IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0396

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

TRACY PENNINGTON,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

Appeal from August 7, 2020 Order Denying Petitioner's Motion to Suppress
Jackson County Circuit Court Case No. 19-F-83

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I. ASSIGNMENT OF ERROR

Petitioner presents a single assignment of error:

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

(Pet'r's Br. 1.)

II. STATEMENT OF THE CASE

A. Brief Procedural Overview

This appeal arises out of the Jackson County Circuit Court's August 7, 2020 order denying Petitioner's motion to suppress, which sought "to suppress any and all statements made by the [Petitioner] . . . and any and all evidence obtained as a result of the illegal, warrantless search of the [Petitioner's] home" on May 16, 2019. (*See* App. Vol. I at 3.) Following a May 18, 2020 suppression hearing (*see generally* App. Vol. II), the circuit court entered an order denying Petitioner's motion to suppress (App. Vol. I at 13–18). Thereafter, Petitioner entered a guilty plea to and was convicted of child concealment in violation of West Virginia Code § 61-2-14d. (*See* App. Vol. I at 29–36; *see also* App. Vol. I at 1–2.) As part of the plea agreement, Petitioner reserved the right "to appeal any prior pretrial evidentiary rulings made by th[e] [circuit] court." (App. Vol. I at 25.) Petitioner now appeals the circuit court's order denying her motion to suppress.

B. Detailed Facts

In July 2018, Petitioner's teenage daughter,[1] S.W., was adjudicated "as a status offender for truancy." (App. Vol. I at 7.) Following adjudication, S.W. continued to have "issues regarding unexcused absences" at school. (App. Vol. I at 5.) In November 2018, "as an alternative to placement," the parties to the juvenile proceeding, including Petitioner, "arranged for [S.W.] to

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[1] Petitioner advises that S.W. "was 16 years old at the time" of Petitioner's June 2019 indictment for child concealment and conspiracy to commit a felony. (*See* Pet'r's Br. 1.)

live with her grandparents." (App. Vol. I at 5.) The circuit court approved the parties' living arrangement and further ordered that S.W.'s grandparents "w[ould] have *temporary* guardianship of [S.W.]." (App. Vol. I at 6 (emphasis added).) There is no evidence in the record that, prior to the temporary placement with her grandparents, S.W. resided anywhere other than with her mother (Petitioner) at an apartment located on Klondyke Road in Jackson County, West Virginia (hereafter "the Klondyke Road apartment" or "the apartment"). (*See* App. Vol. II at 9:2–14; *see also* App. Vol. II at 45:16–23 (testimony that the Klondyke Road apartment was S.W.'s primary residence prior to the temporary placement order).) Likewise, there is no evidence in the record that Petitioner's permanent legal custody of S.W. was ever divested. (*See* App. Vol. II at 10:15–20.) Following the grandparents' temporary guardianship, and absent any unforeseen intervening circumstances, S.W. would have returned to Petitioner's custody. (*See* App. Vol. II at 10:21–11:4.)

The following month, on December 7, 2018, Department of Health and Human Resources ("DHHR") employee Carey Blackhurst, then-acting as S.W.'s youth service worker (App. Vol. II at 7:12–23), was informed that S.W. "ran away" from her grandparents' home (*see* App. Vol. II at 9:15–21; *see also* App. Vol. I at 7, 14). As a result, on January 11, 2019, the State filed an emergency motion pursuant to West Virginia Code § 49-4-705(a)(2) requesting that S.W. be taken into custody and placed in a staff-secured facility. (App. Vol. I at 7–8.) In support, the State advised that S.W.'s "health, safety, and welfare demand[ed] custody pending a detention hearing" in the juvenile proceeding. (App. Vol. I at 8.) On that same date, the circuit court entered an order (hereafter "the juvenile pickup order" or "the pickup order") finding "probable cause to believe that . . . [S.W.'s] health, safety, and welfare demand[ed] custody, in accordance with West Virginia Code § 49-4-705(a)(2)." (App. Vol. I at 11.) The circuit court ordered that S.W. "be

taken into custody forthwith and immediately placed in the custody of the Department of Health and Human Resources for [p]lacement in an available staff-secured facility pending further hearings." (App. Vol. I at 11 (emphasis and capitalization altered).)

As gleaned from the testimony presented during the suppression hearing, after S.W. ran away from her grandparents' home in December 2018, S.W.'s youth service worker traveled to the Klondyke Road apartment on several occasions in an attempt to locate S.W. (*See* App. Vol. II at 12:18–13:6.) Contact was made with Petitioner via phone, but "face-to-face" contact at the apartment, with either Petitioner or S.W., did not occur. (*See* App. Vol. II at 13:1–9; *see also* App. Vol. II at 15:5–13.) Law enforcement also attempted, without success, to make contact at the Klondyke Road apartment, as well as S.W.'s grandparents' residence. (*See* App. Vol. II at 30:19–31:3, 32:3–5.)

On May 16, 2019—approximately five months after S.W. was reported as a runaway from her grandparents' home and four months after the circuit court's entry of the juvenile pickup order—Jackson County Sheriff's Department Deputy B. A. DeWees received a call from his superior, Chief Deputy Mellinger, regarding a tip as to S.W.'s location. (*See* App. Vol. II at 17:2–16.) Chief Deputy Mellinger "had spoken with a lady that actually saw [S.W.] at the house [the Klondyke Road apartment] and actually spoke with [S.W.'s] mother, saying that she was going to keep [S.W.] hidden until she was 18, so all this juvenile stuff would go away." (App. Vol. II at 17:12–16.)

During the suppression hearing, Deputy DeWees testified to the tip relayed to him through Chief Deputy Mellinger and to the facts and circumstances surrounding the execution of the juvenile pickup order. Deputy DeWees received the tip from Chief Deputy Mellinger around 8:00 p.m. on May 16, 2019. (*See* App. Vol. II at 26:7–14, 27:3–7). Deputy DeWees testified he

was not aware of the identity of the individual who provided the tip to Chief Deputy Mellinger. (App. Vol. II at 26:18–27:2.) After he received the information from Chief Deputy Mellinger, Deputy DeWees was advised of the juvenile pickup order to take S.W. into custody. (*See* App. Vol. II at 28:8–10.) Prior to executing the pickup order, Deputy DeWees reviewed the contents of the order (*see* App. Vol. II at 36:13–22, 37:18–24) and spoke with the Jackson County Prosecuting Attorney, who advised "it was okay to go ahead to locate [S.W.]" and proceed without an additional warrant (App. Vol. II at 30:5–7, 35:12–36:9, 38:7–8).

Deputy DeWees arrived at the Klondyke Road apartment around 8:36 p.m., shortly after receiving the tip.[2] (*See* App. Vol. II at 27:3–6.) He testified that he entered the apartment "strictly to find [S.W.]." (App. Vol. II at 24:1; *see also* App. Vol. II at 18:18–21, 19:2–4, 23:18–24:10, 28:2–4, 43:3–6.) Deputy DeWees testified that he had no intention of entering the apartment to discover evidence of criminal activity (*see* App. Vol. II at 23:22–24:1); his sole purpose for executing the pickup order was "to make sure that [S.W.] was safe" (App. Vol. II at 28:3–4; *see also* App. Vol. II at 29:7–8). Prior to entry, Deputy DeWees knocked on the apartment door. (*See* App. Vol. II at 17:24–18:4, 38:9–11.) He heard footsteps coming from inside the apartment, but no one answered. (*See* App. Vol. II at 18:2–5, 38:14–16.) He then went to speak with the landlord, explained the reason for the officers' presence, and the landlord gave him the apartment key. (*See* App. Vol. II at 18:6–11, 38:17–39:3.) Deputy DeWees, along with the other officers, entered the apartment and observed Petitioner and S.W.'s father, G.W., lying on a bed. (*See* App. Vol. II at 18:14–16.) Petitioner and S.W.'s father stated that S.W. "was not there." (App. Vol. II at 18:17.)

[2] Deputy DeWees was not the only officer who responded to the Klondyke Road apartment on May 16, 2019. During the suppression hearing, Deputy DeWees testified that three other officers were also present on scene. (*See* App. Vol. II at 42:13–17.) This Brief will primarily refer to Deputy DeWees's actions and explanation of events as he was the officer who testified during the suppression hearing.

Deputy DeWees testified he was in the apartment looking for S.W. for approximately ten minutes. (App. Vol. II at 28:11–14; *see generally* App. Vol. III (bodycam footage).) S.W. was ultimately located hiding behind a hollowed out chest of drawers (*see* App. Vol. II at 19:18–20:4) and taken into custody (*see* App. Vol. III at 7:48–9:16). Because of "[t]he way [S.W.] was hidden in the room," Deputy DeWees then arrested S.W.'s parents, Petitioner and G.W. (App. Vol. II at 40:20–23; *see also* App. Vol. II at 24:2–5.) Petitioner and G.W. were subsequently indicted for child concealment and conspiracy to commit a felony. (App. Vol. I at 1–2.)

On August 20, 2019, both Petitioner and G.W. filed a motion to suppress any and all statements and evidence obtained as a result of the May 16, 2019 search. (*See* App. Vol. I at 3.) Following the suppression hearing, the circuit court denied the motion. (*See* App. Vol. I at 13–18.) Petitioner appeals the circuit court's denial of her motion to suppress.

III. SUMMARY OF ARGUMENT

Petitioner concedes (*see* Pet'r's Br. 5, 8), and decisions by this Court affirm, that an order directing a juvenile to be taken into custody pursuant to West Virginia Code § 49-5-8—now codified as § 49-4-705—is equivalent to an arrest warrant. *See, e.g.*, *State v. Ellsworth*, 175 W. Va. 64, 70–71, 331 S.E.2d 503, 509 (1985) (finding "that the term 'custody' [as used in West Virginia Code § 49-5-8] is equivalent to an arrest"); *see also* W. Va. Code § 49-4-705 (recodification from previous § 49-5-8 operative May 17, 2015). Nevertheless, Petitioner contends that the circuit court erred in finding that law enforcement's entry into and limited search of the Klondyke Road apartment—for the specific purpose of executing the pickup order and taking Petitioner's daughter, S.W., into custody—was lawful. (*See* Pet'r's Br. 1, 8–17.) In support, Petitioner claims that "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." (Pet'r's Br. 5.)

Petitioner's assignment of error is resolved by this Court's prior decision in *State v. Slaman*, 189 W. Va. 297, 431 S.E.2d 91 (1993). In this matter, similar to *Slaman*, officers "reasonably believed" that the subject of the pickup order, S.W., "[w]ould be inside" Petitioner's residence, the Klondyke Road apartment. *See id.* at 299, 431 S.E.2d at 93. Based on this reasonable belief and the valid juvenile pickup order for S.W., "the officers acted reasonably in entering" the apartment, *see id.*, and "had the legal authority to look and see if [S.W.] was within [its] confines," *see id.* at 300, 431 S.E.2d at 94. Accordingly, the circuit court correctly denied Petitioner's motion to suppress, and this Court should affirm.

Should this Court desire to look further than its decision in *Slaman*, however, the arguments presented in Petitioner's brief elucidate a current split among the federal circuit courts and state courts alike—a split that followed the United States Supreme Court's decisions in *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981). There is no precedent from this Court addressing the specific issue regarding the "reason to believe" standard utilized in *Payton*. In other words, this Court has not yet defined *Payton*'s "reason to believe" standard. If this Court determines that it must reach the issue, the State urges it to reject Petitioner's arguments in favor of a probable cause interpretation and, instead, adopt the explicitly articulated "reason to believe" standard that was originally announced by the United States Supreme Court. Applying the "reason to believe" standard to this appeal, the Jackson County Circuit Court did not err in denying Petitioner's motion to suppress. Accordingly, the circuit court's August 7, 2020 order should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not warranted in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

V. STANDARDS OF REVIEW

With respect to Petitioner's motion to suppress,

> legal conclusions . . . are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

Syl. Pt. 1, *State v. Hoston*, 228 W. Va. 605, 723 S.E.2d 651 (2012) (internal quotation and citation omitted). While conducting its review of a trial court's denial of a defendant's 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. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). "[A] circuit court's denial of a motion to suppress evidence 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." *Id.* at Syl. Pt. 2.

VI. ARGUMENT

A. This Court's decision in *State v. Slaman* is controlling.

Although Petitioner does not cite to *State v. Slaman* in her Brief, it is controlling in this appeal. *See* 189 W. Va. 297, 431 S.E.2d 91 (1993). In *Slaman*, petitioner "lived in a mobile home with Maria Luciano near Eleanor, Putnam County, West Virginia." *Id.* at 298, 431 S.E.2d at 92.

In January 1991, officers traveled to petitioner's home to execute arrest warrants for both petitioner and Luciano. *See id.*; *see also id.* at n.1.

> The deputies knocked on the door of the mobile home, but no one answered. As the two officers were getting ready to leave, a neighbor pulled in and asked what the two men were doing. The officers explained that they were looking for Ms. Luciano, and the neighbor responded by stating that it was that time of the day when Ms. Luciano is usually home.
>
> The officers then knocked on the door again. There was no response. Deputy Harrison checked the front door, discovered it was unlatched and pushed it open. The two officers peered in the trailer and observed a woman's purse on a counter top and a couch with a blanket on it as if someone had just been lying there. The officers called out, but again there was no response.
>
> The officers entered the mobile home and proceeded to look around. Their visual inspection of the premises revealed what appeared to be a "fish aquarium," on the floor in a bedroom, with four marihuana plants growing in it. Shortly thereafter, the two officers left the appellant's residence, without disturbing anything, and then contacted the Putnam County Sheriff Department's drug unit in order to report their discovery.

Slaman, 189 W. Va. at 298, 431 S.E.2d at 92. The following day, a search warrant was obtained and executed at the mobile home. *See id.* During the search, officers again observed the marijuana plants and seized them. *Id.* The petitioner subsequently filed motions to suppress, which were denied by the trial court. *See id.* at 299, 431 S.E.2d at 93. The petitioner's case proceeded to trial and, at its conclusion, the jury found him guilty of manufacturing a controlled substance. *Id.*

On appeal, the petitioner argued "that the initial warrantless search of [his] mobile home was an unreasonable violation of his constitutional rights and privileges, and the evidence seized as a result of the search was inadmissible." *Id.* Specifically, the petitioner argued "that the officers lacked the requisite probable cause and exigent circumstances to justify the illegal entry and search." *Id.* In response to the petitioner's argument, this Court

> stress[ed] the crucial factual point in [the petitioner's] case . . . [by emphasizing] that when the officers entered the mobile home they were there to execute arrest

> warrants. Given their authority, the officers acted reasonably in entering the unlocked mobile home.

Id.

In reviewing the facts and circumstances surrounding the officers' entry and search of the petitioner's home, this Court found that the "officers reasonably believed that one of the suspects, Ms. Luciano, whom they were looking for, could be inside the mobile home." *Id.* In support of this reasonable belief, officers noticed a vehicle "with a vanity license plate with 'Maria 2' on it" and the petitioner's neighbor "suggested that Ms. Luciano should be at home [at that] time of the day." *Id.* The officers then "opened the door [of the petitioner's home] and called out for someone to respond to them." *Id.* After the officers opened the door, they noticed Ms. Luciano's purse and a blanket tossed on the couch. *Id.* at 299–300, 431 S.E.2d at 93–94. Both officers "believed that Ms. Luciano was somewhere inside the mobile home." *Id.* at 300, 431 S.E.2d at 94. "Thus," this Court held, "with the arrest warrants previously referred to in hand, the two [officers] believed Ms. Luciano may have been inside, *and they had the legal authority to look and see if she was within the confines of the mobile home.*" *Id.* (emphasis added). The facts of this case lead to the same conclusion.

Here, Petitioner concedes (*see* Pet'r's Br. 5, 8), and decisions by this Court affirm, that an order directing a juvenile to be taken into custody pursuant to West Virginia Code § 49-5-8—now codified as § 49-4-705—is equivalent to an arrest warrant. *See, e.g.*, *Ellsworth*, 175 W. Va. at 70–71, 331 S.E.2d at 509 (finding that "that the term 'custody' [as used in West Virginia Code § 49-5-8] is equivalent to an arrest"); *see also* W. Va. Code § 49-4-705 (recodification from previous § 49-5-8 operative May 17, 2015). There is no dispute that the juvenile pickup order in this case was valid.

In addition to the valid pickup order, Deputy DeWees reasonably believed that S.W. would be inside the Klondyke Road apartment at the time of entry. Prior to the circuit court's November 2018 order arranging for S.W. to *temporarily* reside with her grandparents, which was a result of continued truancy concerns, S.W. lived with her parents, Petitioner and G.W., at the Klondyke Road apartment. (*See* App. Vol. II at 45:16–23.) The Klondyke Road apartment was S.W.'s "primary residence." (App. Vol. II at 45:21–23.) There is no evidence in the record that, prior to the temporary placement with her grandparents, S.W. resided anywhere other than with her mother (Petitioner) at the Klondyke Road apartment. (*See* App. Vol. II at 9:2–10.) Put simply, there is no evidence of other residences; there is no other location identified that S.W. would call "home."

One month after the order arranging for S.W. to live with her grandparents, S.W. ran away from her grandparents' home. (*See* App. Vol. II at 9:15–21; *see also* App. Vol. I at 7, 14.) DHHR and law enforcement were unable to locate S.W. for approximately five months. (*See* App. Vol. I at 7 (providing that on December 7, 2018, S.W. "left her grandparents[']s residence"), 18 (referencing May 16, 2019 entry into Klondyke Road apartment); App. Vol. II at 9:15–21 (testimony from S.W.'s youth service worker that S.W. ran away from grandparents' home on December 7, 2018), 21:2–6 (testimony confirming May 16, 2019 entry into Klondyke Road apartment).) On May 16, 2019, law enforcement received a specific and detailed tip that included information only someone close to S.W.'s parents or grandparents, or somehow otherwise knowledgeable about S.W.'s juvenile proceeding, would know. The female tipster advised law enforcement that she "actually saw [S.W.] at the house [the Klondyke Road apartment] and actually spoke with [S.W.'s] mother, saying that she was going to keep [S.W.] hidden until she was 18, so all this juvenile stuff would go away." (App. Vol. II at 17:12–16.) This tip was communicated to Deputy DeWees by his superior, Chief Deputy Mellinger. (*See* App. Vol. II at

17:2–16.) At that time, Deputy DeWees proceeded to the Klondyke Road apartment. (*See* App. Vol. II at 17:17–20.) Prior to entry, Deputy DeWees confirmed the existence of the juvenile pickup order and also spoke with the Prosecuting Attorney, who advised "it was okay to go ahead to locate [S.W.]" and proceed without an additional warrant. (*See* App. Vol. II at 30:5–7, 35:12–36:9, 36:13–22, 37:18–24, 38:7–8.) Deputy DeWees arrived at the Klondyke Road apartment shortly after receiving the tip—within the hour. (*See* App. Vol. II at 26:7–17, 27:3–7, 32:19–24.) Deputy DeWees knocked on the apartment door and heard footsteps coming from inside, but no one answered. (*See* App. Vol. II at 17:24–18:5, 38:9–16.) Deputy DeWees then spoke with the landlord, explained the purpose of the officers' presence, and the landlord provided him a key to the apartment. (*See* App. Vol. II at 18:6–11, 38:17–39:3.) Upon entry, the officers observed Petitioner and S.W.'s father lying on a bed. (*See* App. Vol. II at 18:14–16.) The officers looked for S.W. for approximately ten minutes. (App. Vol. II at 28:11–14; *see generally* App. Vol. III (bodycam footage).) S.W. was found hiding behind a hollowed out chest of drawers. (*See* App. Vol. II at 19:18–20:4.)

Based on these facts, the officers' entry and limited search in this case—performed for the sole purpose of locating S.W. pursuant to a valid pickup order (*see* App. Vol. II at 18:18–21, 19:2–4, 23:18–24:10, 28:2–4, 29:7–8, 43:3–6), which was issued to preserve S.W.'s "health, safety, and welfare" (App. Vol. I at 11, 14)—was lawful. Just as in *Slaman*, here Deputy DeWees "reasonably believed" that S.W. "[w]ould be inside" the Klondyke Road apartment. *See* 189 W. Va. at 299, 431 S.E.2d at 93. Based on this reasonable belief and the valid juvenile pickup order, Deputy DeWees "acted reasonably in entering" the apartment, *see id.*, and "had the legal authority to look and see if [S.W.] was within [its] confines," *see id.* at 300, 431 S.E.2d at 94. Accordingly, the circuit court correctly denied Petitioner's motion to suppress, and this Court should affirm.

B. In the event this Court looks further than *Slaman*, it should adopt the "reason to believe" standard announced in *Payton* as opposed to a probable cause standard.

Petitioner ignores *Slaman* and points straight to *United States v. Brinkley*, 980 F.3d 377 (4th Cir. 2020), a recent decision by the Fourth Circuit Court of Appeals. (*See* Pet'r's Br. 9.) In *Brinkley*, the Fourth Circuit held that when officers are in possession of an arrest warrant for a particular suspect, but not a search warrant for the suspect's home, they must "have probable cause to believe that [the suspect] reside[s] there and w[ill] be present when they enter[ ]" the residence. *Id.* at 386. Petitioner claims that the officers in this case lacked *probable cause* to believe that (1) Petitioner's residence was also S.W.'s residence and (2) S.W. would be inside the residence at the time of the officers' entry. (*See* Pet'r's Br. 13–17.) Therefore, Petitioner argues, in light of *Brinkley*, that, notwithstanding the valid juvenile pickup order, the officers' entry into the Klondyke Road apartment in order to look for S.W. was unlawful. (*See* Pet'r's Br. 5–6, 9.) *Brinkley* is not controlling, however, and Petitioner's argument is not as clear cut as it seems.

In *Payton v. New York*, the United States Supreme Court held: "[F]or Fourth Amendment purposes, an arrest warrant founded on 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." 445 U.S. 573, 603 (1980) (emphases added). This is "[b]ecause an arrest warrant authorizes the police to deprive a person of his liberty, [and, therefore,] it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." *Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981). One year later, in *Steagald*, the United States Supreme Court announced the standard for entering and searching the dwelling of a *third party* based on the issuance of a valid arrest warrant: "[A]bsent exigent circumstances

or consent," a search warrant is required for law enforcement officers to "legally search for the subject of an arrest warrant in the home of a third party." *Id.* at 205–06.

Since *Payton* and *Steagald*, both federal and state courts have issued conflicting decisions regarding the "reason to believe" standard that was originally announced in *Payton*. The First, Second, Tenth, and D.C. Circuits have adopted the "reason to believe" or "reasonable belief" standard, finding it to be less stringent than probable cause.[3] State courts in Ohio, Kentucky, Massachusetts, and Indiana, as well as the District of Columbia, have held in accord, recognizing a less rigorous demonstration than probable cause.[4]

In contrast, the Third, Fourth, Fifth, and Ninth Circuits have equated the "reason to believe"

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[3] *See United States v. Werra*, 638 F.3d 326, 337 (1st Cir. 2011) ("We have not explicitly made a choice, but have implicitly accepted the majority view [of the less stringent reasonable belief standard]."); *United States v. Bohannon*, 824 F.3d 242, 254 (2d Cir. 2016) ("[O]ur reason-to-believe review here does not demand probable cause."); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995) (finding that lower court "applied too stringent a test" when it used probable cause, as opposed to reasonable belief, standard); *Valdez v. McPheters*, 172 F.3d 1220, 1224–25 (10th Cir. 1999) (rejecting the "higher knowledge standard on the part of law enforcement officers" and iterating that "the Supreme Court in *Payton* explicitly indicated that entry is permissible so long as there is 'reason to believe the suspect is within'" (citation omitted)); *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) ("Accordingly, we expressly hold that an officer executing an arrest warrant may enter a dwelling if he has only a 'reasonable belief,' falling short of probable cause to believe, the suspect lives there and is present at the time.").

[4] *See State v. Chavez*, No. 27840, 2018 WL 5310268, at *5 (Ohio Ct. App. Oct. 26, 2018) (utilizing "reasonable belief" standard and advising that it requires "something less than probable cause" (internal quotation omitted)); *Barrett v. Commonwealth*, 470 S.W.3d 337, 342 (Ky. 2015) ("[W]e expressly adopt the plain language reason to believe standard from *Payton* and reject the probable cause standard."); *Commonwealth v. Tatum*, 992 N.E.2d 987, 993 n.13 (Mass. 2013) (declining to reconsider previous holding that the reasonable belief and probable cause "standards are different, with reasonable belief being something less than probable cause"); *Duran v. State*, 930 N.E.2d 10, 16 (Ind. 2010) (acknowledging "the 'reasonable belief' required by *Payton* [to] require[ ] a lower degree of confirmation than probable cause"); *Brown v. United States*, 932 A.2d 521, 529 (D.C. Ct. App. 2007) ("We agree . . . that a reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant[.]" (internal quotation and citation omitted)).

standard to probable cause.[5] State courts in Pennsylvania, Washington, Alaska, Arizona, and Oregon have reached similar conclusions, albeit some reaching those conclusions in light of respective state constitutional protections, as opposed to a direct interpretation of the *Payton* "reason to believe" standard.[6] The remaining federal circuit courts have either declined to address

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[5] *See United States v. Vasquez-Algarin*, 821 F.3d 467, 480 (3d Cir. 2016) ("We therefore join those Courts of Appeals that have held that reasonable belief in the *Payton* context embodies the same standard of reasonableness inherent in probable cause." (internal quotation and citation omitted)); *Brinkley*, 980 F.3d at 386 ("[W]e join those courts that have held that reasonable belief in the *Payton* context embodies the same standard of reasonableness inherent in probable cause." (internal quotations and citations omitted)); *United States v. Barrera*, 464 F.3d 496, 501 n.5 (5th Cir. 2006) (characterizing "[t]he disagreement among the circuits" regarding "reason to believe" and probable cause as one of "semantics [rather] than substance"); *United States v. Woods*, 560 F.2d 660, 665 (5th Cir. 1977) (providing that "[r]easonable belief embodies the same standards of reasonableness [as probable cause]" (internal quotation and citation omitted)); *United States v. Diaz*, 491 F.3d 1074, 1077 (9th Cir. 2007) ("In [*United States v.*] *Gorman*, [314 F.3d 1105 (9th Cir. 2002),] we held that to decide whether police have reason to believe a suspect is at a particular place, a court must use the same standard of reasonableness inherent in probable cause." (internal quotation omitted)).

[6] *See Commonwealth v. Romero*, 183 A.3d 364, 400, 405–06 (Pa. 2018) (holding "that the *Payton* dictum must yield to *Steagald* and to the volumes of earlier precedent regarding the protection of the home and the necessity of the warrant requirement" and "conclud[ing] that the Fourth Amendment requires that, even when seeking to execute an arrest warrant, a law enforcement entry into a home must be authorized by a warrant reflecting a magisterial determination of probable cause to search that home, whether by a separate search warrant or contained within the arrest warrant itself."); *State v. Hatchie*, 166 P.3d 698, 706 (Wash. 2007) (holding that the "heightened standard under article I, section 7" of the Washington Constitution necessitates "probable cause [as] the minimum standard for determining when an officer has reason to believe a place to be entered is the suspect's residence"); *Anderson v. State*, 145 P.3d 617, 625 (Ala. Ct. App. 2006) (holding, "regardless of the federal test, [that] the search and seizure provision of the Alaska Constitution (Article I, Section 14) requires the police to have probable cause" to believe that the individual named in the arrest warrant resides at the particular location where the warrant will be executed and will be inside the residence); *State v. Smith*, 90 P.3d 221, 224 (Ariz. Ct. App. 2004) ("We conclude that the explicit commands of the United States and Arizona Constitutions, the language of the *Payton* standard, and the weight of relevant case authority all compel the conclusion that the reason-to-believe standard requires a level of reasonable belief similar to that required to support probable cause."); *State v. Jones*, 27 P.3d 119, 123 (Or. 2001) ("We decline to depart from the unambiguous requirement in Article I, section 9," of the Oregon Constitution "that the search of a private residence is not permissible unless the officer conducting the search has a valid arrest warrant and probable cause to believe that the person sought is inside the residence.").

the probable cause/reasonable suspicion issue arising out of *Payton* or are undecided.[7] One aspect of *Payton* that courts agree on is that it established a two-part test to determine whether officers may lawfully enter a home to execute an arrest warrant: officers must have "reason to believe" or a "reasonable belief"—however that standard is defined by the particular jurisdiction—that (1) the arrestee resides in the dwelling and (2) the arrestee will be present at the time of the officers' entry into the dwelling.[8]

If this Court elects to consider and decide the *Payton* probable cause/reasonable suspicion debate, it should reject the probable cause standard and adopt the "reason to believe" standard as originally, plainly, and explicitly announced in *Payton*. "[W]hen the Court wishes to use the term 'probable cause,' it knows how to do so." *Smith v. Tolley*, 960 F. Supp. 977, 987 (E.D. Va. 1997). In *Payton*, the Supreme Court clearly articulated the probable cause and "reason to believe" standards as separate and distinct: "[F]or Fourth Amendment purposes, an arrest warrant founded on ***probable cause*** implicitly carries with it the limited authority to enter a dwelling in which the

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[7] *See United States v. Cammon*, 849 F. App'x 541, 544–45 (6th Cir. 2021) ("In defining *Payton*'s 'reason to believe' standard . . . we have at times vacillated between a 'probable cause' and a lesser 'reasonable belief' standard . . . . We need not further that debate here, as [the petitioner] does not seriously dispute that officers 'were aware that [he] was in his sister's apartment,' given that surveillance confirmed Cammon's presence."); *Covington v. Smith*, 259 F. App'x 871, 874 (7th Cir. 2008) ("We have not previously chosen a standard and we need not do so here."); *United States v. Ford*, 888 F.3d 922, 926–27 (8th Cir. 2018) (citing *Payton*, but without discussing circuit split and without identifying differing standards of probable cause and "reason to believe"); *United States v. Powell*, 379 F.3d 520, 523–24 (8th Cir. 2004) (same); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995) ("Due to the lack of authority on point, it is difficult to define the *Payton* 'reason to believe' standard, or to compare the quantum of proof the standard requires with the proof that probable cause requires.").

[8] *See, e.g.*, *Brinkley*, 980 F.3d at 384 ("The courts of appeals have unanimously interpreted *Payton*'s standard—'reason to believe the suspect is within,' . . . — to require a two-prong test."); *United States v. Lewis*, 676 F. App'x 440, 444 (6th Cir. 2017) ("*Payton* established a two-part test requiring that officers have a reasonable belief that the subject of the warrant lives at the place of entry and a reason to believe that the subject of the warrant is inside."); *Vasquez-Algarin*, 821 F.3d at 472 (recognizing two-prong test); *United States v. Gay*, 240 F.3d 1222, 1226 (10th Cir. 2001) (same).

suspect lives when there is ***reason to believe*** the suspect is within." 445 U.S. at 603 (emphases added). The Supreme Court required an *arrest warrant* to be founded on probable cause, but chose a different standard—"reason to believe"—to justify entry into the suspect's residence in order to execute the arrest warrant. *See id.* Had the Supreme Court intended to require probable cause to justify entry to execute the arrest warrant, it would have said so. *See Thomas*, 429 F.3d at 289 ("We think it more likely, however, that the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than 'probable cause.'"); *Valdez*, 172 F.3d at 1225 ("As to the level of knowledge required by the officers, the Supreme Court in *Payton* explicitly indicated that entry is permissible so long as there is 'reason to believe the suspect is within.'" (citation omitted)); *Magluta*, 44 F.3d at 1534 ("The strongest support for a lesser burden than probable cause remains the text of *Payton*, and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of 'reason to believe' over that of 'probable cause.'"); *Tolley*, 960 F. Supp. at 987. The Supreme Court was deliberate in its use of "reason to believe." A more demanding standard should not be substituted in its place.

1. Based on the totality of the circumstances, officers had reason to believe that S.W. resided with Petitioner.

As an initial matter, Petitioner takes issue with the circuit court's findings that her residence was S.W.'s "permanent address" and that Deputy DeWees had "good cause to believe" that S.W. would be located at the residence. (Pet'r's Br. 5.) Regardless of the specific findings of fact and conclusions of law reached by the circuit court in its order denying Petitioner's motion to suppress, this Court may affirm the lower court's denial of Petitioner's motion based on "any reason disclosed by the record." *Banbury Holdings, LLC v. May*, 242 W. Va. 634, 636 n.4, 837 S.E.2d 695, 697 n.4 (2019) (collecting cases). As explained in further detail below, here, the juvenile pickup order, coupled with Deputy DeWees's reasonable belief that (1) S.W. was at that time

residing at the Klondyke Road apartment and (2) S.W. would be present at the apartment at the time of entry, permitted officers to enter S.W.'s and Petitioner's shared residence to conduct a limited search for the sole purpose of locating S.W. and executing the pickup order. Accordingly, because the officers' entry and limited search was lawful, the circuit court correctly denied Petitioner's motion to suppress.

With respect to the first part of the *Payton* test, Petitioner's arguments are based on her initial incorrect assumption that the officers were, at the time the pickup order was executed, "uncertain" about her residence. (*See* Pet'r's Br. 5, 10.) Petitioner also improperly focuses on the tip, arguing that "Deputy DeWees entered [Petitioner's] residence armed *only* with a juvenile pickup order and an uncorroborated tip from an unknown tipster." (Pet'r's Br. 6 (emphasis added).) Petitioner's narrow view of the evidence ignores the *totality of the circumstances*, which must be considered when reviewing the legality of the officers' entry and limited search in this case.

"[T]he Fourth Amendment's ultimate touchstone is 'reasonableness[.]'" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 398 (2006). This "reasonableness" determination "must be examined by 'the totality of circumstances in a given case.'" *State v. Rexrode*, 243 W. Va. 302, 311, 844 S.E.2d 73, 82 (2020) (quoting *United States v. Banks*, 540 U.S. 31, 36 (2003)). Therefore, at its core, the question of whether there is "reason to believe" that the subject of an arrest warrant—or, here, a juvenile pickup order—resides at a particular location is answered based on an evaluation of the totality of the circumstances. *See, e.g.*, *Bohannon*, 824 F.3d at 258 (considering "totality of circumstances" in determining whether law enforcement had reason to believe that arrestee was inside premises at time of entry); *United States v. Glover*, 746 F.3d 369, 373 (8th Cir. 2014) ("Whether the officers had reasonable belief [that the arrestee resided in the home and would be

present at the time the arrest warrant was executed] is based upon the 'totality of the circumstances' known to the officers prior to entry."); *United States v. Pruitt*, 458 F.3d 477, 484 (6th Cir. 2006) ("[A]n arrest warrant is sufficient to enter a residence if the officers, by looking at common sense factors and evaluating the totality of the circumstances, establish a reasonable belief that the subject of the arrest warrant is within the residence at that time."). The totality of the circumstances here demonstrates that officers had reason to believe S.W. resided with her mother—the Petitioner—at the Klondyke Road apartment on May 16, 2019.

As detailed above, prior to the circuit court's order arranging for S.W. to temporarily reside with her grandparents, S.W. lived with her parents, Petitioner and G.W., at the Klondyke Road apartment. (App. Vol. II at 45:16–23.) The apartment was S.W.'s "primary residence." (App. Vol. II at 45:21–23.) One month after entry of the order, S.W. "ran away" from her grandparents' home. (*See* App. Vol. I at 14; App. Vol. II at 9:15–21, 12:2–11.) For five months, DHHR and law enforcement, although they had received various other tips prior to the May 16, 2019 tip, were unsure of S.W.'s precise location. (*See* App. Vol. II at 14:4–9, 20:8–14, 20:21–21:1.) Based on S.W.'s previous living arrangement with her parents (*see* App. Vol. II at 9:2–10, 45:16–23), however, it was reasonable to believe that S.W. went back home to the Klondyke Road apartment, her "primary residence" (App. Vol. II at 45:21–23). Officers did not execute the juvenile pickup order until they received a specific and detailed tip on May 16, 2019, containing information that only someone close to S.W.'s parents or grandparents, or somehow otherwise knowledgeable about S.W.'s juvenile proceeding, would know. (*See* App. Vol. II at 17:15–16 (tipster advised Chief Deputy Mellinger that S.W.'s mother stated "she was going to keep [her daughter, S.W.] hidden until [S.W.] was 18, so all this juvenile stuff would go away").) Prior to entry, Deputy DeWees both confirmed the existence of the juvenile pickup order and spoke with the Prosecuting

Attorney, who advised him to proceed on executing the pickup order. (*See* App. Vol. II at 30:5–7, 35:12–36:9, 36:13–22, 37:18–24, 38:7–8.) The sole purpose of officers' entry into the Klondyke Road apartment was to find S.W., execute the juvenile pickup order, and make sure S.W. was safe. (*See* App. Vol. II at 18:18–21, 19:2–4, 23:18–24:10, 28:2–4, 29:7–8, 43:3–6.) When Deputy DeWees knocked on the apartment door, he heard footsteps coming from inside, but no one answered. (*See* App. Vol. II at 18:2–5, 38:14–16.) When officers entered the apartment, they immediately observed Petitioner and S.W.'s father lying on a bed. (*See* App. Vol. II at 18:14–16.) Within ten minutes, officers located S.W. hiding behind a hollowed out chest of drawers. (*See* App. Vol. II at 19:18–20:4.)

Based on the totality of the circumstances, officers had reason to believe that S.W. was residing with her mother (Petitioner) at the Klondyke Road apartment. Accordingly, the first part of the two-part *Payton* test is satisfied.

2. Based on the totality of the circumstances, officers had reason to believe that S.W. was present at her residence at the time of entry.

The second part of the two-part *Payton* test is that officers must have reason to believe the arrestee will be present at the residence at the time of the officers' entry. *See, e.g.*, *Lewis*, 676 F. App'x at 444 (explaining two-part test, with second part of test being "that officers have . . . a reason to believe that the subject of the [arrest] warrant is inside"); *Vasquez-Algarin*, 821 F.3d at 472 (recognizing two-prong test, with second prong being that officers have a reasonable belief that "the arrestee is present at the time of the entry"); *Gay*, 240 F.3d at 1226 (same). Based on the totality of the circumstances, officers had reason to believe that, at the time they entered the Klondyke Road apartment, S.W. would be inside.

Deputy DeWees arrived at the Klondyke Road apartment at approximately 8:36 p.m. (*See* App. Vol. II at 27:3–6; *see also* App. Vol. II at 32:15–24). May 16, 2019, was a Thursday.[9] At the time, S.W. was sixteen years old. (Pet'r's Br. 1.) It was reasonable for officers to believe that a sixteen-year-old juvenile would be at home with her parents at 8:36 p.m. on a weeknight.

Immediately after receiving the tip, Deputy DeWees proceeded to the Klondyke Road apartment. (*See* App. Vol. II at 26:15–17.) He arrived within the hour. (*See* App. Vol. II at 26:7–17, 27:3–7, 32:19–24.) When Deputy DeWees knocked on the apartment door, he heard footsteps coming from inside. (*See* App. Vol. II at 18:2–5, 38:14–16.) Though it was apparent that individuals were present, no one answered. (*See* App. Vol. II at 18:2–5.) Officers, therefore, had reason to believe, based on the tip received less than one hour before, that Petitioner was going through with her plan to hide her daughter, S.W., and that S.W. was inside.

As noted above, "[w]hen 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." Syl. Pt. 1, in part, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. Viewed in this light, the totality of the circumstances demonstrate that officers had reason to believe S.W. was inside the Klondyke Road apartment at the time of their entry.

Accordingly, because the evidence supports satisfaction of both parts of the two-part *Payton* test, the officers' entry and limited search of the apartment, pursuant to the juvenile pickup order, was lawful. The circuit court's denial of Petitioner's motion to suppress was, therefore, proper, and this Court should affirm.

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[9] *Calendar for May 2019 (United States)*, TIME AND DATE, https://www.timeanddate.com/calendar/monthly.html%3Fyear%3D2019%26month%3D5%26country%3D1 (last visited Sept. 9, 2021).

VII. CONCLUSION

The State respectfully requests that this Court affirm the Circuit Court of Jackson County's August 7, 2020 order denying Petitioner's motion to suppress.

STATE OF WEST VIRGINIA,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0396

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

TRACY PENNINGTON,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Katherine M. Smith, counsel for Respondent, hereby certify that on September 13, 2021, I served the foregoing ***"Respondent's Brief"*** on the below-listed counsel by depositing a true and accurate copy of the same in the United States mail, postage prepaid, in an envelope addressed as follows:

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