
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0289

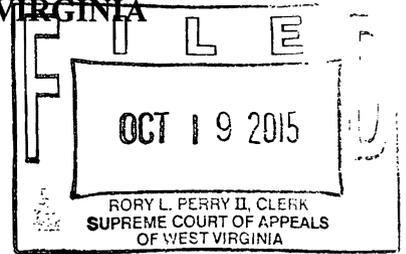
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

ENNIS C. PAYNE, II,

Defendant Below, Petitioner.



RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Petitioner claims the following five (5) assignments of error, which the State specifically and generally denies:

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

Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the State of West Virginia (hereinafter, the “State”), accepts the procedural posture as stated by Ennic C. Payne, II (hereinafter, “Petitioner”), with the following additions, regarding the evidence and arguments of the State, in contrast with the facts as supplied by Petitioner:

A. Petitioner’s October 31, 2013, Pretrial Hearing

The circuit court held a pretrial hearing on October 31, 2013. (Appendix [hereinafter, “App.”],] at 571.) During the hearing, Petitioner was set to appear via video conferencing from the North Central Regional Jail. (*Id.* at 574.) At roughly 9:00 A.M. on the morning of the hearing, however, Petitioner refused to participate. (*Id.* at 575.) Neither the Circuit Court of Harrison County, West Virginia (hereinafter, “circuit court”), nor trial counsel was aware that Petitioner planned to refuse to appear at the pretrial hearing. (*Id.*)

The State expressed its concern over Petitioner’s absence, but argued that “by [Petitioner] not being present, his voluntary and knowing action of absenting himself from this pretrial hearing, . . . acts as a waiver of any issue he may raise down the road, so I would ask that the Court permit the State to proceed. . . .” (*Id.* at 577.) The circuit court, out of caution, sent an officer to reaffirm that Petitioner wished to remain absent from the proceedings. (*Id.*) The court also recognized that in prior hearings, Petitioner had refused to attend or comply with the court’s request on numerous occasions. (*Id.* at 578.) The officer then returned and informed the court that Petitioner affirmed that he did not wish to attend. (*Id.* at 579.) Further, the officer informed the court that if he tried to organize a way to bring Petitioner to the conference room, “[Petitioner] would probably fight.” (*Id.*) The circuit court then found Petitioner voluntarily absent from the proceedings. (*Id.*)

The circuit court thereafter refused to address any evidentiary matter with Petitioner absent, due to Petitioner's constitutional right to be present during critical stages of his criminal proceedings. As such, the court reserved the hearing's purpose to consideration of pending, non-evidentiary pretrial motions concerning (1) suppression of a jailhouse statement made by Petitioner, which the State did not oppose, (2) suppression of evidence of Petitioner's flight, which the State did not oppose, and (3) a motion for a change of venue. (*Id.* at 581.) In response to Petitioner's motion for change of venue, the State argued that "nowhere in that motion was it represented that there was a present hostile sentiment in this county against Mr. Payne, just that there had been some media coverage, which is the case with all trials, and that's not sufficient to warrant a change of venue." (*Id.* at 582.)

The circuit court did not rule on the motions at the time of the hearing, but expressed that Petitioner had voluntarily waived his presence in the courtroom by his knowing absence, thereby allowing the court to consider legal issues. (*Id.* at 583.) The circuit court did, however, order Petitioner to be transported to all future hearings. (*Id.* at 584.) The court further reasoned that "[i]f he misbehaves, we'll remove him from the courtroom and we'll proceed in his absence. That's his choice, but at least he'll be here and we'll deal with it." (*Id.*) The remainder of the hearing dealt specifically with the legal and evidentiary arguments of Petitioner's co-defendant.

B. Petitioner's February 12, 2014, Pretrial Hearing

Petitioner appeared during his next pretrial hearing on February 12, 2014. (*Id.* at 663.) First, the circuit court entertained Petitioner's motion to remove Mr. Fittro as trial counsel, identifying that Petitioner would no longer meet with or speak to Mr. Fittro in the underlying criminal matter. (*Id.* at 664.) Mr. Fittro identified that he had not met with Petitioner because Mr. Wilson was lead counsel on the matter, and that he had reserved himself to serving in a

support capacity at Mr. Wilson's direction. (*Id.* at 665.) Mr. Fittro apologized to both the circuit court and Petitioner, but identified that he had could continue to be of assistance. (*Id.*)

Petitioner then asked for another continuance to accommodate additional DNA testing to be completed by an independent examiner hired by the defense. (*Id.* at 667-72.) Thereafter, the circuit court returned to Petitioner's motion to remove Mr. Fittro as counsel. (*Id.* at 673.) The circuit court recognized that the conflict regarding Mr. Fittro's representation of Petitioner arose largely out of Mr. Fittro and Petitioner not having met as often as desired by Petitioner. (*Id.*) Therefore, the circuit court ordered Mr. Fittro and Petitioner to meet, "work out whatever differences [they] have," and have Mr. Wilson, as lead counsel, find ways to create a more collaborative environment prior to trial. (*Id.*)

The State then called Detective David Wygal, a former detective with the Clarksburg Police Department, who performed the search of the home of Tim Starks, where Petitioner's jacket was found. (*Id.* at 674.) Mr. Wygal informed the circuit court that he had since taken a position as a training instructor for the National White Collar Crime Center in Fairmont, West Virginia, and that his departure from the Clarksburg Police Department was the result of his retirement from the force, rather than disciplinary actions. (*Id.* at 675.)

On January 15, 2010, Mr. Wygal identified that he traveled to the residence of Mr. Starks after Mr. Starks requested to speak to police about the underlying crime. (*Id.* at 676-77.) Upon arriving at the residence, Mr. Wygal asked Mr. Starks if he could search the residence, to which Mr. Starks consented. (*Id.* at 677.) Mr. Wygal then identified that he had found a brown Carhart jacket near the front door of the residence, which Mr. Starks acknowledged as belonging to Petitioner. (*Id.* at 684.) The jacket additionally contained court notices addressed to Petitioner.

(*Id.*) Mr. Wygal identified that, deep inside one of the jacket's pockets, he found a magazine for a .25 caliber semi-auto pistol. (*Id.*) The items were then placed in evidence bags. (*Id.* at 685.)

C. Petitioner's February 18, 2014, Pretrial Hearing

Petitioner's next pretrial hearing occurred on February 18, 2014, and served as a continuation of the previous hearing involving suppression of the Carhart jacket found at the residence of Mr. Starks and any information gleaned from jailhouse communications. (*Id.* at 798.) Petitioner refused to attend the hearing after being transported from the North Central Regional Jail, and refused to leave the holding facility. (*Id.* at 801.) Petitioner staged his disobedience in an effort to have Mr. Fittro removed as co-counsel. (*Id.* at 801-02.) Petitioner also refused to meet with Mr. Wilson if he was accompanied by Mr. Fittro. (*Id.* at 804.) Eventually, after a brief recess, Mr. Wilson was able to convince Petitioner to meet with Mr. Fittro, although Petitioner's distrust of Mr. Fittro ultimately led to Mr. Fittro's withdrawal as co-counsel for the defense. (*Id.* at 810-12.) A second recess subsequently took place, and Petitioner thereafter agreed to appear in court and allow the evidentiary hearing to continue. (*Id.* at 814.)

The State then called Mike Fazzini, an officer with the Clarksburg Police Department at the time of Petitioner's criminal investigation. (*Id.* at 814.) Mr. Fazzini recalled that he contacted Mr. Starks after identifying that Petitioner was staying at his residence. (*Id.* at 816.) After speaking with Mr. Starks, Mr. Fazzini traveled to Mr. Starks' residence to further investigate "the whereabouts of [Petitioner] and if [Mr. Starks] knew - - if [Petitioner] had been with him last night or [had] been staying with him." (*Id.* at 816.) Mr. Starks identified that Petitioner had been staying with him -- primarily staying in the living room -- and had left a jacket in the foyer of the residence. (*Id.* at 817.) Mr. Fazzini then corroborated the earlier

testimony of Mr. Wygal regarding the consent and subsequent search of Mr. Starks' residence upon Mr. Wygal's arrival. (*Id.* at 818-22.)

The State next called Lieutenant Amanda Gump of the North Central Regional Jail. (*Id.* at 829-30.) Lt. Gump identified that inmates of the North Central Regional Jail are explicitly informed that their telephone communications, and unless with an attorney, "may be monitored, intercepted, recorded or disclosed." (*Id.* at 833.) Lt. Gump also identified that such warnings are posted by the jailhouse telephones, and are played via recording on the telephones themselves when inmates make a call. (*Id.* at 833-34.)

The State then called Sergeant Joshua Cox of the Clarksburg Police Department, who investigated the homicide at the Quarry Apartments in Clarksburg, West Virginia. (*Id.* at 840.) Sgt. Cox recalled that Petitioner became a suspect during the course of the investigation after an individual had informed police that Petitioner admitted to shooting the victim in the matter. (*Id.* at 841.) Sgt. Cox also identified that, while investigating the apartment complex, police recovered a .25-caliber casing, a Pittsburgh Pirates baseball cap and two distinct types of footwear impressions in the snow -- those of a tennis shoe and of a boot. (*Id.*)

Sgt. Cox then identified that he had received video of Petitioner wearing a similar cap on the night of the shooting, prior to the shooting at approximately 3:00 A.M. (*Id.*) Police were able to get another video from a nearby business that showed Petitioner without the hat at approximately 3:35 A.M. (*Id.*) Finally, Sgt. Cox reaffirmed that he had found an identical hat at the crime scene. (*Id.* at 842.)

As a result of the foregoing, Sgt. Cox obtained a search warrant for Petitioner's residence which stated that police were searching for "a black jacket with white stripes, boots or shoes, and any .25 caliber firearm or ammunition, and also knives, cell phone, pagers and clothing bearing

any blood stains.” (*Id.* at 845.) The search warrant listed Petitioner’s address based upon information linked to his driver’s license. (*Id.* at 846.) Sgt. Cox further identified that the search warrant contained facts within his personal knowledge of the crime, including identifying information of Petitioner, was rooted upon probable cause, and was not based upon a defective affidavit. (*Id.* at 847-48.) Sgt. Cox then identified that police obtained boots and tennis shoes from Petitioner’s residence, as well as knives and cell phones. (*Id.* at 849-50.)

Sgt. Cox also identified that police had received telephone communications made by Petitioner while incarcerated at the North Central Regional Jail during which Petitioner had made statements against interest/knowledge and had made threats to witnesses involved in Petitioner’s criminal proceedings. (*Id.* at 852.) Sgt. Cox identified that Petitioner had personally admitted to owning the hat found at the scene of the crime, and that he wears a size ten shoe. (*Id.* at 856-58.) During cross-examination, Sgt. Cox identified that Petitioner had threatened Mr. Starks while speaking on a jailhouse telephone. (*Id.* at 866.)

The State then called Detective Corey Beard of the Cumberland City Police Department, who had been assigned to assist Sgt. Cox during his investigation while Petitioner was incarcerated at FCI Cumberland for federal gun charges. (*Id.* at 872-73.) Det. Beard corroborated the steps taken to obtain Petitioner’s DNA and shoe size by Sgt. Cox, but could not offer specific testimony of the conversation between Sgt. Cox and Petitioner while at FCI Cumberland. (*Id.* at 873-78.)

Finally, the State called Mr. Starks, who testified that Petitioner was staying with him at the time of the underlying crime. (*Id.* at 878-79.) Mr. Starks corroborated the testimony of Mr. Fazzini and Mr. Wygal, and admitted to consenting to the search of his residence. (*Id.* at 881-85.) Mr. Starks also admitted to being threatened by Petitioner. (*Id.* at 885.)

D. Petitioner's February 21, 2014, Pretrial Hearing

The circuit court held a continuation of the prior pretrial hearing on February 21, 2014. (*Id.* at 907.) Petitioner's proceedings were again temporarily consolidated with those of his co-defendant for purposes of questioning Richard Lambert and Sgt. Cox on similar subject matter. (*Id.* at 911.) Petitioner appeared in person, as did Mr. Wilson and David DeMoss, new co-counsel. (*Id.* at 910.)

The State then called Richard Lambert, an inmate of the North Central Regional Jail at the same time as Petitioner. (*Id.* at 913-14.) Mr. Lambert recalled Petitioner telling him during their incarceration that "one day [Petitioner] went to a guy's house to rob him, and the robbery went bad and he killed the guy." (*Id.* at 915.) Mr. Lambert further identified that Petitioner informed him that he had gone to the victim's home "[t]o rob him for drugs." (*Id.* at 916.) Mr. Lambert stated that Petitioner broached the subject after he had seen a report regarding the crime in the paper identifying that police had a suspect, and that Petitioner "hoped they [did not] figure out he did it." (*Id.* at 921-22.)

Following cross-examination of Mr. Lambert whereby Petitioner and his co-defendant challenged the credibility and motives of Mr. Lambert, the State recalled Sgt. Cox. (*Id.* at 954.) Sgt. Cox identified that Petitioner's name was not released to the media until a criminal complaint was filed and a warrant was issued, both of which occurred well after Petitioner's jailhouse confession to Mr. Lambert. (*Id.*)

E. Petitioner's May 27, 2014, Pretrial Hearing

The circuit court held another pretrial hearing on May 27, 2014. (*Id.* at 965.) At the hearing, Petitioner again refused to appear in court following his transport from North Central Regional Jail, and trial counsel further informed the circuit court that Petitioner had also refused

to meet with counsel both prior to and on the morning of the hearing. (*Id.* at 967.) Mr. Wilson specifically surmised that Petitioner's refusal to meet or speak with counsel was a result of Petitioner's *pro se* motion to continue, motion to approve funds for utilization of a forensic pathologist, and motion to remove both Mr. Wilson and Mr. DeMoss as counsel. (*Id.* at 968.)

After considering Petitioner's *pro se* motions and determining whether trial counsel was meeting Petitioner's expectations in conducting Petitioner's defense, the circuit court recognized Petitioner's long history of purposeful absentia from his own criminal proceedings:

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

(*Id.* at 972.) Further, the circuit court continued:

I also recalled that on one occasion that he was participating in a non-evidentiary hearing I believe from the North Central Regional Jail, and the Court at that time advised him of his Rule 43 rights that he is required to be present at all stages of the proceedings including the impaneling of the jury and trial of the case and if convicted sentencing, and that if he voluntarily absents himself he would deemed to have waived his right to be present.

(*Id.*) The State further noted that Petitioner's actions had been "going on that way for now over a year." (*Id.* at 973.) The State recalled that the circuit court had already allowed four attorneys to withdraw as counsel for Petitioner, meaning that Petitioner's current motion before the court would bring the number to six. (*Id.* at 974.) As a result, the State argued that Petitioner's motions were clearly nothing more than a delay tactic. (*Id.*)

The circuit court also identified that Petitioner made a threat to the court, necessitating additional security. (*Id.* at 975.) As a result, the State again called Sgt. Cox as a witness. (*Id.*)

Sgt. Cox identified that, after reviewing the jailhouse telephone calls, Petitioner had “made an indication that if he did not get what he wanted he would grab a deputy’s gun.” (*Id.* at 976.)

While the circuit court was entertaining the notion that Petitioner be placed in restraints for his trial proceedings, including the possibility that he be left in his jail clothes, Mr. Wilson identified that Petitioner was entitled to be present in street clothes. (*Id.* at 980.) Mr. Wilson further identified that street clothes were brought for Petitioner to wear, although he refused to communicate with counsel or change into said clothes. (*Id.* at 980-81.) With regards to prisoner restraints during trial, Mr. Wilson “defer[red] to the deputies on their sense of whether or not that would be sufficient to provide ample security for everyone in the courtroom.” (*Id.* at 980.)

The circuit court granted a recess for Mr. Wilson to again approach Petitioner in an effort to allow him to change into his street clothes. (*Id.* at 981-83.) Prior to the recess, however, the circuit court identified that, prior to Petitioner’s week-old motion for new counsel, Petitioner had shown no disfavor with Mr. Wilson or Mr. DeMoss. (*Id.* at 982.) Further, the circuit court identified that “[i]f [Petitioner] refuses to again meet with his attorney and to change into civilian clothes, then the Court intends on proceeding to try him in his absence, that his actions throughout the entire court of this case, as well as his actions here today, indicate that he has voluntarily chosen to waive his right to be present for the purposes of this trial.” (*Id.* at 982.)

Following recess, the circuit court noted the in-person appearance of Petitioner:

Mr. Wilson, the Court’s had [Petitioner] to be brought up. He is in orange. He is in a belly-chain, shackles, and leg shackles. That’s not the way the Court wanted [Petitioner] to appear here today. Were there clothes available for him to wear?

(*Id.* at 983.) Mr. Wilson replied that street clothes were brought for Petitioner to wear that morning, but that Petitioner himself had refused to change. (*Id.* at 984.) Mr. Wilson further informed the circuit court that he had informed Petitioner of his rights during the recess,

including the circuit court's admonishment that actions taken against those rights by Petitioner would be treated as a conscious waiver. (*Id.* at 984.)

The circuit court further noted Petitioner's repeated history of failing to cooperate with his attorney, to which Petitioner replied:

[Petitioner:] Mother fucker, I have been cooperating with my Goddamn attorney.

The Court: Mr. Payne, you be quiet.

[Petitioner:] I ain't got to hear that shit. I'll say what the fuck I want to say.

The Court: You be quiet.

[Petitioner:] Whatever.

The Court: You be quiet.

[Petitioner:] What are you going to do throw me in jail?

The Court: Sir, I told you to be quiet and I expect you to be quiet and let your attorney talk.

[Petitioner:] You going to put me in jail?

The Court: I'll address you in a minute.

[Petitioner:] Raising your voice don't mean nothing. It means you lost control.

The Court: I am in control, sir.

[Petitioner:] You ain't in control of nothing. You just talking cause you got a pair of lips.

(*Id.* at 986-87.)

Mr. Wilson further identified that his conversation during recess with Petitioner was productive "on some sort of level, but then declined to the point where, without divulging anything that would be privileged, [Petitioner] made threats towards counsel and counsel's

family.” (*Id.* at 987.) Mr. Wilson recognized that “that’s never happened before, . . . [it has] put me in an entirely different position and I don’t know how to respond to that.” (*Id.*)

After speaking with Petitioner and Mr. Wilson, the circuit court eventually identified that the cause of Petitioner’s anger was his want to have the window and blinds from the crime scene tested for additional evidence. (*Id.* at 991-93.) In an effort to get Petitioner to again work with Mr. Wilson, who had provided Petitioner with effective and zealous representation up until the hearing, the circuit court again granted Petitioner a continuance on the eve of his trial. (*Id.* at 993-95.) The circuit court also spoke again with Petitioner directly, informing him of his rights and recognizing that Petitioner’s current actions would only harm him at trial. (*Id.*) Specifically, the circuit court identified that “[t]his is not going to do you any good to be shackled or in orange in front of the jury, and it’s not going to be doing yourself or your case any good for this case to proceed to trial without you being here.” (*Id.* at 995.) The circuit court then continued Petitioner’s case until the September 2014 term of court. (*Id.* at 997.)

F. Petitioner’s September 22, 2014, Pretrial Hearing

The circuit court held another pretrial hearing on September 22, 2014, and Petitioner appeared via video teleconferencing from the North Central Regional Jail. (*Id.* at 1004.) Therein, trial counsel renewed a motion for newly-appointed counsel arising out of a potential conflict originally submitted by Petitioner in August 2014. (*Id.* at 1005.) Petitioner based his conflict on “a conflict of interest of threats made by [Petitioner] upon counsel and co-counsel’s life and families’ lives.” (*Id.*) Petitioner also contended that trial counsel had performed negligently. (*Id.*) Trial counsel, however, identified that the requests made by Petitioner during the May 27, 2014, hearing regarding evidentiary testing had since been performed. (*Id.* at 1007-09.)

Regardless, out of an abundance of caution, the circuit court recognized that Petitioner had previously recommended Natalie Sal to be appointed as counsel, and ordered Mr. Wilson to contact Ms. Sal and meet with Petitioner to see if she could represent him. (*Id.* at 1030-31.) The circuit court also identified that it would inspect the law of other jurisdiction to see if Petitioner's threats to Mr. Wilson and Mr. DeMoss created a *per se* case of conflict necessitating their removal as counsel. (*Id.* at 1031.) The circuit court then continued the matter again as a result of Petitioner's new requests in the case. (*Id.* at 1033.)

G. Petitioner's November 3, 2014, Pretrial Hearing

On November 3, 2014, the circuit court held its final pretrial hearing and jury selection for Petitioner's underlying criminal matter. (*Id.* at 1036.) At the beginning of the hearing, Mr. Wilson revealed that Petitioner wished to move for yet another continuance. (*Id.* at 1037.) Mr. Wilson identified that Petitioner was again refusing to meet with counsel despite repeated attempts to meet at North Central Regional Jail. (*Id.* at 1038.) The State further argued that trial counsel continues to perform all the tasks requested by Petitioner, yet immediately prior to trial, Petitioner creates more requests and asks for a continuance. (*Id.* at 1039.) As a result of this and Petitioner's overall actions throughout his criminal proceedings, the State opined that "it's an ongoing pattern of conduct with at least the appearance of nothing more than an attempt just to delay the trial." (*Id.* at 1040.)

The circuit court found that all of the parties, including the court, out of an abundance of caution, had proceeded in a manner exceedingly favorable to Petitioner, and that Petitioner's motion for a continuance should be denied "in the best interest of justice. . . ." (*Id.* at 1041.) Prior to voir dire, the circuit court entered an order regarding Petitioner's appearance in court:

Mr. Payne, the Court is obviously concerned with some of the actions that have taken place here, and some of the comments that have been made by you. However, the Court is going to do something that it hasn't done before, and that is I'm going to sign an order directing that in order to preserve your fair – your right to a fair trial and have you not appear in orange or in leg shackles or handcuffs, I'm going to sign an order directing that what's known as locomotion restrictive humane leg restraints be put on, and they be put on underneath your street clothing so that the jury cannot see or have any idea that those are being used.

(*Id.* at 1055.) The circuit court entered the order to preserve Petitioner's rights while ensuring the safety and security of the courtroom. (*Id.* at 1054-55.) The circuit court, however, informed Petitioner that if he refused to wear street clothes, or refused to cooperate with the use of restraints, it would have no choice but to "direct the bailiffs to bring you to the courtroom for the jury trial in jail clothing and shackles and handcuffs." (*Id.* at 1055.)

After recess, Petitioner refused to change into his street clothes or meet with trial counsel. (*Id.* at 1057.) Upon trial counsel urging him to change into street clothes, Petitioner replied that he "won't be up there for long," indicating that he planned to "create some chaos when he" appears in the courtroom. (*Id.*) As such, the circuit court felt it necessary to make good on its prior order:

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

(*Id.* at 1058.) Petitioner made no objection following the circuit court's order.

Following a brief recess during which Petitioner's presence was secured in a manner consistent with the foregoing order, the circuit court began voir dire. (*Id.* at 1061.) During voir

dire, only two (2) jurors identified that they had heard about Petitioner's case in the news. (*Id.* at 1065-66.) Both jurors, however, stated that the information previously gleaned from news sources did nothing to bias their ability to render a fair decision in Petitioner's case. (*Id.*)

Following voir dire, but before any strikes were made by the parties, the circuit court admonished the jury pool with the following instruction:

Ladies and gentlemen of the jury, you will note that the defendant is in jailhouse clothing and handcuffs and shackles. The reason for this is of no concern to you, and shall not be considered by you for any reason in arriving at your verdict in this case.

In fact, you shall not discuss this aspect of the case at any time during your deliberations. The defendant is presumed under the law to be innocent of all charges, and the only way the defendant can be convicted of anything is if the State of West Virginia produces sufficient evidence by the testimony of witnesses and/or various exhibits to prove beyond a reasonable doubt each and every element of the offenses charged. Then and only then, may you find the defendant guilty of any offense.

Again, you are to make no reference nor speculate as to why the defendant may be in custody at this time.

Do each of you understand and agree that you will give no consideration to his appearance in this case in arriving at your verdict if you are selected to serve on the jury for the trial of this case?

(*Id.* at 1134.) The entire jury pool answered in the affirmative. (*Id.*) Following jury selection, only one juror, Juror McNemar, had recalled seeing Petitioner's case in the news, although she had formed no opinion of Petitioner's case from the news article. (*Id.* at 1065-66, 1142.)

H. Petitioner's Trial

1. Day One, November 5, 2014.

Petitioner's trial began on November 5, 2014. (*Id.* at 1151.) Prior to the start of trial, the circuit court specifically noted that Petitioner had agreed to wear street clothes and humane leg

restraints. (*Id.* at 1158.) Following opening statements, the State first called Jim Copenhaver, the deputy chief of the Harrison Taylor 911 Center. (*Id.* at 1178.) Mr. Copenhaver utilized the computer-generated 911 call report to show that Jennifer Hall called 911 at 3:30 A.M. from the Quarry Apartments on January 13, 2010. (*Id.* at 1183-84.) The 911 call was then played for the jury. (*Id.* at 1184-85.)

The State then called Bill McGahnan, an employee of Army Biometrics who maintained security cameras in Bridgeport, West Virginia. (*Id.* at 1189-91.) Mr. McGahnan identified that surveillance footage taken prior to the crime on January 13, 2010, produced screenshots of Petitioner near the Quarry Apartments wearing a baseball cap. (*Id.* at 1198-1200.) Said screenshots of Petitioner were admitted into evidence by the State. (*Id.*) Upon cross-examination, Petitioner identified he was one of three individuals displayed in the screenshot obtained from the security video. (*Id.* at 1202.)

The State next called Patrick Steffick, an employee of the United States Department of Homeland Security who was responsible for maintaining separate surveillance systems in Clarksburg, West Virginia, around federal properties. (*Id.* at 1205-07.) Mr. Steffick verified surveillance footage taken on January 13, 2010, which was then admitted as evidence. (*Id.* at 1207-13.) Deborah Sandy, an employee of Go-Mart and supervisor of the Bridgeport, West Virginia, locations, then testified on behalf of the State. (*Id.* at 1214.) Ms. Sandy then verified surveillance footage taken from Go-Mart cameras on January 13, 2010, which was then admitted into evidence by the State. (*Id.* at 1216-17.) Ms. Sandy also identified that the video captured by the cameras occurred around 3:30 A.M., shortly after the time of the crime. (*Id.* at 1220.)

The State then called Jennifer Hall, the girlfriend of the victim, Jayar Poindexter. (*Id.* at 1224-25.) Ms. Hall was staying with the victim on the night of the murder, and awoke to find

him struggling near the bedroom window. (*Id.* at 1229.) Ms. Hall recalled seeing the victim fall through the floor shortly thereafter. (*Id.* at 1229-30.) Ms. Hall, frightened and hiding, called 911 after realizing that the victim was nonresponsive. (*Id.* at 1230-31.) The State then admitted several photographs of the victim's home at Quarry Apartments. (*Id.* at 1234-35.) Ms. Hall, however, admitted neither hearing a gunshot nor seeing the perpetrator. (*Id.* at 1245.)

Sergeant Mike Walsh of the Clarksburg Police Department next testified on behalf of the State. (*Id.* at 1257.) Sgt. Walsh recalled reporting to the scene of the crime at approximately 3:40 A.M. on January 13, 2010. (*Id.* at 1258.) Sgt. Walsh identified that upon reaching the bedroom of the apartment, the victim was in a "frog-like position" with his head resting against the wall. (*Id.* at 1263.) Upon finding the victim unresponsive, the accompanying firefighters laid the victim on the floor and noticed blood coming from the victim's nose and "some type of small wound" on the victim's chest. (*Id.* at 1265.)

Upon investigating the scene, Sgt. Walsh recalled finding footprints in the snow outside of the bedroom window. (*Id.* at 1266-68.) The State then published several photographs showing the victim's bedroom window and the footprints located outside. (*Id.* at 1267-70.) Upon cross-examination, Sgt. Walsh recalled finding a strong odor of marijuana and other drug paraphernalia at the scene. (*Id.* at 1271-72.) Sgt. Walsh also identified that the bedroom window screen had been "cut or torn" and that the window had been half raised. (*Id.* at 1274.)

The State then called Whitney Chapman, a paramedic with the Harrison County Emergency Squad who was dispatched to the crime scene following the 911 call by Ms. Hall. (*Id.* at 1278-79.) Ms. Chapman identified that the victim was declared deceased despite attempts to resuscitate the victim over a period of fifteen minutes. (*Id.* at 1283.) Ms. Chapman also identified that she was unable to conclude the cause of the victim's wound. (*Id.* at 1284.)

The State next called Jason Stalnaker of the Clarksburg Fire Department, who was dispatched to the scene following Ms. Hall's 911 call. (*Id.* at 1286.) Mr. Stalnaker recalled that he and his partner, Brian Hall, entered the crime scene and began performing CPR on the unresponsive victim until EMS arrived. (*Id.* at 1288.) Brian Hall, who corroborated Mr. Stalnaker's testimony, was thereafter called by the State. (*Id.* at 1291-96.)

Following an afternoon recess, Lieutenant Robert Cook of the Clarksburg Police Department testified on behalf of the State. (*Id.* at 1298-99.) Lt. Cook recalled being dispatched to the crime scene following the 911 call by Ms. Hall. (*Id.* at 1299.) Lt. Cook corroborated the testimony of Sgt. Walsh, but identified that only one set of footprints appeared to deviate from a common area of the apartment building while appearing to lead to the victim's bedroom window. (*Id.* at 1299-1304.) The State also called Sergeant Mike Kiddy of the Clarksburg Police Department, and Josh Skiviat, who was an officer of the Clarksburg Police Department at the time of the murder, who corroborated the previous testimony of Sgt. Walsh and Lt. Cook. (*Id.* at 1305-13.)

2. Day Two, November 6, 2014.

The following day, the State continued its case by calling Lieutenant James Leary of the West Virginia Regional Jail System, who authenticated a booking data sheet for Petitioner which indicated that Petitioner's jailhouse calls would be monitored. (*Id.* at 1330-33.) Lt. Leary also informed the jury that a notice that calls would be monitored was also posted above every telephone. (*Id.* at 1334.) Finally, Lt. Leary stipulated that, after an inmate enters their offender number into the telephone to place a call, a recording is played over the telephone which informs the inmate that his or her call will be recorded. (*Id.* at 1336.) The State then called Gary Hamrick, an investigator for the prosecutor who obtained Petitioner's jailhouse telephone calls

and redacted the recordings in preparation of trial. (*Id.* at 1339-40.) Mr. Hamrick informed the jury of the redaction procedures and authenticated the audio tapes, which were then admitted as evidence on behalf of the State. (*Id.* at 1340-41.)

Next, Mr. Starks testified on behalf of the State. (*Id.* at 1342.) Mr. Starks identified Petitioner and admitted that he and Petitioner were good friends who grew up together. (*Id.* at 1343.) Mr. Starks identified that, at the time of the murder, Petitioner would occasionally stay at the Starks residence “off and on,” and that Petitioner would “come and go as he pleased.” (*Id.* at 1344.) Mr. Starks stated Petitioner called during the early morning hours of January 13, 2010, to see if the door was unlocked, and had arrived shortly thereafter to stay the night. (*Id.* at 1345.)

Mr. Starks stated that Petitioner only returned to the Starks residence “briefly” thereafter, even though he had left a jacket and cellphone. (*Id.* at 1346.) Mr. Starks identified that Mr. Fazzini and Mr. Wygal arrived at some point thereafter, and that he consented to a search. (*Id.* at 1348.) Mr. Starks then recalled the detectives locating Petitioner’s jacket and finding a silver gun clip in one of the jacket’s pockets. (*Id.* at 1351.) Mr. Starks also identified the Pittsburgh baseball cap worn by Petitioner and found near the scene of the crime. (*Id.* at 1351-52.)

The State played the jailhouse telephone call made by Petitioner to Mr. Starks. (*Id.* at 1353-54.) Mr. Starks admitted that Petitioner was attempting to intimidate him for cooperating with police.¹ (*Id.* at 1354.) Upon cross-examination, Mr. Starks identified that he did not know if Petitioner actually had a key to his home, but that upon Petitioner’s arrival on the night of the murder, Mr. Starks noticed that Petitioner was carrying two guns.² (*Id.* at 1357.) Mr. Starks then warned Petitioner that he could not have the guns in the house. (*Id.* at 1358.) When Mr. Starks

¹ The circuit court gave a cautionary instruction to the jury regarding the telephone call. (*Id.* at 1373-74.)

² Mr. Starks’ testimony about Petitioner’s guns was previously addressed in his statement to police, but the State resolved against addressing the matter at trial. (*Id.* at 1358.) The statement, however, was elicited upon cross-examination by Petitioner’s trial counsel, and in a brief bench discussion the State argued that the matter was *res gestae*. (*Id.*) Trial counsel then decided to move on without further addressing the matter before the jury. (*Id.*)

awoke the following morning, Petitioner had left the home without any indication that he would return. (*Id.* at 1359.)

Mr. Starks admitted that Mr. Fazzini subsequently arrived at the Starks residence. (*Id.* at 1360.) Mr. Starks opined that it was not unusual for Mr. Fazzini to stop by the Starks residence, as he and Mr. Fazzini were good friends. (*Id.* at 1361.) Mr. Starks further elaborated that Mr. Fazzini and Mr. Wygal arrived to search the Starks residence a couple of days later. (*Id.* at 1362-63.) Mr. Starks recalled that the detectives found Petitioner's jacket during the search, at which point Mr. Starks confirmed that Petitioner owned the jacket. (*Id.* at 1365.) Mr. Starks then identified that a .25 caliber gun clip and court papers bearing Petitioner's name were pulled from the jacket. (*Id.* at 1366.)

The State next called Scott Mitchell, a resident of Quarry Apartments who located Petitioner's baseball cap near his apartment. (*Id.* at 1376-78.) Following the brief testimony of Mr. Mitchell, the State called Sergeant Jason Webber of the Clarksburg Police Department. (*Id.* at 1386.) Sgt. Webber interviewed Ms. Hall subsequent to the murder, and later found a shell casing laying in the snow outside of the victim's apartment. (*Id.* at 1388-90.) The shell casing was admitted as evidence, and Sgt. Webber informed the jury that it was a .25 caliber shell casing. (*Id.* at 1396.) Sgt. Webber also recalled Mr. Mitchell informing him of the baseball cap, and identified that he had collected the hat and placed it into evidence. (*Id.* at 1400.) Sgt. Webber then identified that he began investigating surveillance videos in the area, including a video from the Henderson Center showing a "full sized truck and a light color silver looking Cadillac" travelling towards Quarry Apartments on the night of the murder. (*Id.* at 1405.)

The State then called Leonard Hickey, who let Petitioner's co-defendant, Darnell Bouie, borrow his truck on the night of the murder. (*Id.* at 1427-30.) Mr. Hickey testified that he ended

up riding with Mr. Bouie in the truck on the way to Quarry Apartments. (*Id.* at 1441.) Mr. Hickey also verified that his truck was the one seen in the Henderson Center video, and that they were following the Cadillac also seen in the video. (*Id.* at 1442-44.) Mr. Hickey admitted to dropping Mr. Bouie and several individuals off at Quarry Apartments, waiting about 15 or 20 minutes for them to get back, and then travelling to the Bridgeport Go-Mart. (*Id.* at 1447-49.) While Mr. Hickey was hesitant to name any individuals other than Mr. Bouie travelling to Quarry Apartments, he did admit that Petitioner was among the group at Go-Mart. (*Id.* at 1451.) Mr. Hickey also admitted to having size-14 feet, well above the size-10/10 ½ footprints found at the crime scene. (*Id.* at 1453-54.) Upon cross-examination, Mr. Hickey admitted that Petitioner was with Mr. Bouie at Quarry Apartments. (*Id.* at 1462, 1465.)

Following a noon recess, the State called Michael Moran, another friend of Mr. Bouie who was with Mr. Bouie and Petitioner on the night of the murder. (*Id.* at 1470.) Mr. Moran identified that he rode in the Cadillac with Petitioner on the night of the murder. (*Id.* at 1479.) Mr. Moran testified that Mr. Bouie and Petitioner left the vehicles upon arriving at Quarry Apartments. (*Id.* at 1481-82.) Further, Mr. Moran stated that after about four or five minutes, he left the Cadillac to see where Mr. Bouie and Petitioner went, but that they were at that point returning to the vehicles. (*Id.* at 1482.) Mr. Moran additionally identified that he wore size-9 ½ shoes. (*Id.* at 1486.)

The State next called Mr. Wygal, who testified in accordance with the prior testimony reviewed in Subsection (B) above in addition to detailing the investigation of the crime scene. (*Id.* at 1501-13.) Mr. Wygal also detailed the tennis shoe and boot prints found at the scene, specifying that only two sets of prints led to the victim's bedroom window, and informed the jury on the methods used to cast the footprints. (*Id.* at 1513-21.) Mr. Wygal also identified that

he found a baggie of cocaine in the victim's cupboard. (*Id.* at 1534-35.) Mr. Wygal then detailed the search of Mr. Starks' residence and the finding of the gun clip in Petitioner's jacket pocket. (*Id.* at 1539-41.)

3. Day Three, November 7, 2014.

On the third day of trial, the State called Richard McGuire of the Bridgeport Fire Department, who also performed duties as the county medical examiner for Harrison County, West Virginia. (*Id.* at 1562.) Mr. McGuire noted a "one centimeter hole in the left upper chest above the left breast" of the victim. (*Id.* at 1564.) Mr. McGuire also identified that he prepped the body of the victim to be sent for autopsy. (*Id.* at 1568-70.)

Mike Fazzini thereafter testified, detailing his conversation with Mr. Starks and the subsequent search of the Starks residence before the jury. (*Id.* at 1572-84.) Mr. Fazzini also identified that he did not recall finding any of Petitioner's belongings at the Starks residence beyond the jacket in the foyer/hallway. (*Id.* at 1584.)

The State then called Lieutenant Jason Snider of the Clarksburg Police Department, who was dispatched to Quarry Apartments on the morning of the shooting. (*Id.* at 1588-89.) Lt. Snider detailed his investigation of the crime scene and the victim. (*Id.* at 1590.) Additionally, Lt. Snider identified that he found \$1,330.00 in the victim's pocket. (*Id.* at 1593.) Lt. Snider also recalled obtaining evidence from the crime lab and coroner's office, including a bullet found in the victim's body. (*Id.* at 1596.)

Aaron Carey, a relative of Petitioner, then testified on behalf of the State. (*Id.* at 1615.) Mr. Carey testified that Petitioner had specifically confessed that he had shot the victim during a "robbery gone bad." (*Id.* at 1617.) Mr. Carey also identified that Petitioner stated that he had

shot the victim in the chest after the victim foiled his attempt to gain entry through the victim's window. (*Id.* at 1618.)

The State then called Travis Snider, who lived at Quarry Apartments at the time of the murder. (*Id.* at 1625.) Mr. Snider, who was leaving the apartments with his then-fiance for work around the same time of the crime, noticed the aforementioned truck and Cadillac going “[a]bnormally slow” through the apartment complex. (*Id.* at 1626.) The State also called Katelyn Snider, now Mr. Snider's wife, who corroborated his testimony. (*Id.* at 1628.)

Following Ms. Snider's testimony, the circuit court broke for a lunch recess. After the jury left, the circuit court conversed with counsel upon the record, and noted that Petitioner wished to voluntarily absent himself from the afternoon session. (*Id.* at 1633.) Following the lunch recess, the circuit court properly admonished the jury regarding Petitioner's absence, instructing them that it was no indication of his guilt. (*Id.* at 1639.) The State then called Brian McVicker, a forensic examiner and analyst with the FBI at Quantico, Virginia. (*Id.* at 1640.)

Mr. McVicker was quickly qualified as an expert in footwear analysis before turning to the evidence in Petitioner's case. (*Id.* at 1641-42.) Mr. McVicker opined that Petitioner's footwear fit the impressions casted at the scene of the crime. (*Id.* at 1647-51.) Specifically, Mr. McVicker identified that Petitioner's size-10 ½ Timberland boots fit the impression found at the crime scene, in that “the visible design elements . . . correspond to the features in the test impression.” (*Id.* at 1662-66.) Mr. McVicker admitted, however, that there were no individual features in either the boots or the cast with which he could determine that it was Petitioner's specific boots that made the impression. (*Id.* at 1671.)

The State next called Sergeant Josh Cox of the Clarksburg Police Department, who responded to a call from Sgt. Walsh to report to Quarry Apartments on the night of the murder.

(*Id.* at 1673-74.) Sgt. Cox detailed the broken blinds and damaged screen in the victim's bedroom and corroborated the testimony of the other investigating officers. (*Id.* at 1675-85.) Sgt. Cox also reiterated locating a .25-caliber shell casing outside of the victim's apartment. (*Id.* at 1690-91.)

Sgt. Cox similarly addressed the bullet recovered from the victim's body and the baseball cap recovered from near the scene. (*Id.* at 1697-98.) The State then reviewed the videos with Lt. Cox, and established the entire timeline for the crime. (*Id.* at 1699-1716.) Sgt. Cox identified that the Go-Mart video taken after the crime showed that Petitioner appeared to be wearing dark-colored boots. (*Id.* at 1720.) Further, Mr. Bouie appeared to be the only person in the group wearing tennis shoes. (*Id.* at 1721.) Importantly, Sgt. Cox identified that Petitioner admitted to owning the hat found near the crime scene, but that Petitioner also stated that other people would occasionally wear the hat. (*Id.* at 1732.)

Upon cross-examination, trial counsel for Petitioner elicited testimony from Sgt. Cox that "some plastic looking thing" shown in a crime scene photograph on the baseboard underneath the victim's bedroom window could have been the tip to a Black & Mild cigarillo, which Mr. Moran admitted to smoking during his testimony. (*Id.* at 1748.) Petitioner then focused on Mr. Moran's possible involvement in the crime as a defense. (*Id.* at 1748-57.) On redirect, however, Sgt. Cox admitted that Petitioner was seen smoking on video as well, and that the "plastic looking thing" seen in the picture could have been from anyone. (*Id.* at 1760-61.) Finally, Sgt. Cox identified that Petitioner was seen on video without the hat found near the crime scene after the time of the crime. (*Id.* at 1761.)

4. Day Four, November 10, 2014.

The State opened the fourth day of trial by calling David Miller, an employee of the West Virginia State Police Forensic Laboratory. (*Id.* at 1773.) Mr. Miller identified his collection of evidence in the matter, and the collection of biological samples from the evidence. (*Id.* at 1774-78.) Following Mr. Miller's testimony, the State called Angela Gill, a DNA analyst at the West Virginia State Police Crime Lab. (*Id.* at 1781.) Ms. Gill explained DNA analysis to the jury, and opined that Petitioner could not be excluded as a possible donor to the DNA found on the cap, but stated that DNA collection from the hat was too incomplete to outright confirm the DNA on the hat as Petitioner's. (*Id.* at 1797-99.)

The State then called Kent Cochran, a firearm and toolmark examiner with the West Virginia State Police Forensic Laboratory. (*Id.* at 1809.) Mr. Cochran identified that the spent .25-caliber shell casing shared similar extraction marks with ammunition obtained from Petitioner's gun clip. (*Id.* at 1822.) Mr. Cochran also indicated that the .25-caliber shell casing and the bullet recovered from the victim's body were made by the same ammunition company. (*Id.* at 1824.)

The State then called Nabila Haikal, the medical examiner at the time of the murder. (*Id.* at 1833.) Ms. Haikal identified that the victim's death was caused by a shooting, and that the bullet was able to be effectively extracted from the victim's body. (*Id.* at 1845.) Ms. Haikal further identified that the wound was consistent with someone being shot while bending down, toward the muzzle of the gun, as the victim would had to have been positioned. (*Id.* at 1849.) Following a brief recall of Sgt. Cox, the State then rested its case. (*Id.* at 1853.) Thereafter, Petitioner moved for a judgment of acquittal and was subsequently denied. (*Id.* at 1855-59.)

5. Day Five, November 12, 2014.

Petitioner opened his case by calling Gary Rini, an independent forensic science consultant. (*Id.* at 1873.) Mr. Rini challenged the investigating officers' lack of a photolog to assist the investigation, lack of a posted officer or crime scene attendance log, and the lack of crime scene security in general. (*Id.* at 1883-88.) Mr. Rini also opined that the investigation was sloppy in terms of locating obtainable evidence from the crime scene. (*Id.* at 1888-93.) Upon cross-examination, however, the State elicited testimony from Mr. Rini that the police investigation actually comported with Mr. Rini's opinion of a reasonable investigation. (*Id.* at 1894-99.) The State further called into question the reasonableness of Mr. Rini's independent analysis. (*Id.* at 1902-10.)

Following Mr. Rini's testimony, the defense rested its case. (*Id.* at 1913.) Petitioner then renewed his motion for acquittal, but was again denied. (*Id.* at 1916.) Following a lunch recess, the jury began deliberations. (*Id.* at 2000-01.) After deliberating for a majority of the afternoon, the jury asked for a recess from deliberations until the following morning, which the circuit court then granted. (*Id.* at 2006.)

6. Day Six, November 13, 2014.

On the following morning, the jury was again sent back for deliberations. (*Id.* at 2010.) At approximately 1:55 P.M. the jury returned to the courtroom to deliver a verdict. (*Id.* at 2013-14.) The jury found Petitioner guilty of first-degree murder and conspiracy to commit burglary as found within the indictment. (*Id.* at 547.) Petitioner now appeals, contending that he was prejudiced by his presence in jailhouse clothing, shackles and handcuffs during voir dire, was prejudiced by the circuit court's denial of his motion for change of venue, and the State's search

and obtainment of evidence from both the Starks residence and Petitioner's home. In the following sections, Respondent specifically denies the presence of the errors alleged on appeal.

SUMMARY OF THE ARGUMENT

The State disputes that Petitioner is entitled to any form of relief. First, the search of the Starks residence was proper. Mr. Starks, as the homeowner and primary resident, clearly maintained the proper authority to consent to a search of the home. Petitioner, as an occasional overnight guest who slept in a common area of the house and did not have a private room, already had a diminished expectation of privacy in a home shared by Mr. Starks, his wife and three children. Petitioner further diminished that interest by leaving his coat strewn about in a common area, and failing to retrieve it despite the passage of time and his own brief visit back to the Starks residence. While Petitioner may have retained an ownership interest in the jacket, he had clearly abandoned his sole privacy interest in the jacket, as it was immediately foreseeable that another person could see or reach into the jacket pockets during his continued absence.

Second, the search warrant effectuated on Petitioner's own residence was lawful. The warrant listed the specific place to be searched, the things to be seized, was based off of sufficient probable cause, and explained a nexus between the things to be seized and the crime being investigated. From a totality of the circumstances, the warrant was sufficient and lawful.

Third, Petitioner was compelled to wear jailhouse clothing, shackles and handcuffs for numerous reasons during voir dire, rather than the simple "security risk" reason put forth by Petitioner in his brief. This case is rife with examples of Petitioner's violent and disruptive behavior, which serves as the primary reason that his criminal case extended along an approximate period of four years. On the day of trial, Petitioner again attempted his gambit by refusing to change into street clothes. Despite continued warnings and suggestions to do so by

both his trial counsel and the circuit court, Petitioner felt it prudent to issue a veiled threat and implicitly waive his right to appear in street clothes. As such, the circuit court's compulsion was not in error.

Fourth, there is simply no evidence in support of Petitioner's contention that he suffered from unfair pretrial publicity or that the circuit court's denial of Petitioner's motion for change of venue was error. If anything, the record proves the opposite. Of the entire jury pool, only two prospective jurors admitted to hearing anything about Petitioner's case in the news. Both jurors answered in the negative when asked if they had formed an opinion of the case based upon the news articles. Neither juror recalled specific information derived from the news articles, and only one of the two jurors ended up sitting on the venire during Petitioner's trial.

Finally, the State contends that none of the complained-of errors were committed during Petitioner's trial. Alternatively, the State contends that such errors both fail to be numerous and were in effect harmless in the face of the evidence put forth by the State. As such, this Honorable Court should deny Petitioner's direct appeal and affirm his conviction within the Circuit Court of Harrison County, West Virginia.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State contends, based upon the completeness of the underlying record and the issues of law at hand, that oral argument in this matter is unnecessary. This matter may be properly settled via Memorandum Decision pursuant to Rule 21 of the West Virginia Revised Rules of Appellate Procedure through application of current and longstanding West Virginia law.

ARGUMENT

A. The Circuit Court Correctly Ruled That Evidence Obtained from Petitioner’s Jacket, Which Was Found Within the Residence of Tim Starks, Was Admissible During Trial.

1. The Police Officers’ Search of the Starks Residence and Subsequent Seizure of Petitioner’s Gun Magazine from Petitioner’s Jacket Within the Residence Was Lawful, Given the Consent of Mr. Starks to Search the Residence.

“The Fourth Amendment of the United States Constitution, and Article III, Section 6 of the West Virginia Constitution protect an individual’s reasonable expectation of privacy.” Syl. Pt. 7, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981). “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.” *Wagner v. Hedrick*, 181 W. Va. 482, 487, 383 S.E.2d 286, 291 (1989) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

This Honorable Court has previously held that, while an overnight guest has a legitimate privacy interest in the host’s home, the United States “Supreme Court also observed that ‘[f]rom the overnight guest’s perspective, he seeks shelter in another’s home precisely because it provides him with . . . a place where [the guest] . . . and his possessions will not be disturbed by anyone but his host and *those his host allows inside.*” *State v. Dorsey*, 234 W. Va. 15, 26, 762 S.E.2d 584, 595 (2014) (emphasis in original) (quoting *Minnesota v. Olson*, 495 U.S. 91, 99 (1990)). This Court based its finding that a permissible search based off of the host’s consent is lawful upon similar determinations in other jurisdictions made when an overnight guest attempts to challenge a search and seizure under the Fourth Amendment based upon the consent of the homeowner. *Id.*

As an example, this Honorable Court utilized the Eighth Circuit's ruling in *United States v. Oates*, 173 F.3d 651 (8th Cir. 1999), wherein the court found that a houseguest's objection to a search over the homeowner's consent operated in conflict to the greater holding of *Olson*. *Id.* While Petitioner attempts to sidestep the greater ruling of consent and invoke a more narrow challenge to the search of Petitioner's jacket found within the residence, the fact remains that police were within the residence lawfully, based upon the consent of the homeowner, and outside of the necessarily strict confines of the search warrant.

In this instance, the State concedes that Petitioner was a guest at the Starks residence. Of particular import, however, is that Petitioner had no formal living arrangements within the Starks residence, and would often simply stay in the living room area. (*Id.* at 1344.) Further, Petitioner was not solely staying with Mr. Starks, and he would sleep at the Stark's residence "off and on." (*Id.*) Mr. Starks could not remember if Petitioner even had a key to the residence. (*Id.* at 1355.)

On the night of the murder, Petitioner arrived at the Starks residence shortly after the time of the murder, and was gone in the morning before Mr. Starks had awoken. (*Id.* at 1358-59.) When Petitioner arrived at the Starks residence, Mr. Starks noted that Petitioner was in possession of firearms which Mr. Starks told Petitioner he could not have in the home. (*Id.* at 1358.) Mr. Starks testified that Petitioner had left behind a jacket and cellphone, which he did not later retrieve despite coming back to the residence "briefly" thereafter. (*Id.* at 1346.) Finally, this Honorable Court should note that Mr. Starks lived in the residence with his wife and three kids. (*Id.* at 1344.)

The facts of Petitioner's case perfectly comport with both this Honorable Court's holding and its underlying reasoning in *Dorsey*. Petitioner's status as an occasional houseguest cannot trump the consent of Mr. Starks as the homeowner. The investigating police, searching the

Starks residence for evidence of the murder, could certainly seize a jacket plausibly connected to the murder lying in plain view within a common area of the home. Police certainly had the requisite cause to search the jacket after identifying that it had been left by Petitioner following the night of the murder. Petitioner's privacy interest is already diminished as a houseguest, is further diminished as an occasional houseguest who had not been recently present at the Starks residence, and is questionable in its entirety after Petitioner left his jacket in a common area, within a family household among numerous individuals with access to the jacket, and failed to retrieve it upon a subsequent visit.

2. The Police Officers' Search of the Starks Residence and Subsequent Seizure of Petitioner's Gun Magazine from Petitioner's Jacket Within the Residence Was Lawful, Given Petitioner's Abandonment of the Jacket.

Based upon the foregoing, the State further contends that Petitioner had abandoned, in terms of his privacy interest, his jacket at the Starks residence after leaving it in a common area and failing to retrieve it despite visiting the residence "briefly" following the crime. This Honorable Court has previously held that "[t]he State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, such as . . . property that has been abandoned, as well as searches and seizures made that have been consented to." Syl. Pt. 4, *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973).

The issue of abandonment of personal property in regards to search and seizure law in West Virginia is limited. The Fifth Circuit, however, in *United States v. Colbert*, noted that "[t]he issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of

privacy with regard to it at the time of the search.” *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973). As such, abandonment in terms of search and seizure law has nothing to do with a possessory interest, but whether a defendant, through his “words spoken, acts done, and other objective facts” has relinquished his privacy interest in the item searched or seized. *Id.*

Here, the State does not dispute that Petitioner has a possessory interest of the jacket. The State, however, declares that Petitioner’s privacy interest in the jacket was nominal. Petitioner ultimately left his jacket in a common area of a house in which he only occasionally spent the night, and failed to retrieve the jacket despite stopping by the house “briefly” in the time following the murder. Petitioner additionally left his jacket in a common area of a home occupied by a family consisting of Mr. Starks, his wife, and his three children. As such, the objective facts of this case and the acts of Petitioner himself warrant a determination that Petitioner has abandoned his privacy interest in the jacket, and the circuit court correctly determined that evidence obtained from the jacket should not be suppressed.

3. Petitioner’s Authority Bears Little Significance to the Case at Bar.

In support of his position, Petitioner relies on authority easily distinguished from the facts of his own case. In *State v. Duvernoy*, 156 W. Va. 578, 581, 195 S.E.2d 631, 633-34 (1973), police searched a blanket upon which the defendant was lying with a young lady for marijuana without either consent of the parties or a search warrant. In *State v. Moore*, 165 W. Va. 837, 840, 272 S.E.2d 804, 807-08 (1980), police searched an automobile without consent, a search warrant, or any lawful exception to the defendant’s Fourth Amendment rights.

In *State v. Plantz*, 155 W. Va. 24, 41, 180 S.E.2d 614, 625 (1971), *overruled on other grounds* by *State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981), this Honorable Court specifically found that “the well-established 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.” In *Plantz*, this Honorable Court found that articles seized from a residence owned by the defendant’s grandparents and in which the defendant was staying, including clothing hidden in a clothes hamper, were rightfully admitted by the trial court based upon the consent of the grandparents to the search. *Id.* 155 W. Va. at 43, 180 S.E.2d at 626.

Similarly, the United States Supreme Court has granted justification to a search of a premises or property upon consent by a joint occupant or user in *United States v. Matlock*, 415 U.S. 164, 170-72 (1974). In *Frazier v. Cupp*, 394 U.S. 731, 740 (1969), the Supreme Court refused to delve into the “metaphysical subtleties” of the petitioner’s argument in favor of suppression, instead looking into the risk to petitioner’s privacy interest and finding that, although the petitioner allowed his cousin to use a single compartment in his duffel bag, it was not unfeasible that his cousin would have looked inside the duffel bag, therefore minimalizing the petitioner’s privacy interest in the bag.

Finally, Petitioner’s case is distinguishable from the holding of *United States v. Block*, 590 F.2d 535 (4th Cir. 1978), and similar cases involving the search of a criminal defendant’s personal property in the home of another. In *Block*, police obtained consent to search by the defendant’s mother, who owned the home in which defendant was living. *Id.* at 538. The Fourth Circuit found that consent to search the home, including the defendant’s room, was proper, but that evidence forcibly obtained from the defendant’s locked footlocker should have been suppressed. *Id.* at 540. As illustrated above, Petitioner’s jacket was neither in a room in which he maintained exclusive dominion, nor secured in such a way as to ensure a sole privacy interest.

Based upon the foregoing, the circuit court correctly admitted the evidence of Petitioner's gun magazine found in his jacket within the Starks residence. Prior established case law dictates that Mr. Starks was lawfully able to consent to the search of his home, of which he was a primary occupant. 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. Given the lawfulness of the search, Petitioner's abandonment of his jacket, and the lack of legal authority warranting relief, this Honorable Court should deny Petitioner's first assignment of error and affirm his conviction in the circuit court below.

B. The Circuit Court Correctly Ruled That Evidence Seized from Within Petitioner's Home Was Admissible During Trial.

“Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.” Syl. Pt. 4, *State v. Hlavacek*, 185 W. Va. 371, 407 S.E.2d 375 (1991) (citing Syl. Pt. 4, *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762 (1986)). “To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search and further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable.” *Id.*, Syl. Pt. 5 (citing Syl. Pt. 1, *State v. Stone*, 165 W. Va. 266, 268 S.E.2d 50 (1980)).

Further:

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

Syl. Pt. 3, *State v. Corey*, 233 W. Va. 297, 758 S.E.2d 117 (2014) (citing Syl. Pt. 3, *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995)). Finally, “[r]eviewing courts should grant magistrates deference when reviewing warrants for probable cause. Such warrants should be judged by a ‘totality-of-the-circumstances’ test.” Syl. Pt. 1, *Corey* (citing Syl. Pt. 5, *State v. Thomas*, 187 W. Va. 686, 421 S.E.2d 227 (1992)).

Aside from noting 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 search warrant, the State contends that reviewing the warrant in terms of a “totality-of-the-circumstances” test clearly indicates that the warrant was proper for purposes of the search of Petitioner’s residence. The circuit court found that Sgt. Cox provided “sufficient facts to warrant the belief that a crime has been committed and that evidence from that crime may be found at [Petitioner’s] residence of 118 Anderson Street.” (App. at 442.)

The supporting affidavit indicated that Petitioner was seen with a hat prior to the murder and without a hat following the murder, and that a similar hat was found by the victim’s residence. (*Id.* at 2035.) The affidavit identified that surveillance video corroborated such an

assertion. (*Id.*) The affidavit also identified that the victim was murdered with a .25-caliber gun, and that a .25-caliber gun magazine was found in Petitioner's jacket during the search of the Starks residence. (*Id.*) Under the foregoing analysis, the police search of the Starks residence and subsequent seizure of Petitioner's gun magazine should not serve to destroy the validity of the warrant. As such, the circuit court found that it was entirely reasonable "to believe that the place searched – the [Petitioner's] residence – would yield the specific classes of items sought, such as clothing worn by [Petitioner] in the surveillance video." (*Id.* at 442.)

While Petitioner contends that the warrant should be challengeable based upon Sgt. Cox's statement that "[a]ccording to an individual, [Petitioner] has throughout the night attempted to make contact with the victim by phone, . . ." the removal of such a statement does not invalidate the warrant. (*Id.* at 2035, Petitioner's Brief at 18.) This Honorable Court has held that "[a] search warrant affidavit is not invalid even if it contains a misrepresentation, if after striking the misrepresentation, there remains sufficient content to support a finding of probable cause." Syl. Pt. 2, *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995) (in part).

Petitioner also challenges Sgt. Cox's assertion that Petitioner's hat was found near the crime scene. This assertion was based upon strong video evidence, as explained in the affidavit, and was later confirmed by Petitioner. As such, Petitioner's contention that the affidavit's conclusory statement that Petitioner owned the hat somehow invalidates the warrant is meritless. Similarly, the lack of locations where Petitioner is seen with or without the hat within the affidavit bears no weight as to probable cause, considering that the crime was committed, and Petitioner was previously and subsequently spotted, in a local area.

As such, the circuit court made a proper determination that there was a common nexus in the warrant and affidavit of the location to be searched and things to be seized, and that the

affidavit set forth probable cause to warrant the search. Petitioner's argument on this topic is meritless, and this Honorable Court should deny Petitioner's second assignment of error, thereby affirming his conviction in the circuit court below.

C. Petitioner's Own Actions Created an Implicit Waiver of His Constitutional Rights, and the Circuit Court, After Repeated Warnings to Petitioner, Rightfully Ordered Petitioner's Presence in Jailhouse Clothing, Handcuffs and Shackles During Voir Dire.

Petitioner further argues that the circuit court erred by compelling his presence during voir dire while dressed in jailhouse clothing, shackles and handcuffs. Petitioner tries to subtly induce this Honorable Court into finding that he was simply compelled to wear the clothing and restraints citing security reasons by order of the circuit court while, at the same time, circumventing his repeated disruptions during court, his repeated outbursts during court, his repeated refusals to appear before the court, and his threat of danger to the court and jury. For this reason, the State has spent a significant portion of this brief detailing exactly those facts.

In Syl. Pt. 2, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979) (in part), this Honorable Court held that “[a] criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire.” A criminal defendant, however, may “waive a fundamental right protected by the Constitution, but it must be demonstrated that the waiver was made knowingly and intelligently.” *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979). Absent written waiver of a constitutional right signed by the criminal defendant, the waiver may still be valid “when the record firmly establishes the defendant’s personal, knowing, intelligent and voluntary waiver.” Syl. Pt. 7, *State v. Redden*, 199 W. Va. 660, 487 S.E.2d 318 (1997) (pertaining to a criminal defendant’s implicit waiver of a jury trial). Even in cases where a criminal defendant may have been unjustifiably compelled to testify in shackles or prison clothing, both this Honorable Court and

the Fourth Circuit have determined that the appropriate remedy is that of an evidentiary hearing to determine whether such compulsion was necessary and legal. *See State v. Finley*, 219 W. Va. 747, 639 S.E.2d 839 (2006); *Brewster v. Bordenkircher*, 745 F.2d 913 (4th Cir. 1984).

Here, the record is rife with examples of Petitioner repeatedly antagonizing the circuit court and using his absence, or refusal to appear once transported to the courthouse, to unnecessarily delay his criminal trial and ultimate conviction. Petitioner was given numerous opportunities to change into street clothes -- both by the circuit court and by trial counsel -- yet staunchly refused. Instead, Petitioner felt it prudent to insinuate that he would endanger persons present for voir dire. At its core, Petitioner's claim is a perfect example of implicit waiver. Petitioner was repeatedly warned by the circuit court and trial counsel of the potential prejudice that could arise from refusing street clothing, yet Petitioner knowingly accepted that risk. The circuit court officially noted that Petitioner's actions had become a repetitive tactic in his attempts to continue the trial. Finally, the circuit court instructed the jury to disregard Petitioner's clothing. As a result, Petitioner's own impetuous actions are the only reasons he was compelled to appear in jailhouse clothing, shackles and handcuffs. Petitioner's argument on appeal is disingenuous. An evidentiary hearing upon this matter is unnecessary. Petitioner has merely attempted to create error. Therefore, this Honorable Court should deny Petitioner's third assignment of error and affirm his conviction in the circuit court below.

D. The Circuit Court Correctly Denied Petitioner's Motion for a Change of Venue and/or Venire Prior to Trial, as Evidenced by the Jury's Unfamiliarity With Petitioner's Case Prior to Trial.

Petitioner also argues that the circuit court erred by denying Petitioner's motion for a change of venue. "To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests upon defendant, the only person who, in any such

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

Petitioner filed his motion for a change of venue, alleging that the newspaper articles and extensive media coverage explicitly warrant removal of the case to another county or warrant a change of venue. In response, the State proffered that Petitioner had failed to put forth any other evidence “that there exists in this County a prejudice against [Petitioner] so great that he cannot obtain a fair and impartial trial in this County,” or that “a present hostile sentiment exists against [Petitioner], extending throughout the entirety of Harrison County.” (App. at 263.)

Indeed, during voir dire, only two jurors out of the entire jury pool recalled hearing news of the victim’s murder, or the arrest of Petitioner as a suspect. (*Id.* at 1065-66.) By the start of Petitioner’s trial, only one of those jurors remained, and she explicitly informed the circuit court that she had no opinion of the case derived from the news. (*Id.* 1065-66, 1142.) Therefore, in addition to Petitioner putting forth insufficient evidence to warrant removal of the case, his contentions were affirmatively disproven during voir dire. Thus, this Honorable Court should deny Petitioner’s fourth assignment of error and affirm his conviction in the circuit court below.

E. Petitioner Has Not Suffered from the Cumulative Effect of Numerous Errors, as the State Has Proven that the Foregoing Alleged Errors Did Not Occur. Assuming, *Arguendo*, the Existence of Such Errors, the State Proved Petitioner’s Guilt Beyond a Reasonable Doubt Through Evidence Separate from the Evidence Seized During the Aforementioned Searches of the Starks Residence and Petitioner’s Home, Rendering Any Such Errors Harmless.

“Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction

should be set aside, even though any one of such errors standing alone would be harmless error.” Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972). Under *Smith*, however, “the cumulative error doctrine is applicable only when ‘numerous’ errors have been found.” *State v. Tyler G.*, No. 14-0937, 2015 WL 5928449 (W. Va. Oct. 7, 2015). Similarly, “[t]wo errors do not constitute ‘numerous’ for purposes of the cumulative error doctrine.” *Id.*

Here, the State contends that the errors assigned by Petitioner are meritless. If, however, this Honorable Court finds that any of the foregoing errors were committed, the State also contends that such errors were not “numerous.” Finally, any such errors were clearly harmless in the face of the evidence put forth by the State. As indicated in the foregoing, lengthy facts section, the State proffered evidence that Petitioner travelled to the victim’s apartment on the night of the murder, and that he and Mr. Bouie, his co-defendant, were the only individuals to walk to the victim’s apartment upon arrival at Quarry Apartments. Trial counsel, during cross-examination, elicited testimony that Petitioner went to Mr. Stark’s house following the murder, and that Mr. Starks saw Petitioner with guns. Finally, Mr. Curry testified that Petitioner had confessed to shooting the victim during a “robbery gone bad.” (*Id.* at 1617.)

The State produced video showing Petitioner, prior to the crime, wearing a hat found near the scene of the crime, and produced video showing Petitioner without said hat after the crime. The State proffered that Petitioner admitted that he owned the hat, although other people sometimes wore the hat. The State then identified that Petitioner could not be eliminated from contributing the DNA found on the hat. The State produced evidence that a boot print was found outside of the victim’s bedroom window, and further identified that Petitioner was wearing boots in the Go-Mart video taken directly after the murder. As such, even without the evidence seized from Petitioner’s home or the Starks residence, the State put forth sufficient evidence of guilt.

The State further contends that, adding evidence of either the gun magazine, or Petitioner's size-10 ½ boots, further solidifies that guilt. As such, in the event that this Honorable Court finds error during the course of Petitioner's trial, it should similarly find such error to be harmless. By rendering absent the evidence complained of in the present appeal and viewing the remaining evidence in a light most favorable to the State, it is clear that Petitioner did not suffer prejudice from cumulative effects of numerous errors.

CONCLUSION

For the foregoing reasons, the State respectfully directs this Honorable Court to deny the assignments of error within the direct criminal appeal of Ennis Charles Payne, II, and affirm his conviction within the Circuit Court of Harrison County, West Virginia.

Respectfully Submitted,

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Respondent, By Counsel,

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CERTIFICATE OF SERVICE

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the Respondent State of West Virginia hereby verify that I have served a true copy of "**RESPONDENT'S BRIEF**" upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of October, 2015, addressed as follows:

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