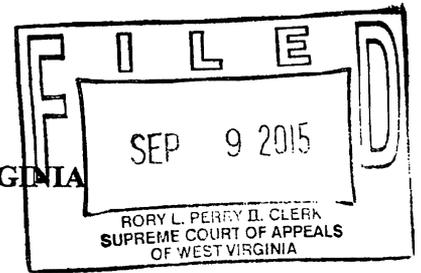


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Wade Painter, Petitioner Below,**

**Petitioner,**

**vs.**

**Docket No. 15-0540**

**David Ballard, Warden  
Mount Olive Correctional Complex  
Respondent Below,**

**Respondent.**

**PETITIONER'S BRIEF IN SUPPORT OF APPEAL FROM CIRCUIT COURT'S  
ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

  
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**Assignments of Error**

- I. The Circuit Court committed reversible error in summarily denying all but one of Petitioner's habeas claims.**
  
- II. The Circuit Court committed reversible error in denying Petitioner's claim that trial and appellate counsel were ineffective by failing to investigate, raise and assert that the seizure and search of bags found in Petitioner's home without a search warrant was unreasonable in violation of the 4th Amendment.**

### Statement of the Case

1. In the February 2006 term of the Berkeley County Circuit Court, Petitioner Painter was indicted in Case No. 06-F-24 on the following counts: Daytime Burglary by Entering Without Breaking and Grand Larceny (arising from a September 12, 2005 incident at the home of Carl Norberg); Daytime Burglary by Entering With Breaking and Petit Larceny (arising from a September 13 or 14, 2005 incident at the home of Misty Wilson); two counts of 1<sup>st</sup> Degree Murder (arising from the September 14, 2005 deaths of Raymond White, Jr., and Raymond White, III); and Possession of a Stolen Vehicle (arising from a September 15, 2005 incident.) See Indictment at Appendix "App." pp. 177-181.
2. According to the criminal complaint underlying the murder counts:

On September 14, 2015, the Whites were found deceased in a residence on Paynes Ford Road in Martinsburg, W.Va., and a Mazda MX-6 was missing from the home. See Criminal Complaint at App. pp. 1-7. On September 15, 2015, law enforcement learned that Mr. Painter had been seen driving the Mazda, and subsequently contacted Mr. Painter at his residence on Pond Lane in Martinsburg, W.Va. App. at pp. 3-7. Mr. Painter would not allow officers to enter his residence, so they took Mr. Painter to the police station and questioned him without first Mirandizing him. *Id.* and August 27, 2007 Pretrial Hearing Transcript at App. pp. 240-241. Law enforcement then reached out to Mr. Painter's girlfriend, Angie Conner (who shared the Pond Lane residence with Mr. Painter), through her father, to see if she would allow a search of the home. App. p. 6. Ms. Conner called law enforcement back while they were speaking with Mr. Painter and agreed to let officers search the residence. App. pp. 3-7. The search revealed items that belonged to the victims and some items which were located in a red duffle bag (including

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several articles of clothing, shoes that appeared to have blood on them, and dog tags with the name of one of the victims). *Id.* One of the law enforcement officers who conducted the search, Captain Dennis Streets, then returned to the station where Mr. Painter was being interrogated. App. p. 7. Captain Streets was advised at that time that Mr. Painter would not admit to anything and requested an attorney, but he decided to reinitiate questioning of Mr. Painter. *Id.* Mr. Painter was then Mirandized and spoke with officers for some time before invoking again invoking his right to remain silent. App. pp. 3-7.

3. Mr. Painter was effectively interrogated by police twice on September 15, 2015. Once by Sergeant Ted Snyder and Corporal Brendon Hall - initially without Miranda warnings (see Snyder/Hall Interview Transcript at App. pp. 15-78), and once by Sergeant Snyder and Captain Streets after he had invoked his right to an attorney (see App. p. 77 and Snyder/Streets Interview Transcript at App. pp. 79-129).
4. Prior to trial, defense counsel filed a motion to sever each of burglary and larceny counts from the murder counts, arguing that they were unrelated and joinder would unfairly prejudice Mr. Painter's defense. See Defendant's Motion to Sever at App. pp. 182-186.
5. The State opposed the severance motion, arguing that the evidence of each of the crimes was inextricably linked and a unitary trial was appropriate. See State's Response in Opposition to Motion to Sever at App. pp. 187-192.
6. The trial court subsequently denied the motion, finding that the evidence of all the crimes was so intertwined that the State would be unable to present the facts from one crime without talking about evidence from the others. See Order Denying Motion to Sever at App. pp. 193-195.

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7. Defense counsel also filed a motion to suppress Defendant's Statements and motion to suppress evidence. See Motion to Suppress at App. pp. 198-201.
  8. A pretrial hearing was conducted on August 27, 2007, wherein Corporal Hall, Sergeant Snyder, and Captain Streets testified. See Pretrial Hearing Transcript at App. pp. 231-310. Corporal Hall testified that on September 15, 2005, he made contact with Mr. Painter at his residence, took him down to the police station in his police cruiser, and began questioning him initially without Miranda warnings. *Id.* at App. pp. 237-241.
  9. Sergeant Snyder testified at the pretrial hearing that when he and Hall arrived at Mr. Painter's residence on September 15, 2005:

We knocked on the door and defendant came to the door, opened it a crack. Identified ourselves as law enforcement officers and asked to speak with him in reference to a vehicle that he was in possession of the day prior and wanted to talk to him about that vehicle. We asked if we could come inside and he immediately refused. He said no, absolutely not. We said, okay, would you like to speak with us. He said, yeah, I will come outside. Shut the door. We waited probably a period of three to five minutes and he came outside.

App. p. 256.

10. Sergeant Snyder further testified that Mr. Painter was not given his Miranda warnings at his residence but was asked to accompany officers to the sheriff's department. App. p. 258. Snyder testified that he decided to Mirandize Mr. Painter after he told him that he was in possession of a stolen car and that it was a crime. App. p. 260.
11. Sergeant Snyder further testified that "[w]e felt that keeping Mr. Painter with us talking to him about other topics would give the officers enough time to obtain a search warrant and prevent him from going back to his residence and destroy or remove evidence we would want to recover." App. p. 262. He testified that when Mr. Painter stated that he did not want

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to talk to the police and wanted a lawyer, he was then placed under arrest. App. p. 263. Mr. Painter was not presented to a magistrate at that point though. App. p. 264-65.

12. Captain Streets testified at the pre-trial hearing that he obtained permission from Angie Conner to search the residence she shared with Mr. Painter, while Painter was away from the home with Corporal Hall. App. pp. 284-286. Captain Streets further testified that he then went back to the station and initiated a conversation with Mr. Painter, indicating that he did not think he knew at that point that Mr. Painter had already requested an attorney. App. 287-88, 292. (Contrast this testimony with Captain Streets “action taken” report wherein he indicates he was advised by Sergeant Snyder that Painter would not admit to anything and had requested an attorney prior to reinitiating questioning. App. p. 7.)
13. At the August 27, 2007 pretrial hearing, the trial court postponed any ruling on the defense motions to suppress evidence and statements until a 2<sup>nd</sup> pretrial hearing, wherein Angie Connor would testify. App. pp. 301-309.
14. At the September 6, 2007 pretrial hearing, Ms. Connor testified that after Mr. Painter was taken away by police, Captain Streets came to her house, asked to search the home, and she consented, filling out forms documenting the consent. App. pp. 317-321, and Connor Consent to Search Forms at App. pp. 8-11. She testified that Streets came to her home approximately a half an hour to an hour after they took Painter to the police station. App. p. 326. She testified that she knew that Mr. Painter objected to police coming into the house based on his conversation with them before they took him away. App. p. 325.
15. During the September 6, 2007 pretrial hearing, the defense moved to suppress evidence found in Mr. Painter’s home, following Painter’s objection to the search and Ms. Connor’s consent, pursuant to *Georgia v. Randolph*, 547 U. S. 103 (2006) (holding that the consent of

- one occupant is insufficient when another occupant is present and objects to the search.) App. pp. 334-348. The trial court denied the motion, finding *Georgia v. Randolph* inapplicable and the search and seizure of items in Mr. Painter's and Ms. Conner's home to be consensual. App. p. 348 and Pretrial Order at App. pp. 1692-1700.
16. During the September 6, 2007 pretrial hearing, the defense also moved to suppress Mr. Painter's statements to law enforcement officers, including those made to Captain Streets pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981)(holding that once a defendant invokes his Fifth Amendment right to counsel police must cease custodial interrogation). App. pp. 356-376. The trial court denied the motion. App. pp. 376, 1691- 1700.
17. Mr. Painter's trial proceeded on September 11-13, 17-18, 2007. See Trial Transcripts at App. pp. 400-1292. The State presented testimony from multiple witnesses, including Corporal Hall, who testified that when he first encountered Mr. Painter on September 15, 2005, "[h]e was told he wasn't under arrest at that time and he didn't have to come back with us but he agreed to come with us. We let him go back in the house and change." App. pp. 646.
18. Corporal Hall also testified during trial that Mr. Painter had previously been arrested in a bar fight, which drew a defense motion for mistrial based on a Rule 404(b) violation. App. pp. 657. The trial court denied the motion. *Id.*
19. Over the defense's renewed objection, the State also introduced items seized from Mr. Painter's residence into evidence via Corporal Hall's testimony, including a pair of Lugs shoes that appeared to have blood on them and apparently belonged to the younger White victim. App. pp. 670-672, 722-723. Corporal Hall also testified regarding seizing items from Mr. Painter's home that were identified as stolen from Mr. Norberg. App. pp. 683-685.

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20. Sergeant Snyder testified at trial that when he first contacted Mr. Painter on September 15, 2005 “[w]e asked him if we could come inside and talk about it a little more at length and he steadfastly refused. He said no, you can’t come in my house. I said all right, we’ll wait outside, why don’t you come outside and we’ll talk about it.” App. pp. 817. Snyder further testified at trial that at that time he first contacted Painter “[w]e had no reason to suspect him with the Whites” and let him change clothes before taking him to the police station. *Id.* (Contrast this testimony with Snyder’s testimony from the August 27, 2007 pretrial hearing, wherein he testified “we were aware that Painter possibly had evidence of a crime inside his mobile home we knew that by the fact if he had belongings that belong to the deceased he wouldn’t let us in his house . . . . We felt that keeping Mr. Painter with us talking to him about other topics would give the officers enough time to obtain a search warrant and prevent him from going back to his residence and destroy or remove evidence we would want to recover. App. p. 262.)
21. Sergeant Snyder also testified at trial about his interview of Mr. Painter, indicating “once we started poking holes in his story he gave us details that just didn’t match the story, was inconsistent. You know, we told him we said listen, we’re going to read you your rights. If you took a vehicle, you know, that’s fine, but you needed to know where you stand as far as this is concerned. You could get yourself in trouble for this and that’s when we read him his rights. So initially I allowed him time to give his side of the story and then we provided him with a rights form.” App. pp. 819-820. Mr. Painter’s interview with police was then played for the jury, over defense’s renewed objections. App. pp. 822-823.
22. On the third day of trial, Sergeant Snyder continued testifying about interviewing Mr. Painter, indicating “it was my aim and Corporal Hall’s aim to let him talk as long as he

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wanted to until they were able to speak to Ms. Connor without Mr. Painter present and determine what type of info she had related to this case.” App. pp. 833.

23. Sergeant Snyder testified that he was in contact with Captain Streets at Mr. Painter’s home and was informed by Streets that they found items in the home that were “similar to the items owned by the Whites. App. p. 834. Sergeant Snyder also testified about Captain Streets reinitiating discussions with Mr. Painter after he had asked for a lawyer. App. pp. 844-45

24. Sergeant Snyder also admitted at trial that he failed to conduct a gunshot residue test on Mr. Painter. App. pp 851-853.

25. Angie Conner testified at trial about the police searching the home she shared with Painter, indicating that she was asked to look at some of the property in the house and tell police whether it belonged to Mr. Painter. App. 1016. She stated “They pointed and said did this belong to you all and I said no and then whatever was laying out was put in bags.” App. p. 1017. She testified that a lot of bags were taken from Mr. Painter’s home and that the items taken by police did not belong to her or Mr. Painter. App. p. 1020. Ms. Connor indicated that she had never seen the items before, but it is unclear from her testimony how she knew the items did not belong to Mr. Painter. *Id.*<sup>1</sup> She further testified that a second search of the home occurred several days later and white shoes that did not belong to Mr. Painter were taken. App. pp. 1022-23.

26. Ms. Connor’s testimony also include reference to Mr. Painter’s brother being in prison (App. p. 1021) for which the defense asked for and received curative instruction. App. 1030-31.

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<sup>1</sup> Ms. Connor testified she asked Mr. Painter where the items had come from, and he said the flea market, but she did not believe him. App. p. 2010.

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27. Trial continued on September 17, 2005, with Captain Streets testifying about searching Mr.

Painter's home and finding pieces of clothing in a gym bag that belonged to Mr. Painter with blood on them and sneakers that had blood on them. App. pp. 1042-1045.

28. Captain Streets also testified at trial about reinitiating discussions with Mr. Painter, indicating that he just wanted to check on him and the following exchange occurred:

Q: What do you mean go check on him?

A: I wanted to ask how he was doing, if he needed anything.

Q: Anything such as what?

A: I asked him if he needed to go to the restroom, needed a drink, how he was generally doing?

Q: Were you aware at the time that you made that request of him that he had requested counsel?

A: Yes, I did.

Q: . . . What was your intent when you went to question him – excuse me, wrong word, when you went to address him about the drink of water or using the restroom?

A: Just to see how his condition was.

App. pp. 1046-47.

29. Mr. Painter's second interview was then admitted into evidence over the defense's renewed objection (App. pp. 1051-52), Captain Streets acknowledged that he could not get Mr.

Painter to confess to the murders. App. p. 1064.

30. Corporal Hall testified at trial about another potential suspect in the murders, Michael

Barrett, but acknowledged that nobody from the department interviewed him. App. pp. 1094,

1097. He also indicated that a gun-shot residue testing was not performed on Mr. Painter,

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gunshot testing on William Christopher Barrett was not tested, and finger nail clippings were not tested. App. 1102.

31. After the State closed its case, the defense made a Rule 29 motion for judgment of acquittal, noting that “[t]he evidence the State has presented is they’re able to tie up some blood evidence found on the New Balance shoes which were found at the defendant’s residence in that red duffle bag, that gym bag.” App. pp. 1105-1106. Defense counsel noted that the New Balance shoes had blood from the elder Mr. White on them. App. p. 1107.
32. The trial court denied the motion. App. pp. 1111.
33. In closing arguments, the State argued: “There is no evidence that contradicts what was at Wade Painter’s house, what was on Wade Painter’s clothes, what was found at the crime scene, what was found at Norberg’s, what was found at the car, and what was found at Wilson’s. . . . That has not been refuted in front of you . . . ” App. pp. 1195-96. Defense objected based on no burden being on the defendant, and the Court said “That’s correct. Ladies and gentlemen, the prosecutor’s evidence has not been refuted but there’s no burden on the defendant to prove himself innocent.” App. p. 1196.
34. The defense renewed its Rule 29 motion and the Court denied it again. App. p. 1199.
35. The jury then proceeded to find Mr. Painter guilty on all counts. App. pp. 1207-08 and Jury Verdict Form 1331-32.
36. The bifurcated mercy trial then proceeded and the jury returned a verdict of no mercy. App. pp. 1212-1287 and Jury Verdict form. App. 1335.
37. The defense then filed a motion for new trial and judgment of acquittal notwithstanding the jury verdict, arguing that the trial court’s denial of the motion to suppress evidence pursuant to *Georgia v. Randolph* was erroneous; the trial court’s denial of the motion to suppress

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statements pursuant to *Edwards v. Arizona* was erroneous; and the trial court should have directed verdict in favor of defendant. App. pp. 1340-57

38. The trial court denied the motion, finding that the search of the home was requested by the co-inhabitant who contacted police through her father after the defendant left the residence; the initial intent of the officers was to question the defendant not search his home; defendant agreed to leave the residence; defendant was not interrogated by Streets asking how he was doing; and defendant requested to speak with the officer which constituted unequivocal waiver. See Sentencing Order and Post Trial Motion Hearing at App. 1358-1363, and Post-trial Hearing Transcript, App. pp. 1364-1381.
39. Defense then filed an appeal to the Supreme Court of Appeals of West Virginia, making the same arguments that were raised in the post-trial motion. See Petition for Appeal at App. 1587-1606.
40. The Supreme Court refused to hear the petition without a ruling on the merits. See Order Refusing Appeal in Docket No. 081400 at App. p. 1389.
41. Mr. Painter then filed his Amended Petition for Writ of Habeas Corpus, raising the following claims:
  - (a) Mr. Painter was subjected to an illegal arrest at his home on September 15, 2005, and admission of evidence seized denied him due process and a fair trial. (App. pp. 1477-1505). Mr. Painter argued under this claim that he received ineffective assistance of trial and appellate counsel based on their failure to raise a claim that he had been illegally arrested at his home on September 15, 2005. (App. pp. 1505-1511.)

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- (b) Mr. Painter's trial and appellate counsel failed to investigate, raise and assert that the search and seizure of bags found in his home was illegal, resulting in the admission of the evidence and deprivation of due process and a fair trial. (App. pp. 1511-1523).
- (c) Mr. Painter's trial and appellate counsel failed to investigate, raise and assert that law enforcement's failure to promptly present Mr. Painter to a magistrate without unnecessary delay violated his constitutional rights. (App. 1523-1537.)
- (d) Mr. Painter was denied due process and a fair trial by the introduction of 404(b) evidence without notice and a proper hearing and appellate counsel's failure to raise the issue on appeal. (App. pp. 1537-1555.)
- (e) Mr. Painter was denied due process by prosecutor's comments in closing that the State's evidence was not refuted, the trial court's support of that statement, and appellate counsel's failure to raise the issue on appeal as impermissible burden shifting. (App. pp. 1555-1568)
- (f) Mr. Painter was denied due process by appellate counsel's failure to assign certain errors on appeal. (App. pp. 1568-1571.)
- (g) Mr. Painter was denied due process and effective assistance of counsel regarding the State's failure to collect, test, and disclose potentially exculpatory evidence. (App. pp. 1571-1582)
- (h) Mr. Painter's prior appellate arguments were not ruled upon on the merits and entire him to relief. (App. pp. 1582-1583, 1587-1606.)
- (i) The cumulative eight of errors within Petitioner's trial warrant the granting of a new trial. (App. pp. 1583.)

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- (j) That Mr. Painter is entitled to habeas relief regarding restitution payments being deducted from his inmate account. (App. pp. 1584, 1608-1611.)
42. The Circuit Court summarily dismissed all of Mr. Painter's habeas claims except (b) above, regarding trial and appellate counsel's failure to investigate, raise and assert that the search and seizure of bags found in his home was illegal, resulting in the admission of the evidence and deprivation of due process and a fair trial. See Order at App. pp. 1617-1642.
43. The Circuit Court considered claim (a) regarding Mr. Painter's illegal arrest, finding that although the claim was not raised on direct appeal, the Court would consider the ineffective assistance of counsel aspect of the claim. App. 1624. The Circuit Court found that the claim that Mr. Painter was subjected to a seizure or *de facto* arrest was not supported and thus there was no ineffective assistance of counsel in failing to raise it. App. 1624-1627. The Circuit Court also found that there was no evidence that the police removed Mr. Painter from the home in order to obtain consent to search from the co-occupant in violation of *Georgia v. Randolph*. App. p. 1628.
44. The Circuit Court considered claim (c) regarding Mr. Painter's trial and appellate counsel failure to investigate, raise and assert that law enforcement's failure to promptly present Mr. Painter to a magistrate without unnecessary delay violated his constitutional rights. App. 1628-1630. But the Circuit Court found that the delay in presenting Mr. Painter to the magistrate was not "unnecessary" and not for the purpose of obtaining Ms. Conner's consent to search or allowing for Mr. Painter's second interview after he had asked for a lawyer. App. 1629-1630.
45. The Circuit Court considered claim (d) regarding Mr. Painter being denied due process and a fair trial by the introduction of 404(b) evidence without notice and a proper hearing and

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appellate counsel's failure to raise the issue on appeal. App. 1630-1635. The Court found that the evidence was either introduced through Mr. Painter's own statements and/or not objected to by counsel on the basis of strategy, which would not be second-guessed. *Id.*

46. The Circuit Court considered claim (e) that Mr. Painter was denied due process by prosecutor's comments in closing that the State's evidence was not refuted, the trial court's support of that statement, and appellate counsel's failure to raise the issue on appeal as impermissible burden shifting. App. pp. 1634-1635. The Court found that appellate counsel's decision not to present the issue on appeal was strategic and "Petitioner's attempt to reassert his trial objection is waived for purposes of this habeas proceeding" and Petitioner cannot show that the waiver was unknowing and unintelligent. App. pp. 1636.

47. The Circuit Court found that Petitioner's claim (f) regarding failure to raise certain errors on appeal was a reiteration of those issues discussed under (e) and denied the claim for the same reasons. *Id.*

48. The Circuit Court considered claim (g) that Mr. Painter was denied due process and effective assistance of counsel regarding the State's failure to collect, test, and disclose potentially exculpatory evidence. App. 1636-1640. However, the Circuit Court found that there was no evidence that the potentially exculpatory evidence was favorable to the defendant, the evidence was not suppressed by the State – it simply was not tested, and no prejudice resulted to defendant. *Id.*

49. The Circuit Court also considered Mr. Painter's prior appeal arguments because they had not been previously ruled upon on the merits by this Supreme Court, but found that there was no evidence that police removed Mr. Painter from his home for the purpose of obtaining consent from the co-occupant in violation of *Georgia v. Randolph* and no evidence that police

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improperly initiated interrogation after Mr. Painter requested an attorney. App. pp. 1640-41. The Circuit Court also found the State's evidence was sufficient to sustain the convictions. App. p. 1641. The Circuit Court also found no cumulative error based on finding no single error. *Id.*

50. The Circuit Court did order the State to respond to Mr. Painter's claim that trial and appellate counsel failed to investigate, raise and assert that the search and seizure of bags found in his home was illegal, resulting in the admission of the evidence and deprivation of due process and a fair trial. App. p. 1642.

51. The State subsequently filed a response. App. pp. 1668.)

52. The Circuit Court then entered its Final Order dismissing the remaining claim and denying the habeas petition. App. pp. 1669-1678. The Circuit Court found that Ms. Conner had authority to and did consent to the search of the bags, and even if the search was unlawful, the evidence would have been inevitably been discovered through lawful means. App. 1677-1678.

53. The instant appeal followed.

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### Summary of the Argument

Petitioner's appeal is led by two main arguments.

First, Petitioner avers that the Berkeley County Circuit Court committed reversible error in summarily denying his all but one of his habeas claims for relief. Petitioner argues that the Circuit Court either erroneously found that his claims had been previously waived or specifically found that his claims had not been waived and yet failed to require the State to respond to the claims. Petitioner believes that this action constitutes an abuse of discretion and clear error of law under Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings and W.Va. Code §53-4A-3. Petitioner argues that his habeas claims are sufficient to trigger the requirement of a State response and evidentiary hearing.

Second, on the one habeas issue to which the Circuit Court required a State response, the Circuit Court erroneously found that the claim was insufficient to afford Petitioner relief or even require an evidentiary hearing. Petitioner argues that the threshold standard for when an evidentiary hearing must be held is equally low as the standard for when the State must respond to a habeas petition.

Contrary to the Circuit Court's decision, Petitioner avers that his habeas claims in whole and in part entitle him relief, and at the very least, sufficiently demonstrate there is probable cause to believe he may be entitled to some relief such that the State should have been required to respond and an evidentiary hearing should have been held.

## Statement Regarding Oral Argument and Decision

Petitioner's counsel believes oral argument is unnecessary.

### Argument

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review." Syllabus Point 1, *Mathena v. Haines*, 633 S.E.2d 771, 219 W.Va. 417 (W.Va. 2006).

#### I. The Circuit Court committed reversible error in summarily denying all but one of Petitioner's habeas claims.

W.Va. Code §53-4A-3 entitled "Refusal of writ; granting of writ; direction of writ; how writ made returnable; duties of clerk, attorney general and prosecuting attorney" provides in pertinent part:

(a) If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence . . . show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall by order entered of record refuse to grant a writ, and such refusal shall constitute a final judgment. **If it appears to such court from said petition, affidavits, exhibits, records and other documentary evidence, or any such available record or records referred to above, that there is probable cause to believe that the petitioner may be entitled to some relief, and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall forthwith grant a writ, directed to and returnable as provided in subsection (b) hereof.**

(Emphasis added.)

Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus

Proceedings provides in part:

- (c) Evaluation for summary dismissal; contents of summary dismissal order. — The petition shall be examined promptly by the judge to whom it is assigned. **The court shall prepare and enter an order for summary dismissal of the petition if the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived.** The court's summary dismissal order shall contain specific findings of fact and conclusions of law as to the manner in which each ground raised in the petition has been previously and finally adjudicated and/or waived. If the petition contains a mere recitation of grounds without adequate factual support, the court may enter an order dismissing the petition, without prejudice, with directions that the petition be refiled containing adequate factual support. The court shall cause the petitioner to be notified of any summary dismissal.
- (d) Order to file answer. — **For all petitions not dismissed summarily as provided in Rule 4(c), the court shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the court deems appropriate.** A copy of the order directing that an answer be filed shall be served upon the prosecuting attorney of the county wherein the petition will be heard.

(Emphasis added.)

Thus, under Rule 4, a habeas petition should only be summarily dismissed if the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived. Rule 4(d) requires the court to order the State to respond to all petitions that are not summarily dismissed.

Also, W.Va. Code §53-4A-3 provides that the court shall grant the writ if there is probable cause to believe that the petitioner may be entitled to some relief. This is a very low standard. Note that the code does not require probable cause to believe petitioner is entitled to relief, but rather, simply requires that the petitioner *may be* entitled to *some* relief. W.Va. Code §53-4A-3(a).

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In this case, the Circuit Court found that certain habeas grounds had not been previously and finally adjudicated or waived, yet still summarily dismissed those claims without requiring the State to respond. Petitioner argues this constitutes an error of law and abuse of discretion Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. Petitioner further argues that his habeas claims were sufficient to trigger the extremely low threshold of probable cause to believe he may be entitled to relief, thereby requiring the writ to be granted and a return filed by the State.

**a. Petitioner’s habeas claims were not previously and finally adjudicated or waived.**

The Circuit Court specifically found that habeas claim (a) regarding Mr. Painter’s illegal arrest and corresponding ineffective assistance of counsel was not waived. (See Order Summarily Dismissing Claims at App. 1624, finding “Typically, any ground for habeas relief that could have been advanced on direct appeal or in a previous post-conviction proceeding but was not included is considered waived under West Virginia Code § 53-4A-1(c), however, Petitioner essentially alleges that his counsel was ineffective for failing to raise the issue in trial and then on appeal.”) But the Circuit Court did not require the State to respond to the claim as mandated by Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. *Id.*

The Circuit Court did not find prior adjudication or waiver of habeas claim (c) regarding Mr. Painter’s trial and appellate counsel’s failure to investigate, raise and assert that law enforcement’s failure to promptly present Mr. Painter to a magistrate without unnecessary delay violated his constitutional rights. See Order at App. pp. 1628-1630. But then the Circuit Court conducted its own analysis (reaching an erroneous result as argued below) without requiring the

State to respond to the claim as mandated by Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. *Id.*

The Circuit Court analyzed the habeas claim (d) regarding Mr. Painter being denied due process and a fair trial by the introduction of 404(b) evidence without notice and a proper hearing and appellate counsel's failure to raise the issue on appeal. App. 1630-1635. Despite the extended analysis of the substance of the claim, the Circuit Court also indicated that the claim was barred because the Petitioner has failed to rebut the presumption that the waiver of appeal claim was knowing and intelligent. App. p. 1635. But this is an odd conclusion, considering the Circuit Court's following analysis of appellate counsel's purported strategic decision to not include the claim:

[A]ppellate counsel may have not found such an argument to be convincing or worth the Supreme Court's time. Often, appellate attorneys present only the strongest ground on appeal, seeking to present a clean and convincing appeal that does not distract from the strongest grounds or negatively impact the perceived trustworthiness of the overall appeal. Because this falls within the scope of reasonableness, such a strategy decision is not reviewable within a habeas proceeding.

App. pp. 1632.

The Circuit Court aptly describes a commendable appellate strategy and implicitly acknowledges such decisions fall under the attorney's authority, but the Circuit Court seems to forget that attorneys and clients do not always agree on strategy and which arguments are strong versus weak. In the event of such a disagreement, if the attorney nevertheless excludes weak appeal issues that the client desires to include, it cannot be said that the client knowingly and intelligently waived the issue. Notably, the Petition for Appeal (App. 1587-1606) is not signed by Mr. Painter and is virtually identical to the previously filed Motion for New Trial (App. pp. 1344-1357), indicating that further development and consultation regarding appellate strategy was not conducted with Mr. Painter. Under these circumstances (and according to the Circuit

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Court's own acknowledgement of *counsel's* strategic decision to exclude the claim), the claim was not knowingly and intelligently waived by Mr. Painter and the State should have been required to respond.

The Circuit Court reached a similar conclusion regarding habeas claim (e) that Mr. Painter was denied due process by prosecutor's comments in closing that the State's evidence was not refuted, the trial court's support of that statement, and appellate counsel's failure to raise the issue on appeal as impermissible burden shifting, finding that appellate counsel's decision not to present the issue on appeal was strategic and "Petitioner's attempt to reassert his trial objection is waived for purposes of this habeas proceeding." App. pp. 1635-1636. But again the Circuit Court acknowledged "Appellate counsel clearly presented a tailored petition that would give his client the best chance for appeal and did not waste the Supreme Court's patience on weak arguments." (Emphasis added.) Although no attorney wants to waste the Supreme Court's time or test its patience, an attorney must arguably still present weak arguments that he or she does not endorse for the appellate court's consideration pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and *Rhodes v. Leverette*, 239 S.E.2d 136, 160 W.Va. 781 (W.Va. 1977). When certain appeal grounds are not presented and the petition for appeal is not verified by the client, the presumption of a knowing and intelligent waiver of such issues by the client should be extinguished.

The Circuit Court thoroughly considered claim (g) that Mr. Painter was denied due process and effective assistance of counsel regarding the State's failure to collect, test, and disclose potentially exculpatory evidence. App. 1636-1640. The Circuit Court did not find that the ineffective assistance of counsel claim was waived, and yet did not require the State to

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respond to the claim as mandated by Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. *Id.*

The Circuit Court also found that Mr. Painter's prior appeal grounds were not previously adjudicated or waived, and yet did not require the State to respond to the claim as mandated by Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. App. pp. 1640-1641.

The Circuit Court did not find that Mr. Painter's claim of cumulative error was previously adjudicated or waived, and yet did not require the State to respond to the claim as mandated by Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. App. p. 1641.

With respect to each of the above-referenced claims, the Circuit Court either found that there had been no prior adjudication or waiver or erroneously found that there had been a waiver. Thus, pursuant to Rule 4, the State should have been required to respond to these claims. The Circuit Court made a clear error of law and abused its discretion in summarily dismissing the claims. Circuit court should not be allowed to extend itself beyond its assigned role and dismiss such claims without a State response. The prosecutors – those lawyers who join defense attorneys on the front lines in the quest for truth, justice and fairness – may very well confess error upon their own review of the claims. Habeas petitioners will be prejudiced if circuit courts are allowed to put themselves in the shoes of the State and render judgment on claims that have not been previously adjudicated or waived without first even knowing whether the State agrees or disagrees with the claims.

**b. Mr. Painter's habeas claims are sufficient to trigger granting of the writ and an evidentiary hearing.**

Again, W.Va. Code §53-4A-3 sets forth an incredibly low standard that the court shall grant the writ if there is probable cause to believe that the petitioner may be entitled to some relief. The code does not require probable cause to believe petitioner is entitled to relief, but rather, simply requires that the petitioner *may be* entitled to *some* relief. W.Va. Code §53-4A-3(a). There is wisdom in such a low standard, considering that once a writ is granted and the State is ordered to file a return pursuant to W.Va. Code §53-4A-3, the State may very well agree that the Petitioner is entitled to relief.<sup>2</sup>

Mr. Painter's claim that he was subjected to an illegal arrest at his home on September 15, 2005, and admission of evidence seized denied him due process and a fair trial, as argued in his habeas petition (App. pp. 1477-1505) establishes probable cause that he may be entitled to some relief. Mr. Painter also argued under this claim that he received ineffective assistance of trial and appellate counsel based on their failure to raise a claim that he had been illegally arrested at his home on September 15, 2005. (App. pp. 1505-1511.) Petitioner thoroughly set forth the law regarding illegal seizures and a fair analysis under the *United States v. Mendenhall* 446 U.S. 544 (1980) and *Florida v. Royer*, 460 U.S. 491 (1983) cases holding an encounter may be transformed into a seizure if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave, and the analysis under *Florida v. Bostick*, 501 U.S. 29 (1991) and *United States v. Drayton*, 536 U.S. 194 (2002) explaining that where a person is someplace they might not want to leave then the question is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the

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<sup>2</sup> Petitioner acknowledges that this rarely occurs, but the opportunity for the State to acknowledge error and lack of fairness in a proceeding is still a critical part of due process. In other words, the more sets of eyes and legal minds that are focused on ensuring justice prevails, the better. That appears to be the intent of the post-conviction habeas code's low standard for triggering a State review and response to the petition.

encounter.”<sup>3</sup> App. pp. 1496-1505. Pursuant to this analysis, Petitioner pointed out that there were two officers present at his home, the encounter occurred in a non-public place, there would be further testimony at an evidentiary hearing regarding the officers’ authoritative manner implying that compliance would be compelled, there was no indication that the officers gave Painter the *State v. Mays*, 307 S.E.2d 655 (1983)<sup>4</sup> warning that he is not under arrest and was not obligated to answer questions and is free to go, the officers made physical contact with him – searching and finding marijuana on him, the officers used the inherently coercive knock and talk technique, the officers implied that he was a suspect regarding the stolen vehicle in possessed, the officers were engaged in a ruse and deception trying to lure Petitioner away from his home in order to gain access, and Painter initially refused to cooperate by not letting them inside as requested but they persisted in trying to get him to leave the residence. App. pp. 1497- 1504. Also, once Painter was in the police car and taken to the station, he was not free to leave because he did not have a car.

Thus, in light of the totality of the circumstances and particularly in light of the officer’s failure to give the *Mays* warning, Mr. Painter petition established probable cause that he may be entitled to relief on his claim of illegal seizure and corresponding poisonous fruits of the tree such that the Circuit Court should have ordered the State to review and respond to the claim pursuant to Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings.

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<sup>3</sup> The Petitioner also relied on *State v. Jones*, 193 W.Va. 378, 456 S.E.2d 459 (W.Va., 1995) (holding in Syl. Pt. 1, “Where police, lacking probable cause to arrest, ask suspects to accompany them to police headquarters and then interrogate them ... during which time they are not free to leave or their liberty is restrained, the police have violated the Fourth Amendment.” Syllabus Point 1, in part, *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).

<sup>4</sup>See Syllabus Point 2 “Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go.”

Mr. Painter's claim that trial and appellate counsel failed to investigate, raise and assert that law enforcement's failure to promptly present Mr. Painter to a magistrate without unnecessary delay violated his constitutional rights is also sufficient to trigger the requirement that the State review and respond to the claim. (App. 1523-1537.) Petitioner pointed out that both W.Va. Code § 62-1-5 and Rule 5 (a) of the West Virginia Rule of Criminal Procedure provide that an officer " . . . making an arrest . . . shall take the arrested person without unnecessary delay before a Magistrate." Petitioner relied in part on *State v. Persinger*, 169 W.Va. 121 (1982) wherein the Court explained that delay in taking the defendant before a magistrate is a critical factor when it appears the primary purpose of delay was to obtain a confession, and *State v. DeWeese*, 582 S.E.2d 786, 213 W. Va. 339 (2003) explaining:

The prompt presentment rule is not a constitutional doctrine. It is a legislatively created and judicially adopted rule. Although the prompt presentment rule is not adorned by the constitution, it is designed to protect the constitutional rights of an accused. In view of the significant purpose of the prompt presentment rule, we perceive no legally justifiable reason for not extending the fruits of the poisonous tree doctrine to preclude the use of evidence derived directly from a statement that was obtained as a result of a violation of the prompt presentment rule.

App. pp. 1534-1537.

Petitioner argued that the officers impermissibly delayed his presentment to a magistrate in order to obtain access to his home and escalate the interview process that he had already terminated, requesting a lawyer. *Id.* As a result of this unnecessary delay, the officers obtained an incriminating statement from Petitioner, wherein he acknowledged a firearm had been used in the homicides without having been previously told that by law enforcement. App. pp. 1535. When Petitioner's argument is fairly considered, it is clearly sufficient to establish probable cause that he might be entitled to relief on the claim and the State should have been required to respond

under Rule 4 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings.

Mr. Painter's claim that he was denied due process and a fair trial by the introduction of 404(b) evidence without notice and a proper hearing and appellate counsel's failed to raise the issue on appeal (App. pp. 1537-1555) is also sufficient to trigger the low Rule 4 threshold. Petitioner pointed out that evidence that he had been in a fight in a bar, had a mugshot, spent his paycheck on Xanax, and tried to sell stolen property was all introduced against Petitioner at trial without objection from his counsel. App. 1553. Although the Circuit Court cast the claim aside as unreviewable strategic decision of counsel (App. 1630-1635), how does the Circuit Court know what trial counsel was thinking without holding an evidentiary hearing and taking testimony on the issue? Notably, the standard for conducting an evidentiary hearing is equally as low as that to trigger an order for the State to respond. See W.Va. Code §53-4A-7(a), providing in part:

**If it appears to the court from said petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or any such record or records referred to above, that there is probable cause to believe that the petitioner may be entitled to some relief and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced, and the court shall pass upon all issues of fact without a jury. The court may also provide for one or more hearings to be held and/or evidence to be taken in any other county or counties in the state.**

Likewise, the 404(b) claim is sufficient to require a response pursuant to Rule 4 and W.Va. Code §53-4A-3.

Mr. Painter claim that he was denied due process by prosecutor's comments in closing that the State's evidence was not refuted, the trial court's support of that statement, and appellate counsel's failure to raise the issue on appeal as impermissible burden shifting (App. pp. 1555-

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1568) also requires a response from the State under Rule 4. In closing arguments, the State argued: “There is no evidence that contradicts what was at Wade Painter’s house, what was on Wade Painter’s clothes, what was found at the crime scene, what was found at Norberg’s, what was found at the car, and what was found at Wilson’s. . . . That has not been refuted in front of you . . .” App. pp. 1195-96. Defense objected based on no burden being on the defendant, and the Court said “That’s correct. Ladies and gentlemen, the prosecutor’s evidence has not been refuted but there’s no burden on the defendant to prove himself innocent.” App. p. 1196. The trial court effectively endorsed the State’s comment that Defendant had not proven himself innocent, rendering the court’s follow-up comment that Defendant did not have the burden to prove himself innocent wholly ineffective to cure the harm. At the very least this issue establishes probable cause that Petitioner may be entitled to some relief.

Mr. Painter also made a sufficient Rule 4 showing on his claim that he was denied due process and effective assistance of counsel regarding the State’s failure to collect, test, and disclose potentially exculpatory evidence. App. pp. 1571-1582. However, the Circuit Court summarily dismissed the claim, finding that there was no evidence that the potentially exculpatory evidence was favorable to the defendant, the evidence was not suppressed by the State – it simply was not tested, and no prejudice resulted to defendant. App. 1636-1640. But again the Circuit Court was using wrong standard. The question at the Rule 4 stage is not whether Petitioner is entitled to relief, but rather whether there is probable cause that he *may* be entitled to *some* relief. A perfect example of such a case is this one, where the potentially exculpatory evidence was not tested, but may be tested and established as exculpatory through a habeas proceeding.

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Mr. Painter's also should have prevailed on his claim that his prior appellate arguments entitle him to relief. (App. pp. 1582-1583, 1587-1606.) In particular, there seems to be a clear violation of the *Georgia v. Randolph*, 547 U. S. 103 (2006) holding that the consent of one occupant is insufficient when another occupant is present and objects to the search.

The United States Supreme Court held in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id.*, at 1528. *Randolph* somewhat modified the High Court's prior holding in *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) that "[v]alid consent to search may be given by a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Therefore, *Randolph* expressly drew "a fine line," (*Id.*, at 1527): if a potential defendant with self-interest in objecting is in fact at the door and objects, the co - tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out. (*Id.*).

Nevertheless, the Supreme Court in *Randolph* did impose one limitation upon the otherwise "fine line" test, to-wit, that a search might be unconstitutional "[if there is] evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection...." *Id.*, at 1527.

This Supreme Court acknowledged *Randolph* in *State v. Bookheimer*, 656 S.E.2d 471, 221 W.Va. 720 (2007) (per curiam) (concluding a warrantless entry and search of a home was unconstitutional) and also noted that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution" per Syl. Pt. 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979).

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In this case, Sergeant Snyder testified at the pretrial hearing that when he and Hall arrived at Mr. Painter's residence on September 15, 2005:

We knocked on the door and defendant came to the door, opened it a crack. Identified ourselves as law enforcement officers and asked to speak with him in reference to a vehicle that he was in possession of the day prior and wanted to talk to him about that vehicle. We asked if we could come inside and he immediately refused. He said no, absolutely not. We said, okay, would you like to speak with us. He said, yeah, I will come outside. Shut the door. We waited probably a period of three to five minutes and he came outside.

App. p. 256.

Sergeant Snyder further testified that Mr. Painter was not given his Miranda warnings at his residence but was asked to accompany officers to the sheriff's department. App. p. 258. Snyder testified that he decided to Mirandize Mr. Painter after he told him that he was in possession of a stolen car and that it was a crime. App. p. 260. Sergeant Snyder further testified that "[w]e felt that keeping Mr. Painter with us talking to him about other topics would give the officers enough time to obtain a search warrant and prevent him from going back to his residence and destroy or remove evidence we would want to recover." App. p. 262.

Based on this testimony, Petitioner avers that there is probable cause to believe he may be entitled to relief on the claim that he was impermissibly removed from the home in order to avoid an objection to police entering the home, and the State should have been required to respond to the claim.

Petitioner also argues that there is probable cause that he may be entitled to relief on his claim of a violation of *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that once a defendant

invokes his Fifth Amendment right to counsel police must cease custodial interrogation). The *Edwards* Court further held that “when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police.” See also Syllabus Point 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (W.Va., 1987) (“For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.”)

In this case, it appears undisputed that Captain Streets reinitiated conversations with Mr. Painter after he demanded counsel. The Circuit Court’s denial of the claim was based on the finding that Captain Streets did not reinitiate *interrogation* and was not required by law to remain in complete silence. But the law does not distinguish between reinitiating questioning and just “checking” on a defendant in custody. The law says that once an attorney is requested, the defendant must initiate a conversation. This was not done because Captain Streets approached Mr. Painter under the guise of checking on him in order to evade his request for a lawyer and continue the interrogation. Even the State knew what was really going on. See Captain Streets trial testimony:

Q: What do you mean go check on him?

A. I wanted to ask how he was doing, if he needed anything.

Q: Anything such as what?

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A: I asked him if he needed to go to the restroom, needed a drink, how he was generally doing?

Q: Were you aware at the time that you made that request of him that he had requested counsel?

A: Yes, I did.

Q: . . . What was your intent when you went to *question* him – excuse me, wrong word, when you went to address him about the drink of water or using the restroom?

A: Just to see how his condition was.

App. pp. 1046-47 (emphasis added).

Under these circumstances, Petitioner established at the very least that there is probable cause he may be entitled to some relief on this ground.

Additionally, and for all the reasons, discussed herein and in Petitioner's amended habeas petition, Petitioner argues that that his habeas claims are sufficient to entitle him to relief, or at the very least, require an evidentiary hearing in light of the extremely low standard to trigger such a requirement (as discussed below).

**II. The Circuit Court committed reversible error in denying Petitioner's claim that trial and appellate counsel were ineffective by failing to investigate, raise and assert that the seizure and search of bags found in Petitioner's home without a search warrant was unreasonable in violation of the 4th Amendment.**

The Circuit Court correctly required the State to respond to this claim but then erred in dismissing the claim. W.Va. Code §53-4A-7(a), providing in part:

**If it appears to the court from said petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or any such record or records referred to above, that there is probable cause to believe that the petitioner may be entitled to some relief and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall promptly hold a hearing and/or take evidence on the**

**contention or contentions and grounds (in fact or law) advanced**, and the court shall pass upon all issues of fact without a jury. The court may also provide for one or more hearings to be held and/or evidence to be taken in any other county or counties in the state.

(Emphasis added)

Thus, the standard for the Circuit Court to hold an evidentiary hearing is equally low as the standard for requiring the State to initially respond. The Circuit Court found that Ms. Conner had authority to and did consent to the search of the bags, and even if the search was unlawful, the evidence would have been inevitably been discovered through lawful means and thus denied the claim without an evidentiary hearing. App. 1677-1678. But the Court ignored the fact that the search grew as a fruit of a poisonous tree after a probable *Georgia v. Randolph* violation and found that Ms. Conner had apparent authority or actual authority to consent to the search of the bags. *Id.*

Angie Conner testified at trial about the police searching the home she shared with Painter, indicating that she was asked to look at some of the property in the house and tell police whether it belonged to Mr. Painter. App. 1016. She stated “They pointed and said did this belong to you all and I said no and then whatever was laying out was put in bags.” App. p. 1017. She testified that a lot of bags were taken from Mr. Painter’s home and that the items taken by police did not belong to her or Mr. Painter. App. p. 1020. Ms. Connor indicated that she had never seen the items before, but it is unclear from her testimony how she knew the items did not belong to Mr. Painter. *Id.* Ms. Connor testified she asked Mr. Painter where the items had come from, and he said the flea market, but she did not believe him. App. p. 2010. Thus, the police knew that the bags did not belong to Ms. Connor but did not appear to have solid grounds to believe the bags did not belong to Painter. In fact, Captain Streets testified at trial about searching Mr. Painter’s home and finding pieces of clothing in a gym bag that belonged to Mr.

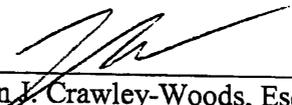
Painter with blood on them and sneakers that had blood on them. App. pp. 1042-1045. He even testified that Ms. Connor identified the gym bag as belonging to Painter. App. 1042. So, it appears the police did know that the bag belonged to Mr. Painter and searched it anyway.

At the very least, these facts establish that Petitioner may be entitled to some relief and therefore it was erroneous for the Circuit Court to deny this claim (as well as all the additional claims discussed above) without holding an evidentiary hearing per W.Va. Code §53-4A-7(a).

### **Conclusion**

For all of these reasons and those discussed in his amended habeas petition, Petitioner requests the Supreme Court reverse the Circuit Court's Order Summarily Dismissing Certain Grounds and Order Denying Habeas Petition, and grant Petitioner a new trial, or remand with instructions to require a State response to all Petitioner's habeas claims and hold an evidentiary hearing on the same.

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**CERTIFICATE OF SERVICE**

I, Ben Crawley-Woods, counsel for Petitioner did serve the foregoing Petitioner's brief along with Appendix by hand-delivering a copy of the same, to the following persons at the following address, on the 9<sup>th</sup> day of September, 2015:

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