IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,

Plaintiff Below, Respondent,

v. **NO. 21-0396**

Tracy Pennington,

Defendant Below, Petitioner.

PETITIONER'S BRIEF

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Constitutional Provisions

Defendant, Tracy Pennington, was convicted of the felony offense of child concealment by virtue of guilty plea. Pennington's guilty plea was a **conditional plea whereby she reserved the right to appeal the Circuit Court's denial of a motion to suppress evidence.** AR25. By Order entered April 15, 2021, the Circuit Court sentenced Pennington to imprisonment of not less than one year nor more than five years. Said sentence of imprisonment was suspended and Pennington was placed on probation for a period of four years. AR34. It is from this Order that Pennington now appeals.

This appeal concerns the sanctity of the home. As our British legal forebears recognized, no place is more deserving of protection from government intrusion than the home:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement! *Lange v. California*, No. 20-18, 594 US ___ (slip op. 13, n.4)(June 23, 2021).

Assignment of Error

The Circuit Court erred when finding that law enforcement's search of Pennington's residence to execute a juvenile pickup order was lawful where it was based upon an uncorroborated tip from an unknown tipster.

Statement of the Case

The defendant, Tracy Pennington, was charged along with her co-defendant GW in a two-count Indictment for the offenses of child concealment and conspiracy to commit the felony of child concealment. AR01. The child concealed by Pennington and GW is SW, who is the birth daughter of the defendants and was 16 years old at the time. Pennington moved to suppress the search for SW at Pennington and GW's residence—an apartment located on Klondyke Road in Ripley, Jackson County, West Virginia—on

May 16, 2019. SW was located in the residence during the search. As a result, Pennington and GW were charged with the crimes herein.

On or about November 29, 2018, the Circuit Court of Jackson County placed SW in the temporary custody of her paternal grandparents. This Order was entered in a truancy proceeding against SW, which is a juvenile status offense case. The placement was made pursuant to an agreement by the parties to allow SW to live with her paternal grandparents and attend school in Kanawha County, which was hoped to address SW's pattern of unexcused absences. TR 8.

SW ran away from her paternal grandparents' home on or about December 7, 2018 and her whereabouts were unknown. TR 9. Thereafter, on January 11, 2019, a pickup order was issued for SW, placing her in the custody of the West Virginia Department of Health and Human Resources. TR 9. Again, this Order was entered under the Court's jurisdiction over SW as a juvenile status offender. No claims or allegations were ever filed against SW's parents as part of a juvenile abuse and neglect case. Moreover, despite the pickup order, GW and Pennington's parental rights have remained intact. TR 10.

At some point after the pickup order was entered, Youth Service Worker Carey Blackhurst spoke to the defendants on the phone regarding SW's whereabouts. TR 12. Blackhurst also went to the Klondyke Road residence on several occasions, but never went inside the residence. Instead, Blackhurst left her card because no one answered the door. TR 12. Blackhurst went to the residence by herself or with other workers on these occasions. TR 13. Blackhurst said that she had previously communicated with law enforcement about places to look for SW. TR 13. But on the date of the search, Blackhurst was not the on-call worker, so she did not have any communication with law enforcement regarding the search on that date. TR 14.

Law enforcement had also been out to Pennington and GW's residence on occasions prior to the date of the search, but never entered the residence because no one answered the door. Law enforcement had also gone out to Pennington's mother's residence looking for SW to no avail. TR 30-31.

On May 16, 2019, at 8:38 PM, Deputy Dewees was on duty and received information from Chief Deputy Ross Mellinger that Deputy Mellinger had recently spoken with "a lady" who saw SW at Pennington and GW's residence. TR 16, TR 31. The tipster also advised that she had spoken with Pennington about SW, and Pennington had stated that it was her intention to hide SW from law enforcement until SW turned 18, so SW would no longer be under the Court's jurisdiction as a juvenile status offender. TR 17.

Upon receiving this information, Deputy Dewees went directly to Pennington and GW's residence. TR 17. Deputy Dewees did not in his own right do anything to to confirm the credibility of Deputy Mellinger's tipster or the reliability of the information. TR 26, TR 43. The tipster did not provide any information that SW was in any immediate danger. TR 26.

After receiving the tip from Deputy Mellinger, Deputy Dewees obtained a copy of the pickup order for SW. TR 27. Also, Deputy Dewees contacted CPL Comer of the West Virginia State Police. Sometime between 5:00 PM when his shift started and 8:38 PM when he received the tip from Deputy Mellinger, Deputy Dewees heard over the radio that CPL JM Comer and CPL MP Fanin with the West Virginia State Police were out at the residence regarding a separate criminal investigation. The Troopers knocked on the door of the residence, but nobody answered the door. Deputy Dewees called CPL Comer to advise him of the tip, and CPL Comer advised that he and CPL Fanin would assist. TR 33.

Deputy Dewees also called Katie Franklin, Prosecuting Attorney of Jackson County, and sought counsel regarding whether to obtain a search warrant. Prosecutor Franklin advised Deputy Dewees to proceed without obtaining a search warrant. TR 34-35.

Deputy Dewees then proceeded to Pennington and GW's apartment and knocked on the door. Deputy Dewees could hear walking inside the apartment, but no one answered the door. Deputy Dewees then went to the landlord and obtained the key to the apartment. TR 37. After obtaining the key, officers entered the residence and began searching for SW. Deputy Dewees and Lt. Todd Roberts of the Jackson County Sheriff's Department and CPL Comer and CPL Fanin of the West Virginia State police participated in the search. TR 40. But CPL Comer and CPL Fanin additionally took Pennington aside while the search was pending to take a statement from her regarding the separate criminal matter they were investigating. TR 42. No occupant of the residence gave the officers consent to search the residence. TR 28.

Upon entry to the residence, Pennington and GW were found lying on the bed in the first bedroom on the left. TR 18. Both Pennington and GW denied SW was at the residence. TR 18. SW was found hiding inside of a hollowed-out chest of drawers in the second bedroom of the residence. TR 19. Bodycam footage shows a crying and distraught SW arguing with law enforcement against being removed from Pennington's residence. Appx, Vol. III. GW and Pennington were then placed under arrest for child concealment. TR 40.

On May 18, 2020, the Circuit Court held an evidentiary hearing and the State called YSW Blackhurst and Deputy Dewees as witnesses. At the evidentiary hearing, Deputy Dewees testified that he did not know the tipster and could not attest to the tipster's credibility:

Q: You just testified earlier on cross-examination that you didn't know whether or not the actual person that gave the tip was credible.

A: We had information that she had saw her in the residence.

Q: But you don't know the individual that actually gave you that tip; is that correct?

A: I don't know the person, no.

Q: So there is no way for you to know whether or not that person is credible; is that correct?

A: Correct. TR 45.

The State did not call Chief Deputy Mellinger to testify at the evidentiary hearing.

By Order entered August 7, 2020, the Circuit Court denied Pennington's Motion to Suppress. AR13. On September 29, 2020, Pennington entered a conditional guilty plea, reserving the right to appeal the suppression issue. AR29.

Summary of Argument

In its Order denying Pennington's Motion to Suppress, the Circuit Court found that a juvenile pickup order equates to an arrest warrant. AR16. Pennington concedes this point.

But the Circuit Court also made the conclusory findings that (1) Pennington's residence was SW's "permanent address" and (2) Deputy Dewees had "good cause to believe" that SW would be there. AR17-AR18. It is with these conclusory findings that Pennington takes issue.

As will be discussed in greater detail below, the law requires that when law enforcement is uncertain about the residence of the target of an arrest warrant, they must have probable cause that (1) the location to be searched is the target's residence and (2) the target will be at that location at the time of the search.

In this case, Deputy Dewees acted on a tip he received secondhand from Chief Deputy Mellinger that the tipster had seen SW at Pennington's residence. Deputy Dewees did not know the tipster. And the State never called Chief Deputy Mellinger at the evidentiary hearing to testify about the tipster. So as far as the evidence of record is concerned, the tip was an anonymous tip.

An anonymous tip is not sufficient for probable cause, unless officers independently verify the tip by investigation leading to the discovery of information that corroborates the tip. In this case, Deputy Dewees did not conduct any kind of investigation. Instead, Deputy Dewees entered Pennington's residence armed with only a juvenile pickup order and an uncorroborated tip from an unknown tipster. Finally, no exception to the warrant requirement saves Deputy Dewees's illegal search of Pennington's residence. For these reasons, this Court must reverse the Circuit Court's Order denying Pennington's Motion to Suppress.

Statement Regarding Oral Argument and Decision

Oral argument is necessary under Rev. R. App. Pro. Rule 18(a). Under Rev. R. App. Pro. Rule 20(a)(1), this case would be appropriate for Rule 20 argument as a matter of first impression regarding the "reason to believe" standard for arrest warrants under *New York v. Payton*, 445 U.S. 573, 586 (1979), and clarified by the Fourth Circuit Court of Appeals in *United States v. Brinkley*, 980 F.3d 377, 386 (4th Cir. 2020). Because this case involves substantial questions of Fourth Amendment constitutional law and may result in the creation of new points of West Virginia law, a memorandum decision would be inappropriate in this case.

Argument

A. Suppression Standard of Review

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the

> circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore the circuit court's factual findings are reviewed for clear error. Syl. Pt. 1, *State v. Bookheimer*, 656 S.E.2d 471 (W. Va. 2007)(quoting Syl. Pt. 1, *State v. Lacy*, 468 S.E.2d 719 (W. Va. 1996)).
>
> In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article of the West Virginia Constitution is a question of law that is reviewed *de novo*.... Thus, a circuit court's denial of a motion to suppress will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made. Syl. Pt. 2, *State v. Bookheimer*, 656 S.E.2d 471 (W. Va. 2007)(quoting Syl. Pt. 2, *State v. Lacy*, 468 S.E.2d 719 (W. Va. 1996)).

B. *Because law enforcement opted to enter Pennington's residence by the authority of an arrest warrant over applying for a search warrant, they needed probable cause*

The Fourth Amendment of the United States Constitution protects citizens of the United States from *unreasonable* intrusions into their homes.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

The United States Supreme Court has applied the Fourth Amendment of the United States to the States under the incorporation doctrine of the due process clause of the Fourteenth Amendment of the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961)(applying the exclusionary rule to the States).

The West Virginia Constitution contains within it a near-verbatim statement of the right against unreasonable searches and seizures as that contained in the Fourth Amendment of the United States Constitution:

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized. W. Va. Const., art III, § 6.

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1979). And the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* at 585 (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

In this case, the Circuit Court found that the juvenile pickup order for SW operated as an arrest warrant. AR16. Pennington does not dispute that the juvenile pickup order equated to an arrest warrant. As such, law enforcement's entry into her residence was not a warrantless search *per se*, but this does not end the analysis.

When police armed with an arrest warrant seek to enter a suspect's own home, *Payton v. New York*, 445 U.S. 573 (1980) controls. In *Payton*, the United States Supreme Court concluded that "for Fourth Amendment purposes, an arrest warrant founded upon probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is **reason to believe** the suspect is within." *Id.* at 603 (emphasis added).

Several federal courts of appeal and state courts of last resort have differed over the "reason to believe" standard, since the United States Supreme Court did not define it in *Payton*.

The United States Supreme Court denied a petition for writ of *certiorari* presenting this exact question on January 7, 2019. *Harper v. Leahy*, 17-1995-cv (2d Cir. 2018), cert denied, 139 S. Ct. 795 (2019). At that time, two federal appellate courts (3rd and 9th Circuits) and two state high courts (Washington and Pennsylvania) had held

that the proper standard was a probable cause standard.[1] Three other federal appellate courts (2d, 10th and D.C. Circuits) and five other state high courts (Ky., Mass., Ind., D.C. and Colo.) held that the proper standard was reasonable suspicion.[2] Further sowing confusion was that yet two other federal appellate courts (5th and 6th Circuits) had issued conflicting precedents applying both standards.[3]

At the time the United States Supreme Court denied cert to *Harper*, the legal picture appeared murky for West Virginia, since neither the West Virginia Supreme Court of Appeals nor the Fourth Circuit Court of Appeals had decided this issue.

But fortunately for Pennington, the Fourth Circuit has, since that time, adopted the probable cause standard. *United States v. Brinkley*, 980 F.3d 377, 386 (4th Cir. 2020). Since West Virginia is a state within the Fourth Circuit, this Court has previously given due deference to decisions of the Fourth Circuit addressing the constitutional rights of a criminal defendant. See e.g., Syl Pt. 1, *State v. Kopa*, 311 S.E.2d 412 (W. Va. 1983)(overruling precedent permitting alibi instruction where Fourth Circuit invalidated the instruction due to unconstitutional burden-shifting).

To be clear, the distinction between the reasonable suspicion standard and the probable cause standard is an important one. This is not simply arguing over semantics.

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[1] *United States v. Vasquez-Algarin*, 821 F.2d 467, 479 (3d Cir. 2016); *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002); *Commonwealth v. Romero*, 183 A.3d 364, 394 (Pa. 2018); *State v. Hatchie*, 166 P.3d 698, 706 (Wash. 2007).

[2] *United States v. Bohannon*, 824 F.3d 242 (2d. Cir. 2016); *Valdez v. McPheters*, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999); *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005); *Barrett v. Commonwealth*, 470 S.W. 3d 337, 342 (Ky. 2015); *Commonwealth v. Gentile*, 2 N.E.3d 873, 875 (Mass. 2014); *Duran v. State*, 930 N.E.2d 10, 16 (Ind. 2010); *Brown v. United States*, 932 A.2d 521, 529 (D.C. 2007); *People v. Arkansas*, 150 P.3d 1271, 1276 (Colo. 2006).

[3] *United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006); *United States v. Hardin*, 539 F.3d 404, 416 n.6 (6th Cir. 2008); *United States v. Route*, 104 F.3d 59, 62 (5th Cir. 1997); *United States v. Barrera*, 464 F.3d 496, 501 (5th Cir. 2006).

For example, by adopting the reasonable suspicion standard, the Second Circuit held that *Payton* only requires a "reasonable basis for the police to believe defendant **might** be within." *Bohannon*, 824 F.3d at 255. This standard entails a "lesser showing" and "less justification" than probable cause, which requires that "the totality of circumstances indicates a 'fair probability that the thing to be seized will be found in a particular place.'" *Id.* Accord *Illinois v. Gates*, 462 U.S. 235 (1983)("probability...is the standard of probable cause").

As other courts have recognized, "[t]he reasonable belief standard is not very demanding, and certainly less demanding than probable cause." *Gentile*, 2 N.E.3d at 884. or, stated inversely, "[p]robable cause requires more than [mere] suspicion." *Hatchie*, 166 P.3d at 706. The United States Supreme Court has stated a reasonable suspicion may be supported by less reliable evidence than probable cause:

> Reasonable suspicion is a less demanding standard than probable cause[,] not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Alabama v. White*, 496 U.S. 325, 330 (1990).

In *Brinkley*, the Fourth Circuit adopted the probable cause standard whenever "police seek to enter a home and are uncertain whether the suspect resides there." 980 F.3d at 385. The Fourth Circuit found the probable cause standard to be most consistent with "the special protections that the Constitution affords to the home. The home has long enjoyed 'pride of place in our constitutional jurisprudence.'" *Id.* at 385 (quoting *Vasquez-Alagarin*, 821 F.3d at 478).

In *Brinkley*, the Fourth Circuit further noted that while the appellate courts differed over the "quantum of proof" to satisfy *Payton*, the various courts agree that *Payton* requires the following two-prong test:

> the officers must have reason to believe both (1) "that the location is the defendant's residence" and (2) "that he [will] be home" when they enter. *United States v. Hill*, 649 F.3d 258, 262 (4th Cir. 2011).

The Fourth Circuit recognized that this first prong of *Payton* is extremely important because of the United States Supreme Court's holding in *Steagald v. United States*, 451 U.S. 204 (1981) that police must obtain a search warrant to enter the home of a third party to execute an arrest warrant. The Fourth Circuit adopted the probable cause standard in large part because a reasonable suspicion standard "would effect an end-run around...*Steagald* and render all private homes...susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination. *Brinkley*, 980 F.3d at 385-86 (quoting *Vasquez-Alagarin*, 821 F.3d at 480). [4]

In *Steagald v. United States*, the search of the defendant Steagald's home was predicated upon an arrest warrant for a person named Lyons, who was a federal fugitive wanted on drug charges. DEA agents received information that Lyons could be reached at a certain landline telephone number. Agents then obtained the address for that telephone number, which was Steagald's address. Agents raided the residence. Lyons was not found, but agents did find 43 pounds of cocaine. As a result, Steagald was convicted of federal drug charges. At the suppression hearing in Steagald's case, the Agent in charge of the investigation testified he believed the arrest warrant for Lyons was sufficient to justify the entry and search of Steagald's residence.

The United State Supreme Court held that the arrest warrant for Lyons was insufficient to justify a violation of Steagald's Fourth Amendment rights. In doing so,

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[4] The Fourth Circuit in *Brinkley* clarified that *Payton's* legal framework controls when officers *believe* that the suspect resides in a certain home, even if they are mistaken. Where officers attempt to execute a search warrant in the home of a third party without any belief that the home is also the suspect's residence, *Steagald* applies. *Brinkley*, 980 F.3d at 385 (citing *Vasquez-Alagarin*, 821 F.3d at 472).

the Supreme Court recognized that two distinct interests were at stake—the suspect's interest in being free from unreasonable seizure and the third party's interest in being free from an unreasonable invasion of his home:

> Here, of course, the agents had a warrant—one authorizing the arrest of Ricky Lyons. However, the Fourth Amendment claim here is not being raised by Ricky Lyons. Instead the challenge to the search is asserted by a person not named in the warrant who was convicted on the basis of evidence uncovered during a search of his residence for Ricky Lyons.
>
> ...
>
> Thus, whether the arrest warrant issued in this case adequately safeguarded the interests protected by the Fourth Amendment depends upon what the warrant authorized the agents to do. To be sure, the warrant embodied a judicial finding that there was probable cause to believe the Ricky Lyons had committed a felony, and the warrant therefore authorized the officers to seize Lyons. However, the agents sought to do more than use the warrant to arrest Lyons in a public place or in his home; instead, they relied on the warrant as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there. Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant in this case may have protected Lyons from an unreasonable seizure, it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home. *Steagald*, 451 U.S. 204, 212-213 (1981).

The Fourth Circuit's decision to adopt the probable cause standard is not just sound legal reasoning, it also makes for good public policy. There are over two million active criminal warrants in the United States on any given day, with half being for felonies, of which approximately 100,000 are for serious violent crimes. David M. Briere, *University of Maryland, College Park, National Public Registry of Active-Warrants: A Policy Proposal*, https://www.uscourts.gov/sites/default/files/79_1_5_0.pdf (June 2015)(last accessed on July 27, 2021). Of course, the other half of active warrants are for misdemeanors and minor criminal offenses. In addition to these, are pickup orders, such as the one at issue in this case.

Although a relatively small percentage of the above-described warrants may be for West Virginia suspects, the point remains the same, there is an extremely large number of active arrest warrants at any given time. Moreover, the number of active arrest warrants must be multiplied by the known relatives, friends and paramours of such suspects—whose homes could be entered at any time on the basis of such a warrant—to comprehend the full extent of homes that could be entered by law enforcement. If this Court were to not give due deference to *Brinkley*, the constitutional rights of a great many West Virginians "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" could be easily circumvented.

If this Court were to apply the lesser reasonable suspicion standard, the result would be to convert arrest warrants into "general warrants and writs of assistance," which this Court recognized as invalid long ago:

> The police in *Steagald, supra* were looking for a third party for whom they had an arrest warrant. Instead, upon entering the house, the police discovered drugs that belonged to the homeowner and promptly arrested him. The Supreme Court held the use of the arrest warrant in this manner was reminiscent of general warrants and writs of assistance that gave the police the unfettered discretion to search anywhere and arrest anybody. **No such warrant is valid.** *State v. Schofield*, 331 S.E.2d 829, 836 (W. Va. 1985).

C. *Law enforcement lacked probable cause that Pennington's residence was SW's residence*

After Deputy Dewees testified that he had no knowledge regarding the credibility of the tipster, the State attempted to rehabilitate his testimony by eliciting testimony from him that he had known SW to live at the residence **before** she was placed with her paternal grandparents:

> Q: Are you aware where [SW] resided prior to the—prior to her living with her grandparents?
>
> A: With her mother.
>
> Q: So you're aware that that residence was her primary residence **prior to that order being entered**—

A: Yes.

Q:—and placing her with her grandparents?

A: Yes (TR 45-46)(emphasis added).

The Circuit seized upon this testimony to find in rather conclusory fashion that Pennington's residence was SW's residence: "Deputy testified he was aware **S.W.'s permanent address** was at [Pennington's] apartment, **notwithstanding the Court's Order placing her in the custody of her grandparents.**" AR17 at ¶ 23 (emphasis added).

The Circuit Court's conclusory finding that Pennington's residence was SW's "permanent address" appears to be an attempt by the Circuit Court at an end-run around the first prong of the *Payton*, which requires a showing that "the location **is the defendant's residence.** The first prong of *Payton* requires proof regarding the current actual residence of the target of the arrest warrant. SW's prior residency at Pennington's apartment, by itself, is not sufficient to establish that it was her current residence See *Brinkley*, 980 F.3d at 387 (finding that law enforcement's investigation into only one address associated with Brinkley was not sufficient to establish probable cause of Brinkley's current residence where Brinkley's "consistent pattern of inconsistent addresses suggests that Brinkley may have tended to stay temporarily in various places rather than residing at any one address.").

In this case, Deputy Dewees clearly testified that he had no indication that SW was residing at Pennington's apartment until receiving the tip secondhand from Chief Deputy Mellinger:

> Q: And was [the May 16, 2019 search] the first time that you're aware of that either you or any other law enforcement personnel would have been to [Pennington's] residence about this matter?
>
> A: We had been to this residence before and knocked on the door, and nobody answered. And we had also been to the [maternal]

grandmother's house, which is maybe 500 feet down, but they never answered.

Q: Do you recall about—I know this has been some time, but can you give me an approximate of approximately how long before [the May 16, 2019 search] that law enforcement went to [Pennington's residence]?

A: I'm not sure, because where she had went missing in December, we just did sporadic—you know, just thinking she might be at Grandma's; and she might be at Mom's. **We didn't know until we got this tip.** TR 30-31 (emphasis added).

As this testimony shows, the decision to enter Pennington's residence was based upon the secondhand tip received from Chief Deputy Mellinger rather than any independent knowledge on Deputy Dewees part regarding SW's residence.

Finally, the Circuit Court's claim that Pennington's apartment was SW's "permanent residence" is simply not supported by the record. On November 29, 2018, the Circuit Court ordered that SW reside with her paternal grandparents at their home in Kanawha County. AR05. This means that, as a matter of legal record, SW's last known address was in Kanawha County as of approximately six months prior to the date of the search, including the date on which the pickup order was issued. The pickup order itself does not state SW's last known address; instead, it simply states that SW is "an active runaway, whose current whereabouts are unknown." AR11.

Yet, the Circuit Court found that Pennington's apartment was SW's "permanent residence." This makes no sense whatsoever because had Pennington's residence been SW's "permanent residence", SW's presence at the residence would not have constituted a felony offense. In effect, the Circuit Court attempts to have it both ways by finding SW's "permanent residence" to be Pennington's residence while simultaneously finding it a crime for SW to be at that residence. The Circuit Court's finding that Pennington's apartment was SW's "permanent address" was clearly erroneous and contrary to legal precedent.

D. Law enforcement lacked probable cause that SW would be in Pennington's residence when they entered it.

In addition to lacking probable cause that Pennington's apartment was SW's residence, law enforcement lacked probable cause that SW would actually be in the apartment when they entered it. As stated above, Deputy Dewees testified that law enforcement did not actually suspect SW was in Pennington's apartment "until we got this tip." TR 30-31. But Deputy Dewees also testifed that he did not know who the tipster was and only received the tip secondhand from Chief Deputy Mellinger. TR 17, 45.

This Court has previously held that whether an tipster's tip is adequate to establish probable cause depends upon the reliability of the information:

> A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informants lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs when the information (or some aspects of it) is corroborated by independent observations of the police officers. Syl. Pt. 6, *State v. Bookheimer*, 656 S.E.2d 471 (W. Va. 2007)(quoting Syl. pt. 4, *State v. Lilly*, 461 S.E.2d 101 (W. Va. 1995)).

In this case, Deputy Dewees did not know the tipster. TR 17, 45. Accordingly, he could provide no information regarding whether the tipster had a track record of providing accurate information to law enforcement. Chief Deputy Mellinger provided Deputy Dewees with the tip. For reasons unknown to the Petitioner, the State elected to not call Chief Deputy Mellinger at the evidentiary hearing to testify regarding the tipster's identity. Since the record contains no evidence regarding the tipster's identity or track record, the information obtained from the tipster amounts to nothing more than an anonymous tip, which clearly is not sufficient information to support the search of a residence. *See Aguilar v. Texas*, 378 U.S. 108, 115 (1964).

Because the identity of the tipster remains unknown, the only way Deputy Dewees could have established probable cause was to investigate the tip and find corroborating information. Deputy Dewees did not conduct any kind of investigation to obtain corroborating information. To the contrary, he immediately went to Pennington's apartment to execute the pickup order.

Upon arriving at Pennington's apartment, Deputy Dewees knocked on the door. Deputy Dewees testified he could hear walking inside the apartment. TR 38. Deputy Dewees then went to the landlord, obtained a key and used it to enter Pennington's apartment.

Although the walking inside the apartment that Deputy Dewees heard might have raised his suspicions that criminal activity was afoot, the Fourth Circuit in *Brinkley* made clear that such noises do not support a finding of probable cause:

> [T]he sounds of active movement here at least indicated that some living being was present. But...these sounds were not particularized to the suspect; "at best, the police had reason to believe that *someone* was present...." The noises could have been made by anyone, including a child...or a grandparent, or even a pet. *Brinkley*, 980 F.3d at 391 (quoting *United States v. Hill*, 649 F.3d 258, 264 (4th Cir. 2011)).

Given the paltry evidence of record regarding the reliability of the information leading to the search of Pennington's residence, the Circuit Court's finding that "Deputy had good cause to believe S.W. was inside the Apartment" is clearly erroneous and contrary to legal precedent.

E. No exceptions are applicable to law enforcement's unlawful entry into Pennington's residence

At the outset, Pennington would note that the Circuit Court made no findings that any exception to the warrant requirement applied in this case. Pennington argues this is because no such exception is applicable to this case. But since the search in this case based on a juvenile pickup order clearly violated *Payton's* "reason-to-believe"

standard as interpreted by the Fourth Circuit in *Brinkley*, the only available avenue to the State to save the search is arguing that such an exception does apply. Since, this Court has *de novo* review of the ultimate reasonableness of the search, Pennington believes it prudent to close her argument with a brief discussion of the most likely exceptions that the State will claim in this case.

The burden rests with the State to prove that an exception applies to the unlawful search in this case. This Court have previously held that any claimed exception must be carefully and cautiously considered to ensure that the exception does not "swallow the rule:"

> Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution- subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative. Syl. Pt. 1, *State v. Moore*, 272 S.E.2d 804 (W. Va. 1980), overruled in part on other grounds by *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

1. *Exigent circumstances exception does not apply.*

The West Virginia Supreme Court of Appeals has recognized that exigent circumstances may justify a warrantless arrest in certain, limited circumstances:

> The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to **destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others**. This is an objective test based on what a reasonable, well-trained police officer would believe. Syl. Pt. 6, *State v. Kendall*, 639 S.E.2d 778 (W. Va. 2006)(quoting Syl. Pt. 2, *State v. Canby*, 252 S.E.2d 164 (W. Va. 1979); Syl. Pt. 3, *State v. Mullins*, 355 S.E.2d 24 (W. Va. 1987)).

The United States Supreme Court has noted that for the exigent circumstances exception to the warrant requirement to apply, the situation must be an emergency situation whereby law enforcement does not have time to obtain a search warrant:

> We have held that the police may enter a home without a warrant when there are "exigent circumstances." But circumstances are exigent only when there is not enough time to get a warrant. *Caniglia v. Strom*, No. 20-157 (slip op. at 11)(May 17, 2021)(internal citations omitted).

At the evidentiary hearing, Deputy Dewees repeatedly testified that his only motivation for going to Pennington's residence was finding SW. (TR 19, 29) Although Pennington does not doubt that Deputy Dewees had sincere concerns for SW's safety and welfare, his actions show that his first priority was to alert the State Police of his intent to enter Pennington's residence to aid their ongoing criminal investigation. When Deputy Dewees came on his shift, he heard over the radio that the State Police had been out to the residence earlier in an attempt to obtain a statement from Pennington. TR 34-35. While the Deputies continued the search for SW in the apartment, CPL Comer and CPL Fannin of the West Virginia State Police took Pennington aside to question her about their investigation.[5] TR 42.

In addition to calling the State Police to aid them in their criminal investigation, Deputy Dewees contacted Jackson County Prosecuting Attorney Katie Franklin, to inquire whether he should obtain a search warrant. Franklin wrongly advised Deputy Dewees that he did not need to obtain a search warrant since he had the juvenile pickup order. (TR 36).

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[5] The State Police investigation related to charges of forgery and uttering. Pennington was separately indicted for this offense, but that indictment was dismissed as part of the plea agreement in this case, with the only stipulation being that Pennington pay restitution to the alleged victim of that offense, which she has done. AR19.

All of the above shows that Deputy Dewees was not responding to an emergency situation on the evening of May 16, 2019. The very fact that he called the prosecutor to inquire whether he needed a search warrant proves that he believed he had sufficient time to obtain a search warrant, if one were needed.

SW had been missing for a period of nearly six months at the time Deputy Dewees received this tip from Chief Deputy Mellinger. There is no testimony in the record the Pennington had any inkling that law enforcement had been tipped off that she was concealing her daughter. Accordingly, there was no reason to believe that Pennington would secret her daughter away to another location while officers obtained a search warrant. Moreover, officers could have conducted surveillance of the apartment to observe whether anyone left or entered the premises in the meantime, such investigation might even have led to law enforcement obtaining probable cause to enter the apartment.

Finally, it is worth noting that SW had been placed with her paternal grandparents in Kanawha County to address the issue of her truancy. There is no evidence in the record that Pennington or SW's father had ever abused or neglected SW or that she or SW's father was a danger to SW. And Deputy Dewees testified that the tip did not contain any information that SW was in any kind of danger. TR 27.

Accordingly, Deputy Dewees had no objective basis for entering Pennington's apartment on the basis of exigent circumstances.

2. *Community caretaking exception does not apply*

Since Deputy Dewees testified his primary motivation was to find SW, another possible exception the State could attempt to claim is the community caretaking exception. The possibility of this exception can be disposed of quickly. In *Caniglia v. Strom*, the United States Supreme Court declined to extend the community caretaking exception to searches of the home. The Court explained that it originally recognized this

exception in the context of a motor vehicle search in *Cady v. Dombrowski*, 413 U.S. 433 (1973). The Court held that because this exception deals with noncriminal "community caretaking functions," it makes sense to limit its application to police activities in public. On the other hand, it makes little sense to use this exception to erode the protection of the home from government intrusion:

> *Cady's* unmistakable distinction between vehicles and homes also places into proper context its reference to "community caretaking." This quote comes from a portion of the opinion explaining that the "frequency with which . . . vehicle[s] can become disabled or involved in . . . accident[s] on public highways" often requires police to perform noncriminal "community caretaking functions," such as providing aid to motorists. But, this recognition that police officers perform many civic tasks in modern society was just that—a recognition that these tasks exist, and not an open-ended license to perform them anywhere.
>
> What is reasonable for vehicles is different from what is reasonable for homes. Cady acknowledged as much, and this Court has repeatedly "declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home." *Caniglia,*, (slip op. at 6)(internal citations omitted).

Because this case involved a search of Pennington's residence, *Caniglia* dictates that the State may not claim the "community caretaking exception" in this case.

Conclusion

For the foregoing reasons, Pennington requests that this Court reverse the Circuit Court's Order denying Motion to Suppress and remand this case for further proceedings.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,

Plaintiff Below, Respondent,

v. **NO. 21-0396**

Tracy Pennington,

Defendant Below, Petitioner.

Certificate of Service

I, Roger L. Lambert, hereby certify that on the 28th day of July, 2021, I served a true copy of the foregoing *Petitioner's Brief* and *Appendix* via certified mail, return receipt requested, on the following:

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