[23] Based on this history, the trial judge advised the petitioner, immediately before jury voir dire began on November 3, 2014, as follows:

> Mr. Payne, the Court is obviously concerned with some of the actions that have taken place here, and some of the comments that have been made by you. However, the Court is going to do

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> Petitioner: Whatever. Judge: You be quiet.
>
> Petitioner: What are you going to do throw me in jail?
>
> Judge: Sir, I told you to be quiet and I expect you to be quiet and let your attorney talk.
>
> Petitioner: You going to put me in jail?
>
> Judge: I'll address you in a minute.
>
> Petitioner: Raising your voice don't mean nothing. It just means you lose control.
>
> Judge: I am in control, sir.
>
> Petitioner: You ain't in control of nothing. You just talking cause you got a pair of lips.

[23] The petitioner articulated this threat during a telephone call that he made from the regional jail. During the May 27, 2014, pre-trial hearing, Sergeant Graeber, the officer charged with courtroom security, proffered the following opinion when the trial judge asked whether he believed the petitioner posed a security risk:

> Sgt. Graeber: I think it's obviously a concern of mine and my deputies knowing that he has nothing to lose at this point; that if he's made threats to grab a deputy's weapon[,] it's a danger to everybody in this courtroom and the general public of Harrison County who is visiting the building. There may be an issue with safety concerns.

> something that it hasn't done before, and that is I'm going to sign an order directing that in order to preserve your fair - - your right to a fair trial and have you not appear in orange or in leg shackles or handcuffs, I'm going to sign an order directing that what's known as locomotion restrictive humane leg restraints be put on, and they be put on underneath your street clothing so that the jury cannot see or have any idea that those are being used.
>
> However, in the event that you do not cooperate with those devices being installed, or if you refuse to change in[to] street clothes, then the Court will direct the bailiffs to bring you to the courtroom for the jury trial in jail clothing and shackles and handcuffs, which will remain on throughout the trial.
>
> • • • •
>
> So the choice is yours at this point in time. The Court's tried to accommodate you as much as what it can. But this case is going to trial, and hopefully you'll realize, as the Court's told you in the past, that the only person you're going to be hurting is yourself.

The petitioner was then placed in the custody of the bailiff to allow him to put on the humane restraints and street clothes. Soon thereafter, the petitioner's counsel reported to the trial court that counsel had met with the petitioner, who refused to change into the street clothes and the humane restraints that were made available to him. Counsel further stated that when he advised the petitioner that he should do so, the petitioner responded that he "wo[uld]n't be up

there for long," which counsel interpreted as the petitioner's intent "to try to create some chaos" when he came into the courtroom. Upon receiving this information, the trial judge stated, as follows:

> The defendant has left this Court with no choice but based upon his attitude, his demeanor, comments he's made, and his actions, refusing to come out of his cell on occasion, refusing to be brought to hearings, refusing to meet with his counsel, and his now refusal to change into street clothes. This is not the first time that the defendant has done this with the case set for trial. The Court is left with no choice but to have him brought to the courtroom in his jail clothing with shackles and handcuffs . . . .

Thereafter, the petitioner was brought into the courtroom wearing jail attire, shackles, and handcuffs, and the jury voir dire began. The trial judge admonished the jury venire with the following instruction:

> Ladies and gentlemen of the jury, you will note that the defendant is in jailhouse clothing and handcuffs and shackles. The reason for this is of no concern to you, and shall not be considered by you for any reason in arriving at your verdict in this case.
>
> In fact, you shall not discuss this aspect of the case at any time during your deliberations. The defendant is presumed under the law to be innocent of all charges, and the only way the defendant can be convicted of anything is if the State of West Virginia produces sufficient evidence by the testimony of witnesses and/or

> various exhibits to prove beyond a reasonable doubt each and every element of the offenses charged. Then and only then, may you find the defendant guilty of any offense.
>
> Again, you are to make no reference nor speculate as to why the defendant may be in custody at this time.
>
> Do each of you understand and agree that you will give no consideration to his appearance in this case in arriving at your verdict if you are selected to serve on the jury for the trial of this case?

The entire jury pool answered in the affirmative.

Several months prior to jury voir dire, the petitioner had filed a motion for a change of venue due to pre-trial publicity.[24] The State opposed the motion, asserting the petitioner had failed to put forth any evidence, other than stories reported in local media, that "there exists in this County a prejudice against [the petitioner] so great that he cannot obtain a fair and impartial trial in this County," or that "a present hostile sentiment exists against [the petitioner], extending throughout the entirety of Harrison County." The trial court deferred ruling on the motion until jury selection. During voir dire, when questioned regarding their prior knowledge of the case, only two members of the jury pool indicated they had some prior knowledge based on news coverage; both stated they had formed

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[24] The appendix record includes several news articles regarding the murder.

no opinion of the case, nor could they recall specific information derived from the news articles.[25]

Following the presentation of evidence, the jury returned its verdict finding the petitioner guilty of first degree murder with a recommendation of mercy and conspiracy to commit burglary. The petitioner directed his counsel not to file a post-trial motion for a new trial.[26] This appeal followed.

## II. Standard of Review

The petitioner assigns errors that involve varying standards of review. Accordingly, we will set forth those standards in our discussion of each issue as we proceed to determine whether the petitioner is entitled to relief from his convictions.

## III. Discussion

The petitioner seeks to overturn his convictions on grounds related to the denial of his motions to suppress evidence and to change venue, as well as his appearance in restraints and jail attire during jury

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[25] One of these two jurors was selected to sit on the petitioner's jury.

[26] Notwithstanding the failure to move for a new trial, we find the errors assigned were fully developed, carefully considered, and ruled upon by the trial court during pre-trial proceedings below. Accordingly, we will address the same. *See* Syl. Pt. 4, *State v. Jessie*, 225 W.Va. 21, 689 S.E.2d 21 (2009) ("Although this Court has held that a defendant may not assign an error for the first time on appeal that could have been presented initially for review in a post-trial motion, failure to raise an issue in a post-trial motion will not prevent this Court from entertaining that issue on appeal where it is clear that the trial court carefully and completely considered that specific issue in a pre-trial motion.").

voir dire. We address each of these assignments of error, in turn, below.

### A. Search and Seizure

The petitioner asserts the trial court erred by refusing to suppress the evidence seized during the police search of Starks' residence with Starks' consent. Citing *United States v. Matlock*, 415 U.S. 164 (1974), the petitioner argues that consent to search an item of personal property can only be given by someone with "common authority" over, or other sufficient relationship with, the item to be inspected, and that any notion that he abandoned his jacket would eviscerate the principles announced in *Matlock*. Maintaining that Starks was neither a user nor possessor of the jacket at the time it was searched, the petitioner contends that while the police could observe the jacket and notice things in plain view, the officers exceeded the scope of the consent search and trespassed upon his jacket by seizing items from a pocket of the jacket, rendering such evidence inadmissible at trial.

Relying upon *State v. Dorsey*, 234 W.Va. 15, 762 S.E.2d 584 (2014), the State asserts there was no error because an overnight guest has a privacy interest when staying in another's home against everyone but the host and those whom the host permits to enter his or her home. The State asserts the petitioner abandoned any privacy interest he had in his jacket by leaving it behind in a common area of Starks' home with no indication that he ever planned to return or to retrieve it. Thus, the State maintains that any expectation of privacy the petitioner maintained in his jacket had already been forfeited

by him at the time Starks consented to the search of his residence.

In determining whether the seizure of the petitioner's jacket and its contents was constitutionally reasonable and whether the circuit court correctly denied the petitioner's motion to suppress the evidence recovered from the jacket, our standard of review is plenary:

> In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. . . . Thus, 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 the 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). We have also observed that

> [w]hen 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.

*Id.* at 107, 468 S.E.2d at 722, syl. pt. 1.

While the United States Supreme Court has recognized that an overnight guest has a legitimate expectation of privacy in a host's home, the Court also observed that "[f]rom the overnight guest's perspective, . . . his possessions will not be disturbed by anyone but his host *and those his host allows inside*." *Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (emphasis added). Courts have found, based on this observation in *Olson*, that an overnight guest cannot challenge a search and seizure under the Fourth Amendment when their host has consented to the police search. *See*, *e.g.*, *United States v. Isom*, 588 F.2d 858 (2d Cir.1978) (finding no violation of defendant's Fourth Amendment rights where owner consented to search of home in which defendant stayed intermittently); *Wigley v. State*, 44 S.W.3d 751, 754 (Ark. Ct. App. 2001) (finding defendant, as overnight guest in home, did not have reasonable expectation of privacy because "an overnight guest has no reasonable expectation of privacy when the host consents to the search").

Here, Starks voluntarily consented to a police search of the first floor of his home. "'Where a person voluntarily and knowingly consents to a search of his premises, such a search may be conducted in the absence of a search warrant.' Syllabus Point 1, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976)." Syl. Pt. 1, *State v. Hambrick*, 177 W.Va. 26, 350 S.E.2d 537 (1986). Further, "[t]he State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in

which a search and seizure warrant is not needed, such as . . . property that has been abandoned, as well as searches and seizures made that have been consented to." Syl. Pt. 1, in part, *State v. Angel*, 154 W.Va. 615, 177 S.E.2d 562 (1970).

Because "Fourth Amendment rights are personal rights [that] . . . may not be vicariously asserted[,]"[27] "we must begin our analysis by first determining whether the petitioner has standing to make a claim for violation of his rights under the Fourth Amendment and Section 6 of Article III of the *West Virginia Constitution* as a result of the search and seizure of evidence from [Starks'] residence." *Dorsey*, 234 W.Va. at 21, 762 S.E.2d at 590. "'The Fourth Amendment of the *United States Constitution*, and Article III, Section 6 of the *West Virginia Constitution* protect an individual's reasonable expectation of privacy.' Syl. Pt. 7, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981)." Syl. Pt. 1, *Wagner v. Hedrick*, 181 W.Va. 482, 383 S.E.2d 286 (1989). In this regard, we have recognized that "[a] claim of protection under the Fourth Amendment and the right to challenge the legality of a search depends not upon a person's property right in the invaded place or article of personal property, but upon whether the person has a legitimate expectation of privacy in the invaded place or thing." *Hedrick*, 181 W.Va. at 487, 383 S.E.2d at 291 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)). Consequently, "if a person is in such a position that he cannot reasonably expect privacy, a court may find that an unreasonable

[27] *Alderman v. United States*, 394 U.S. 165, 174 (1969).

Fourth Amendment search has not taken place." *Hedrick*, 181 W.Va. at 487, 383 S.E.2d at 291.

With specific regard to the seizure of the petitioner's jacket and its contents, which he left behind in Starks' home, we observe that

> [t]he touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?

*California v. Ciraolo*, 476 U.S. 207, 211 (1986). Under this two-party inquiry, our analysis does not turn on whether the petitioner retained an ownership interest in the jacket, but whether he retained a reasonable expectation of privacy in the jacket and its contents. Critically, the petitioner "b[ore] the burden of proving not only that the search of [his jacket] was illegal, but also that he had a legitimate expectation of privacy in that [jacket]." *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *see also Rakas v. Illinois*, 439 U.S. 128, 131 n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth amendment rights were violated by the challenged search and seizure.").

Relying upon *Matlock*,[28] the petitioner asserts that Starks could consent to the search of his own home,

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[28] *United States v. Matlock*, 415 U.S. 164 (1974).

but not to the search of the petitioner's jacket. The petitioner relies upon cases addressing whether a person could consent to the search of the interior of a closed item that belonged to someone else, such as a briefcase found in the locked trunk of a vehicle[29] and a footlocker located in the defendant's bedroom.[30] However, the relevant inquiry is not whether the pocket of the petitioner's jacket is a closed "container," but whether the petitioner had a reasonable expectation of privacy in the jacket at the time of the search and seizure. As we recently explained,

> "one who asserts a Fourth Amendment violation must demonstrate a 'reasonable expectation of privacy' in the subject of the seizure. That expectation is to be measured both subjectively and by an objective standard of reasonableness." *Marano v. Holland*, 179 W.Va. 156, 163, 366 S.E.2d 117, 124 (1988). Thus, an expectation of privacy is legitimate when an individual demonstrates that he or she personally has an expectation of privacy in the place searched, and also demonstrates that the expectation is reasonable. *Rakas v. Illinois*, 439 U.S. 128, 143-44, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In order for an expectation to be "reasonable" it must have "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." 439 U.S. at 143-144 n.12, 99 S.Ct. 421. In other words, the individual's

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[29] *United States v. Infante-Ruiz*, 13 F.3d 498 (1st Cir. 1994).

[30] *United States v. Block*, 590 F.2d 535 (4th Cir. 1978).

> subjective expectation of privacy must be "one that society is prepared to recognize as 'reasonable.'" *Id.*

*Dorsey*, 234 W.Va. at 22, 762 S.E.2d at 591.

In determining whether the petitioner met his burden of proving that he had a legitimate expectation of privacy in the jacket, we examine the evidence presented at the suppression hearing [31] through a "highly fact-specific" lens. *Lacy*, 196 W.Va. at 107, 468 S.E.2d at 722, syl. pt. 1, in part. Importantly, such facts are to be "construe[d] . . . in the light most favorable to the State." *Lacy*, 196 W.Va. at 107, 468 S.E.2d at 722, syl. pt. 1, in part.

Construing the facts of the case at bar in the light most favorable to the State, we find the petitioner failed in his burden of proving that he had a reasonable expectation of privacy in his jacket and, thus, lacks standing to challenge the search. The suppression hearing evidence demonstrated that Starks bailed the petitioner out of jail at the end of December of 2009,[32] after which the petitioner "just kind of hung out" with the Starks family "a little bit," sometimes staying at Starks' house, or he might "stay

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[31] *See State v. Buzzard*, 194 W.Va. 544, 552, 461 S.E.2d 50, 58 (1995) ("[T]here is no authority . . . that upon appellate review, we should consider the . . . testimony at trial in upholding the trial court's ruling which arose out of the pre-trial suppression hearing"); *State v. Farley*, 192 W.Va. 247, 253-54 n.7, 452 S.E.2d 50, 56-57 n.7 (1994) ("Because the defendant did not renew his motion to suppress at trial, specifically after he had testified, he is now foreclosed from using trial testimony to challenge the trial court's ruling.").

[32] This was less than two weeks before the victim's murder on January 13, 2010.

with somebody else[,]" "crashing" at Starks' home "when he needed to." The evidence also showed that the petitioner arrived at Starks' home during the early morning hours of January 13, 2010, shortly after the murder. When Starks awoke later that same morning, the petitioner was gone, having relinquished possession of his jacket by leaving it in the foyer of the home, a common area. The petitioner gave Starks no indication as to whether he would ever return to Starks' home, and he left no instructions with regard to his jacket.

In short, the petitioner could not reasonably have expected that no one would ever touch or handle his jacket that he had abandoned on a chair in the foyer of Starks' home, whether it be Starks, or his wife or children, or people Starks invites into his home, such as Detective Wygal and Officer Fazzini. Other courts are in agreement that persons by their acts and deeds can lose any expectation of privacy in personal items. *See Brown v. United States*, 97 A.3d 92, 96 (D.C. 2014) (citing *United States v. Boswell*, 347 A.2d 270, 274 (D.C. 1975) ("'The issue is not abandonment in the strict property-right sense but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question.'"); *Hill v. United States*, 664 A.2d 347 (D.C. 1995) (finding defendants did not have legitimate expectation of privacy in apartment where they "sometimes" stayed, where they had stayed previous night, and were good friends with tenant); *State v. Corbin*, 957 N.E.2d 849 (Ohio Ct. App. 2011) (finding defendant had no expectation of privacy in contents of bag he had abandoned in plain view at home of third-party who

consented to search of home where defendant was occasional overnight guest ); *State v. Francisco*, 26 P.3d 1008, 1012 (Wash. Ct. App. 2001) (upholding search and seizure of gun at mother's home and observing that "[defendant's] intermittent use of his mother's house as a place to stay overnight, do laundry, and store clothes does not suggest that he had authority to exclude anyone from the premises or that he could legitimately expect that items he left there would remain undisturbed.").

Under the specific facts and circumstances of the instant matter construed in the light most favorable to the State, we find no error in the admission of the evidence seized from Starks' home. Accordingly, we affirm the trial court's denial of the motion to suppress.

**B. Probable Cause for Search Warrant**

The petitioner asserts the trial court erred by denying his motion to suppress the evidence seized from his residence at 118 Anderson Street because the affidavit seeking the search warrant lacked a proper nexus between the criminal activity, the place searched, and the items sought. The petitioner argues that the sufficiency of the affidavit for the probable cause determination must be based solely on the facts within the four corners of the affidavit. He contends Sergeant Cox's affidavit contained no facts to connect 118 Anderson Street to any of the items or activities described therein; used knowledge of an uncorroborated hearsay informant regarding phone calls; contained a conclusory statement that the Pittsburgh Pirates hat found at the scene belonged to the petitioner; and failed to state where

and when the petitioner was seen wearing the hat.[33] For these reasons, the petitioner argues that the evidence seized pursuant to the search warrant, including a pair of size 10.5 Timberland boots, should have been suppressed at trial.

The State responds that the trial court correctly ruled that the evidence seized from within the petitioner's home was admissible at trial. The State asserts that reviewing courts should grant issuing courts deference when reviewing warrants for probable cause, judging such warrants under the totality of the circumstances. Regarding the statement in the affidavit that an individual said the petitioner endeavored to phone the victim on the night of the murder, the State maintains a search warrant is not invalidated merely because it contains a misrepresentation if, absent the misrepresentation, the balance of the affidavit supports a finding of probable cause. Arguing there was probable cause for the warrant to issue, the State cites the strong surveillance video evidence, as described in the affidavit, first depicting the petitioner wearing the Pirates hat and later showing him without the hat, combined with the fact that a Pirates hat was found at the crime scene. The State asserts that the lack of specific locations in the affidavit as to where the petitioner was seen with or without the hat "bears no weight as to probable cause." The State also notes that the affidavit stated the victim was murdered with a .25-caliber gun and that a .25-caliber gun

[33] Although the petitioner also asserts the affidavit was deficient because it described the ammunition magazine seized from his jacket, we have already determined that the trial court was correct in refusing to suppress this evidence.

magazine was found in the petitioner's jacket at a friend's residence. Lastly, the State asserts the affidavit sought "specific classes of items," which the surveillance video evidence indicated the petitioner possessed.

It is well-established that "[b]oth the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation." Syl. Pt. 3, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986); *see also* W.Va.R.Crim.P. 41(c) ("A warrant shall issue only on an affidavit or affidavits sworn to before the magistrate or a judge of the circuit court and establishing the grounds for issuing the warrant. If the magistrate or circuit judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, that magistrate or circuit judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part.").

In the instant matter, Sergeant Cox sought a warrant to search 118 Anderson Street, Clarksburg, West Virginia, based on the following information set forth in his affidavit:

> On 01-13-10, around 0330 hrs, Jayar Poindexter was shot and killed with a .25 caliber gun at the Overlook Apts[34] in Harrison County. According

[34] The Quarry Apartments are located on Overlook Drive. Throughout this criminal proceeding, witnesses used the names

> to an individual, EC Payne had throughout the night attempted to make contact with the victim by phone. EC Payne's Pirate hat was located on the ground, across from the victim's residence. Surveillance video showed around 0300 hours EC Payne was wearing the hat. At 0336 hrs, EC Payne is observed at the Go Mart in Bridgeport without the hat. During a search of the coat belonging to EC Payne at a friend's residence, Officers recovered a .25 auto magazine containing bullets.

(Footnote added). In determining whether there was probable cause for the circuit court to issue the search warrant based upon this affidavit, we are guided by the following principles:

> Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. It is not enough that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend

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"Overlook Apartments" and "Quarry Apartments" to refer to the same apartment complex.

> solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances.

Syl. Pt. 3, *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995). Further, [i]n *State v. Thomas*, 187 W.Va. 686, 421 S.E.2d 227 (1992), we quoted approvingly the standard of review of the sufficiency of a search warrant affidavit outlined by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983):

> [W]e have repeatedly said that after-the-fact scrutiny by the courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts. A grudging or negative attitude by reviewing courts toward warrants, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.

*State v. Corey*, 233 W.Va. 297, 303-04, 758 S.E.2d 117, 123-24 (2014).

Applying these standards, we find Sergeant Cox's affidavit established probable cause for the circuit court to issue the search warrant. While the petitioner characterizes the reference in the affidavit to the Pirates hat as being conclusory, the affidavit provides that this hat was discovered on the ground near the victim's apartment and that surveillance video captured the petitioner wearing a Pirates hat

shortly before the murder, but not wearing it shortly after the murder. Further, even if we were to remove the statement concerning the petitioner attempting to call the victim on the night of the murder, we find the balance of the information in the affidavit was sufficient for the circuit court to find probable cause to issue the warrant. As we have previously held, "[a] search warrant affidavit is not invalid even if it contains a misrepresentation, if, after striking the misrepresentation, there remains sufficient content to support a finding of probable cause. Probable cause is evaluated in the totality of the circumstances." Syl. Pt. 2, *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995). The affidavit further provided that the victim was shot and killed with a .25 caliber gun and that officers had recovered a .25 caliber ammunition magazine from the jacket the petitioner left behind at a friend's home. Based upon the "cumulative effect of the facts in the totality of circumstances,"[35] and viewing the facts in the light most favorable to the prosecution, we find Sergeant Cox's affidavit contained ample information establishing probable cause for the circuit court's issuance of the search warrant. Accordingly, we find no error in the trial court's denial of the petitioner's motion to suppress the evidence seized during the execution of the warrant.

**C. Venue**

The petitioner asserts the trial court erred by failing to grant his motion for a change of venue, alleging that newspaper articles and extensive media

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[35] *Lilly*, 194 W.Va. at 598, 461 S.E.2d at 104, syl. pt. 3, in part.

coverage was so prejudicial as to warrant either the removal of his trial to another county or a change of venire by summoning potential jurors from another county. Noting that West Virginia Code § 62-3-13 (2014) provides that "[a] court may, on the petition of the accused and for good cause shown, order the venue of the trial of a criminal case in such court to be removed to some other county[,]" the petitioner asserts that "good cause shown" means the establishment of a "present, hostile sentiment" against the accused throughout the county in which the offense occurred, which precludes the defendant from receiving a fair trial. Although the petitioner concedes that prejudicial pre-trial publicity alone is insufficient to require a change of venue and that prejudice must be proven, he maintains that he suffered "substantial prejudice" due to "extensive and voluminous" media coverage in the community.

The State responds that the trial court correctly denied the motion as there was insufficient evidence to support a change of venue. Noting the burden of proof for any change of venue motion rests with the movant, the State maintains that the decision on whether to grant a change of venue should not be disturbed on appeal absent a clear abuse of discretion. The State points out that during voir dire, only two potential jurors recalled hearing news of the victim's murder or of the petitioner's arrest as a suspect; neither had formed an opinion of the case based upon the news articles; and neither could recall specific information derived from the news articles.

It has long been the law in this state that

> "[t]o warrant a change of venue in a criminal case, there must be a showing of good cause

> therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Syl. pt. 2, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946).

Syl. Pt. 2, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983). Importantly, "[w]idespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial." Syl. Pt. 1, *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982). Moreover, a change of venue will not be granted unless "a present hostile sentiment against the accused, extending throughout the entire county in which he is brought to trial[,]" is shown. Syl. Pt. 1, in part, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981) (quoting Syl. Pt. 1, *State v. Siers*, 103 W.Va. 30, 136 S.E. 503 (1927)).

Here, the trial court delayed ruling on the petitioner's motion for a change of venue until after jury voir dire, which ultimately proved unavailing to the petitioner. Indeed, "[o]ne of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or

innocence of the defendant." Syl. Pt. 3, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). As the State points out, only two jurors had any recollection of news coverage of the matter and both indicated, unequivocally, that they had no fixed opinions regarding the matter.

Although the petitioner asserts that prejudicial newspaper articles were magnified by the low crime rate in his small community, the fact remains that even if he had been able to establish that any prejudice existed against him, a change of venue would still not have been warranted unless he could demonstrate that the "prejudice against him [was] so great that he [could not] get a fair trial." *Gangwer*, 169 W.Va. at 177, 286 S.E.2d at 391, syl. pt. 1, in part. Jury voir dire simply did not demonstrate the prejudice about which the petitioner speculated.

"Whether a change of venue is warranted rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that such discretion has been abused." *Gangwer*, 169 W.Va. at 177, 286 S.E.2d at 391, syl. pt. 2. Based on the record before us, we find no abuse of discretion in the trial court's decision that a change of venue was not warranted in this matter.

**D. Jail attire**

The petitioner asserts the trial court deprived him of his constitutional right to a presumption of innocence by compelling him to wear orange jail attire and to be restrained in handcuffs and leg shackles in the presence of the jury during voir dire. Relying upon *Estelle v. Williams*, 425 U.S. 501 (1976), the petitioner asserts that courts cannot compel

defendants to stand trial while dressed in "identifiable prison clothes . . . ." *Id.* at 512. The petitioner contends the trial court erred by failing to permit him to be absent from jury selection after he refused to wear the street attire that was provided to him.

While agreeing that a criminal defendant has a fundamental right not to be forced to attend trial in identifiable prison attire, the State asserts that a criminal defendant may waive a fundamental right protected by the Constitution, so long as the right was knowingly and willingly waived. Maintaining that the petitioner's repeated threats and statements throughout pre-trial hearings suffice this standard, the State recounts the efforts made by the trial judge and the petitioner's counsel to have the petitioner to change into the street attire provided to him. Because the petitioner refused to do so, the State asserts the petitioner waived his right not to appear during voir dire in orange jail attire. We agree.

There is no question that "[a] criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire." Syl. Pt. 2, in part, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979). Further, "'[a] criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints." Syl. Pt. 3, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979). In addressing this issue of constitutional dimension, our review is plenary. *See State v. Finley*, 219 W.Va. 747, 749, 639 S.E.2d 839, 841 (2006) (addressing issue of defendant appearing at trial in jail attire and finding that "[t]he

issue . . . calls on us to examine a question of constitutional dimension and as such, '[w]here the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review.' Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).").

As indicated above, the record is replete with the petitioner's threats to his counsel, his counsel's families, witnesses, and courtroom security; his insulting language directed to the trial judge; his disruptive behavior; and finally his trial counsel's stated belief that the petitioner was going "to try to create some chaos" in the courtroom during jury voir dire. The record indisputably demonstrates that the trial court went to great lengths to protect the petitioner's constitutional rights, while also assuring courtroom security, by offering and making available passive restraints to be worn under the street clothes.[36] The petitioner's flat out refusal to change into the street clothing and passive restraints prompted the trial judge to find that "[t]he Court is left with no choice but to have him [the petitioner] brought to the courtroom in his jail clothing with shackles and handcuffs."

It is abundantly clear that every effort was made by the trial judge and defense counsel to have the petitioner change into the street attire and the humane restraints. The petitioner's blatant refusal to do so leads us to the ineluctable conclusion that the petitioner knowingly and intelligently waived his right not to wear jail attire. *See State v. Eden*, 163

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[36] The parties represent that the petitioner appeared throughout the remainder of his trial in street clothing.

W.Va. 370, 378, 256 S.E.2d 868, 873 (1979) ("An accused may, by declaration and conduct, waive a fundamental right protected by the Constitution, but it must be demonstrated that the waiver was made knowingly and intelligently."). Moreover, we find no merit in the petitioner's contention that he should have been absented from jury voir dire due to his refusal to change into street clothing. Critically, the petitioner never asked to be absent from voir dire. Had the trial court, sua sponte, refused to allow the petitioner to be in the courtroom in jail attire during voir dire, the trial court would have denied the petitioner his constitutional right to be present at a critical stage of his criminal proceedings. *See* Syl. Pt. 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977) ("The defendant has a right under Article III, Section 14 of the *West Virginia Constitution* to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless."); *see also* W.Va. R.Crim. P. 43(a) ("The defendant shall be present . . . at every state of the trial . . . ."). For these reasons, we find no error in this regard.[37]

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[37] The petitioner also asserts that the cumulative effect of the errors he has alleged deprived him of his constitutional right to a fair trial and warrants a reversal of his convictions. *See* Syl. Pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972) ("Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error."). Having failed to demonstrate any error in the proceedings below, there is no basis to invoke the cumulative error doctrine.

## IV. Conclusion

For the reasons stated above, the petitioner's conviction for first degree murder and conspiracy to commit burglary are hereby affirmed.

Affirmed.

## APPENDIX B

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA,

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| STATE OF WEST VIRGINIA | |
| v. | Case No. 13-F-112-3 |
| ENNIS CHARLES PAYNE, | James A. Matish, Chief Judge |
| Defendant. | |

**ORDER RULING ON PRETRIAL MOTIONS**

Presently pending before the Court are motions filed by the State of West Virginia ("State") to admit evidence and motions filed by Ennis Charles Payne ("Defendant") to suppress evidence in the Defendant's criminal trial. Hearings on the motions were held on October 31, 2013, February 12, 2014, February 18, 2014 and February 21, 2014. The State's first motion seeks to admit statements allegedly made by the Defendant to a friend named Aaron Carey and to a fellow inmate named Richard Lambert, statements made by the Defendant during recorded telephone calls while he was in jail, and statements made by the Defendant to Sergeant Josh Cox during the execution of a search warrant. The State's second motion seeks to admit threats allegedly made by the Defendant to a potential witness. The Defendant's motion seeks to suppress evidence obtained during

the search of two residences. Each motion will be addressed in turn.

## I. Motions Made by the State of West Virginia.

The statements subject to the State's motions can be grouped into four categories : (A) statements made to the Defendant's friend, Aaron Carey, and statements made to a fellow inmate, Richard Lambert; (B) statements made by the Defendant during recorded telephone calls while he was in jail; (C) statements made by the Defendant to Sgt. Josh Cox during the execution of a search warrant; and (D) alleged threats made by the Defendant to a witness.

### A. Statements Made by the Defendant to Mr. Carey and Mr. Lambert.

In its motions, the State seeks to admit statements allegedly made by the Defendant to Mr. Carey and Mr. Lambert. The State alleges that following the homicide of Jayar Poindexter, the Defendant advised Mr. Carey that he killed Mr. Poindexter during an attempt to rob him of drugs and money. The State further alleges the Defendant told Mr. Carey that while he and other individual were attempting to enter Mr. Poindexter's residence through a window, the individual present with the Defendant was grabbed by Mr. Poindexter which prompted the Defendant to shoot Mr. Poindexter. The Defendant argues that Mr. Carey's chronic and continuous use of marijuana renders his testimony unreliable and that the danger of unfair prejudice substantially outweighs the probative value of the statements.

The State further alleges that the Defendant made similar statements to a fellow inmate during his

incarceration for an unrelated offense. The fellow inmate, Mr. Lambert, testified at an in camera hearing before this Court on February 21, 2014. At the hearing, Mr. Lambert testified that in January of 2010 he met the Defendant in jail. Mr. Lambert further testified that the Defendant stated "he went to a guy's house to rob him, and the robbery went bad and he killed the guy." Mr. Lambert added that the Defendant said he went to the individual's home "to rob him for drugs", but "the guy was home and he didn't think he was home." Mr. Lambert also testified that the Defendant said "he hoped they don't figure out he did it" while looking at a newspaper article about Mr. Poindexter's homicide and ongoing investigation. According to Mr. Lambert, the conversation took place in the Defendant's jail cell. The Defendant argues that Mr. Lambert's testimony is unreliable because Mr. Lambert was in the process of negotiating a plea agreement for his pending charges. The Defendant argues that the information provided by Mr. Lambert, as well as the timing of the disclosure, renders his testimony unreliable and that the danger of unfair prejudice substantially outweighs the probative value of the statements.

"'A statement is not hearsay if the statement is offered against a party and is his [or her] own statement, in either his [or her] individual or a representative capacity. W.Va.R.Evid. 801 (d)(2)(A).' Syl. Pt. 1, *Heydinger v. Adkins*, 178 W. Va. 463, 360 S.E.2d 240 (1987)." Syl. Pt. 7, *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010). As expressed in *Payne*,

> The theory underlying this evidentiary rule is that if a person's own statements are offered

> against him, he cannot be heard to complain that he was denied an opportunity for cross-examination. An additional justification supporting the admissibility of this class of evidence is the fact that it is inherently trustworthy. [citation omitted] Presumably, a party would not admit or state anything against his or her interest unless it was true; nevertheless, if the statement is inaccurate, the party may deny it altogether or explain why he/she made it.

225 W. Va. at 611, 694 S.E.2d at 944 (quoting *Heydinger v. Adkins*, 178 W. Va. at 468, 360 S.E.2d at 245).

Furthermore, in order to be admissible at trial, evidence must be relevant under Rule 401 and its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence under Rule 403 of the West Virginia Rules of Evidence. *See State v. Hypes*, 230 W. Va. 390, 395, 738 S.E.2d 554, 559 (2013). As stated in *Hypes*,

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion,

> or undue delay is disproportionate to the value of the evidence.

*Id.* (quoting Syl. Pt. 9, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)).

In the instant case, the statements made by the Defendant to Mr. Carey are not hearsay and are admissible under Rule 801 (d)(2)(a) as statements made by a party-opponent. The statements are relevant because they directly implicate the Defendant in Mr. Poindexter's homicide and because they explain the Defendant's motive for attempting to burglarize Mr. Poindexter.

Additionally, the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The probative value of the statements is significant in that they amount to a confession showing the Defendant's involvement in Mr. Poindexter's homicide; this probative value far outweighs any prejudicial effect. The Court is satisfied that the evidence will not induce the jury to decide this case on an improper basis.

While the Defendant argues that Mr. Carey's testimony is unreliable because of his drug use, any such drug use goes to the weight rather than the admissibility of the statements. Since the statements meet the requirements of admissibility, the reliability of Mr. Carey's testimony is properly a matter for assessment by the trier of fact where the Defendant will have the opportunity to impeach the witness or cast doubt on his credibility.

Furthermore, the statements made by the Defendant to Mr. Carey were freely and voluntarily made. Mr. Carey is not an agent of any law enforcement agency. The statements were made by the Defendant at Mr. Carey's residence, and there is no evidence that the Defendant was threatened or coerced into making the statements.

The statements made by the Defendant to Mr. Lambert are also not hearsay and are admissible under Rule 801(d)(2)(a) as statements made by a party-opponent. The statements are relevant because they directly implicate the Defendant in Mr. Poindexter's homicide, they explain the Defendant's motive for attempting to burglarize Mr. Poindexter, and they show the Defendant's involvement in a conspiracy with another individual to burglarize Mr. Poindexter's residence.

Also, the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The probative value of the statements is significant because the statements implicate the Defendant in Mr. Poindexter's homicide and in a conspiracy to burglarize Mr. Poindexter's residence with another individual. The probative value of the statements outweighs any prejudicial effect.

The Defendant argues that Mr. Lambert's testimony is unreliable and should be inadmissible because he was negotiating a plea agreement for his pending charges. Such evidence again goes to the weight rather than the admissibility of the evidence. Since the evidence meets the requirements of

admissibility, the reliability of Mr. Lambert's testimony is properly a matter for assessment by the trier of fact. The Defendant will have the opportunity to impeach the witness or cast doubt on his credibility.

Last, the statements made by the Defendant to Mr. Lambert were freely and voluntarily made. While Mr. Lambert was incarcerated with the Defendant at the time the statements were made, there is no evidence that Mr. Lambert was an agent of any law enforcement agency or the State of West Virginia. There is no evidence that Mr. Lambert was promised anything to elicit statements from the Defendant. The statements were made by the Defendant in his own jail cell, and there is no evidence that the Defendant was threatened or coerced into making the statements.

**B. Recorded Telephone Calls from Jail.**

The State also seeks to admit various recorded statements made by the Defendant during telephone conversations while incarcerated at North Central Regional Jail. The telephone calls made by the Defendant occurred on January 17, 2010 at approximately 9:01 p.m.; January 18, 2010 at approximately 10:54 a.m.; January 21, 2010 at approximately 8:46 p.m.; January 24, 2010 at approximately 3:28 p.m.; February 14, 2010 at approximately 9:27 p.m.; February 28 2010 at approximately 10:21 p.m.; March 7, 2010 at approximately 5:08 p.m.; and March 7, 2010 at approximately 9:37 p.m.

In the first call, made on January 17, 2010, the Defendant states that he heard Mr. Poindexter's

girlfriend gave conflicting statements to the police, that people keep associating him with the homicide by stating that "if people keep putting my name in this shit it just keeps the shit alive and don't give it no time to die down", and that if he knew where the murder weapon was, he would turn it in to clear his name. In the call made on January 18, 2010, the Defendant opines that the news media continues to run the story about the homicide so that people at the murder site may be able to say they recognize the perpetrator. In the third call, made on January 21, 2010, the Defendant recounts his conversation with Sgt. Cox and states that "he already know", "it don't look good for the home team", and "they want the gun and the shooter." The Defendant advises the person on the other end of the conversation that they cannot tell anyone about what the Defendant said, except for his sister whom can then pass along the information. The Defendant also expressed that he does not wish to talk about the matter over the phone because the conversation is recorded. In the next call made on January 24, 2010 the Defendant states "that mother [expletive] [expletive] around and get me a life sentence." The context of the conversation reveals that the Defendant is retelling to Timothy Starks, who resides at a house searched by police officers. The fifth call the State seeks to admit, made on February 14, 2010, involves alleged threats made by the Defendant to Mr. Starks.[1] In the three calls made on February 28, 2010 and March 7, 2010, the Defendant states fellow inmate Richard Lambert's name during conversations.

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[1] This conversation is subject to another motion in limine addressed in this Order.

The above statements made by the Defendant in recorded phone conversations while in jail, except the statement addressed in the following paragraph, are not hearsay. Under Rule 801(d)(2)(a), nearly all of the statements are admissions by a party-opponent. The statements made on January 17, 2010 ("if people keep putting my name in this shit it just keeps the shit alive and don't give it no time to die down") and January 21, 2010 ("it don't look good for the home team") are also not hearsay because the statements also not offered for truth of the matter asserted. Instead, both statements indicate the Defendant's guilty conscience, state of mind and knowledge of the homicide.

However, the Defendant's statement on January 17, 2010 that he "heard" Mr. Poindexter's girlfriend gave conflicting statements to the police is not admissible. The statement is not an admission by a party-opponent because it is merely an indication that the Defendant heard an event occurred. The statement was not intended as an admission of fact. Furthermore, the State's argument that the statement is indicative of the Defendant's knowledge, guilty conscience and involvement in the homicide is unconvincing. The Defendant's knowledge and involvement cannot plausibly be connected with the witness's conflicting statements. Also, a sufficient link between the witness's conflicting statements and a guilty conscience is not established in the statement. Therefore, the statement that the Defendant heard Mr. Poindexter's girlfriend gave conflicting statements to the police is inadmissible.

Additionally, the probative value of the admissible statements made on January 17, January 18,

January 21, January 24, and February 14, 2010 is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The probative value of the statements is significant because the statements implicate the Defendant in Mr. Poindexter's homicide and evidence that the Defendant bad knowledge about the investigation. This probative value outweighs any prejudicial effect the statements may have.

Furthermore, statements made by the Defendant during phone calls on February 28 and March 7, 2010 indicating the Defendant's knowledge of Mr. Lambert are not admissible. While the statements are relevant to show the Defendant was acquainted with Mr. Lambert, a witness who claims the Defendant confessed to the murder of Mr. Poindexter, the statements will likely confuse the issues, waste time, and will be a needless presentation of cumulative evidence. At issue in the trial is the Defendant's guilt or innocence, and not whether the Defendant was acquainted with Mr. Lambert. Also, the State has listed Mr. Lambert as a witness. Mr. Lambert will likely testify about his relationship with the Defendant and the statements made during their conversations. If, however, an issue arises about the Defendant's association with Mr. Lambert, the statements identifying Mr. Lambert are available for rebuttal.

The Court further finds that statements made by individuals to whom the Defendant is speaking with in the recorded conversations are also admissible. "If a statement is not being offered for the truth of the

matter asserted but for some other purpose, it is not hearsay and therefore is admissible." *State v. Burd*, 187 W. Va. 415, 421, 419 S.E.2d 676, 682 (1991) (citing Syl. Pt. 1, *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990)). In this case, the non-party statements are admissible "at least as reciprocal and integrated utterances between two parties, for the limited purpose of putting the responses of the [Defendant] in context and making them intelligible to the jury and recognizable as admissions." *Id.* (citations and quotations omitted).

***Recordation and Interception of the Defendant's Calls.***

W. Va. Code § 31 -20-Se [2002], discussing the procedures and restrictions for monitoring and recording inmate telephone calls, provides:

> The executive director or his or her designee is authorized to monitor, intercept, record and disclose telephone calls to or from inmates housed in regional jails in accordance with the following provisions:
>
> (1) All inmates housed in regional jails shall be notified in writing that their telephone conversations may be monitored, intercepted, recorded and disclosed;
>
> (2) Only the executive director and his or her designee shall have access to recordings of inmates' telephone calls unless disclosed pursuant to subdivision (4) of this subsection;
>
> (3) Notice shall be prominently placed on or immediately near every telephone that may be monitored;

(4) The contents of inmates' telephone calls may be disclosed to the appropriate law-enforcement agency only if the disclosure is:

(A) Necessary to safeguard the orderly operation of the regional jails;

(B) Necessary for the investigation of a crime;

(C) Necessary for the prevention of a crime;

(D) Necessary for the prosecution of a crime;

(E) Required by an order of a court of competent jurisdiction; or

(F) Necessary to protect persons from physical harm or the threat of physical harm;

(5) Recordings of telephone calls may be destroyed after twelve months unless further retention is required for disclosure pursuant to subdivision (4) of this subsection or, in the discretion of the executive secretary, for other good cause; and

(6) To safeguard the sanctity of the attorney-client privilege, an adequate number of telephone lines that are not monitored shall be made available for telephone calls between inmates and their attorneys. Such calls shall not be monitored, intercepted, recorded or disclosed in any matter.

In the case at hand, the State provided testimony from Lieutenant Amanda Gump, an officer with North Central Regional Jail. Lt. Gump testified that whenever an inmate first arrives at the jail for processing, the inmate is given a document to sign informing them that all calls except to attorneys may be monitored, intercepted, recorded and disclosed.

This document, referred to as a jail booking data form, was admitted into evidence for the purposes of the hearing on February 18, 2014. The jail booking data form showed that the Defendant was admitted to North Central Regional Jail on January 16, 2010. The jail booking data form provided: "I have been advised of the following: … (5) All calls, except those to Attorneys, may be monitored, intercepted, recorded, and disclosed." The Defendant signed his name below this advisement. The jail booking data form showed that the Defendant and officers signed and dated the form on January 16, 2010.

Lt. Gump further testified that inmates are provided a handbook warning them that calls, except those to attorneys, may be monitored, intercepted, recorded and disclosed. Additionally, Lt. Gump testified that warnings are posted by every telephone where inmates make calls. Lt. Gump added that jail security checks on all shifts to ensure the warnings are posted.

Based upon the testimony and exhibits presented by the State, the Court concludes that the State has sufficiently demonstrated that notice was prominently displayed at North Central Regional Jail and that there was no violation of W. Va. Code § 31-20-5e. Lt. Gump testified that warnings are posted near every telephone which states that calls may be monitored. Furthermore, Lt. Gump testified that North Central Regional Jail had in place procedures to ensure the notices would remain prominently displayed. While no testimony was provided that a notice was up at the exact phone used by the Defendant at the specific time and date when the calls were made, the evidence introduced was

sufficient to satisfy the Court that notices were prominently displayed during the Defendant's calls. Moreover in the jail booking data form the Defendant acknowledged that his phone calls would be subject to monitoring and recording. Testimony was also introduced that a message played on the telephones at the beginning of each call advising the Defendant and the other party to the conversation that the call was subject to monitoring and recording.

The Court further finds that the telephone calls were properly disclosed. W. Va. Code § 31-20-Se(4)(b) allows disclosure of the contents of an inmate's telephone calls if the disclosure is necessary for the investigation of a crime. Nothing in the record suggests that Sgt. Cox sought the Defendant's telephone calls for any purpose other than investigating the murder in which the Defendant was charged.

**C. Statements made by the Defendant to Sgt. Cox.**

The State next seeks to admit statements made by the Defendant to Sgt. Cox during execution of a warrant to obtain the Defendant's DNA and shoe size on November 12, 2010. The Defendant argues that the statements occurred during custodial interrogation and are inadmissible because he was not read his Fifth Amendment rights nor did he execute a waiver of those rights.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the United States Supreme Court found that a defendant should be apprised of certain constitutional rights in a custodial interrogation situation. Two elements must be present before

*Miranda* warnings are required: first, the person must be in custody, and, second, he or she must be interrogated." *State v. Honaker*, 193 W. Va. 51, 60, 454 S.E.2d 96, 105 (1994). "The special safeguards outlined in *Miranda* are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation." Syl. Pt. 8, in part, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999).

"A trial court's determination of whether a custodial interrogation environment exists for purposes of giving *Miranda* warnings to a suspect is based upon whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest." Syl. Pt. 1, *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006), *overruled on other grounds by State v. Eilola*, 226 W. Va. 698, 704 S.E.2d 698 (2010).

"Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last." *Howes v. Fields*, 132 S.Ct. 1181, 1189 (2012). A court must ask "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at 1190. Imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*. *Id.*

The *Howe* court provided at least three strong grounds to support this conclusion. "First, questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest." *Id.* When a person who is

already serving a term of imprisonment is questioned, there is usually no abrupt change in circumstances. *See id*. at 1190-91. "Second, a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release." *Id.* "Third a prisoner unlike a person who has not been convicted and sentenced, knows that law enforcement officers who question him probably lack the authority to affect the duration of his sentence." *Id.*

"The factors to be considered by the trial court in making a determination of whether a custodial interrogation environment exists, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest." *State v. Middleton*, at Syl. Pt. 2.

In the case at hand, a reasonable person in the Defendant's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest. The Defendant did not invite or give his consent for officers to obtain his shoe size or DNA; rather, the officers entered under the authority of a search warrant. Because the officers were acting under the search warrant, the Defendant could not have returned to his cell at will.

A second question, however, is whether the meeting "present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*, 132 S.Ct. at 1190. In the

meeting Sgt. Cox, another officer from Clarksburg, West Virginia and Detective Corey Beard of the Allegheny County, Maryland combined investigations unit executed the search warrant in a common area at a federal prison. Sgt. Cox and Detective Beard testified that the three officers executing the warrant were all unarmed and no promises, threats or representations were made to the Defendant. Testimony from Sgt. Cox and Detective Beard also revealed that the entire meeting lasted less than thirty minutes. Sgt. Cox testified that when he began collecting samples, the Defendant asked him why he was collecting DNA samples. Sgt. Cox testified that he told the Defendant he was doing so to compare the sample to a hat located at the scene of a homicide. The Defendant then responded by stating he owned the hat, but that other people sometimes wear it. Sgt. Cox testified that he then asked the Defendant if he wished to speak about the investigation, to which the Defendant advised that he needed a lawyer. Sgt. Cox testified that he thereafter did not ask any further questions of the Defendant. Sgt. Cox further testified that the Defendant continued by asking what he would get out of the matter if he cooperated, to which Sgt. Cox stated that he could not make any deals with the Defendant.

Taking all of the above factors into consideration, the Court determines that the Defendant cannot show inherently coercive pressures that caused him to make any of the statements to Sgt. Cox. The meeting occurred in a common area. There is no evidence of coercion or any other manner of physical or psychological intimidation. The officers were unarmed and made no threats or promises. The

officers visited the Defendant to execute a search warrant, not to elicit a confession. Also, the entire encounter lasted only thirty minutes. Although the statements made by Sgt. Cox did involve the suspected offenses, the statements were in response to inquiries by the Defendant. After such inquiries, Sgt. Cox testified that he asked the Defendant if he wished to speak about the investigation. The Defendant then advised Sgt. Cox that he needed an attorney. In response, Sgt. Cox ceased asking further questions of the Defendant. Additionally, the Defendant was arrested for the suspected offenses in September 2012, nearly two years after the statements were made. This situation does not represent custodial interrogation because the Defendant was not subjected to the type of coercive pressures against which *Miranda* was designed to guard.

Even if a custodial interrogation environment did exist, the Defendant was not subject to interrogation. "Two elements must be present before *Miranda* warnings are required: first, the person must be in custody, and, second, he or she must be interrogated." *State v. Honaker*, 193 W. Va. 51, 60, 454 S.E.2d 96, 105 (1994). "The special safeguards outlined in *Miranda* are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation." Syl. Pt. 8, in part, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999). "Interrogation has been defined by the United States Supreme Court as 'express questioning . . . [or] any words or actions on the part of the police. . . that the police should know are reasonably likely to elicit an incriminating response

from the suspect.'" *State v. Kilmer* 190 W. Va. 617, 625, 439 S.E.2d 881, 889 (1993) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90 (1980)). "Further, the 'definition of interrogation can extend only to words or actions on the part of the police officers that they should have known were reasonably likely to elicit an incriminating response .'" *Id.* (quoting *Innis*, 446 U.S. at 302, 100 S.Ct. at 1690).

In this case, there is no evidence that the Defendant was coerced to talk in any way. There is no evidence of any threats, promises, coercive tactics or trickery by Sgt. Cox to get the Defendant to start talking. Instead, the record shows that Sgt. Cox was responding to the Defendant's inquiries about why Sgt. Cox was collecting DNA samples. The Defendant's inquiries were met with reasonable responses that were not likely to elicit an incriminating response from the Defendant. Sgt. Cox's reasonable responses were not the functional equivalent of interrogation. There is no evidence to indicate Sgt. Cox should have reasonably known or expected that his conversation with the Defendant would have been reasonably likely to elicit an incriminating response from the Defendant. When Sgt. Cox did expect a detailed discussion about the homicide, he specifically asked the Defendant if he wished to speak about the investigation. The Defendant declined Sgt. Cox's invitation and advised that he needed a lawyer. Sgt. Cox thereafter ceased any questioning. Therefore, the Defendant's rights were not violated by Sgt. Cox's failure to give *Miranda* warnings.

**D. Alleged Threats to a Witness.**

The State's final motion seeks to admit alleged threats made by the Defendant to Timothy Starks and April Starks during a phone conversation. The alleged threats were made by the Defendant on February 14, 2010 while he was incarcerated on unrelated charges. During the Defendant's conversation with Mr. Starks, the Defendant asked questions concerning whether Mr. Starks gave permission for the police to search the residence, whether the police brought his jacket back and whether a receipt was left for the jacket. The conversation then proceeded as follows:

DEFENDANT: People said that the police have been going over to your house a lot and talking to you and Johnny a lot, and, I don't know, you might want to watch your ass when you go out at nighttime. They think you and Johnny are telling something.

MR. STARKS: No, fuck that. I've only been...

DEFENDANT: I'm telling you what the word is that, motherfuckers think you and Johnny is telling, and motherfuckers is kind of like and they feelings about this shit.

MR. STARKS: Shit, fuck them I don't give a fuck what they think, you know me. If any of them have something to say those punk motherfuckers can say it to my face, you know what I'm saying?

DEFENDANT: They ain't going to say nothing to you, you know what they're going to do.

MR. STARKS: Ah, let them try it. I ain't worried about them. Ain't nobody around this town for me to worry about.

DEFENDANT: No doubt, that's how I feel.

MR. STARKS: Yea, exactly.

DEFENDANT: I'm just trying to find out what happened to my jacket and shit, and why they ain't give you no paperwork saying that they took it and everything.

MR. STARKS: Yea, I know they took it but I can't remember I know I signed something but I don't think there was anything, like, uh, I don't think I got a paper over here, if there is one it's up in the kitchen someplace and you know how many papers is all over this motherfucker. I'll look for it a little bit later on and if you talk to April tomorrow or the next day I will let you know.

DEFENDANT: Alright, that'll work.

MR. STARKS: Alright, here she is.

MRS. STARKS: Alright.

DEFENDANT: He [Mr. Starks] ain't tell you Josh [Sgt. Cox] was over there the other day, did he?

MRS. STARKS: Uh-uh [No].

DEFENDANT: I told you to watch that motherfucker. Him and Johnny they, the word came through in the jail that motherfuckers is about to smoke your husband and Johnny. I tell you right now, they ready to fire they ass up.

MRS. STARKS: Do what?

DEFENDANT: Them [expletive] from Pittsburgh think that Timmy [Mr. Starks] and Johnny are snitching to the police, well they know that they snitched to the police and they talking about firing their heads up. Talking about cutting off all loose

ends. They done got themselves in some shit, put you all's family in some shit. You know what I'm saying?

MRS. STARKS: Mmm.

DEFENDANT: For real. And the police don't give a fuck, they ain't going to protect you. That's just the word I've been, that's why I asked them about the shit. Motherfuckers say the police been going up there, been going up there talking to Timmy and Carter all the time. You know what I'm saying?

MRS. STARKS: Mmm-hmm [yes].

Evidence which is "intrinsic" to the indicted charge is not governed by Rule 404(b) of the West Virginia Rules of Evidence. *State v. Harris*, 230 W. Va. 717, 722, 742 S.E.2d 133, 138 (2013). "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or other acts were' necessary preliminaries' to the crime charged." *State v. Dennis*, 216 W. Va. 331, 351, 607 S.E.2d 437, 457 (2004). If the proffer fits in to the 'intrinsic' category, evidence of other crimes should not be suppressed when those facts come in as *res gestae* - as part and parcel of the proof charged in the indictment." Id

In the case at hand, the threatening statements made by the Defendant are intrinsic evidence and are inextricably intertwined to the charged crimes. The threats were made on February 14, 2010, approximately one month after Mr. Poindexter's homicide on January 13, 2010 and after Mr. Starks cooperated with police authorities. The threats are direct evidence intrinsic to the crimes alleged in the

indictment, and not "other act" evidence designed to prove some facet of the Defendant's character.

However, out of an abundance of precaution, and to resolve all doubts in favor of the Defendant, the Court will analyze the statements under Rule 404(b) of the West Virginia Rules of Evidence. Rule 404(b) provides, in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident...

Rule 404(b) applies to evidence of subsequent as well as prior crimes, wrongs, or acts. *U. S. v. DeAngelo*, 13 F.3d 1228, 1231 (8th Cir. 1994). The general framework for admitting evidence under Rule 404(b) has been set out as follows:

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance

> of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). When offering evidence under Rule 404(b), the prosecution is required to identify the specific purpose for which the evidence is being offered. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). *Id.* at Syl. Pt. 1.

The Court held an in camera hearing on February 18, 2014. At the hearing, Mr. Starks testified that he received a phone call from the Defendant on February 14, 2010. During the hearing, the State introduced a recorded copy of the conversation that was obtained from a prison facility where the Defendant was incarcerated. [2] Mr. Starks authenticated the Defendant's voice and the

[2] The substance of the conversation is provided above.

Defendant stated his name at the beginning of the recorded conversation. Therefore, the Court is satisfied by a preponderance of the evidence that the statements occurred and that the Defendant made the statements.

Additionally, the State has identified a specific purpose for which the evidence is being offered. The State has provided that the evidence relates to criminal intent and the Defendant's knowledge and guilty conscience. The State explains that if the Defendant had not been involved in the homicide, he would not be worried about the witness' cooperation with law enforcement.

The statements are also relevant under Rule 401 and Rule 402 of the West Virginia Rules of Evidence. Mr. and Mrs. Starks owned the residence where the Defendant was known to reside on occasion. Mr. Starks consented to a police search of his residence, which resulted in police officers obtaining evidence against the Defendant. Because of Mr. Stark's interactions with law enforcement, the Defendant warned both Mr. Starks and Mrs. Starks that individuals may commit violent acts against Mr. Starks and that Mr. and Mrs. Starks' family is in danger. The statements were made approximately one month after Mr. Poindexter's homicide and after Mr. Starks interacted with law enforcement. The timing and the nature of the statements indicate that the Defendant was attempting to dissuade Mr. Starks from further participating with law enforcement or from acting as a witness. The statements are therefore relevant as to criminal intent and whether the Defendant had knowledge of and was conscious of his guilt of the charged crime.

Furthermore, the probative value of the statements is not substantially outweighed by the danger of unfair prejudice. The statements were made and belong to the Defendant. The Court is satisfied that a jury will place the proper weight on the statements and will not decide this case on an improper basis.

"The law is well established that, in a criminal case, evidence of a defendant's attempt to influence a witness to testify regardless of the truth is admissible against him on the issue of criminal intent." *United States v. Billups*, 692 F.2d 320, 330 (4th Cir. 1982) (quoting *United States v. Reamer*, 589 F.2d 769, 770 (4th Cir. 1978)). Likewise, "[e]vidence showing consciousness of guilt, such as a threat to kill a potential witness, is admissible to prove that a defendant committed the crime charged." *Com. v. Fernandes*, 427 Mass. 90, 94, 692 N.E.2d 3, 6 (1998); see also *U. S. v. Zierke*, 618 F.3d 755 (8th Cir. 2010) ("We have ruled a number of times that evidence of death threats against witnesses or other parties cooperating with the government is generally admissible against a criminal defendant to show consciousness of guilt of the crime charged."). The statements made by the Defendant establish his criminal intent and consciousness of guilt. They were not offered to prove anything about the Defendant's character, and are thus admissible in the Defendant's trial.

Based upon this ruling, the Court will instruct the jury on the limited purpose for which the statements have been admitted. The Court will instruct the jury at the time the statements are offered and will repeat the instruction in the court's charge to the jury at the conclusion of the evidence.

**II. Motions Made by the Defendant.**

The Defendant's motions seek to suppress evidence obtained from searches of two residences. The Defendant claims that evidence obtained from his residence, 118 Anderson Street, should be inadmissible in his trial because the search warrant was not supported by probable cause, the application provided no nexus between his residence and the death of Jayar Poindexter, and no information was provided as to why it was believed that the designated items would be located at the listed address.

The Defendant further claims that a brown coat containing a loaded .25 caliber magazine obtained from 726 Fowler Avenue, a residence frequented by the Defendant, should be inadmissible in his trial. The Defendant argues that he had a reasonable expectation of privacy in the residence and therefore a duly authorized search warrant or the consent of the Defendant, and not the owner of the residence, was required. The Defendant argues in the alternative that the consent to search form signed by the owner of the residence is invalid because the form contains an erroneous date.

***Search of 118 Anderson Street.***

"'Both the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation.' Syl. Pt. 3, in part, *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762 (1986)." Syl. Pt. 5, *State v. Kilmer*, 190 W. Va. 617, 439 S.E.2d 881 (1993). "To constitute probable cause for the issuance

of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search." *Id.* at 627, 439 S.E.2d at 891 (internal quotations and citation omitted). "Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable." *Id.* (quoting Syl. Pt. 4, in part, *Adkins*, 176 W. Va. at 614-15, 346 S.E.2d at 764).

"Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. It is not enough that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances." Syl. Pt. 3, *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995).

Additionally, Rule 41(a) of the West Virginia Rules of Criminal Procedure states that "[u]pon the request of a law enforcement officer or an attorney for the state, a search warrant authorized by this rule may

be issued by a magistrate or a judge of a circuit court within the county wherein the property or person sought is located." Rule 41(c) of the West Virginia Rules of Criminal Procedure further provides that "[a] warrant shall issue only on an affidavit or affidavits sworn to before the magistrate or a judge of the circuit court and establishing the grounds for issuing the warrant. If the magistrate or circuit judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, that magistrate or circuit judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched."

In the case at hand, the affidavit conveyed to the circuit judge that a "black jacket with whites [sic] stripes on the sleeve and white stripes around the collar, boots or shoes, and any .25 caliber firearm, .25 caliber ammunition or container, knife, box cutter, cell phone, pager, any clothing bearing blood stains and any gray shirts" is concealed in "118 Anderson St in Clarksburg, WV; County of Harrison - white one story residence, located at the comer of Anderson St and Kennedy Court." The affidavit further stated that the facts for such belief are "On 01-13-10, around 0330 hours, Jayar Poindexter was shot and killed with a .25 caliber gun at the Overlook Apts in Harrison County. According to an individual EC Payne had throughout the night attempted to make contact with the victim by phone. EC Payne's Pirate hat was located on the ground, across from the victim's residence. Surveillance video showed around 0300 hrs EC Payne was wearing the hat. At 0336 hrs, EC Payne is observed at the Go Mart in Bridgeport

without the hat. During a search of a coat belonging to EC Payne, at a friend's residence, Officers recovered a .25 auto magazine containing bullets."

The affiant, Sgt. (then Detective) Josh Cox, provided the circuit judge with sufficient facts to warrant the belief that a crime has been committed and that evidence from that crime may be found at the Defendant's residence of 118 Anderson Street.[3] The affidavit conveyed to the circuit judge that Jayar Poindexter was murdered with a .25 caliber gun at the Overlook Apartments in Harrison County at approximately 3:30 a.m. The Defendant was linked to Mr. Poindexter in that his ball cap was located on the ground across from the victim's residence. The affidavit added that surveillance video depicted the Defendant wearing the ball cap at approximately 3:00 a.m. At 3:36 a.m., however, the Defendant is observed without the ball cap at a gas station in close proximity to the murder scene. Additionally, the affidavit stated that a loaded .25 caliber magazine was found in a coat belonging to the Defendant at his friend's residence. It was reasonable for the circuit judge to believe that the place searched - the Defendant's residence - would yield the specific classes of items sought, such as clothing worn by the Defendant in the surveillance video. Given the totality of the circumstances, especially the fact that the Defendant was placed near the victim's residence via surveillance video at the time he was murdered,

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[3] The State agrees that no probable cause existed to search 118 Anderson Street for a cellular phone. As such, the Court does not place any reliance on the facts in the affidavit reading "[a]ccording to an individual, EC Payne had throughout the night attempted to make contact with the victim by phone.

sufficient evidence was presented to the circuit judge via the affidavit to support a finding of probable cause, justifying the issuance of the search warrant for clothing, footwear, and a .25 caliber firearm.

***Search of 726 Fowler Avenue.***

The Defendant argues a duly authorized search warrant or his consent was required to search a residence belonging to Timothy Starks and April Starks because he was more than a casual visitor and because he had a legitimate expectation of privacy in the searched premises. Because neither was obtained, the Defendant requests for the evidence obtained in the search to be suppressed.

A casual visitor who is merely present in another person's home does not have a legitimate expectation of privacy to contest an illegal entry by police in that home. *See Com. v. Givens*, 429 Pa.Super. 464, 471, 632 A.2d 1316, 1319 (1993). However, "a defendant who is more than a casual visitor to an apartment or dwelling in which illegal drugs have been seized has the right under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution to challenge the search and seizure of the illegal drugs which he is accused of possessing." *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762 (1986).

In this case, Mr. Starks testified that the Defendant stayed "a lot" and that more often than not, the Defendant would stay at the residence. Mr. Starks added that he and his wife posted the Defendant's bail on unrelated charges in late December 2009 so the Defendant could spend Christmas with the family. Mr. Starks testified that

the Defendant continued to periodically stay at the residence until mid-January 2010. Therefore, the Defendant was more than a "casual visitor" and he enjoyed a legitimate expectation of privacy in the Starks' residence.

Determining that the Defendant was more than a casual visitor does not end the inquiry. "It is by now well settled that a consent to search need not be obtained from the defendant." *State v. Worley*, 179 W. Va. 403, 410 n.8, 369 S.E.2d 706, 713 n.8 (1988). "The State may justify a warrantless search by proof that consent was obtained from another party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected ." *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988 993 (1974)).

"Authority to consent to a search cannot be implied from the mere property interest a third party has in the property, but rather must derive from the party's mutual access to or control over the area to be searched." *Id.* (internal quotations and citation omitted). "In deciding if a consent to search is valid, the trial court must make a factual determination whether the consenting party possessed the requisite authority over or relationship to the premises to be searched to justify his allowing the police to conduct a search." 'Syl. Pt. 3, *State v. Hambrick*, 177 W. Va. 26, 350 S.E.2d 537 (1986).

In the case at hand, Mr. Starks lived at the residence with his wife and children. Mr. and Mrs. Starks permitted the Defendant to stay in their home. Mr. Starks testified that the Defendant was permitted on the first floor of the residence, but not upstairs except for showers. The consent to search

form listed the living room, hallway, kitchen, and bathroom area of the downstairs as the places to be searched. The evidence the Defendant wishes to suppress was found in the downstairs living area. The Court therefore concludes that Mr. Starks was authorized to consent to the search.

The Defendant last argues that evidence obtained at the residence is inadmissible based upon in-irregularities with the consent to search executed between Detective Dave Wygal, Officer Mike Fazzini, and Mr. Starks. The Defendant points out that the consent to search form is dated December 13, 2010. The search of the residence, however, occurred on January 15, 2010.

At a pretrial hearing in this case, Detective Wygal testified that the consent to search form came from his police cruiser, which erroneously stated December 13, 2010 before Mr. Starks signed the form. Detective Wygal further testified that he did not correct the erroneous date on the consent to search form because he contemporaneously recorded the consent given by Mr. Starks to reflect the correct date. Detective Wygal added that Mr. Starks was not threatened, promised or coerced into signing the consent to search, and that Mr. Starks did not appear to be under the influence of drugs or alcohol or otherwise mentally impaired. Officer Mike Fazzini, another officer present when Mr. Starks signed the consent to search form, also testified that he was aware the form stated an erroneous date but that the officers used the audio recording to reflect to correct date. Last, Mr. Starks testified that the officers searched his residence with his permission. Mr. Starks acknowledged his signature and testified that

he verbally gave the officers permission to conduct the search. Mr. Starks further testified that he was sober and lucid during the search.

Based upon the above testimony, the court determines that Mr. Stark gave his valid consent to Detective Wygal and Officer Fazzini for a search of his residence. Even though the incorrect search date is listed on the consent to search form, testimony from pretrial hearings reveals that the actual search date was January 15, 2010. The erroneous date, which was clarified by an audio recording, did not render Mr. Starks' consent invalid.

**ORDERS**

Based upon the above facts and conclusions, it is hereby **ORDERED** that the State's motion to admit statements made by the Defendant to Mr. Carey and Mr. Lambert is **GRANTED**.

It is **FURTHER ORDERED** that the State's motion to admit statements made during recorded telephone conversations while the Defendant was in jail is **GRANTED IN PART** and **DENIED IN PART**, in accordance with the Court's conclusions above.

It is **FURTHER ORDERED** that the State's motion to admit statements made by the Defendant to Sgt. Josh Cox is **GRANTED**.

It is **FURTHER ORDERED** that the State's motion to admit threats made by the Defendant to a witness is **GRANTED** for the limited purpose specified by the Court above.

It is **FURTHER ORDERED** that the Defendant's motion to suppress evidence obtained from 118 Anderson Street is **DENIED**.

It is **FURTHER ORDERED** that the Defendant's motion to suppress evidence obtained from 726 Fowler Avenue is **DENIED**.

The Circuit Clerk is **DIRECTED** to send certified copies of this Order to the following:

| | | |
|---|---|---|
| **James Armstrong, APA** | **Christopher M. Wilson, Esq.** | **David B. DeMoss, Esq.** |
| Harrison County Courthouse 301 | Counsel for Defendant 300 Adams | Counsel for Defendant 301 Adams Street, Ste. 802 |

| | | |
|---|---|---|
| West Main Street Clarksburg, WV 26301 | Street Fairmont, WV 26554 | Fairmont, WV 26554 |

ENTER: 05/16/2014

/s/ James A. Matish
**James A. Matish, Chief Judge**

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 16th day of May, 2014.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix Seal of the Court this 16th day of May, 2014.

Donald L. Kopp II
Fifteenth Judicial Circuit &
18th Family Court
Circuit Clerk
Harrison County, West
Virginia

## APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd of March, 2017, the following order was made and entered:

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 15-0289

Ennis C. Payne II,
Defendant Below, Petitioner

**ORDER**

On October 28, 2016, the petitioner, Ennis C. Payne II, by counsel Jason T. Gain, filed a motion for stay of mandate, pending application to the Supreme Court of the United States for writ of certiorari.

Upon consideration, the Court is of the opinion to and does hereby grant the motion to stay entry of the mandate pursuant to Rule 26(c) of the Rules of Appellate Procedure. The stay shall not exceed ninety days unless a petition for writ of certiorari has been filed in the Supreme Court of the United States.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

## APPENDIX D

**FORENSIC LABORATORY**

**725 Jefferson Road, South Charleston, West Virginia 25309-1698**

February 7, 2011

| | |
|---|---|
| DET. JOSHUA J. COX<br>CLARKSBURG POLICE DEPT.<br>222 WEST MAIN STREET<br>CLARKSBURG, WV 26301 | AGENCY CASE NO. 10002512<br>LAB CASE NO. 1000162<br>SECTION ID. NO. B10-550-1<br>REF NO. B10-415, B10-241, B10-205, B10-74, S10-29, B10-71, S10-22 |

**This examination has been made with the understanding that the evidence is connected with an official investigation and that the Laboratory report will be used for official purposes only.**

| | |
|---|---|
| REFERENCE: | Jayar Poindexter – Victim<br>Darnell C. Bouie – Suspect |

| | |
|---|---|
| | Ennis Charles Payne – Suspect<br>Homicide – 01/13/2010 |
| EXAMINATION REQUESTED: | DNA Analysis |
| EVIDENCE RECEIVED: | The following exhibit was received at the laboratory in a sealed condition on 11/16/2010 via certified mail and placed into secure storage:<br>Known saliva of Ennis Payne |
| EVIDENCE DISPOSITION: | To be returned |

RESULTS OF EXAMINATION:

A sufficient amount of human DNA was recovered from the known saliva specimen of Ennis Payne to perform PCR-based DNA analysis. The results generated from this known were compared to the headband of the ball cap sample previously reported as B10-415.

The extract was amplified using the PCR-based GenePrint® PowerPlex™ 16 System kit from Promega Corporation. Capillary electrophoresis was performed to identify the genotypes of the samples.

Technical assistance was provided to the writer of this report in accordance with the protocols and procedures of the West Virginia State Police Forensic Laboratory.

A summary of the DNA analysis results is attached.

OPINION RENDERED:

The results identified from the headband of the ball cap are consistent with a mixture of DNA from two or more individuals. Using African American databases and 3 out of 15 loci, the combined probability of exclusion for the mixture results obtained from the above sample is 97.7381368%. Approximately 1 in each 44 randomly selected unrelated individuals would be a potential contributor to this mixture. Using Caucasian databases and 3 out of 15 loci, the combined probability of exclusion for the mixture results obtained from the above sample is 98.4657503%. Approximately l in each 65 randomly selected unrelated individuals would be a potential contributor to this mixture. Based on the analysis performed, Ennis Payne cannot be excluded as a possible donor to the mixture of DNA identified from the above sample. No conclusions were made regarding the additional DNA identified from the above sample. Known blood (EDTA tube) and saliva specimens from all other involved individuals should be submitted for comparison purposes, if additional testing is desired.

Sincerely,

s/ A.K. Gill

A.K. Gill
Forensic Scientist

Attachment

DET. JOSHUA J. COX
FEBRUARY 7, 2011
DNA ANALYSIS SUMMARY PAGE

AGENCY CASE NO. 10002512
LAB CASE NO. 1000162
SECTION ID.
NO. B10-550-1
REF NO. B10-415, B10-241, B10-205, B10-74, S10-29, B10-71, S10-22

**POWERPLEX 16 ANALYSIS RESULTS**

| Sample | D3S1358 | THO1 | D21S11 | D18S51 | Penta E |
|---|---|---|---|---|---|
| Ennis Payne | 16,17 | 6,9 | 28,29 | 12,20 | 5,11 |

| D5S818 | D13S317 | D7S820 | D16S539 | CSF1PO |
|---|---|---|---|---|
| 12 | 12,13 | 9,11 | 9,13 | 11,13 |

| Penta D | AMEL | vWA | D8S1179 | TPOX | FGA |
|---|---|---|---|---|---|
| 10,13 | XY | 15,17 | 12,16 | 9,12 | 24,26 |

**POWERPLEX 16 ANALYSIS RESULTS**
**(previously reported as B10-415)**

| Sample | D3S1358 | THO1 | D21S11 | D18S51 | Penta E |
|---|---|---|---|---|---|
| Headband of ball cap | 14, 15, 16,17 | 6,7, @* | 28* | @* | @* |

| D5S818 | D13S317 | D7S820 | D16S539 | CSF1PO |
|---|---|---|---|---|
| 12 (11,13) | 12,@* | 9* (@) | 13* | @* |

| Penta D | AMEL | vWA | D8S1179 | TPOX | FGA |
|---|---|---|---|---|---|
| 11* (@) | X (@) | @,17* | 12* @ | 9,11* | 24,26 |

All controls gave expected results; additional peaks/amplification artifacts were identified in some results.
XX = female
XY = male
( ) = weaker results
@ = additional peaks and artifacts observed
* = this locus was not used to develop the statistical calculation for this sample