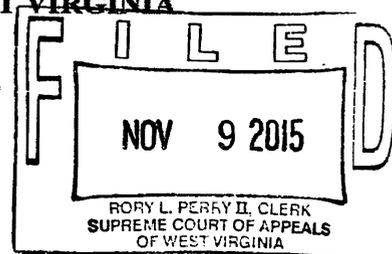


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

Counsel For Petitioner:

Jason T. Gain (WV Bar #12353)
Gain Law Offices
103 E. Main Street
Bridgeport, WV 26330
Phone: (304) 842-0842
Fax: (304) 842-0844
jason.gain@gainlawoffices.com

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

After careful review of the State's Response Brief, the Petitioner continues to believe 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

The State devotes the first twenty-seven pages of its forty page brief to supplement the Petitioner's statement of the case in an attempt to show this Court that Mr. Payne is a really, really bad guy. Of course, such issue is not before this Court, nor is it ever before any court made of human beings. No matter the personal character of Mr. Payne, or the crimes which he is accused, he is entitled to the protections of privacy in his "persons, papers, houses, and effects" by the exact same standards as the most prominent of citizens. U.S. CONST. Amend. IV; XIV.

The Petitioner believes that the State has failed to respond to his arguments regarding jail clothing and change of venue. He continues to assert that there was a lesser alternative, absenting him from the trial, instead of presenting him to the jury pool shackled and dressed in orange. He likewise contends that regardless of statements of jurors, the sole murder in

Clarksburg that year had prejudiced the community against him. He rests upon the facts and legal arguments put forth in the initial brief with respect to those two assignments of error.

The Response devotes a mere eight pages to two separate questions of constitutional importance related to the privacy of all West Virginians in their homes. The Response has failed to rebut the controlling authority from this Court, the United States Supreme Court, and the persuasive authority from other courts which have examined the issues of third party consent searches of personal effects and bare bones search warrant affidavits.

The State's arguments are deficient as they would allow virtually no protection for people in their homes, and would allow intrusions into that privacy based upon faulty notions of consent and search warrants to be issued based on the flimsiest of statements.

- I. *The State's argument regarding third party consent searches would allow searches of one's personal effects based upon the purported consent of person who had no actual or apparent authority to consent.*

The State proposes a rule whereby a roommate has the authority to consent to the search of the entirety of another roommate's personal effects located in the shared home, and the interior of those effects, no matter how intimate, so long as the first roommate does not place the effects under lock and key. *See* Response Brief at 30; 33.

It attempts to justify this rule by a careful cherry picking of *dicta* from cases which stand for the uncontroversial proposition that sharing space with another allows the other person to invite guests into the home who may see their personal property or wrongfully misappropriate it. *See, e.g., State v. Dorsey*, 762 S.E.2d 584, 595 (W.Va. 2014) ("his possessions will not be disturbed by anyone but his host and *those his host allows inside*") (emphasis in original) (internal citations omitted).

It does not follow from this rather obvious fact that the mere act of a guest leaving a personal effect in a shared home turns into a positive grant of authority to the host, the host's guests, or the host's agents to search through his wallet, cell phone, diary, nightstand, toiletry items, or his clothing or jacket pockets. Neither property law nor "the authority recognized by customary social usage..." permits this conversion. *Georgia v. Randolph*, 547 U.S. 103, 103 (2006).

The State's argument would eviscerate the controlling authority from the United States Supreme Court which has consistently held that in order for such third party consent search to be valid, the third party must have "common authority," "mutual use," or a "sufficient relationship" to the "effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974) (emphasis added). It is clear from the record that the jacket at issue was not one worn by both Mr. Starks and Mr. Payne. The two parties did not buy the jacket as part of a joint venture. The only relationship between Mr. Starks and the jacket was the mere fact that it was located in the home he shared with Mr. Payne.

The Court's holding in *Frazier* illustrates the impropriety of the State's argument:

Petitioner's final contention can be dismissed rather quickly. He argues that the trial judge erred in permitting some clothing seized from petitioner's duffel bag to be introduced into evidence. This duffel bag was being used jointly by petitioner and his cousin Rawls, and it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the duffel bag, and both Rawls and his mother consented to its search. During this search, the officers came upon petitioner's clothing, and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it. *Harris v. United States*, 390 U. S. 234 (1968); *Warden v. Hayden*, 387 U. S. 294 (1967). Petitioner argues that Rawls only had actual permission to use one compartment of the bag, and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to

have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case.

Frazier v. Cupp, 394 U.S. 731, 740 (1969). If the State's argument was a correct analysis of the law, this holding would have read, "Since the duffel bag was located in Rawls' home, Rawls had authority to consent to its search" instead of reading, "Since Rawls was a joint user of the bag, he clearly had authority to consent to the search." *Id.*

In this matter, Mr. Starks was not a "joint user" of the jacket and, as such, "clearly" did not have authority to consent to the search. *Id.*

The "metaphysical subtleties" discussed by the Court, and mentioned by the State, Response at 32, were directed towards the argument that Rawls only had permission to use an individual pocket in the duffel bag and not the remainder of the bag. Mr. Payne is not engaging in such subtleties by claiming that Mr. Starks only had authority over, say, the left inner side pocket of the jacket, and not the particular pocket where the magazine was found. Such a construction of the third party consent rulings would needlessly cause confusion and difficulties in administration and enforcement.

The bright line rule created by the Supreme Court therefore does enlarge the scope of third party consent to the entire premises as argued by the State. The specific contours of the limits of a third party consent over *another's* personal property is one of first impression in West Virginia.

There is very little persuasive authority from other states, but those that have addressed the issue have firmly come down on Mr. Payne's side and held that when a police officer knows that an item of personal property does not belong to the person giving consent, the consent is not valid. *See, e.g., People v. Stage*, 7 Cal.App.3d 681 (1970) (holding a car owner's consent to search a car was not valid consent to search the pockets of a jacket lying in the car and belonging

to another passenger.); *People v. LaBelle*, 729 NW 2d 525 (Mich. App. 2006) (suppressing the search of an unlocked backpack located in a vehicle when the police did not have reason to believe that the driver consenting to the search was the owner of the backpack); *People v. Cruz*, 61 Cal. 2d 861, 866 (Cal. 1964) (holding “The general consent given by Ann and Susan that the officers could ‘look around’ did not authorize Agent Van Raam to open and search suitcases and boxes that he had been informed were the property of third persons....”); *State v. Drake*, 343 So. 2d 1336 (Fla. Dist. Ct. App. 1977) (search upheld only because officers had no reason to know backpack was defendant’s). This Court should take this opportunity to provide protections for West Virginians in their items of personal property.

The State next claims that because Mr. Payne only stayed at the Starks’ home “off and on,” Response at 29, it was unknown if he “even had a key to the residence,” *id.*, or that four other people lived in in the home, *id.*, that Mr. Payne somehow enjoyed a diminished expectation of privacy in the residence. Such a contention is unsupported by any published decision.

There are no “degrees of privacy interests” inside a home. Either a person is an overnight guest and is entitled to the same Fourth Amendment protection as the owner, *Minnesota v. Olson*, 495 U.S. 91 (1990), or is a casual visitor without standing to challenge a search. *Minnesota v. Carter*, 525 U.S. 83 (1998). Neither of these cases placed any importance on the possession of a key, the number of overnight stays, or the number of other residents in the home, nor do they discuss a lesser expectation of privacy in a shared home.

In further support of its diminished expectation of privacy argument, the State admits that Mr. Payne had a possessory interest in the jacket, but claims that “Petitioner did nothing to ensure that he would retain a solitary privacy interest in his jacket, which he haphazardly left in

an open, communal area of the household.” Response at 33. It mentions elsewhere that the jacket was not “secured in such a way as to ensure a sole privacy interest.” *Id.* at 32.

The State is attempting to summon the *Katz* doctrine that “a claim of protection under the Fourth Amendment and the right to challenge the legality of a search depends not upon a person’s property right in the invaded place or article of personal property, but upon whether the person has a legitimate expectation of privacy in the invaded place or thing.” *Katz v. United States*, 389 U.S. 347, 353 (1967); Response at 28. The State argues that Mr. Payne’s possessory interest in the jacket is irrelevant because he had no reasonable expectation of privacy in it where it was placed. Response at 32.

However, the *Katz* formulation was not a limitation, but an expansion of Fourth Amendment protections. *United States v. Jones*, 123 S.Ct. 945, 952 (2012) (“The *Katz* reasonable-expectation-of-privacy test has been *added* to, not *substituted* for, the common-law trespassory test.”) (emphasis in original).

Although Mr. Katz did not have a possessory interest in the phone booth in which he was making his illegal gambling phone calls, he had a reasonable expectation of privacy there. However, *Jones* discounted the notion that the *Katz* doctrine was now the only test. “Fourth Amendment rights do not rise or fall with the *Katz* formulation.” *Id.* at 950. “[F]or most of our history the Fourth Amendment was understood to embody a particularly concern for government trespass upon the areas (‘persons, papers, houses, and effects’) it enumerates. *Katz* did not repudiate that understanding.” *Id.*

In *Jones*, the police placed a GPS tracking device on the exterior of Jones’ automobile. The government argued that since Jones exposed the exterior of his automobile to the public, he had no reasonable expectation of privacy in the exterior of his car. Further, as the car’s

movements were all in public view, he likewise had no reasonable expectation of privacy in the movements of his car as those movements could be monitored by police simply by following him. However, the Court ruled that by trespassing upon his property, the data collected should have been suppressed.

The trespass upon Mr. Payne's property in this case goes even further than the trespass in *Jones*. Instead of merely attaching something to the exterior of Mr. Payne's jacket, the police invaded the interior to search for other items. A proper analogy to this case would be if the police had searched Mr. Jones' car without a warrant under the guise that he had "haphazardly" left it on the street in full view of the public, or because he failed to lock the door he had somehow invited the world to search it. Response at 33.

Regardless of the ultimate determination of whether Mr. Payne had a reasonable expectation of privacy in his jacket, the search amounted to a trespass on the jacket and the property inside it, was therefore unreasonable, and the fruits of that search should be suppressed.

Second, notwithstanding the trespass argument, Mr. Payne undoubtedly had a reasonable expectation of privacy in the *contents* of his jacket. The property in question that Mr. Payne intended to shield from prying government eyes is not the exterior of the jacket, but the magazine, or any other item contained in the pockets. Of course, when he leaves the jacket in a common area, any person who is lawfully in the house may observe the jacket and notice things in plain view. For example, if there was blood located on the exterior of the jacket, then Mr. Payne would have no reasonable argument for its suppression.

The State makes the argument that because his jacket was exposed to any visitors that Mr. Starks would permit, that the interior of that jacket and the contents contained therein were exposed to public view. Such an argument has no limiting principle. As an absurd example, the

exterior of a person's home is visible to passersby on the street, but this fact does not suggest that a person has no interest in the privacy of the home's contents and that the home may be searched at will, even if the front door is unlocked. Likewise, the police search may not search any car parked on the street on the grounds that the car has been exposed to public view. It is unclear what privacy interests *anyone* would have in an item of personal property under the State's formulation.

Finally, the State attempts to argue that Mr. Payne had abandoned the jacket and therefore Mr. Starks could use it as he saw fit. With respect to the State, this argument is absurd on its face. The State concedes that Mr. Payne was a frequent overnight guest at the Starks' home and would sleep there "off and on." Response at 29.

On January 13, 2010, at approximately four a.m., Mr. Starks noticed that Mr. Payne had entered his home and left the jacket at issue and his cell phone. (A.R. Vol II, 1358-59). Mr. Payne, came back "briefly" at some time thereafter. *Id.* at 1346. The purported consent search occurred on January 15, 2010 near ten p.m. (A.R. Vol I, 162). Scarcely forty-two *hours*, less than two days, had passed since the time Mr. Payne left the jacket at the residence. Although there is no specific time period for abandonment, it is clearly improper to suggest that by leaving a jacket at a home for two days, where he frequently stayed as an overnight guest, suggests that Mr. Payne "voluntarily discarded, left behind, or otherwise relinquished interest" in it. Response at 30; *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973). A contrary holding should make every West Virginian very cautious about taking a weekend vacation.

As such, the magazine was illegally seized from Mr. Payne's jacket and should have been suppressed.

II. The State has failed to rebut Mr. Payne's assertion that the search warrant affidavit for 118 Anderson Street did not contain sufficient facts to justify its issuance.

As noted in the Petitioner's Brief, there are five separate reasons in addition to its reliance on the improperly seized magazine why the affidavit for the search warrant is invalid. Pet. Brief at 6. The State attempts to discredit three of those allegations with scarcely two paragraphs of argument, while reasserting the trial court's conclusory rulings for the other two.

First, the affidavit contains no facts whatsoever to conclude that 118 Anderson Street was Mr. Payne's residence or that such residence had any connection to the alleged crime. (A.R. Vol II, 2035). Neither the trial court nor the State have addressed this basic issue.

The State argues that it flows from the warrant that evidence of the crime would be found at Mr. Payne's residence. Response at 34. However, the knowledge that 118 Anderson Street was Mr. Payne's residence, in some way connected with Mr. Payne, or otherwise connected with this crime, was not contained in the affidavit. *State v. Adkins*, 346 S.E.2d 762, 767 (W.Va. 1986) (“[The determination of probable cause for the issuance of a search warrant must be based solely on the facts contained in the four corners of the affidavit.”) (emphasis added).

It seems as if the affiant officer had recited all of the other statements in the affidavit but put “1716 Kanawha Blvd. E. in Charleston, WV; County of Kanawha—a brick three story residence, located at the corner of Kanawha Blvd. and Greenbrier St.” as the place to be searched, the State and the trial court would believe that Governor and Mrs. Tomblin should be lawfully subject to a search of their home based upon this *exact* affidavit.

The search warrant affidavit is fatally flawed based on this discrepancy alone and cannot be saved under a “totality of the circumstances” argument. Response at 34. No matter how one views the search warrant application, expands it, adds inferences, turns it sideways, or looks at

penumbras, the knowledge that 118 Anderson Street was Mr. Payne's residence comes from a source outside of the affidavit and may not be considered for the probable cause determination. *Adkins*, 346 S.E.2d at 767.

As such, no search of 118 Anderson Street should have taken place by virtue of this affidavit and warrant.

Both the Petitioner and the State are in agreement that the statement: "According to an individual, [Petitioner] has throughout the night attempted by make contact with the victim by phone,..." should be stricken from the affidavit for determination of probable cause purposes. (A.R., Vol II, 2035); Response at 35. However, the trial court erred by limiting the conclusory statement so as to only disallow a search of 118 Anderson Street for a cellular phone. (A.R. Vol. I, 442). The trial court should have done what both the Petitioner and Respondent agree is proper: strike the statement from the affidavit in its entirety. *State v. Thompson*, 358 S.E.2d 815, 817 (W.Va. 1987).

The conclusory statement that the Pirate hat found at the scene was Mr. Payne's should likewise be stricken for the reasons discussed. Pet. Brief 19-20. Contrary to the State's assertion, Mr. Payne does not contend that this statement, by itself, should "invalidate the warrant." Response at 35. This response, like all conclusory statements, should be stricken from the warrant and the remaining valid statements use to determine if probable cause exists. *Thompson*, 358 S.E.2d at 817.

Although the State contends that this "assertion was based upon strong video evidence," Response at 35, such conclusions are improper in a search warrant affidavit. *State v. DeSpain*, 81 S.E.2d 914, 916 (W.Va. 1954). A statement that a suspect was guilty of the crime charged

may be supported by strong evidence, but could never act as a proper factual allegation in a search warrant application.

The State next contends that the lack of specificity regarding where Mr. Payne was seen wearing the hat “bears no weight as to probable cause, considering that the crime was committed, and Petitioner was previously and subsequently spotted, in a local area.” Response at 35. The fact that Mr. Payne was “previously...spotted [] in a local area” is contained nowhere in the affidavit. (A.R. Vol II, 2035); *Adkins*, 346 S.E.2d at 767. As in *Thompson*, this fact should not be used for a probable cause determination.

The State further fails to address the argument that there is no nexus between the facts outlined in the affidavit and the things sought to be seized. The facts as stated in the affidavit bear no relationship to the boots, shoes, knives, box cutters, cell phones, or pagers that the officer wished to seize. (A.R. Vol. II, 2035).

The State complains that “[a]side from nothing Petitioner’s overbearing insinuation that police should detail all aspects of a crime, including those yet unproven or undiscovered, while contrastingly arguing that police should be barred from doing the same while seeking the issuance of a warrant....” Response at 34. Apart from requiring Petitioner’s counsel to verify that “contrastingly” is actually a real word, the State seems to suggest that Mr. Payne is being unfair to affiant officer and requiring them to recite *ad nauseum* all aspects of the crime committed in a search warrant affidavit. He is not suggesting any such thing. He is merely asking this Court to affirm it’s holding in *Adkins* that the police, before they search my home, Governor Tomblin’s home, or members of this Court’s homes, must do more than blandly regurgitate in a single paragraph the fact that a crime was committed. Thousands of Americans died in a revolutionary war against the British for this basic freedom against general warrants.

Our police officers have been educated in the public schools of West Virginia and are fully capable of putting forward the who, what, where, when, and why needed to invade the privacy of another West Virginian in his home. The Constitution demands no less.

Many citizens complain of criminals “getting off” on a “technicality.” The right to privacy and the right to be left alone are not technicalities in a free society. They must be jealously guarded, and the judicial branch of government is the one branch in the best position to affirm these rights. As such, this Court respectfully must do so.

For the foregoing reasons, the search warrant affidavit did not set forth sufficient probable cause for a search of 118 Anderson Street, and the fruits of that search should have been suppressed.

III. These errors were not harmless beyond a reasonable doubt

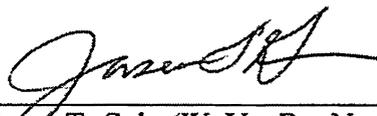
The State uses the familiar appellee argument of “harmless error.” The items sought to be suppressed were a magazine containing cartridges which were shown to have been cycled through the murder weapon and boots which were consistent with footprints found at the crime scene. It defies logic to say that the State has proven that the introduction of such incriminating items were harmless beyond a reasonable doubt. *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).

CONCLUSION

For the reasons above and those contained in the Petitioner’s brief previously submitted, 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,

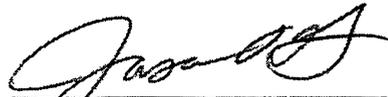


Jason T. Gain (W. Va. Bar No. 12353)
jason.gain@gainlawoffices.com
Gain Law Offices
103 E. Main St.
Bridgeport, West Virginia, 26330
Telephone: (304) 842-0842
Facsimile: (304) 223-0100
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I have caused a copy of this Petitioner's Reply Brief to be placed in first class mail, postage prepaid to Shannon Frederick Kiser, Counsel for the Respondent, West Virginia Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25301 on this 6th day of November, 2015.

Respectfully submitted,



Jason T. Gain (W. Va. Bar No. 12353)

Jason.Gain@gainlawoffices.com

Gain Law Offices

103 E. Main St.

Bridgeport, West Virginia, 26330

Telephone: (304) 842-0842

Facsimile: (304) 223-0100

Counsel for Petitioner