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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.

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REPLY BRIEF

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Pursuant to W. Va. R. App. Pro. Rule 10(g), Petitioner hereby replies to the Respondent's brief filed in the above-styled case.

1. This Court should adopt Fourth Circuit precedent regarding the interpretation of the United States Constitution.

The State asks this Court to ignore controlling Fourth Circuit precedent interpreting *Payton's* "reason to believe" standard; namely, *United States v. Brinkley*, 980 F.3d 377, 386 (4th Cir. 2020). In doing so, the State wholly ignores previous precedent of this Court deferring to Fourth Circuit precedent regarding the constitutional rights of an accused person under the United States Constitution. See Syl Pt. 1, *State v. Kopa*, 311 S.E.2d 412 (1983)(overruling precedent permitting alibi instruction where Fourth Circuit invalidated the instruction due to unconstitutional burden-shifting). West Virginia is within the territorial jurisdiction of the Fourth Circuit. And by holding that the "reason to believe" standard is probable cause, that is the applicable standard under federal law in West Virginia. Yet, the State invites this Court to break with the Fourth Circuit and thereby create an inconsistency in the law applicable to the State of West Virginia.

But the Fourth Circuit got it right in *Brinkley*. Time and again, the United States Supreme Court has held that of all places, the home is most deserving of special protection under the Fourth Amendment. As recently as a few months ago, the United States Supreme Court reaffirmed this principle: "The very core of [the Fourth Amendment's] guarantee is the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Caniglia v. Strom*, (slip. op. at 3)(May 17, 2021)(Thomas, J.)(quoting *Florida v. Jardines*, 569 U. S. 1, 6 (2013)). By adopting the probable cause standard, the Fourth Circuit acted consistently with the great weight of authority regarding the status of the home in our constitutional jurisprudence.

If this Court adopts the lesser reasonable suspicion standard requested by the State, this would mean that any officer with an arrest warrant and a hunch could enter

the home of any West Virginia citizen. As stated in Petitioner's Brief, on any given day there are over two million active arrest warrants in the United States. The target of each such warrant likely has multiple relatives, paramours, friends and acquaintances. In the age of social media, law enforcement need go no further than Facebook's website to print off a list of the names of these individuals. Under the reasonable suspicion standard advocated by the State, law enforcement, armed with an arrest warrant and an anonymous tip, could enter the home of any such person.

Moreover, by breaking with the Fourth Circuit, this Court would be creating confusion for law enforcement in the exercise of their duties. Federal, state and local law enforcement often coordinate efforts in the investigation of state and federal crimes. This is most common in the context of federal drug task forces, which are composed of federal, state and local law enforcement.¹ If this Court breaks with the Fourth Circuit, this would mean that the federal agents would have follow the probable cause standard while state and local law enforcement would only need a reasonable suspicion.

And it would further mean that while a United States District Court Judge would be compelled to throw out a case involving the entry of a home supported only by an arrest warrant and reasonable suspicion. A West Virginia Circuit Court Judge at the Courthouse across the street would deny a motion to suppress in the same case. Likewise, a West Virginia citizen would have a cognizable civil rights cause of action in federal court and no corresponding claim in state court; thereby, creating a forum

¹ The United States Attorney's Office for the Southern District of West Virginia lists nine such task forces operating in southern West Virginia. See Task Forces, <https://www.justice.gov/usao-sdwv/task-forces> (last accessed on September 21, 2021). The United States Attorney's Office for the Northern District of West Virginia lists ten such task forces operating in northern West Virginia. See Task Forces, <https://www.justice.gov/usao-ndwv/contact-us/task-forces> (last accessed on September 21, 2021).

shopping issue. By breaking with the Fourth Circuit, this Court would be creating a plethora of legal issues and unclear guidance for federal, state and local law enforcement to boot.

For all these reasons, this Court should adopt the probable cause standard.

2. *By its silence on probable cause, the State has conceded that it cannot meet this standard*

In the State's response, it makes no attempt to defend law enforcement's actions under the probable cause standard. W. Va. R. App. Pro. Rule 10(d) provides, "If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." Since the State did not respond to the Petitioner's clear assertion in her brief that law enforcement lacked probable cause, it has conceded this point.

Finally, the State, as did the Circuit Court, attempts to sidestep the issue by arguing that the Petitioner's home was SW's "permanent residence." This is a paradoxical and absurd notion. The Petitioner's home cannot be SW's residence after the Circuit Court Ordered approximately six months earlier that she make her home with her paternal grandparents. Likewise, if it were SW's lawful residence, it could not be a crime for SW to be there. The State cannot have it both ways.

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

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Certificate of Service

I, Roger L. Lambert, hereby certify that on the 21st day of September, 2021, I served a true copy of the foregoing *Reply Brief* via first class mail, postage prepaid, on the following:

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