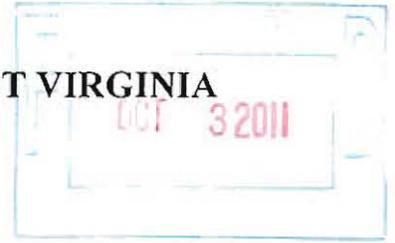


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0643



STATE OF WEST VIRGINIA,
RESPONDENT,

V.

JOSHAWA KEITH CLARK,
PETITIONER.

Appeal from a final order of
the Circuit Court of Cabell
County (10-F-6)

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The trial court erred when it denied Petitioner's motion to suppress all evidence flowing from the State's illegal and unconstitutional subpoena of Petitioner's phone records.

STATEMENT OF THE CASE

In November 2008, the Marquee Cinemas in Huntington was robbed. (A.R. 58). No arrests were made and the case remains unsolved to this day. In July 2009, the same cinema was robbed again. Petitioner Josh Clark, an employee of the cinema at the time, was working during both robberies. (A.R. 53-55). Huntington Police Department Detective Cass McMillian was assigned the investigation of the July robbery. Id. At the initial stage of his investigation, McMillian asked a colleague, DEA Special Agent Tom Bevins, to use a DEA administrative subpoena to seize Clark's phone records for July 12-13, 2009. (A.R. 470-473). Over the course of the preliminary hearing, the suppression hearing and the trial there were varying reasons given for using this approach.

At the preliminary hearing, McMillian testified as follows:

- Q. Okay. Did you – Cass, did you become involved in the investigation pretty much when the first one occurred in July?
- A. Yes.
- Q. How essentially did Huntington become involved?
- A. We responded to the call. Then I was called out on the – in regards to the follow-up investigation that night.
- Q. What did you do in your investigation to determine who was involved in this particular robbery?
- A. Through the investigation, we obtained who was working that night along with who had been working previously. They had had a previous robbery.

Q. Okay. So that we're clear what we're talking about, are we talking now on July 13th of 2009?

A. Yes.

Q. Okay. So right from that, that robbery – the first robbery that we're here on today, you started finding out who was working on a prior robbery is that correct?

A. Correct. There had been a robbery in November of '08 –

Q. Okay.

A. -- at the same place.

Q. At the Marquee Cinemas. Okay.

And when you say who was working, who was working at the cinema?

A. Correct.

Q. All right. Go ahead.

A. Based on that, Joshua Clark was our common connector in that.

Q. All right. I'm going to stop you as we go along. You say he's your common connector.

A. He was –

Q. Did you make any determination as to if there was anyone that was working on the date of the July 13th, 2009 robbery and the date of this prior one that you had in 2008 in the fall?

A. Yes, Joshua [sic] Clark.

*** [witness identifies Clark for the purposes of the record]

Q. So after you determined that he was there at both of those – as an employee? Am I correct?

A. Yes.

Q. -- what did you do after that?

A. We turned around. We obtained his cell phone records through a subpoena. And when we obtained his cell phone records, we turned around and started looking at the numbers which he had called. There was one common number on there that was reoccurring within minutes of each other that night all evening [during the robbery].

Q. And what did you do after you found that out?

A. We obtained a subpoena for the number in question, the unknown number, and found it to come back to Dustin Shaver.

Q. All right. What did you do after you found that out?

A. We started an investigation on Joshua [sic] Clark and Dustin Shaver as far as what their connections were. And we learned through that investigation that they had been friends in school.

Q. All right. What did you do after that?

A. After that, we then started following Mr. Clark periodically to see where he was going to, which turned out nothing of any value to us until this most recent robbery [in October 2009].

(A.R. 53-58).

After indictment, however, the circumstances surrounding the seizure of Clark's phone records were described differently by the State. The Defendant filed a motion to suppress all evidence flowing from the illegally-obtained phone records. (A.R. 79-80).

No witnesses testified at the hearing on the Defendant's motion. However, the State argued that J.T. Combs, not McMillian, initiated the investigation. (A.R. 92-93).

Huntington Police officer J.T. Combs, the state proffered,

is with the ATF [task force], but he also worked over at the Marquee Cinema as a moonlight-type job, and he observed that this defendant had a lot of new things. And so he got to talking to the people at the Cinema

and wanted to know where he had gotten these things or how he had gotten the money for these things, and that's how the investigation began ... that's where the probable cause began. There was also a video of this defendant and the co-defendant at Marcum Terrace together the night of the July robbery.

(A.R. 93). The State misstated the evidence, however, because the video of Clark and Shaver together at Marcum Terrace was from the night of the October robbery, not the night of the July robbery. (A.R. 616-621). Both Shaver and Clark lived in Marcum Terrace. (A.R. 335, 349, 1152). Clark's phone records were seized two months before the October 2009 robbery occurred. (A.R. 53-58, 474). When Judge Ferguson inquired about Clark's argument that the subpoena used was to be used for drug cases only, the State responded "[w]ell, they didn't know at the time what they were dealing with. They didn't know if it was a drug related case at the time when they initiated the subpoena." (A.R. 93-94). Despite the State's assertion to the contrary, it is abundantly clear that at the time the phone records were subpoenaed, a robbery at the Marquee Cinema had occurred, not a drug transaction.

Moreover, when the order denying the motion to suppress was entered, some allegations attributed to Huntington Police officer J.T. Combs, justifying issuance of the subpoena, appeared in the order despite the fact that they were never mentioned by the State during the hearing. (A.R. 102-06, 137-38, 143). At a subsequent hearing the defense objected to the presence of these untested allegations in the order.¹ (A.R. 137-38). At this hearing, Prosecutor Jara Howard admitted that she had *ex parte*

¹ The allegations objected-to by the defense: "Sgt. JT Combs noticed that the Defendant had many new items that he likely could not afford on minimum wage. These items included a new motorcycle, a new motorcycle jacket and helmet. Sgt. Combs also works for the Huntington Housing Authority and knew the Defendant lived at Marcum Terrace, another indicator that he likely would be unable to afford these items. Sgt Combs asked a manager at the Cinema about the Defendant and his newly acquired items and her response was that he had received a check from the Marines because he was going to enlist. HPD looked into this assertion and determined it was not true."

communications with the Court's law clerk and that she provided said clerk with the alleged facts without giving notice or opportunity to the defense to confront the allegations. (A.R. 143). Because of Howard's improper *ex parte* communications, an amended order denying the motion to suppress was entered after the trial. (A.R. 1094-97). While the amended order deleted some specifics of Combs' untested allegations regarding an investigation prior to issuance of the subpoena, the substance of Combs' supposed allegations remained in the amended order. (A.R. 1094-97, 102-06).

At trial, no testimony was presented about Clark's possible involvement with drugs. McMillian was the only State witness at trial that was involved in the investigation prior to issuance of the subpoena and he did not mention anything about Clark's alleged drug activity as justification for the subpoena. Rather, McMillian testified that he caused Clark's phone records to be subpoenaed through DEA Special Agent Tom Bevins after he saw "suspicious" things in the video of the July robbery. (A.R. 307, 471). McMillian said that he found it suspicious that the robber turned his back to Clark during the July robbery and allowed Clark to use the phone. (A.R. 301-02). Clark testified, however, that the robber instructed him to use the phone to call his manager. (A.R. 842). McMillian also found it suspicious that Shaver pushed the manager but he wasn't violent toward Clark. *Id.* Clark was tied up and treated roughly during the October robbery. (A.R. 470). Further, on cross-examination McMillian testified that he caused the DEA subpoena to be issued because Marquee Cinemas is a "multi-state business," therefore the Federal Government may want to get involved in the investigation of the robbery. (A.R. 471-472). Although the State went to great lengths at the pretrial stage to create the impression that Clark's phone records were subpoenaed

because of suspected drug activity, at trial McMillian was unable to explain why a DEA subpoena was used, although he admitted that the person he asked to get the records, Tom Bevins, is a DEA agent. (A.R. 472).

It seems quite unlikely that all of the different explanations of the circumstances surrounding the subpoena of Clark's phone records are true. McMillian testified to one story during the preliminary hearing, prosecutor Jara Howard told another story during the pretrial hearing, and McMillian told a third story during the trial. It appears from these varying rationalizations and retroactive justifications that at some point the State made the decision to say whatever it must to ensure the validity of the subpoena. This impression is bolstered by the prosecutor's unethical conduct during the crafting of the order denying the motion to suppress. See West Virginia Rules of Professional Conduct, Rule 3.5. The Petitioner submits that the "common connector" justification described by McMillian during the preliminary hearing is the most likely grounds for issuance of the subpoena because this hearing occurred shortly after the arrest, before the State's apparent realization of the need to bolster the factual and legal bases for the subpoena.

What is not disputed, however, is that the investigation of the July robbery went cold until the October robbery occurred. (A.R. 473). After viewing the cinema's surveillance video of the October robbery, McMillian thought the robber was the same person that robbed the cinema in July, however the identity of the person was unknown. (A.R. 58). Based upon the lead from Clark's July phone records and the follow-up investigation that tied Clark and Shaver together during the July robbery, Detective Sperry showed a photo lineup containing Shaver's picture to Felicia Gross, who was working the ticket window during the October robbery. (A.R. 319). Gross picked

Shaver's picture and said she had sold him a ticket on the night of the October robbery. (A.R. 319-20). Also, based upon the lead from Clark's phone records, police viewed surveillance video from Marcum Terrace that showed Clark and Shaver together a few hours after the October robbery. (A.R. 320). Subsequently, an arrest warrant was issued for Shaver and a search warrant was issued for Clark's residence. (A.R. 63, 321, 1152-53). Shaver and Clark were then interrogated by the Huntington Police Department and immediately afterward they were both taken into custody and charged with conspiracy and first degree robbery. (A.R. 321, 412). Clark has never admitted involvement in the robberies and Shaver did not implicate Clark until after Clark was arrested. (A.R. 322-411, 1204-75).

SUMMARY OF ARGUMENT

First, the subpoena for Petitioner's phone records violates Petitioner's legitimate expectation of privacy in the phone numbers he dials. Second, even if Petitioner does not have a legitimate expectation of privacy, he has standing to challenge the illegal subpoena. Third, the subpoena is illegal because administrative subpoenas in robbery investigations are not authorized by State statute. Fourth, the subpoena was unlawfully issued under the Federal Controlled Substances Act.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under the West Virginia Rules of Appellate Procedure, Rule 18(a) criteria. A Rule 20 oral argument should be scheduled because this case involves issues of first impression, of fundamental importance, and constitutional questions regarding the validity of the lower court's ruling.

ARGUMENT

- I. Clark's phone records were obtained in violation of his legitimate expectation of privacy guaranteed by Article III, § 6 of the West Virginia Constitution.
 - A. Fourth Amendment jurisprudence in this area uses flawed logic and creates undesirable results.

The United States Supreme Court recognizes that citizens have an expectation of privacy in the content of their telephone conversations. See Katz v. United States, 389 U.S. 347, 352 (1967). Justice Stewart, writing for the majority, reasoned that every citizen "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private conversation." Id. at 352.

After Katz, however, the Supreme Court used an assumption of risk analysis to defeat citizens' expectation of privacy claims in their phone records and bank records that are held by third parties. See Smith v. Maryland, 442 U.S. 735 (1979) (telephone subscribers voluntarily disclose to the telephone company the phone numbers they dial and assume the risk that those numbers will be divulged to the Government); United States v. Miller, 425 U.S. 435 (1971) (depositors voluntarily reveal their affairs to the bank and assume the risk of disclosure of those records to the Government). The assumption of risk analysis was first used by the Court to find that persons do not have a legitimate expectation of privacy when speaking in the presence of undercover government agents. See, e.g., Lopez v. United States, 373 U.S. 427, 429 (1963); Hoffa v. United States, 385 U.S. 293, 302-03 (1966); United States v. White, 401 U.S. 745, 751-52 (1971). The extension of the assumption of risk doctrine to defeat the expectation of privacy in a person's dialed phone numbers and bank records understandably encouraged vigorous dissents in the Smith and Miller cases as well as statutes to contain the effect of

these rulings. See 18 U.S.C. § 2703 (2011)²; 12 U.S.C. § 3401 (2011)³; W.Va. Code § 31A-2A-1 (2011)⁴; see also 132 Cong. Rec. H. 4039 (daily ed. Jun 23, 1986) (statement of Rep. Kastenmeier)⁵.

² 18 U.S.C. § 2703, the Electronic Communications Privacy Act of 1986, allows the government to subpoena a subscriber's phone records "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

³ 12 U.S.C. § 3401, the Right to Financial Privacy Act, establishes standards for law enforcement requests of bank records that are intended to protect customers of financial institutions from unwarranted intrusion of their financial privacy.

⁴ W.Va. Code § 31A-2A-1, the Maxwell Governmental Access to Financial Records Act, is similar in purpose to the federal Right to Financial Privacy Act.

⁵ With regard to the Electronic Communications Privacy Act, Representative Kastenmeier stated as follows:

Let me take a few moments to highlight what I believe to be the fundamental principles which guide this legislation.

The first principle is that legislation which protects electronic communications from interceptions by either private parties or the Government should be comprehensive, and not limited to particular types or techniques of communicating. For example, it is technically impossible to effectively differentiate between wire line phone calls and those which are carried by wire, microwave, satellite, and radio. Any attempt to write a law which tries to protect only those technologies which exist in the marketplace today; that is, cellular phones and electronic mail is destined to be outmoded within a few years.

The second principle which should be followed in this area is a recognition that what is being protected is the sanctity and privacy of the communication. We should not attempt to discriminate for or against certain methods of communication, unless there is a compelling cast that all parties to the communication want the message accessible to the public.

The third principle we should keep in mind is that the nature of modern recordkeeping requires that some level of privacy protection be extended to records about us which are stored outside the home. When the Founders added the fourth amendment's protection against unreasonable searches and seizures to the Constitution, they did so to protect citizens' papers and effects. In those days an individual's private writings and records were kept within the home. That situation has changed drastically today. Many Americans are now using computer services, which store their bank records, credit card data, electronic mail and other personal data. If we fail to afford protection against governmental snooping in these files, our right of privacy will evaporate. Moreover, if we fail to protect the records of third-party providers, there will be a tremendous disincentive created against using these services. Thus, the adverse business consequences of inadequate protection for third-party records with respect to communications has led several industry groups to support the privacy provisions of the bill.

Today Congress stands at a crossroads with respect to electronic communications privacy. We may provide the forum to balance the privacy rights of citizens with the legitimate law enforcement needs of the Government; or we abdicate that role to ad hoc decisions made by the courts and the executive branch.

One problem with the risk assumption approach is the illusory notion of choice implicit therein. Regarding bank records, Justice Brennan opined that “[f]or all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account.” United States v. Miller at 451 (Brennan, J., dissenting). In the context of telephone records, Justice Marshall recognized that

unless a person is prepared to forego use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.

Smith v. Maryland at 749 (Marshall, J., dissenting).

The privacy of dialed phone numbers is of value to all persons, not just those engaged in illegal activity. Justice Stewart, the author of the Katz opinion, reasons that a person has a legitimate expectation of privacy in the phone numbers he dials because they

are not without ‘content.’ Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person’s life.

Smith at 747 (Stewart, J. dissenting). In a separate dissenting opinion, Justice Marshall argues further that “the prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide” such as journalists and members of unpopular political parties. Id. at 749.

Further, Justice Marshall also points out the slippery slope that assumption of risk analysis brings to search and seizure jurisprudence:

[T]o make risk analysis dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of Fourth Amendment protections. For example, law enforcement officials, simply by announcing their intent to monitor the content of random samples of first-class mail or private phone conversations, could put the public on notice of the risks they would thereafter assume in such communications.

Id. at 750. When considering which approach to use, this Court should weigh not only citizens' legitimate privacy concerns in their dialed phone numbers, but the danger of further government intrusion on citizens' privacy rights created by Fourth Amendment risk analysis.

B. West Virginia should have higher standards with regard to the protection of its citizens' expectation of privacy that their cellular phone records will be free from governmental intrusion.

This Court should find that the West Virginia Constitution recognizes a person's legitimate expectation of privacy in the phone numbers they dial and that government agents must seek judicial authorization before requesting phone records. Although Fourth Amendment jurisprudence uses risk analysis to determine the legitimacy of privacy expectations, this court should not follow that approach and instead rely on the West Virginia Constitution. This Court has held that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protections than afforded by the Federal Constitution." Syllabus Point 1, State v. Mullens, 221 W.Va. 70, 650 S.E.2d 169 (2007). The purpose of Article III, § 6 of the West Virginia Constitution "is to impose a standard of 'reasonableness,' upon the exercise of discretion by government officials, including law enforcement officers, so as to safeguard the privacy and security of individuals against arbitrary invasions [by

government officials].” Mullens at 188, quoting State v. Legg, 207 W.Va. 686, 692, 536 S.E.2d 110, 116 (2000).

In the context of warrantless interception of conversations with government agents in the home, this Court has written of risk analysis with disfavor. Quoting Justice Harlan, Justice Davis writes that risk analysis wrongly frames the legitimacy of privacy expectation “in terms of the expectations and risks that ‘wrongdoers’ or ‘one contemplating illegal activities’ ought to beat. . . . Interposition of a warrant requirement is designed not to shield ‘wrongdoers,’ but to secure a measure of privacy and a sense of personal security throughout our society.” State v. Mullens, 221 W.Va. 70, 77, 650 S.E.2d 169, 176, quoting United States v. White, 401 U.S. 745, 789-90 (1971) (Harlan, J., dissenting). This Court has a history of actively protecting West Virginian’s privacy against unwarranted eavesdropping. See Syllabus Points 2 and 4, Mullens; Syllabus Point 1, Roach v. Harper, 143 W.Va. 869, 105 S.E.2d 564 (1958) (citizens may recover damages for violation of an individual’s right to be let alone and to keep secret his private communications, conversations and affairs); Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 646, 609 S.E.2d 895, 908 (2004) (employees in public spaces have a reasonable expectation of the privacy in their oral communications with customers and fellow employees). Other jurisdictions with similar privacy concerns have chosen not to follow Fourth Amendment jurisprudence and hold that their State’s citizens have a reasonable expectation of privacy in the phone numbers they dial under their respective state constitutions. See State v. Hunt, 450 A.2d 952 (N.J. 1982); Commonwealth v. Beauford, 472 A.2d 783 (Pa. 1984); People v. Corr, 682 P.2d 20 (Colo. 1984); see also State v. Gunwall, 720 P.2d 808 (Wash. 1986) (constitutional right to privacy); Shaktman v.

Florida, 553 So. 2d 148 (Fla. 1989) (constitutional right to privacy); State v. Rothman, 779 P.2d 1 (Hawaii 1989) (constitutional right to privacy).

At present, this Court has not decided whether West Virginia citizens are constitutionally protected against suspicionless snooping through their phone records. That is exactly what happened in this case. McMillian surmised that Clark's presence during the uncharged November 2008 robbery and the July 2009 robbery meant that he was a "common connector," so he requested Clark's phone records to find out if he was right. However, the cinema's manager Matthew Mundy also worked during both robberies but McMillian did not subpoena Mundy's phone records. (A.R. 4, 13, 437, 449). The factual basis for the subpoena of Clark's phone records was later embellished by the State in varying manners during the pretrial and trial, and the credibility of these retroactive justifications should be viewed with suspicion given the prosecutor's unethical conduct during the crafting of the pretrial order. (A.R. 143); see West Virginia Rules of Professional Conduct, Rule 3.5. Given our State's tradition of protecting the privacy of our citizens, a hunch that someone was in the wrong place at the wrong time should not be enough to justify a fishing expedition through their phone records, no matter the end result. Rather, government agents should seek judicial authorization upon a showing of probable cause that a person has committed a crime before his phone records can be seized. In this case, McMillian needed more information than the common connector theory to justify the invasion of Clark's legitimate expectation of privacy in his phone records.

- C. Because West Virginians have a legitimate expectation of privacy in phone records, the evidence obtained from the improperly issued subpoena should have been suppressed as fruit of the poisonous tree.

1. Of the three factual scenarios offered by the State to justify the subpoena, the common connector theory is probably closest to the truth.

The State had various theories to justify the issuance of the subpoena for Clark's phone records. Because of the bent circumstances surrounding the drafting of the pretrial order denying the motion to suppress and the slippery justifications given by McMillian during the trial, the Petitioner will proceed upon the assumption that the first explanation given is the most accurate account. At the preliminary hearing, McMillian testified that when the subpoena was issued in July 2009, Clark was working during both the November 2008 and July 2009 robberies; therefore he was a "common connector." (A.R. 54-55). However, manager Matthew Mundy was also a common connector because he too was present during both the uncharged November robbery and the July robbery and his records were not seized. (A.R. 4, 13, 437, 449). The common connector theory put forth by McMillian is merely a veil for an inarticulate hunch that is an inadequate basis for issuance of a subpoena for Clark's phone records. If the common connector theory were written on an application for a court order authorizing the subpoena, when the records of a similarly-situated employee were not requested, the request should have been denied.

It is apparent that after the preliminary hearing the State felt that the barebones subpoena needed additional justification because it added completely new facts to the pretrial order that were not mentioned during the preliminary hearing or the trial. It appears to be a fair deduction that at the suppression hearing the State realized that it needed to be able to justify its use of a DEA subpoena in a robbery investigation and it slipped facts into the order that bolstered the State's theory at pretrial that Clark was involved in drugs. (A.R. 143). Without these facts, the State's theory at the pretrial that

a robbery was committed so it decided to initiate a drug investigation simply does not make sense. The State's theory at pretrial should also be discounted because it is based upon an unsworn proffer of the prosecutor and because it was abandoned by the State at trial.

At trial the State again changed its tune regarding the basis for the subpoena. McMillian testified that the phone records were seized with a federal subpoena because Marquee Cinemas is a "multi-state business" and the cinema's surveillance video of the July robbery was suspicious. It is fair to question the reliability of McMillian's testimony given the State's unethical conduct at the pretrial stage and that neither of these reasons was mentioned before the trial. Although it is true that Marquee Cinemas is involved in interstate commerce, there is no evidence that federal authorities were interested in investigating the robbery, and it is also unclear why a DEA subpoena would be used to investigate a robbery. Also, if the July video is really that suspicious and gave McMillian probable cause to suspect Clark was involved in the robbery, McMillian would not have waited until after the October robbery, identification of Shaver in the photo lineup, and review of the Marcum Terrace video to get a search warrant for Clark's residence. Given the conflicting and inadequate explanations for the basis of the subpoena, and after separating the wheat from the chaff, it is apparent that all McMillian had when he requested the phone records was an inarticulate hunch that Clark was in the wrong place at the wrong time and this is an insufficient basis to seize a citizen's telephone records.

2. No exceptions to the exclusionary rule apply.

Without the phone record connection between Clark and Shaver, neither Clark nor Shaver would have been implicated in the robberies. All of the information that the

police had when they applied for the search warrant of Clark's apartment flowed from the information they gathered from the unlawful seizure of Clark's phone records. Because all roads blazed during the investigation lead back to Clark's phone records, the exceptions to the exclusionary rule do not apply. See Syllabus Point 2, State of West Virginia v. Hawkins, 167 W.Va. 473, 280 S.E.2d 222 (1981).

First, there is no independent source of evidence of Clark's involvement that is free from connection to the phone record subpoena. Clark's phone records, requested after the July robbery, showed that he was calling or texting someone around the time of the July robbery. Police then subpoenaed the records for that number, and the subscriber to that number turned out to be Dustin Shaver. (A.R. 310-15, 474). This is the genesis of the official suspicion of Shaver. Shaver was not initially identified as a suspect in the July robbery by eyewitnesses, surveillance video, or any other evidence. Clark's phone records made it possible for police to identify Shaver as a suspect in the July robbery and this led to their investigation of Shaver after the October robbery. Without the connection made from Clark's phone records, the police would not have shown a photo lineup to Felicia Gross with Dustin Shaver's picture in it. Without the phone records, they also would not have known to view the Marcum Terrace video after the October 2009 robbery. The police were only able to arrest Shaver and search Clark's house in October after they gained the information from Clark's July phone records. In short, all the State's conclusions about the perpetrators and their mode of operation lead back to information gained from the illegal subpoena of Clark's phone records after the July robbery.

Second, Clark's involvement would not have been inevitably discovered. Prior to seizure of the phone records, McMillian had nothing more than an inarticulate hunch that Clark was involved in the robbery because he was working during both the uncharged November 2008 and the July 2009 robbery. McMillian's testimony that he subpoenaed Clark's phone records because the July robbery appeared to be staged is merely a convenient explanation retroactively informed by the State's delayed realization that it needed to bolster the factual and legal bases of the subpoena. (A.R. 314-15). If McMillian truly thought the surveillance video of the July robbery was suspicious he would have used this as a basis for a search warrant of Clark's residence. However, McMillian did not come to this conclusion until after he initiated the fishing expedition for clues from Clark's phone records. In fact, McMillian admits that he did not have enough evidence for a warrant until Felicia Gross placed Shaver at the scene of the October robbery and Detective Sperry viewed the Marcum Terrace video from the night of the October robbery. (A.R. 473, 1152-53). Police would have done neither of these things in October without the benefit of the subpoenaed phone records that linked Clark and Shaver in July.

Third, the connection between the illegal phone subpoena and the discovery of the connection between Clark and Shaver is not so attenuated as to remove any taint of the original illegality. Quite the opposite, the information gained from the phone record subpoenas is the foundation of the State's case. Clark was not the principal actor. He was working at the cinema when it was robbed by Shaver. The State's theory is that Clark acted as an accessory and that he planned the robbery with Shaver. (A.R. 262-63). There is nothing at the outset of the investigation in July that linked Clark to the robbery;

the police needed more evidence. This is why Clark's phone records were subpoenaed. Without the phone records that link Clark and Shaver together around the time of the July robbery, the subsequent investigation in October would not have occurred as it did. The police knew to place Shaver's photo in the lineup and to view the Marcum Terrace video because of the link between Shaver and Clark established by the July phone records. The July phone records are the genesis of the initial suspicion of both Shaver and Clark and without them, the State had no substantive leads in the investigation.

II. Even if West Virginians do not enjoy a legitimate expectation of privacy in their cell phone records, Clark should have standing to challenge the investigative subpoena.

To prevent fishing expeditions into private citizens' phone records, West Virginia citizens should have standing to challenge whether the records sought by subpoena are relevant to an ongoing criminal investigation. This would act as a check on government agents who should not have a free hand to issue administrative subpoenas for telephone records absent reasonable grounds to do so. See Syllabus Point 1, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996); see also Commonwealth v. Vinnie, 698 N.E.2d 896 (Mass. 1998). A West Virginia citizen such as Clark should be able to challenge a subpoena issued to a third party telephone company on the basis that (1) the information sought is relevant to an ongoing criminal investigation and (2) the subpoena is issued in good faith and is not intended as a general fishing expedition. See State v. Harman, 165 W.Va. 494, 270 S.E.2d 146, fn. 5 (1980).

The subpoena in the instant case was issued not to Clark, but to a third party, the phone company. In some jurisdictions, Clark would not have standing to challenge a third party subpoena. This Court, however, has recognized the right of a person to

challenge a third party subpoena. See Feathers v. West Virginia Board of Medicine, 211 W.Va. 96, 105, 562 S.E.2d 488, 497 (2001); see generally State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Moreover, West Virginia has a line of established jurisprudence that justifies a ruling from this Court that allows citizens such as Clark to challenge the grounds for issuance of a subpoena in a criminal case. In the context of administrative subpoena issued to a third party by the West Virginia Board of Medicine, Justice Cleckley wrote that

[a]s an appellate court, we are particularly sensitive to claims of administrative subpoena ‘abuse’ and when that issue is raised, we give the case and the subpoena duces tecum that issued careful scrutiny. . . . [T]he justification for issuing the subpoena . . . must be clear, and [] it must be shown that the information sought must be consistent with the statutory mission and purpose of the agency. . . . It is by now apodictic that the test of reasonableness is decided by a balancing of one party’s need for the requested information, and the other party’s right to be free from unjustifiable governmental intrusion. [Citations omitted]. Absent countervailing considerations, this standard is to be applied to administrative subpoenas duces tecum in West Virginia. . . . The short of it is that, without some meritorious justification, an administrative subpoena duces tecum is not some talisman that dissolves all rights and privileges of the citizens of this State. We do not expect circuit courts will forget that administrative subpoenas must operative within the limits of their governing statutes. . . . **There can be no greater judicial function of the court than to stand between the government and the citizen, and, thus, to protect the latter from harassment and unfounded intrusion. . . .** [M]eaningful judicial oversight is necessary to prevent a ‘judicial fishing enterprise’ and ‘unreasonable searches and seizures and meddling curiosity concerning an individual’s person affairs,’ and these matters ‘are not to be determined by the exercise of a merely ministerial function.’” Hoover at 18-19, quoting Ebbert v. Bouchelle, 123 W.Va. 265, 269, 14 S.E.2d 614, 616 (1941) [emphasis added].

Even if a person does not have a legitimate expectation of privacy in his phone records, Justice Cleckley’s analysis surely would give that person the ability to go to court to challenge the issuance of the subpoena. The absence of a constitutional

protection should not eliminate a person's ability to challenge a subpoena issued by a government agent without reasonable cause to do so.

III. The seizure of Clark's phone records was unlawful and fatal to the State's case.

A. Clark's telephone records were seized pursuant to an illegal subpoena.

There is no West Virginia statute authorizing the seizure of telephone records by investigative subpoena in a robbery investigation. Cf. W.Va. Code § 62-1G-1 (2011) (authorizing investigative subpoenas for certain offenses against minors). It would have been impossible for McMillian to issue an investigative subpoena for Clark's phone records under state law because there is no authorizing statute. See Syllabus Point 1, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996); see generally W.Va. Code § 62-1D-1 et seq. (2011).

Although McMillian could not issue a subpoena for Clark's phone records under West Virginia law, he asked Special Agent Tom Bevins to issue a DEA subpoena for Clark's phone records. However, the investigation of a robbery is outside the scope of the authorizing statute for DEA subpoenas. See 21 U.S.C. § 876(a) (2011).⁶ DEA subpoenas are to be used in investigations of Federal Controlled Substance Act violations. See United States v. Mountain States Telephone and Telegraph Co., 516 F.Supp. 225 (D. Wyo. 1981). Although at trial McMillian claimed to be ignorant about

⁶ The text of 21 U.S.C. §876(a): Authorization of use by Attorney General. In any investigation relating to his functions under this title with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing; except that a witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpoena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

“what Act” authorized DEA Agent Tom Bevins to issue the subpoena, it is clear that McMillian was investigating a robbery, not a violation of drug laws. (A.R. 319). Moreover, the prosecutor’s proffer during the suppression hearing that the authorities used a DEA subpoena because they “didn’t know if it was a drug related case at the time when they initiated subpoena” is *prima facie* unreasonable. (A.R. 93-94). There is no credible evidence in the record that Clark was involved with drugs. This theory was fabricated by the State and it found its way into the order denying the motion to suppress via the prosecutor’s unreliable and improperly-considered *ex parte* communications with the judge’s law clerk. Ultimately, the State abandoned this theory at trial and came up with different reasons for the subpoena.

Simply put, McMillian used the DEA subpoena as an end-around the inconvenient fact that West Virginia does not allow investigative subpoenas to be issued in a robbery investigation. Because there is no state statute authorizing investigative subpoenas in a robbery investigation, and because the DEA subpoena was improperly issued to investigate a robbery, this Court should exercise its supervisory authority and rule that all evidence flowing from the illegal subpoena is inadmissible. See Syllabus Point 3, State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992).

B. If the evidence flowing from the illegal subpoena had been excluded, Clark could not have been convicted of the robberies.

All evidence against Clark flows from the phone records, therefore without the illegal subpoena, none of the evidence against Clark would have been discovered. As previously mentioned, there is no independent source of evidence against Clark. No warrants were issued after the July robbery. However, the phone records showed that Clark and Shaver were communicating around the time of the July robbery. This

connection led the police to include Shaver's picture in a photo lineup shown to Felicia Gross and to view the Marcum Terrace surveillance video after the October robbery. The photo lineup and the Marcum Terrace video are the lynchpins to the State's identification of Clark and Shaver as the perpetrators of the robberies. Only after the State had this evidence were warrants issued. Without the July phone records, Shaver's picture would not have been shown to Gross and the Marcum Terrace video would not have been viewed; therefore, Clark and Shaver would have never been implicated.

CONCLUSION

Petitioner prays that this Court will find that the phone records and the evidence flowing there from were erroneously admitted into evidence and will either enter a judgment of acquittal or reverse the guilty verdict and remand for a new trial.

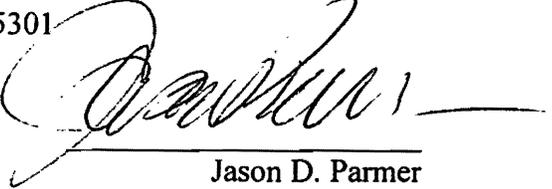
Signed: _____


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CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have served the foregoing petition for appeal by first class mail on the 3rd day of October, 2011 upon:

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Jason D. Parmer