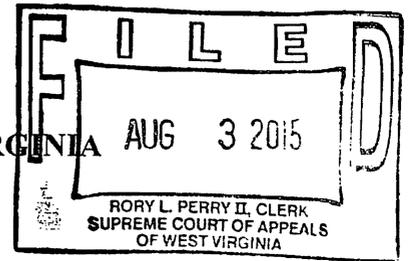


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

NO. 15-0289

STATE OF WEST VIRGINIA

Plaintiff/Respondent

v.

Appeal from a final order
of the Circuit Court of
Harrison County (13-F-112-3)

ENNIS C. PAYNE II

Defendant/Petitioner

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- 1) The trial court erred by refusing to suppress the evidence illegally seized at the home of Tim Starks because Mr. Starks had no authority to consent to the search of the Petitioner's jacket.
- 2) The trial court erred by refusing to suppress the evidence illegally seized at the Petitioner's home because the affidavit in support of the search warrant failed to establish the requisite probable cause or particularity necessary for its issuance.
- 3) The trial court erred by allowing the Petitioner to be shown to the jury dressed in jail attire and restrained by handcuffs and leg shackles.
- 4) The trial court erred by refusing to change venue and/or venire to a county where there had been less prejudicial pre-trial publicity regarding the case.
- 5) The cumulative effect of these errors were not harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

On January 13, 2010, Jayar Poindexter tragically lost his life as a result of a single gunshot wound to the heart. (A.R. Vol. II, 1159). The murder was committed at the Quarry Apartments, located in Clarksburg, Harrison County, West Virginia sometime between 3:15 and 3:30 a.m. (*Id.*) The police found two sets of footprints in the snow around the victim's apartment, one set of sneaker prints and one set of boot prints. (*Id.* at 1116). The prosecution proceeded on the theory that these two individuals attempted to commit a burglary inside Mr. Poindexter's apartment and that one of the individuals shot and killed him. (*Id.* at 1159.)

A review of relevant surveillance camera footage showed that five different men were present outside of the apartment complex at or near the time Mr. Poindexter was killed: Darnell Bouie, Michael Moran, the Petitioner Ennis Charles Payne, Leonard Hickey, and Michael Thomas. (*Id.* at 1159-65.) These five men were seen outside a Clarksburg bar, then seen driving in the direction of the Quarry Apartments, seen near the Quarry Apartments shortly before the

murder, and finally seen at a local gas station near the Quarry Apartments shortly after the murder. (*Id.* at 1165.)

On these videos, Mr. Payne was seen wearing a Pittsburgh Pirates baseball cap prior to the murder, but was not wearing this same cap after the murder. A Pittsburgh Pirates baseball cap was found in the parking lot of the Quarry Apartments a fair distance from Mr. Poindexter's apartment. (*Id.* at 1174.) A DNA analysis of the cap showed that Mr. Payne "can't be excluded" from contributing the DNA inside of it. (*Id.* at 1798.)

As the police were familiar with Mr. Payne, they began to search for his whereabouts. Barely one day after the murder, the police discovered that Mr. Payne had been frequently staying as an overnight guest at the residence of Mr. Tim Starks. They proceeded to the Starks home and purportedly obtained a partial consent from Mr. Starks to search his residence. (A.R. Vol I, 162). During their search, they discovered a jacket lying on a rocking chair. Before searching the jacket, Mr. Starks told them that it was not his jacket, but that it belonged to Mr. Payne. (*Id.* at 826); (A.R. Vol II, 1365; 1583.)

Notwithstanding Mr. Starks' lack of ownership of the jacket, the police searched its pockets and found a .25 caliber magazine holding four cartridges. (*Id.* at 1577.) One of the cartridges in this magazine was later determined to have been ejected from the same firearm as the spent cartridge found near the crime scene. (*Id.* at 1819.) The trial court later refused to suppress this evidence. (A.R. Vol I, 444.)

The police used this evidence, in part, to apply for and receive a search warrant for Mr. Payne's permanent residence where they found, among other things, a pair of size 10 ½ Timberland boots. (A.R. Vol. II, 1665-56.) These boots were later found to have been consistent

with the boots which left the one of the set prints near the victim's apartment. (*Id.* at 1669.) The trial court later refused to suppress this evidence. (A.R. Vol I, 442.)

As the investigation came to a close, the prosecution concluded that Darnell Bouie and the Petitioner, Ennis C. Payne were the two men who committed this terrible act: Mr. Bouie conspiring with Mr. Payne to commit a burglary and accompanying him to the apartment, with Mr. Payne the individual who shot and killed Mr. Poindexter. (A.R. Vol II, 1160).

Mr. Bouie and Mr. Payne were indicted by a grand jury in Harrison County, West Virginia sitting at the May, 2013 term of court on the charges of Felony Murder and Conspiracy to Commit Burglary. (A.R. Vol I, 19.) The trial court ordered separate trials for the defendants. (*Id.* at 204).

After a four day trial, Mr. Bouie was convicted of both counts of the indictment on March 21, 2014 and his conviction was subsequently affirmed by this Court. *State v. Bouie*, 14-0639 (W.Va. Sup. Ct., June 16, 2015).

Mr. Payne was tried in November, 2014. Although there had been a voluminous amount of pre-trial publicity regarding the murder, the trial court refused to grant a change of venue and/or venire. Although Mr. Payne had been unruly, the trial court presented him to the jury wearing jail clothing instead of absenting him from the proceedings. After nearly a five day trial, a jury convicted him on the same two criminal counts, recommending mercy. (*Id.* at 2014-15.) Subsequently, Mr. Payne was sentenced to life imprisonment, with parole possible after fifteen years, in the custody of the West Virginia Division of Corrections, and further sentenced to one to five years in the custody of such division, with the sentences to run consecutive. (A.R., Vol I, 550):

It is from this conviction and sentence which Mr. Payne now appeals to this Honorable Court for relief.

SUMMARY OF ARGUMENT

The purported consent search of Mr. Payne's jacket was improper. Although Mr. Starks undoubtedly had authority to consent to the search of his own residence, he did not have the authority to allow the police to search the contents of Mr. Payne's jacket.

Consent to search an item of personal property can only be given by one with "common authority over or other sufficient relationship to the premises *or effects* sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974) (emphasis added). "Common authority ... rests ... on mutual use of the property by persons generally having joint access or control for most purposes...." *Id.* at 171, n. 7.

"A privacy interest in a home itself need not be coextensive with a privacy interest in the contents ... of everything situated inside the home. This has been recognized before in connection with third-party consent to searches. 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." *United States v. Karo*, 468 U.S. 705, 725 (1984) (O'Connor, J, concurring). *See also United States v. Infante-Ruiz*, 13 F.3d 498 (1st Cir. 1994) (suppressing evidence obtained from a consent search of a briefcase located in an automobile when the driver indicated to the police that the briefcase belonged to another person).

In this matter, Mr. Starks signed a valid consent form to search “[t]he living room, Hallway, kitchen + bathroom area of the downstairs” on January 15, 2010¹. (A.R. Vol I, 162.) The police, relying on Mr. Starks’ consent, lawfully proceeded into his home to search for items related to Mr. Payne. They noticed a jacket hanging on the back of the dining room chair and asked Mr. Starks if that was Mr. Payne’s jacket. He replied that it was. (A.R. Vol II, 1365).

Although certainly the officers could observe the jacket and notice things which were in plain view, they proceeded to search the interior pockets of the jacket and found the above-mentioned magazine. This search was improper because the officers knew that Mr. Starks did not have “common authority over or a sufficient relationship” to the jacket. *Matlock*, 416 U.S. at 171. No evidence was presented to suggest that the parties shared the jacket or that Mr. Starks stored his personal belongs in it. The evidence was clear and unambiguous that the jacket was Mr. Payne’s alone. (A.R. Vol I, 826); (A.R. Vol II 1365; 1583)

As such, the officers exceeded the scope of the consent search and the items seized from the jacket should have been suppressed.

Ten days later, the investigating officers wished to search Mr. Payne’s permanent residence for further incriminating evidence. The affidavit they presented to the presiding judge was conclusory and failed to establish the requisite probable cause to allow a search.

Since the application of the Fourth Amendment to the states, the United States Supreme Court has required independent evidence to be contained in a warrant application that shows the basis of knowledge and veracity of a hearsay informant. *See, e.g. Aguilar v. Texas*, 378 U.S. 108

¹ Although the consent form contains the date of December 13, 2010, more than eleven months later than the actual search, the Petitioner concedes that when the evidence is taken in the light most favorable to the prosecution, this is a simple clerical error.

(1964); *Spinelli v. United States*, 393 U.S. 410 (1969) (together requiring that in each instances the police demonstrate the basis of knowledge and the veracity of a hearsay informant).

The Court later modified its holding by stating that a “totality of the circumstances” would suffice so long as police corroborated the informant’s story by other methods. *Illinois v. Gates*, 462 U.S. 213 (1983) (holding that a follow up investigation which confirmed many of the informant’s details was sufficient without a specific investigation of his past veracity).

Further, “the determination of probable cause for issuance of a search warrant must be based solely on the facts contained within the four corners of the affidavit.” *State v. Adkins*, 346 S.E.2d 762, 767 (W.Va. 1986). “[F]or the purposes of the Fourth Amendment, the false material must be excluded from the affidavit, and the affidavit’s remaining contents must then be sufficient to establish probable cause.” *State v. Thompson*, 358 S.E.2d 815, 817 (W.Va. 1987).

The application for a search warrant in this matter fails these basic tests as it: 1) states no facts to connect the address of 118 Anderson Street to any of the items or activities it describes, 2) uses the knowledge of an uncorroborated hearsay informant, 3) states in a conclusory fashion that the Pittsburgh Pirates ball cap found at the scene was Mr. Payne’s cap, 4) fails to state where Mr. Payne was seen wearing the cap, 5) references the improperly seized magazine and ammunition stated above, and 6) fails to provide a factual nexus between the allegations and the things to be seized.

As such, the results of the search of Mr. Payne’s residence and the size 10 ½ Timberland boots should have been suppressed.

Next, Mr. Payne argues that the trial court erred by denying him his request for a change of venue. Specifically, Mr. Payne argues that due to the highly prejudicial nature of the pre-trial publicity, he should have been granted a change of venue. The pre-trial publicity was highly

prejudicial because newspaper articles frequently reported on the murder and called it a “slaying.” Furthermore, newspaper articles outlined Mr. Payne’s arrest record and published statements allegedly made by Mr. Payne before the trial court was able to rule whether such information would be admissible at trial. Therefore, due to the high probability of a hostile sentiment towards Mr. Payne in a very small community, the trial court committed reversible error by denying his motion for a change of venue.

Finally, Mr. Payne argues that the trial court committed reversible error by compelling him to appear before the entire jury pool while wearing prison clothes. By compelling Mr. Payne to stand in front of the entire jury pool while wearing prison clothing, Mr. Payne was denied a fair trial. Essentially, Mr. Payne was denied his right to the presumption of innocence. Furthermore, Mr. Payne was denied equal protection, pursuant to the Fourteenth Amendment of the United States Constitution because the trial court’s order was discriminating against him. Specifically, the trial court’s order in effect discriminates against those accused who cannot or are denied the opportunity to post bond and be released while awaiting trial. Also, the trial court wrongfully justified its order compelling Mr. Payne to appear before the jury pool while wearing prison clothing by stating that such precaution was needed to for courtroom security purposes. However, Mr. Payne appearing in prison clothing in no way furthers the trial court’s purpose for compelling Mr. Payne to appear before the jury pool while donning prison clothing. Therefore, due to the clear error committed by the trial court in ordering Mr. Payne to appear in the presence of the jury pool while wearing prison clothing, Mr. Payne should be granted a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner submits that oral argument under W.Va. R. of App. Pro. 20 is proper in this matter because a third party consent search of one's personal effects is an issue of first impression in West Virginia, and involves a question of constitutional importance.

Alternatively, this matter is suitable for oral argument under Rule 19 as it involves an unsustainable exercise of discretion by the trial court by placing the Petitioner in front of a jury in jail clothing, failing to change venue when prejudicial pre-trial publicity was present in the county, and by allowing the fruits of a search warrant obtained by a conclusory affidavit.

As such, a memorandum opinion would not be appropriate in this case and the Petitioner believes that a signed opinion from this Court is necessary.

ARGUMENT

This Court should reverse the Petitioner's convictions because: 1) the "third-party consent" search of his domicile was invalid as the occupant of the house had no authority to consent to the search of Petitioner's jacket, 2) the search warrant affidavit for the search of the Petitioner's home was "bare bones" and did not provide the requisite probable cause for its issuance, 3) the trial court improperly allowed the Petitioner to appear before the jury panel in jail clothing, 4) the trial court improperly denied the defense motion to change venue and/or venire, and 5) these errors were not harmless beyond a reasonable doubt.

I. The trial court erred by refusing to suppress the ammunition magazine and four .25 caliber bullets illegally seized at the home of Tim Starks because Mr. Starks had no authority to consent to the search of the Petitioner's jacket.

The police did not possess a warrant to search the Starks home for evidence against Mr. Payne.

The most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption... that the exigencies of the situation made that course imperative."

State v. Duvernoy, 195 S.E.2d 631, 634-5 (W.Va. 1973) (internal citations and quotation marks omitted). "As a corollary to this rule, the burden rests on the State to show by a preponderance of the evidence that the warrantless search falls within an authorized exception."
State v. Moore, 272 S.E.2d 804, 808 (W.Va. 1980).

One of the exceptions to a requirement to obtain a search warrant is the so-called "consent" exception. Consent may not only be given by a party that may be potentially incriminated by such a search, but may also be given by a third-party:

The general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures.

State v. Plantz, Syl. Pt. 8, 180 S.E.2d 614 (W.Va. 1971), *overruled in part on other grounds by State ex rel. White v. Mohn*, 283 S.E.2d 914 (W.Va. 1981). However, this is the "general" rule, only applicable to the premises and not closed containers on the premises, and subject to exceptions.

Consent to search an item of personal property can only be given by one with "common authority over or other sufficient relationship to the premises *or effects* sought to be inspected."
United States v. Matlock, 415 U.S. 164, 171 (1974) (emphasis added). "Common authority ... rests ... on mutual use of the property by persons generally having joint access or control for most purposes...." *Id.* at 171, n. 7.

In the matter below, the State used the “premises or effects” language from *Matlock* to argue that since Mr. Starks had control of the premises, he could consent to the search of Mr. Payne’s effects. (A.R. Vol I, 285). A more natural reading of the language would require an analysis of the factual situation to determine whether a search of a premises was at issue or a search of an effect was at issue, and then determine common ownership or control over the particular thing at hand. The State’s rule would basically leave out the “or effects” language and give a person no control over their personal effects if they left them on another’s property. (*Id.* at 171.)

The courts have consistently failed to apply the rule proposed by the State whereby ownership or control of a particular area allows a third party to consent to a search of each and every particular item present in that area, and the interior of those items. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (upholding admissibility of evidence seized from a duffel bag because defendant “allow[ed] Rawls to use the bag *and* le[ft] it in his house”) (emphasis added).

“A privacy interest in a home itself need not be coextensive with a privacy interest in the contents ... of everything situated inside the home. This has been recognized before in connection with third-party consent to searches. 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.” *United States v. Karo*, 468 U.S. 705, 725 (1984) (O’Connor, J, concurring). *See also United States v. Infante-Ruiz*, 13 F.3d 498 (1st Cir. 1994) (suppressing evidence obtained from a consent search of a briefcase located in an automobile when the driver indicated to the police that the briefcase belonged to another person); *United States v. Block*, 590 F.2d 535 (4th Cir. 1978) (a search of a footlocker belonging to another could not be authorized by the homeowner); *Walter v. United States*, 447 U.S. 649,

654 (1980) (“[A police] officer’s authority to possess a package is distinct from his authority to examine its contents.”)

Further, the test is not only one of property law, but “the authority recognized by customary social usage....” *Georgia v. Randolph*, 547 U.S. 103, 103 (2006).

In *Frazier*, a defendant left incriminating items in a duffle bag and stored it in his cousin’s house. The defendant further allowed the cousin to share a compartment in the duffle bag to store his own items. The cousin subsequently consented to a search of the duffle bag. In upholding the defendant’s conviction, the Court ruled that “[s]ince Rawls was a joint user of the bag, he clearly had authority to consent to its search.” *Frazier*, 394 U.S. at 740.

The *Block* court said that the idea was “well settled” that “third person consent, no matter how voluntarily and unambiguously given, cannot validate a warrantless search when the circumstances provide no basis for a reasonable belief that shared or exclusive authority to permit inspection exists in the third person from any source.” *Block*, 590 F.2d at 540 (citing *Stoner v. California*, 376 U.S. 483, 489 (1964)).

In this matter, it was clear that neither the police nor Mr. Starks harbored any doubts that the jacket belonged to Mr. Payne. (A.R. Vol I, 826); (A.R. Vol II, 1365; 1583.) Prior to searching the jacket, the police asked if it was Mr. Payne’s jacket, (A.R. Vol II, 1365), and Mr. Starks confirmed it. (*Id.*) The police did not observe any evidence in plain view on the jacket. At this point, the police should have stopped their investigation and attempted to secure a search warrant from a magistrate. *See Arizona v. Hicks*, 480 U.S. 321 (1987) (holding that even when police are lawfully on the premises, the plain view exception does not allow police officers to manipulate an object to bring items into plain view; they must first secure a search warrant).

However, in their zeal to gather evidence against Mr. Payne, the police took the next step of placing their hands inside the jacket and finding an ammunition magazine containing four .25 caliber cartridges. (*Id.* at 1577.)

The trial court, with little analysis, failed to make any distinction between the property itself and the containers located within it: “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.” (A.R. Vol I, 444.)

However, there is no evidence to suggest that Mr. Starks had “common authority,” “mutual use,” or a “sufficient relationship” to the jacket. *Matlock*, 415 U.S. at 171. It was an article of clothing owned and used solely and exclusively by a person whom he let occupy his home. As Mr. Starks did not have authority over Mr. Payne’s jacket, and the police knew it, he likewise did not have authority to permit the police to inspect it.

The State would likely argue that the intrusion into a jacket, which is freely accessible without a key, differs in scope from hacking open a locked briefcase or footlocker as in *Block* or *Infante-Ruiz*, but the questions of authority, mutual use, and a sufficient relationship over those items remain the same. Also, the U.S. Supreme Court has expressly declined to make a distinction between “worthy” and “unworthy” containers:

For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

United States v. Ross, 458 U.S. 798 (1982). Nobody would seriously suggest that simply because of their location in Mr. Starks’ home, he would have authority over, mutual use, or a relationship with Mr. Payne’s wallet, money, toiletry items, or other effects which are personal to

Mr. Payne. *Randolph*, 547 U.S. at 103. Common custom, and in certain instances, criminal and tort law dictates that those items are entirely off limits for roommates. An item like a jacket is not as personal as a toothbrush, but the same “customary social usage,” along with property law, does not support the inference that male roommates share each other’s jacket as required by *Frazier*. Further, the State has not presented evidence to suggest that Mr. Payne shared his jacket with Mr. Starks or otherwise allowed him to search through the pockets. *Moore*, 272 S.E.2d at 808. As stated in *Ross*, even though Mr. Payne did not place the ammunition magazine inside a sophisticated locked safe, his simple “container,” his jacket pockets, are no less worthy of constitutional protection.

The State would also likely argue that by leaving the jacket in a common area, Mr. Payne took the risk that Mr. Starks would expose its contents. This argument fundamentally misstates the risk one takes by placing his property in areas under common control, and attempts to conflate risk with authority.

Many West Virginians may leave their homes or their cars unlocked. Others may leave personal documents in the care of friends or family members, or roommates may leave money lying on the kitchen table. When a person does these things, he certainly takes the risk that someone may steal from his home or car, or betray his trust and misappropriate or misplace his personal information, however this risk is unrelated to the authority that he delegates to others by doing so.

In the first example of an unlocked car or home, there is no authority, expressed or implied, granted to anyone to invade the interior spaces of those areas or convert the property to one’s own use. In the latter example of leaving valuables in another’s home, “customary social” norms imply a limited grant of authority to do certain things. For example, a homeowner may

move the personal items for storage or cleaning purposes, but it is unlikely that the grant of authority would include disclosing the sensitive personal information to the newspaper.

Likewise, the authority granted to Mr. Starks by Mr. Payne in leaving his jacket at the common residence is limited by common social customs. This is inapposite and not comparable to the risks he takes by leaving the jacket: namely theft, conversion, negligent damage to his jacket, or private disclosure to the police. No observer of social custom, or regular speaker of the English language would contort the risk of leaving an item unsecured into a positive grant of “common authority” for others to do as they wish with the item. *Matlock*, 415 U.S. at 171.

It is clear that had Mr. Starks improperly searched Mr. Payne’s jacket himself, found the magazine, and turned it over to police, there would not be a reasonable argument for suppression. *See Burdeau v. McDowell*, 256 U.S. 465, 465 (1921) (holding that private searches are not subject to the exclusionary rule, even though “wrongful”). However, when the police enlisted the help of Mr. Starks, he became their agent, and his wrongful conduct is now subject to the exclusionary rule. *Id.*

For the reasons stated in the controlling and persuasive authority cited above, this search exceeded the scope of the consent available to Mr. Starks to grant. These facts were known to the police officers on scene, and as such the evidence found inside the jacket should have been suppressed.

II. The trial court erred by refusing to suppress the size 10 ½ Timberland boots illegally seized at the Petitioner's home because the affidavit in support of the search warrant failed to establish the requisite probable cause or particularity necessary for its issuance.

Privacy in our homes is one of the most cherished benefits of living in a free country. Our founding fathers, tired of the abuses of general warrants at the hands of the British, enshrined this basic protection into our Bill of Rights, and the founding fathers of West Virginia placed it in our own Constitution:

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

W.Va. Const. Art. III, Section 6; *see also* U.S. Const. Amend IV. Although probable cause has been a difficult concept for law students and legal scholars alike to precisely define, this Court has done so as follows:

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.

State v. Corey, 758 S.E.2d 117, 124-5 (W.Va. 2014) (internal citations omitted)

(emphasis added). “[T]he determination of probable cause for issuance of a search warrant must be based solely on the facts contained within the four corners of the affidavit.” *State v. Adkins*, 346 S.E.2d 762, 767 (W.Va. 1986). Stating conclusions derived from facts is “tantamount to

permitting the affiant to usurp the judicial function of the issuing magistrate or court in determining whether probable cause for such belief exists.” *State v. DeSpain*, 81 S.E.2d 914, 916 (W.Va. 1954).

The affidavit for the search warrant for this matter consists of only one page and contains only one paragraph of factual support. (A.R. Vol II, 2035). The entirety of the factual allegations are as follows:

On 1-13-10, around 0330 hrs, Jayar Poindexter was shot and killed with a .25 caliber gun at the Overlook (sic) 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.

(*Id.*) The affiant officer used those facts to support a reasonable belief that the following items would be found: “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, box cutter, cell phone, pager, any clothing bearing blood stains and any gray shirts,” *id.*, and further averred that those facts previously cited support a reasonable belief that these items would be found at “118 Anderson St in Clarksburg, WV; County of Harrison – white one story residence, located at the corner of Anderson St and Kennedy Court.” (*Id.*)

The affidavit is deficient in six separate ways, including its reliance on the illegally seized ammunition magazine discussion in section one, *supra*. Each of the remaining five defects are discussed in turn:

A. The affidavit for the search warrant fails to describe the nexus between the facts asserted and 118 Anderson Street.

Missing from the one paragraph statement of facts is any connection between the events described and the address of 118 Anderson Street. Based upon the facts contained in the affidavit, a reader is left in the dark regarding the significance of that address, only that it is a “white one story residence.” (*Id.*)

Neither the facts in the affidavit, nor common sense inference, support the assumption that it is Mr. Payne’s residence, as it could have been any other person’s residence in the City of Clarksburg. There are many reasons why the police may want to search the home of a neighbor, a friend, an intimate partner, or a place where Mr. Payne visited briefly, and the face of this affidavit does not disclose the relevance of that particular residence. The affidavit further fails to aver the factual basis for the officer’s belief why the items sought might be found at this unknown residence. *Corey*, 758 S.E.2d at 124-5.

This issue was raised below and the trial court failed to address its substance, making the straight-forward assertion that “the affiant...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.” (A.R. Vol I, 442.) It failed to consider that the knowledge that such address was Mr. Payne’s residence or otherwise related to the murder was not contained in the four corners of the affidavit. *Adkins*, 346 S.E.2d at 767.

Should the Court hold that such an affidavit is valid, it would eviscerate the particularity requirement of the Fourth Amendment, and allow police to search any home they wish after the commission of a crime simply by failing to describe the nexus between the facts and the residence sought to be searched.

This cannot be excused as a mere clerical oversight. By failing to specify the appropriate factual nexus, the police usurped the authority of the independent arbiter to determine the existence of probable cause relative to that particular address and assumed it for themselves. *DeSpain*, 81 S.E.2d at 916.

For this reason alone, the warrant is invalid and the fruits of the search should have been suppressed.

B. The affidavit uses uncorroborated hearsay testimony to support probable cause that Mr. Payne had been in contact with the victim that night.

“According to an individual, EC Payne had throughout the night attempted to make contact with the victim by phone.” (A.R. Vol II, 2035). A neutral magistrate is left to wonder what individual, the basis of the knowledge of that individual, and whether that individual is truthful. This is clearly the type of uncorroborated hearsay testimony barred by the *Adkins* Court.

The trial court recognized this inadequacy but failed to provide the proper remedy, holding in a footnote: “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.’” (A.R. Vol I, 442).

This analysis misses the point entirely. It is not that Mr. Payne is complaining of an intrusion of the privacy of his cell phone, but that such a conclusory statement has served to provide purported probable cause for the issuance of a warrant which invaded the privacy of his entire home.

As in *Thompson*, this statement should be stricken from the affidavit and the remaining facts used to determine if probable cause exists.

C. The affidavit makes the conclusory statement that the cap found at the scene was Mr. Payne's

“EC Payne’s Pirate hat was located on the ground.....” (A.R. Vol II, 2035). This statement is similarly conclusory as it does not provide facts to support the belief that the hat was Mr. Payne’s. The affiant attempts to do so as discussed in subsection D, *infra*, however he fails for the reasons specified in that subsection. Pittsburgh Pirates hats are common in north central West Virginia as this area is part of the local market for the Pirates.

It is further improper to make such conclusory statements and should be stricken from consideration under the rule articulated in *Thompson*. The affiant once again usurped the role of the independent judge whose duty it was to read the facts and make his own conclusions from those facts. *DeSpain*, 81 S.E.2d at 916.

D. The affidavit fails to specify where Mr. Payne was wearing the hat at 3:00 a.m. making the statement that it was missing at 3:36 a.m. irrelevant to this matter, and the affiant's prior conclusion that it was Mr. Payne's hat to be not supported by the facts.

It would certainly be probative information if a person was seen wearing a hat near the murder scene at 3am, be seen not wearing the hat at 3:36 am, also near the murder scene, when a similar hat was found near such murder scene. However, the facts in this affidavit do not support such an inference.

Assuming, *arguendo*, that the neutral judge could take judicial notice that the “Overlook Apts” were actually the Quarry Apartments located on Overlook Drive, and could also take judicial notice that travel from that location to the “Go Mart in Bridgeport” was possible within

the time frame outlined in the affidavit, he cannot infer that when Mr. Payne was seen wearing the hat at 3:00 a.m. that he was near the murder scene.

The affidavit makes no mention of where Mr. Payne was seen wearing the hat, and such facts are crucial to determining not only whether the affiant's statement that it was Mr. Payne's hat was true, but whether it was even possible that it was the same hat.

For example, had Mr. Payne been seen in Morgantown at 3:00 a.m. wearing the hat, and then seen in Bridgeport at 3:36 not wearing the hat, it would have violated the laws of physics for the hat found at the crime scene to have belonged to Mr. Payne. Further, as an example, had Mr. Payne been seen in Jane Lew at 3:00 a.m. wearing the hat, it may be possible but unlikely that it was Mr. Payne's hat. By failing to mention the location where Mr. Payne was seen wearing the hat at 3:00 a.m., the affiant took it upon himself to reach the conclusion that there was sufficient time and means of transportation for Mr. Payne to be where he was at 3:00 a.m., leave the hat at the scene of the murder between 3:15 a.m. and 3:30 a.m., and then be seen at the Bridgeport Go-Mart at 3:36 a.m.

These determinations, as always, are not to be made by the affiant officer by way of a conclusory statement in an affidavit. *DeSpain*, 81 S.E.2d at 916. The facts themselves are to be placed in the "four corners" of that affidavit so that a decision on their merits can be had by one not intimately tied to the investigation. *Adkins*, 346 S.E.2d at 767.

Without these essential facts, the conclusory statements that the hat was Mr. Payne's and the times he was seen wearing or not wearing the hat should be stricken from the affidavit as in *Thompson*.

E. The facts in the affidavit fail to show the relevance of the particular things sought to be seized to the investigation of the crime alleged.

Assuming, *arguendo*, that the facts in the affidavit established probable cause that a murder was committed by Mr. Payne, the affidavit fails to specify how a “black jacket with whites (sic) stripes on the sleeve and white stripes around the collar, boots or shoes...knife, box cutter, cell phone, pager...and any gray shirts” are connected to this crime. (A.R. Vol II, 2035).

The affidavit shows no facts to connect *any* of these items to the murder at the Quarry Apartments. There is no mention that Mr. Payne was wearing boots, a black jacket, or carrying a knife, box cutter, cell phone, or pager. As such, the neutral judge could not reasonably conclude that those items were likely to contain evidence related to the crime.

The trial court failed to address this issue by simply holding, “[i]t 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.” (A.R. Vol I, 442). This holding is disturbing for two reasons²: First, the trial court did not take notice that no facts in the affidavit suggested that the clothing described was viewed in the surveillance video. Second, the types of items requested are hardly “specific.” (*Id.*) The affidavit requests permission to seize clothing, any footwear, knives, box cutters, pagers, and cell phones with absolutely no factual nexus between those items and the murder.

For example, the affidavit purports to give probable cause for a search or seizure of a knife. The facts contained in the affidavit describe a murder committed with a .25 caliber firearm. There is no mention of a knife or how it relates to the murder. Further, although it may be inferred from common sense that Mr. Payne was not barefoot while visiting the Bridgeport

² Apart from the once more unsupported assertion that this place was the Defendant’s residence.

Go-Mart in the January snow, there are no facts in the affidavit to support the inference that his footwear played a role in the crime or may contain evidence of the crime. Further, the officers had seen the surveillance video and could have provided the judge with some specificity as to the type of footwear at issue.

This type of particularity is at the cornerstone of the Fourth Amendment. In the future, without relief from this Court, citizens of Harrison County may expect to have the entirety of their property, and the containers inside that property, searched based upon suspicion of a crime. A warrant issued on these terms bears little dissimilarity to the general warrants that our founding fathers enacted the Fourth Amendment as a protection against.

The “totality of the circumstances” test likewise does not save this warrant. *Corey*, 758 S.E.2d at 124-5. By removing the invalid portions, the State is only left with the allegations that a murder was committed with a .25 caliber firearm. This is clearly insufficient for probable cause to search anyone or anything. *Id.* at 124 (“It is not enough that a magistrate believes a crime has been committed.”).

Without providing factual support for a nexus between the crime alleged and the things to be seized, the results of the search and seizure of Mr. Payne’s size 10 ½ Timberland boots should have been suppressed.

III. The trial court committed reversible error by denying Mr. Payne’s Motion for a Change of Venue

The trial court committed reversible error by failing to grant Mr. Payne’s motion for a change of venue because pre-trial hostility existed in the community, which prejudicially affected Mr. Payne in receiving a fair trial. In fact, because the pre-trial publicity was so rampant in the community, Mr. Payne was the presumption of innocence whole at trial.

“The principle that there is a presumption of innocence in favor of the accused in the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453 (1895). West Virginia Code §62-3-13 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 ‘good cause’ which an accused must show to be entitled to a change of venue on the ground of prejudicial pretrial publicity is the existence of a present, hostile sentiment against him, arising from the adverse publicity, which extends throughout the county in which the offense was committed, and which precludes the accused from receiving a fair trial in that county.” *State v. Williams*, Syl. pt. 3, 172 W.Va. 295, 305 S.E.2d 251 (1983). The good cause that the criminal defendant asserts, which he or she believes warrants a change of venue, must exist at the time the criminal defendant moves the trial court for a change of venue. *State v. Wooldridge*, Syl. Pt. 2, 129 W.Va. 448, 40 S.E.2d 899 (1946).

A trial court should grant a criminal defendant a change in venue “when it is shown that there is ‘a present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial,’” and such hostile sentiment will constitute good cause for moving the trial to a different venue. *State v. Peacher*, 167 W. Va. 540, 541, 280 S.E.2d 559, 564 (1981) (quoting *State v. Siers*, Syl. pt. 1, 103 W. Va. 30, 136 S.E. 503 (1927)); accord *State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978). Although prejudicial pre-trial publicity alone is not enough to require a change of venue, in some instances it will require a change of venue. *Peacher*, 167 W. Va. at 550, 280 S.E.2d at 568; *Cf. Patton v. Yount*, 467 U.S. 1025, 1031 (1984) (“[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors’ claims that they can be impartial should not be believed.”). Thus, when pre-trial publicity has

risen to the level that the public will have a preconceived notion as to the guilt of the criminal defendant, then the trial court should take it into consideration when deciding whether to allow a criminal defendant a change of venue. *See Mu'Min v. Virginia*, 500 U.S. 415, 427-428 (1991).

When reviewing a denial of a change of venue, this Court is to analyze whether the trial court abused its discretion in denying the criminal defendant a change of venue. *Williams*, Syl. Pt. 2, 172 W. Va. 295, 305 S.E.2d 251. A change of venue is appropriate when “the dissemination of potentially prejudicial material [creates] a reasonable likelihood that in the absence of such relief a fair trial cannot be had.” Cleckley, *Handbook on West Virginia Criminal Procedure*, Second Edition, pp. I-842, (1993). Furthermore, the size and kind of the community plays a role in deciding how much of an impact the pre-trial publicity would have in prejudicing the accused and, thus, resulting in a change of venue. *See Skilling v. United States*, 561 U.S. 358, 444 (2010).

In the present case, Mr. Payne was denied a fair trial due to the voluminous pre-trial publicity of his case. Mr. Payne’s counsel filed a motion for change of venue or venire prior to Mr. Payne’s trial (A.R. Vol. I. 105). In that motion, Mr. Payne’s counsel argued to the trial court that Mr. Payne could not “obtain a fair and impartial trial in Harrison County, West Virginia due to the existence of substantial prejudice . . . existing against [Mr. Payne], as well as the extensive media coverage of the case against [Mr. Payne].” (Id.) However, the trial court denied Mr. Payne’s motion for the change of venue. As result, Mr. Payne suffered substantial prejudice due to the extensive and voluminous amounts of media coverage in the community. (See A.R. Vol. II, 2050-2101). For example, some of the newspaper articles pointed to Mr. Payne as being guilty. (See e.g., A.R. Vol. II, 2087-88). Also, newspaper articles mentioned evidence that was recovered during searches before the trial court could rule on the admissibility of that evidence.

(*See* A.R. Vol. II, 2075). Furthermore, there were newspaper articles that discussed and outlined Mr. Payne's prior arrest records. (*See* A.R. Vol. II, 2076). Mr. Payne's prior records would not have been admissible at trial, but potential jurors in the community, by simply reading the newspaper could have easily learned of Mr. Payne's arrest records and prior criminal history. Such evidence is classified as character evidence and should not be taken into account when determining the guilt of an individual. However, having this information casted into the public before he was able to obtain a fair trial substantially prejudiced Mr. Payne. Furthermore, The newspaper articles commonly referred to the crime as a "slaying," while continually linking that term to that of Mr. Payne. (A.R. Vol. II, 2077). Thus, due to the numerous media reports and the highly prejudicial information contained within those reports, Mr. Payne was denied of his right to the presumption of innocence. Thus, a change of venue should have been granted.

Also, the size of the community in which the prejudicial pre-trial publicity took place is relatively small. In contrast to communities that see multiple murders every year, Clarksburg, West Virginia, is a small town, which rarely sees more than two murders a year. In fact, in 2010, only one murder, the murder of Jayar Poindexter, was reported in Clarksburg. (*See* A.R. Vol. II, 2043). Thus, all the media coverage regarding a murder in Clarksburg was the murder in which Mr. Payne was convicted of. The likelihood of potential jurors being exposed to the pre-trial publicity was very high due to the fact that the community is so small. Furthermore, on more than one occasion, Mr. Payne was on the front page of the newspaper as a result of him allegedly being involved in the murder. (*See e.g.*, A.R. Vol. II, 2074-75).

Mr. Payne properly moved the trial court for a change of venue by stating that there was good cause for the change of venue. Furthermore, the pre-trial publicity, which implicitly and explicitly stated that Mr. Payne was guilty of the alleged crimes, were written before Mr. Payne

moved the trial court for the change of venue. Thus, Mr. Payne was able to show that the good cause for his motion for a change of venue existed at the time he moved the trial court for the change of venue. (See A.R. Vol. II, 2050-2101). Despite the evidence of the prejudicial effect on Mr. Payne, the trial court denied Mr. Payne's motion. The pre-trial publicity was highly prejudicial to Mr. Payne's defense. As a result, there was no chance that Mr. Payne would receive a fair trial by having the trial in the Circuit Court of Harrison County. Therefore, this Court should reverse Mr. Payne's conviction and grant him a new trial in a different venue where the prejudice from pre-trial publicity will not affect his presumption of innocence.

IV. The trial court committed reversible error by compelling Mr. Payne to wear prison clothes in the presence of the jury.

The trial court committed reversible error by compelling Mr. Payne to wear prison clothes in the presence of the jury. Such compulsion denied Mr. Payne of his Constitutional right to a fair trial.

A criminal defendant's right to a fair trial is a fundamental liberty that is secured by the Fourteenth Amendment to the United States Constitution. *Drope v. Missouri*, 420 U.S. 162, 172 (1975). Although not articulated in the Constitution of the United States, the presumption of innocence is "a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Close judicial scrutiny is required when analyzing the probability of harmful effects on fundamental rights. *Estes v. Texas*, 381 U.S. 532 (1965). Furthermore, it has been held by the Supreme Court of the United States that, consistent with the Fourteenth Amendment, a state cannot "compel an accused to stand trial before a jury while

dressed in identifiable prison clothes” *Williams*, 381 U.S. at 512.³ The Supreme Court of the United States has held the following:

Similarly troubling is the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment.

Williams, 425 U.S. at 505-506 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

In *United States ex rel. Stahl v. Henderson*, 472 F.2d 556 (5th Cir. 1973), cert. denied 411 U.S. 971 (1973), the Fifth Circuit Court of Appeals declined to overturn a conviction where the defendant was tried for a murder while wearing jail clothes. However, the murder occurred while the defendant was an inmate. 472 F.2d at 556. The Court of Appeals held that “no prejudice can result from seeing that which is already known. *Id.* at 557.

In *Williams*, *supra*, the defendant was unable to post bond and was held in custody while awaiting trial. 425 U.S. at 502. Before going on trial, the defendant requested an officer at the jail for his civilian clothes, but the officer denied the defendant’s request. *Id.* However, the defendant nor his counsel objected to the defendant appearing in prison clothes. *Id.* In addition to the defendant’s counsel failing to object to the defendant wearing prison clothes, the defense counsel during voir dire expressly referred to the defendant’s

³ Prior to the *Williams* case, other courts had determined that an accused should not be compelled to stand trial in the presence of the jury while wearing prison clothes because of the possible irreparable harm to the presumption of innocence. *Gaito v. Brierley*, 485 F. 2d 86 (3d Cir. 1973); *Brooks v. Texas*, 381 F. 2d 619 (5th Cir. 1967); *Commonwealth v. Keeler*, 216 Pa. Super. 193, 264 A. 2d 407 (1970); *Miller v. State*, 249 Ark. 3, 457 S.W. 2d 848 (1970); *People v. Shaw*, 381 Mich. 467, 164 N.W. 2d 7 (1969); *People v. Zpata*, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (1963), cert. denied, 377 U.S. 406 (1964); *Eaddy v. People*, 115 Colo. 488, 174 P. 2d 717 (1946). Furthermore, the American Bar Association’s Standards for Criminal Justice also disapprove of allowing a criminal defendant to stand trial in the presence of the jury while wearing prison clothes. ABA Project on Standards for Criminal Justice, Trial by Jury § 4.1(b), p. 91 (App. Draft 1968).

prison clothes. *Id.* at 510. The defendant was ultimately convicted of assault with intent to murder with malice, and the defendant filed a petition for a writ of habeas corpus. *Id.* at 503. The Supreme Court of the United States held that even though it was unconstitutional for the state to require the defendant to stand trial in prison clothes, “the failure to make an objection to the court as to being tried in such clothes . . . is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.”⁴ *Id.* at 512-13.

Here, the trial court issued an order title “Order Concerning Trial Security.” (A.R. Vol. I, 513). Within the order, the trial court stated that because of Mr. Payne’s actions in prior courtroom proceedings, Mr. Payne was being ordered to wear prison clothes if he did not change into street clothes. (A.R. Vol. I, 515). The trial court cloaked the order requiring Mr. Payne to appear in prison clothes if he refused to change into his street clothes by stating that it was being done for security reasons. (*See generally*, A.R. Vol. I, 513-15). This was an incorrect ruling by the trial court because the type of clothing worn by Mr. Payne was not going to provide any more or less security in the courtroom.⁵ Furthermore, the trial court could have taken action that was much less prejudicial than requiring Mr.

⁴ Although the Williams case states that the failure to object negates the violation, that case was decided before this Court adopted the “plain error” doctrine. See Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). This Court stated that in order “[t]o trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, Miller, 194 W. Va. at 7, 459 S.E.2d at 118. In Miller, the Court distinguished between a “waiver” and a “forfeiture” of known rights. Id. “When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” Id. However, a “mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error.” Id. In order for an error to be considered “plain,” it must be “clear” or “obvious.” Id. In the present case, the trial court’s order compelling Mr. Payne to stand trial substantially affected his right to be presumed innocent until proven guilty. Furthermore, the trial court’s order denied Mr. Payne constitutional right to equal protection under the law. Also, the error was plain because it should have been clear to the trial court that compelling Mr. Payne to wear prison clothes in the presence of the jury was prejudicial and substantially affected Mr. Payne’s rights. Furthermore, the Williams case, *supra*, was decided nearly forty (40) years before Mr. Payne’s trial. Thus, the trial court should have known that such a measure was extremely prejudicial to Mr. Payne and affected Mr. Payne’s right to a fair trial.

⁵ The trial court also ordered that Mr. Payne wear “locomotion-restrictive humane leg restraints” under Mr. Payne’s clothing. (A.R. Vol. I, 515). This requirement is more closely-related to courtroom security than requiring Mr. Payne to wear prison clothing.

Payne to appear in person while wearing prison clothing in the presence of the jury. In fact, the trial court, on numerous occasions, told Mr. Payne that if he refused to come to any part of his trial, the trial court would find that he was waiving his right to be present at his proceedings. (See e.g., A.R. Vol. II, 1046). Thus, the trial court could have simply started voir dire and conducted the trial without Mr. Payne being present. It would have been much less prejudicial to Mr. Payne had he not been there at all as opposed to appearing in front of the jury while wearing prison clothes. Thus, the trial court committed plain error by requiring Mr. Payne to be present during voir dire while wearing prison clothing in the presence of the jury.

Also, similar to *Williams, supra*, Mr. Payne was compelled by the trial court wear prison clothes during voir dire. (A.R. Vol. I, 515). Although Mr. Payne's counsel did not object to Mr. Payne donning prison clothing in the presence of the jury, Mr. Payne's counsel did not draw attention to the prison clothes during voir dire. In contrast to *Williams*, Mr. Payne's attorney did not intentionally draw attention to Mr. Payne's prison clothes. Furthermore, in contrast to *Henderson, supra*, Mr. Payne was not incarcerated while the alleged murder took place. Thus, although no objection was formally place upon the record, the compulsion to wear the prison clothes still violated Mr. Payne's constitutional right to a fair trial.

Consistent with the Fourteenth Amendment, the trial court committed reversible error by compelling Mr. Payne to wear prison clothes in the presence of the jury. Such compulsion affected Mr. Payne's right to be innocent until proven guilty. Such error requires reversal of Mr. Payne's conviction. Furthermore, similar to *Williams, supra*, Mr.

Payne was denied equal protection because he was discriminated against for not being able to post bond following his arrest.

Based on the foregoing, this Court should reverse Mr. Payne's conviction and grant him a new trial. Furthermore, this Court should instruct the trial court that Mr. Payne is not to be compelled to wear prison clothes during the trial, nor should he be compelled to wear prison clothes at any time that he will be in the presence of the jury.

V. These cumulative errors were not harmless beyond a reasonable doubt

Constitutional errors may not be considered harmless unless the state "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

Chapman v. California, 386 U.S. 18, 24 (1967). See also *State v. Farmer*, Syl. Pt. 3, 454 S.E.2d 378 (W.Va. 1994); *State v. Thomas*, Syl. Pt. 20, 203 S.E.2d 445 (W.Va. 1974).

This Court has previously commented on the evidence against Mr. Payne:

In evaluating the strength of the prosecution's case at trial, we begin by noting that the involvement of alleged co-conspirator Payne in Poindexter's death appears manifest. The surveillance videos revealed that Payne had been wearing a baseball cap prior to the murder, but not afterward. A baseball cap discovered near the crime scene was tested and found to contain DNA consistent with Payne's. A search of Payne's living quarters turned up an ammunition magazine with four .25 caliber rounds; forensic analysis revealed that at least one of the loaded rounds had once been extracted by the same weapon that expelled the .25 caliber shell casing retrieved from the scene. During that same search, the police seized a pair of boots that matched one set of the footwear impressions found beneath Poindexter's window.

State v. Bouie, 14-0639, (W.Va. Sup. Ct., June 16, 2015). It should be noted that a minimum of five separate men were outside the Quarry Apartments that night: Bouie, Payne, Moran, Hickey, and Thomas. (A.R. Vol II, 1159-65.) The State did not charge three of those men with a crime, and two testified for the prosecution at both Mr. Payne and Mr. Bouie's trials.

It is clear from the footwear impressions that only two individuals approached the victim's apartment: Mr. Bouie, because he was the only one wearing tennis shoes, and another individual who wore size 10 ½ Timberland boots.

The DNA test of the Pittsburgh Pirates cap showed that Mr. Payne "can't be excluded" as a contributor and discovered another person had also contributed genetic material. (*Id.* at 1798.) Further, the cap was found on the far side of the parking lot where it had remained for a full day. (*Id.* at 1385.)

Importantly, the defense showed that Mr. Moran also wore size 10 ½ shoes and owned a pair of Timberland boots, size unknown. (*Id.* at 1970.) A DNA test performed on the boots found in Mr. Payne's residence excluded him from contributing the genetic material found on them. (*Id.* at 1807). Further, the boots owned by Mr. Payne were merely "consistent" with the impressions left at the scene and could have been made by any other pair of size 10 ½ Timberland boots. (*Id.* at 1974.)

Also, Mr. Moran is a smoker whose favorite brand is Black and Mild. (*Id.* at 1970.) A cigarette butt, consistent with the Black and Mild brand, was photographed near the window where the shooting occurred. (*Id.*)

As such, the defense presented a plausible alternate theory of the crime whereby Mr. Payne was innocently standing at the far end of the parking lot while Mr. Moran and Mr. Bouie committed the felony murder. (*Id.* at 1970-73.)

The improper introduction of the ammunition magazine, the boots illegally seized from Mr. Payne, the prejudicial pretrial publicity, or displaying him to the jury in jail clothing, individually and the in the aggregate almost certainly contributed to the verdict. The State

certainly cannot meet its burden outlined in *Chapman* that the jury would have convicted Mr. Payne beyond a reasonable doubt without the existence of any of these errors.

As such, these errors, either individually or cumulative, should not be dismissed as “harmless error.”

CONCLUSION

For the reasons above, the Petitioner respectfully requests that this Court reverse the underlying convictions in the Circuit Court of Harrison County and remand the matter to that court for further proceedings with instructions to change venue and/or venire, not display Mr. Payne to the jury in jail clothes, and suppress all evidence from the illegal searches and seizures at the home of Mr. Starks and 118 Anderson Street.

Respectfully submitted,



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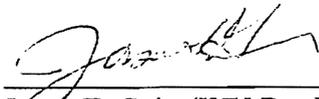
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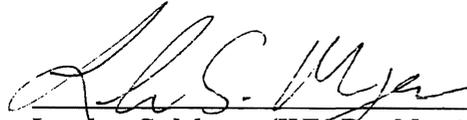
CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2015, true and accurate copies of the foregoing **Petitioner's Brief** was mailed by first class, postage pre-paid, to the following:

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