IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-88

STATE OF WEST VIRGINIA,

Respondent,

v.

RODERICK LEVI HOWARD,

Petitioner.

BRIEF OF RESPONDENT

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INTRODUCTION[1]

Petitioner Roderick Levi Howard is not entitled to the relief he seeks. The facts in this case are straightforward: During a traffic stop, Petitioner was arrested on an active warrant issued from another county. After the arrest, law enforcement performed a pat down search, and located an item in a sensitive area on Petitioner's body. To spare him embarrassment, Petitioner was given the opportunity to remove the contraband from his person, which he did. The recovered contraband consisted of approximately 9.5 ounces of Fentanyl. The law is equally straightforward: Upon review of the record, the circuit court correctly found that this was a lawful search incident to arrest, and denied Petitioner's motion to suppress the evidence. Petitioner subsequently pled no contest to attempt to commit a felony, although he reserved his right to appeal. The evidence presented to the circuit court fully supports the ruling in favor of the legality of the search. Accordingly, Petitioner's conviction should be upheld.

ASSIGNMENTS OF ERROR

In his brief, Petitioner sets forth three "points," which Respondent shall address as formal assignments of error:

> Point One: The lower court clearly erred factually when it ruled [Petitioner] was under arrest at the time of search of his person because a 911 call by Corporal Oiler indicates Mr. Howard was not placed under official arrest until a minimum of 25 minutes after the traffic stop and 15 minutes after the pat down was conducted.
>
> Point Two: [Petitioner] was not under arrest during his pat down, therefore, the contraband must be immediately apparent before officers may remove it from the detainee's person without a warrant.

[1] The West Virginia Office of the Attorney General would like to thank intern Stuart Roush, rising 2L at Yale Law School, for his research and writing assistance on Section II of this brief.

Point Three: Officers' request to [Petitioner] regarding removing the item from his pants was made while he was detained but without benefit of *Miranda* warnings and the item retrieved incriminated [Petitioner].

Pet'r's Br. 10, 14, 18.

STATEMENT OF THE CASE

A. Proceedings on the First Indictment

On March 15, 2022, the Grand Jury of Putnam County returned a two-count felony indictment against Petitioner: one count of possession of fentanyl in excess of five grams, in violation of West Virginia Code § 60A-4-415(b); and one count of possession of a firearm by prohibited felon, in violation of West Virginia Code § 61-7-7. App. 77-78.[2] The indictment was obtained upon the testimony of Corporal B. M. Oiler of the Hurricane Police Department. App. 65-76.

On or about May 11, 2022, Petitioner filed Defendant's Supplement to Motion to Suppress.[3] App. 80-86. On September 22, 2022, a suppression hearing was held before the Honorable Phillip M. Stowers. App. 89-90, 117-189. The only witness to testify was Corporal Oiler, who was called by the State. App. 117-189.

Corporal Oiler testified that at approximately 7:00 p.m. on July 27, 2021, he was on I-64 as a part of his assignment with Hurricane's Criminal Interdiction Unit. App. 120. Corporal Oiler observed "a silver in color SUV traveling westbound" in the passing lane. App. 121. The vehicle was originally going slowly at "just a coast," but after Corporal Oiler pulled out behind it, the vehicle seemed to react "immediately," and "tried to ram his car between two other moving vehicles, making a last minute signal to get off the interstate." App. 121, 139. This maneuver

[2] All cites to the Appendix refer to Petitioner's Amended Appendix, filed on May 20, 2024.

[3] It does not appear that the original motion to suppress was included by Petitioner in his appendix.

placed it at "less than one car length" behind the car in front of it, while the car behind "had to slam on their brakes to avoid an accident." App. 122. After conducting the "abrupt lane change," the vehicle exited at a rest stop area "without using a turn signal." App. 122-23. The car "quickly flew into a parking spot," but did not make any attempts to get out of the car. App. 139-40.

Corporal Oiler "pulled in behind [Petitioner] and initiated a traffic stop." App. 123. Corporal Oiler observed Petitioner "just s[i]tting in his vehicle," on a phone call which was coming through the car speakers. App. 123. Petitioner gave no indication that he had stopped to use the rest area facilities, but appeared to have pulled off the interstate in an attempt "to evade" the officer. App. 140. Petitioner was the driver and sole occupant of the vehicle. App. 123-24. Corporal Oiler approached, "informed him of [the] reason for [the] stop," and asked Petitioner for his driver's license and proof of insurance. App. 123, 164. Petitioner only provided the officer with his driver's license. App. 123, 164. At that point, Corporal Oiler ran Petitioner's driver's license through Putnam County Dispatch ("Dispatch"). App. 124. Petitioner advised that the vehicle, which had a California plate, was a rental car. App. 121, 133.

Initially, Corporal Oiler intended to write Petitioner a warning ticket. App. 133. Corporal Oiler testified that while "[a] warning citation details the location of where [he] was at when [he] stopped the vehicle, information about the person and the vehicle, [it is] not near as much as that on a written citation." App. 133-34. Corporal Oiler testified that he "always write[s] warning tickets for the most part." App. 134. Corporal Oiler further testified to his normal practice that "If [he] was writing a citation [he] would have taken [Petitioner's] license, ran it through Putnam County Dispatch, [and] made sure that he didn't have any active warrants or that he wasn't suspended or revoked for DUI," which is something he will "always check." App. 135, 155. "The reason being is [he has] to make sure that [he is] safe while doing it, and while [he is] writing a

citation that a person doesn't have a warrant and they don't pose a danger to [him]." App. 135. "Then after that [he] would have written [Petitioner] the citation." App. 135. Corporal Oiler testified that it could take more than ten minutes to write a warning ticket, and that in this case it would have taken longer because Petitioner did not have a copy of the rental agreement for the car or a copy of the registration for the vehicle. App. 154, 156-57, 165.

After informing Petitioner that he intended to write him a warning ticket—but before getting a response from Dispatch—Corporal Oiler asked Petitioner to exit the vehicle, but did not perform a pat down search at that time. App. 136, 164. Corporal Oiler testified that he did this to minimize any "threat," that would result from the driver remaining in the vehicle, and that he "get[s] every person [he] stop[s] out of the car on a traffic stop," for officer safety. App. 137, 160, 169-70.

Soon after the stop was performed, Corporal Oiler was joined by Corporal Wilson, his partner, and Officer Bumgardner, who was present "as an extra set of eyes." App. 124-25, 142-43. Corporal Oiler was uncertain on when either officer joined him, but indicated that it was not very long, initially saying, "Maybe 3 [minutes]" but agreeing with Petitioner's counsel that it could have been "6 to 9 minutes later." App. 150.

Shortly thereafter, Dispatch advised Corporal Oiler that Petitioner had an active arrest warrant issued by Wyoming County, West Virginia, on charges of fleeing from an officer and obstructing an officer. App. 124, 165-66. Dispatch further advised that Petitioner's driver's license was suspended. App. 124. Corporal Oiler testified that upon learning this information, he placed Petitioner under arrest, pursuant to the Wyoming County warrant. App. 124, 166. As a result of his arrest, Petitioner was in handcuffs at the time of the search. App. 125. Corporal Oiler testified that shortly after the arrest, a search was conducted, which is standard protocol "to ensure

that [arrestees] don't have any weapons on them and that there's nothing else deeply hidden in them or on them." App. 168. In this case, the search "incident to arrest" was performed by Corporal Wilson, although Corporal Oiler was close by and observed the same. App. 124-25. As Corporal Oiler testified, "After [officers] placed [Petitioner] in handcuffs, he definitely would have been patted down and sent to arrest." App. 159-61. Corporal Oiler was adamant throughout his testimony that Petitioner "was under arrest" at the time of the search. App. 163.

Corporal Oiler affirmed that prior to the search, Petitioner "was standing funny." App. 169. During the search of Petitioner, Corporal Oiler testified that Officer Wilson located something on Petitioner's person, and the officer temporarily removed the handcuffs to allow Petitioner "to retrieve it out of his own person." App. 162. Describing the sensitive location of the located drugs, Corporal Oiler advised that they gave Petitioner this option because the officers "preferred not to go in there with [their] own hands and grab [Petitioner's] male genitalia to retrieve the contraband." App. 163. Corporal Oiler affirmed that this was allowed to save Petitioner from embarrassment from having the officers touch his genitals. App. 169.

Corporal Oiler was not certain of the exact time of the arrest, but testified that it was contemporaneous to learning from Dispatch that Petitioner had an active arrest warrant. App. 151. Corporal Oiler testified that when he makes an arrest he will "[t]ypically" notify Dispatch, but did not testify that he did so in this case. App. 152. When questioned about why the Dispatch report—otherwise known as a "CAD sheet"— indicated that the arrest occurred one hour and forty minutes after the traffic stop was initiated, Corporal Oiler testified that "There would have not been a delay in actually physically effecting the arrest." App. 153. According to Corporal Oiler, "There could have been a delay in simply putting that radio traffic out, or [the officer] tried to put it out and it doesn't come across to Dispatch, or [] even delegating that to someone else and then forgetting to

do it." App. 153-54. Corporal Oiler could not "give a definitive answer" on what caused the delayed reporting to Dispatch, but testified, "All I know is that he wasn't placed under arrest an hour and 30 minutes later." App. 154.

During his interaction with Petitioner, Corporal Oiler "asked if there [were] an[y] weapons in the vehicle or any drugs or narcotics," and Petitioner initially denied either, but did "disclose that there would possibly be a little bit of weed in the car but nothing more." App. 126, 148, 167. Corporal Oiler testified that he also "detected odor of marijuana during the stop." App. 126. Corporal Oiler conducted a search of the vehicle, where he located a handgun, which Petitioner was prohibited from possessing. App. 127. Corporal Oiler testified that it "takes a long, long time if you search a vehicle very properly and thoroughly," and affirmed that he likely did not call in to Dispatch that Petitioner was formally under arrest prior to conducting the search of the vehicle. App. 167-68. Petitioner did not give consent to search the vehicle. App. 127. After finding the drugs on his person, officers attempted to make a "deal" with Petitioner.[4] App. 163. Petitioner was not advised of his *Miranda* rights at any point during the traffic stop. App. 129, 161, 170.

At the conclusion of Corporal Oiler's testimony, the circuit court asked, "Does the CAD sheet show when Dispatch advised him verbally that there was a warrant?" App. 171. Through a discussion amongst the attorneys, it was determined that Petitioner's counsel had the CAD sheet and had a CD with "different clips" of the recorded conversations between Corporal Oiler and Dispatch, but the State did not have the CD. App. 171-75. At that point, the circuit court indicated that it would recess the hearing to allow Corporal Oiler to listen to the recordings "and see if he

[4] The specifics of the deal are unclear. Corporal Oiler testified at the preliminary hearing that he "told [Petitioner] that [he] would be willing to work with him," but did not testify to what that would entail. App. 242. Corporal Oiler advised that any possibility of a "deal" was withdrawn when the officers found the gun in the car and determined that Petitioner "was not honest, truthful and forthcoming." App. 242-43.

could testify as to what that means." App. 176. The circuit court gave the parties discretion to determine whether it was "important" for the court to receive a copy of the CAD sheet, but stated that it did not want to listen to the recordings. App. 177-78.

Before the matter went to recess, the State advised that—based on Corporal Oiler's testimony—Petitioner was in custody when he was asked if there was any contraband in the vehicle, but had not been advised of his rights. App. 180. Therefore, the State determined that the search of the vehicle followed a violation of Petitioner's *Miranda* rights, and advised that it "voluntarily agree[d] not to put that into [its] case in chief because of that." App. 180.

After the recess, the State informed the circuit court that upon speaking with Petitioner's counsel it was determined that the charge for which Petitioner had been indicted in March 2022—a violation of West Virginia Code § 60A-4-15(b)—had been repealed by the State Legislature, effective June 2022. App. 182. Accordingly, the State moved to dismiss the indictment, but set forth that it intended to reindict "under the correct statute." App. 182-83. Without objection, the circuit court granted the State's motion to dismiss without prejudice. App. 89-90, 184-86. The circuit court did not inquire further as to the lingering questions it had, which necessitated the recess in the first place. App. 181-88. No exhibits were admitted into evidence during the course of the hearing. App. 117-89.

B. Proceedings on the Second Indictment

On November 14, 2022, the Grand Jury of Putnam County once more indicted Petitioner. App. 101-02. This time, the indictment contained a single count: possession with intent to deliver, to-wit: fentanyl, in violation of West Virginia Code § 60A-4-401(a). App. 101-02. Again, the indictment was obtained upon the testimony of Corporal Oiler. App. 91-100. This indictment, however, was assigned to the court of the Honorable Joseph K. Reeder. App. 199-200.

On January 23, 2023, Petitioner filed Defendant's Motion to Suppress, relative to the new indictment. App. 110-15. At pretrial hearing on March 3, 2023, Petitioner "supplemented the record with grand jury transcript[5] and the criminal complaint for the Court's review," and "phone records and dispatch records."[6] App. 199. The State did not object. App. 199. The circuit court then heard oral argument. App. 199.

Thereafter, Petitioner submitted Defendant's Proposed Findings of Fact and Conclusions of Law,[7] which argued "six sources of information for the Court to use in its ruling," including "[t]he criminal complaint, the preliminary hearing transcript,[8] the grand jury transcript, discovery provided by the State in 22-F-27,[9] documentation provided by the defendant,[10] and the suppression hearing transcript noted above." App. 191. Petitioner's proposed order relied heavily upon the CAD sheet. App. 191-94.

On May 30, 2023, the circuit court entered its order denying Petitioner's motion to suppress the search of Petitioner's person. App. 202-07. In its findings of fact, the circuit court relied upon

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[5] It is not clear which "grand jury transcript" was admitted: whether it was only one grand jury transcript—and if so, which one—or whether it was both grand jury transcripts.

[6] It is not clear what was included in the "dispatch records," and whether that included the CAD sheet, all or some recordings, all or some transcripts of recordings, or some combination thereof.

[7] The March 3, 2023, hearing order does not reflect that the circuit court ordered the parties to submit proposed findings of fact and conclusions of law. App. 199-200. The circuit court considered the submission, regardless. App. 202.

[8] Although Corporal Oiler was questioned at the suppression hearing about his testimony at the preliminary hearing (App. 130-31), the preliminary hearing transcript does not appear to have been admitted or made a part of the record in the underlying proceedings.

[9] It is unclear when or whether the State's discovery was moved into evidence or made a part of the record in the underlying proceedings. The March 3, 2023, hearing order only referenced the criminal complaint. App. 199.

[10] It is unclear what this "documentation" entails. The only documents that appear to have been submitted by Petitioner below were phone records. App. 199.

Corporal Oiler's testimony at the September 22, 2022, hearing. App. 202-04. Specifically, the court found that "[Corporal] Oiler testified that when he ran the license through Putnam County Dispatch, it came back with a positive warrant out of Wyoming County, and Defendant's license was suspended," and "that at this time, he and [Corporal] Wilson . . . placed Defendant under arrest." App. 203. The circuit court found that after Petitioner "was placed in handcuffs," "[Corporal] Wilson searched Defendant incident to arrest." App. 203.

The circuit court relied upon *Carroll v. U.S.*, 267 U. S. 132 (1925), *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Robinson*, 414 U.S. 218 (1973). App. 204-05. Moreover, the circuit court found that Petitioner "concedes that the traffic stop was initiated because he committed various traffic violations including improper lane change. Thus, the Court **FINDS** the initial stop was valid." App. 205 (emphasis in original). "Further, [Corporal] Oiler testified that dispatch informed him that Defendant's license was revoked, but more importantly, Defendant had an active warrant out of Wyoming County, West Virginia. Thus, the Court **FINDS** that, based on the information given to [Corporal] Oiler from dispatch, he had probable cause to arrest Defendant." App. 205-06.

Noting that "search incident to a lawful arrest is a traditional exception to the warrant requirement," the circuit court found that, while Petitioner was acting suspicious due to "walking in a strange manner," Petitioner "was already under arrest and placed in handcuffs" at the time. App. 206; *Robinson*, 414 U.S. at 224. The circuit court found that pursuant to "*Arizona v. Gant*, the officers had the authority to search Defendant's person for weapons or any destructible evidence." App. 206; 556 U.S. 332 (1969). The circuit court further rejected Petitioner's argument that he was forced to incriminate himself by retrieving the contraband, finding that this was allowed "as a courtesy to him and to save him from embarrassment. Had Defendant not retrieved

the item himself, the contraband would have been within Defendant's control and subject to a lawful search incident to arrest." App. 206-07. "Thus, the Court **FINDS** the search of Defendant was permissible," and "**ORDERS** that the evidence seized from Defendant shall be **ADMISSIBLE** at the trial in this matter." App. 207 (emphasis in original).

At hearing on December 6, 2023, Petitioner entered a conditional no contest plea to attempt to commit a felony, a lesser included offense of the sole count of the indictment, in violation of West Virginia Code § 61-11-8. App. 221-24. Pursuant to the plea agreement, Petitioner "reserves the right to appeal the motion to suppress the ruling from the court." App. 218. On February 2, 2024, Petitioner was sentenced to prison for not less than one year nor more than three years, the execution of which was suspended, and Petitioner was placed on probation for a period of two years. App. 226-27. It is from this sentence that Petitioner now appeals.

SUMMARY OF ARGUMENT

One exception to the warrant requirement is the search incident to arrest. Essentially, when an officer effectuates an arrest, that officer is authorized to perform a pat down search of the arrestee's person, without any other cause or reason. Here, Petitioner was arrested on an outstanding warrant from another county within West Virginia, and after his arrest, a search of his person was performed. Petitioner's attempts to obfuscate the record—which is confusing enough on its own—by arguing that the Dispatch entries and a phone log from Petitioner's friend is more credible than the testimony of the arresting officer. These documents were not cross-examined, did not testify to the context in which they were created, and do not establish their significance within the confines of the traffic stop. Corporal Oiler, on the other hand, testified under oath on four separate occasions—twice subject to cross-examination—that Petitioner was under arrest at the time of the search, explained why there may be a discrepancy between when the arrest occurred

and when it was entered through Dispatch, and relied upon his training and experience to explain the traffic stop, from initiation to completion. Petitioner was searched incident to arrest.

Petitioner argues that he was not under arrest at the time of the search of his person, and therefore, the circuit court should have suppressed the contraband discovered incident to that search. Despite Petitioner certainly being under arrest when searched, even if not, the evidence is still admissible. Testimony indicates that the officers were deeply suspicious that Petitioner was carrying a weapon or contraband, and that he may pose a danger to their safety. Moreover, because Officer Oiler detected the odor of marijuana and noticed a range of other factors giving rise to probable cause—coupled with the Petitioner's history of fleeing and obstruction—the responding officers could justifiably search Petitioner without a formal arrest. Thus, the contraband discovered on his person is admissible whether under arrest or not.

Petitioner further misapplies *Miranda* to the facts in this case. The search of Petitioner's person was not a custodial interrogation, and allowing Petitioner the option to remove the found contraband did not coerce him into giving a testimonial. Further, he was not in a position to give or refuse consent for the search. To hold otherwise would expand *Miranda* beyond the confines of both federal and state precedence. Ultimately, this argument is without merit, and the conviction in this case should be upheld.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision, because the record is fully developed, and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

STANDARD OF REVIEW

The substance of this appeal is the admissibility of contraband found on Petitioner's person, and the circuit court's May 30, 2023, order ruling the search lawful and the evidence admissible.

When considering the suppression of evidence on appeal, this Court addresses the issue on two planes: the law and the facts.

"[T]he ultimate determinations as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*." Syl. pt. 2, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996); *see also* syl. pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994) ("On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*.").

This Court, however, has recognized that the legal determinations cannot be fully divorced from the factual findings of the lower court. "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." Syl. pt. 1, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. "In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference." Syl. pt. 3, *Stuart*, 192 W. Va. 428, 452 S.E.2d 886. "Therefore, the circuit court's factual findings are reviewed for clear error." Syl. pt. 1, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. "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." *Id.*

ARGUMENT

I. The circuit court correctly found that the search of Petitioner was a lawful search incident to arrest.

This appeal rests upon Petitioner's contention that the circuit court should have supplanted Corporal Oiler's testimony for a CAD sheet, which may or may not have been admitted into the

record below.[11] Pet'r's Br. 11. Acknowledging that Corporal Oiler testified no less than "four separate times" that Petitioner was under arrest when he was searched,[12] Petitioner nonetheless contends that the timeframe within the unauthenticated CAD sheet is far more credible, and should be upheld as the gospel, regardless of its providence. Pet'r's Br. 11. Petitioner further argues that one of the exchanges between Corporal Oiler and Dispatch "demonstrates [Corporal] Oiler did not believe he had probable cause to arrest [Petitioner] until he confirmed procedure with the 911 Dispatcher more than fifteen minutes after [Corporal] Wilson's pat down." Pet'r's Br. 13.

Before analyzing the depth of Petitioner's misunderstanding of the amorphous and undefined record, it is necessary to first consider the law on search incident to arrest. Aside from correctly stating the standard of review, Petitioner does not cite to any constitution, code, or case within his argument for this assignment of error in clear violation of West Virginia Rule of Appellate Procedure 10(c). Pet'r's Br. 10-14. Of course, there is little on the law to argue, as the right to search an arrestee has been extensively—and conclusively—upheld.

In *U. S. v. Robinson*, the United States Supreme Court of Appeals considered whether "the principles" of *Terry*, "should be carried over to this probable-cause arrest for driving while one's license is revoked." 414 U.S. at 227. The answer was a resounding "no." *Id.* at 234-35. First,

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[11] Although "dispatch records" were admitted into the record at the March 3, 2023, hearing, it is unclear what was included in those records. App. 199. Given the lack of specificity below, it can only be presumed that the records provided in Petitioner's Appendix are the same as the records submitted to the circuit court below. Petitioner's Appendix does not include the circuit clerk docket sheet for either indicted case, so the record below is only defined by the hearing order.

[12] In addition to the suppression hearing on September 22, 2022, Corporal Oiler also testified: (1) at the preliminary hearing on August 10, 2021, "we arrested him, then conducted a pat down on him" (App. 236); (2) at the first grand jury on March 15, 2022, responded in the affirmative when asked if Petitioner was arrested after the active warrant was discovered, and before the search (App. 70-71); and (3) at the second grand jury on November 14, 2022, Dispatch "said he had a warrant out of Wyoming County for fleeing and resisting, at which point in time we placed him under arrest. We began to speak to him a little bit further and give him a pat down incident to arrest" (App. 95).

the Court affirmed that "[i]t is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment," which includes "that a search may be made of the person of the arrestee by virtue of a lawful arrest." *Id.* at 224. Next, the Court considered the intent behind the proposition of a pat down search of an arrestee, finding that "[i]t is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station," as compared to the level of potential danger that derives from a traditional *Terry* stop. *Id.* at 234-35. This safety concern alone "is an adequate basis for treating all custodial arrests alike for purposes of search justification." *Id.* at 235. Therefore, "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id.* at 234 (citing *Agnello v. United States*, 269 U. S. 20 (1925); *Abel v. United States*, 362 U.S. 217 (1960)).

Despite the purpose of the search, the Court was careful to find that "[t]he authority to search the person incident to a lawful custodial arrest . . . does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Robinson*, 414 U.S. at 235. Instead, "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* "It is the fact of the lawful arrest which establishes the authority to search," and as such, the Court held "that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under the Amendment." *Id.*

The Supreme Court of Appeals of West Virginia has reached the same finding, acknowledging that "[o]ne of the most frequently utilized exceptions to the warrant requirement is the search incident to an arrest." *State v. Julius*, 185 W. Va. 422, 426, 408 S.E.2d 1, 5 (1991) (quoting J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 322 (2d ed. 1985)). "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resister arrest or effect his escape." *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). "There is ample justification, therefore, for a search of the arrestee's person." *Id.* Accordingly, it is the law in West Virginia that "[a] warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest." Syl. pt. 1, *id.* (quoting syl. pt. 6, *State v. Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled on other grounds*, *Julius*, 185 W. Va. 422, 408 S.E.2d 1). Upon this law, there can be no doubt that West Virginia recognizes that the person of an arrestee may be searched following his arrest. It does not appear that Petitioner argues otherwise.

But, Petitioner claims that he was not under arrest at the time of the search. In support, Petitioner relies upon two transcripts of two snippets of conversation between Corporal Oiler and Dispatch. Pet'r's Br. 12-13; App. 260-68. While both transcripts include the date of the traffic stop—July 27, 2021—neither include a timestamp.[13] App. 260-68. It is also unclear which recording occurred first, or when either call occurred in relation to the stop being initiated. App. 260-68. It is further uncertain whether there were additional relevant recordings between Corporal Oiler—or any other responding officer—and Dispatch. App. 260-68. What the transcripts *do*

[13] Although Petitioner claims that at least one call was made at 19:14:10, or 7:14 p.m., this is not facially clear on the transcript themselves, nor obvious from the CAD sheet, and it is not readily apparent how or why Petitioner is able to argue an exact time. App. 6-14, 260-68.

confirm is that Dispatch unequivocally advised Corporal Oiler that Petitioner had an "active capias out of Wyoming County for . . . obstructing and fleeing," which was discussed in both transcripts. App. 261, 265-66. One of the calls ended with Corporal Oiler saying, "we're about to wrap up and book him," indicating that Petitioner had already been arrested and the officers were preparing to take him in for booking. App. 262.

Petitioner's entire appeal rests upon the premise that Corporal Oiler lied under oath, on multiple occasions, and that, somehow, the transcripts of portions of the Dispatch call and the CAD sheet clearly and convincingly prove this. Pet'r's Br. 13-14. But at the suppression hearing, Corporal Oiler was confronted directly with the CAD sheet timeline, and he provided reasonable explanations which *were not contested.* App. 152-54, 167-68. Petitioner did not testify that Corporal Oiler was lying or incorrect. The worker at Dispatch who entered the information into the CAD sheet was not called, and therefore did not testify that Corporal Oiler's timeline was wrong. Nor did the Dispatch operator testify as to the process for how the CAD sheets are created, how accurate they are, or if the operator was working on other overlapping calls at the same time. No other officers testified, either. And it is axiomatic that counsel's questions—no matter how provocative—are not evidence. The existence of the CAD sheet is inescapable; but the substance of its contents was only testified to by one person, and one person alone: Corporal Oiler.

In support of his claim that he was not arrested at the time of the search, Petitioner points to the timestamp on the CAD sheet, which indicates that the traffic stop was initiated at 18:51, or 6:51 p.m., and that the arrest was logged at 20:32, or 8:32 p.m. App. 6-7. Corporal Oiler was explicitly asked about this timeline at the suppression hearing, where he testified that there was *not* a one hour and forty-minute gap between the initiation of the traffic stop and the arrest, and "there would have not been a delay in actually physically effecting the arrest." App. 152-53.

Corporal Oiler testified to potential reasons for this apparent discrepancy, such as a delay in communicating the arrest to Dispatch, or that it did not "come across to Dispatch." App. 153-54. Another possible explanation was that a vehicle search "takes a long, long time," and it was possible that he did not confirm the arrest to Dispatch until after the search was concluded. App. 167-68. While he could not "give a definitive answer," he was adamant that there was not a delay, testifying that, "All I know is that he wasn't placed under arrest an hour and 30 minutes later." App. 154. Two entries on a CAD sheet are not proof that Corporal Oiler perjured himself, and it is not enough to demonstrate that the circuit court erred in relying on his testimony.

In an attempt to counteract Corporal Oiler's testimony, Petitioner relies upon his friend's phone records—although not his own—to indicate that the call "continued for 30 minutes" after the arrest. Pet'r's Br. 13; App. 258-59. But neither Petitioner nor his friend testified as to what was occurring during this call. Were Petitioner and his friend actively talking during this time? That would be odd, since there were officers present. Was the friend a passive listener, staying on the line in case Petitioner wanted a witness for a potential court proceeding? Was the friend called back to arrange for her to retrieve Petitioner's car? After all, Corporal Oiler testified that he allowed Petitioner's friend to come pick up the rental car, rather than have it towed. App. 158.

Although the State did not object to the admission of the dispatch records or the phone records, disembodied evidence is entitled to little weight, if any. In this case, the evidence of the Dispatch communications and the friend's phone records are so thoroughly detached from the environment around it that it is impossible to determine how it is supposed to fit. Put another way, Petitioner has given this Court a handful of puzzle pieces without establishing that those pieces even belong to the same puzzle that the Court is working to solve. Ultimately, without context, these records are meaningless.

On the other hand, Corporal Oiler's testimony is substantively uncontroverted. As is his testimony that the arrest—and subsequent search—occurred within a matter of minutes of his first interaction with Petitioner, and that Petitioner was under arrest at the time of the pat down search of his person. App. 151, 163. Corporal Oiler's testimony was the same across four proceedings, stretching from August 10, 2021, to November 14, 2022. App. 70-71, 95, 124-25, 236. At no point over a greater than two year span did Corporal Oiler alter or shift his account that Petitioner was under arrest on the outstanding Wyoming County warrants at the time the search of his person occurred. App. 70-71, 95, 124-25, 236. This was credible testimony, up to and including his assertions that the CAD sheet incorrectly noted that an hour and forty minutes passed prior to the arrest, and his explanations for why that may have occurred. App. 152-54, 167-68.

To be sure, most of the crucial elements pertaining to the search incident to arrest are not contested. As the circuit court found below, Petitioner "concede[d] that the traffic stop was initiated because [Petitioner] committed various traffic violations including improper lane change." App. 205. Accordingly, the Court found "the initial stop was valid." App. 205. Perhaps most importantly, at no point has Petitioner claimed that Petitioner did *not* have a valid arrest warrant out of Wyoming County, West Virginia. Petitioner argues that his driver's license was valid but does not—nor cannot—argue that the Wyoming County warrants were illegitimate. Pet'r's Br. 13-14; App. 25-27. The issue of the license is a red herring: Petitioner was arrested on the outstanding capias. It is ultimately undisputed that not only was there an active capias, but Corporal Oiler was advised of the capias and relied upon the capias.

Petitioner argues, *ad nauseum*, that pursuant to the CAD sheet and Dispatch transcripts, Petitioner was not "officially" arrested at the time of the search. Pet'r's Br. 10-14; App. 267. One can speculate as to what the word "officially" means, but the only person who was called to testify

as to the events of the arrest testified, without hesitation, that Petitioner was actually and absolutely placed under arrest *prior* to the search being performed. And Corporal Oiler's testimony rang true. For instance, Corporal Oiler explained how Petitioner was arrested and handcuffed, but during the search, the handcuffs were removed so that Petitioner could retrieve the contraband himself. App. 159-63. Why else would Petitioner have been handcuffed, if it was not as a consequence of the arrest on an outstanding warrant that is not in dispute? This is the type of detail that supports a credible recollection, not a deceitful imagination. Whatever attributes "officially" has within the parameters of paperwork and policy hierarchy, at the time of the search, Petitioner was indeed under arrest.

Petitioner has not asked this Court to find that the circuit court misapplied the law. Instead, Petitioner's argument rests solely upon his contention that this Court should find that the circuit court erred in the facts it adopted. Pet'r's Br. 10-14. Facts which "an appellate court should construe . . . in the light most favorable to the State," and factual findings owed "particular deference." Syl. pt. 1, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. When reviewing the facts in the light most favorable to the State—when taking every reasonable inference in the State's favor—and when affording the circuit court's factual findings due deference, there is simply no reason for reversal. The circuit court appropriately considered the evidence before it, deemed Corporal Oiler's testimony to be more credible than the unsubstantiated, unexplained CAD proffered by Petitioner, and thus determined that Corporal Oiler "had probable cause to arrest" Petitioner, and to conduct a search incident to arrest. App. 205-06. This ground alone is sufficient to uphold the circuit court's ruling and affirm Petitioner's conviction.

II. Even if Petitioner was not under arrest at the moment the pat down was performed, the search of his person was still lawful.

Petitioner argues that because he was not under arrest at the time of the search, the contraband discovered on his person must be rendered inadmissible. Pet'r's Br. 14-18. Petitioner argues that it was a *Terry* frisk, but "[t]here isn't a single shred of evidence that states officers immediately recognized the item on Mr. Howard's person as contraband," as opposed to a weapon. Pet'r's Br. 16. As demonstrated by the preliminary hearing and grand jury transcripts—which were presumptively submitted into evidence by Petitioner—that is not accurate.

At the preliminary hearing, Corporal Oiler testified that he observed Petitioner to be "excessively nervous," and Corporal Wilson "picked up on the way that [Petitioner] was standing that indicated that he might have something tucked." App. 235. He further testified that the officers "arrested him," based on the outstanding warrants, and "then conducted a pat down on [Petitioner], and at that point, confronted him on that aspect of how he was standing," specifically that he "was clinching his butt." App. 236.

Corporal Oiler likewise testified before the first grand jury that not only was Petitioner searched after being placed under arrest, but also that based on Petitioner's behavior, he and Corporal Wilson had already developed suspicions that Petitioner was carrying either a weapon or contraband on his person. App. 70-71. Specifically, Corporal Oiler testified that he and Corporal Wilson "noticed, based on [Petitioner's] body language, that [he] was kind of walking around in a weird manner. It's hard to describe. But his buttocks were very clenched while he walked around and his feet were narrow." App. 71. When asked if "at that point in time did you become wary that [Petitioner] might have had a weapon or contraband on his person," Corporal Oiler responded, "Very much so." App. 71. Corporal Oiler further testified that he observed Petitioner had "a plastic glove on his person, like in his back pocket sticking out of it. And he was sweating

profusely," and Corporal Oiler knew that when it came to drugs like Fentanyl, those moving it "[do not] want to handle that with bare hands." App. 75. After Corporal Oiler had Petitioner "under arrest for the warrant and he's still this nervous, it very much, based on body posture too, it very much so tipped me off that I wanted to investigate further." App. 75. Corporal Wilson conducted the pat down, and "felt what he thought was something that's not part of [Petitioner's] body. And that's when we asked him what it was, and [Petitioner] said that he had something in there." App. 71.

At the suppression hearing, Corporal Oiler began to testify that Corporal Wilson "observed [Petitioner] walking in a manner," but was cut off by Petitioner's counsel before he could finish his sentence. App. 145. Corporal Oiler was able to testify, however, that Petitioner was "profusely sweating to the point where his shirt [was] drenched." App. 151. Corporal Oiler affirmed that part of the reason he had Petitioner step out of the vehicle was because he believed that Petitioner "was somehow a threat to [the officer's] safety while he was in the vehicle." App. 137, 169-70. Corporal Oiler was particularly concerned by Petitioner's "reaction to [Corporal Oiler's] presence," as demonstrated by how Petitioner attempted to evade Corporal Oiler while driving on the interstate. App. 138. Corporal Oiler interpreted this activity as an indication of criminal activity, and that "based on [his] training and experience," Petitioner's actions "absolutely" correlated with somebody who "might be carrying contraband." App. 147-48. Corporal Oiler further affirmed that prior to the search, Petitioner "was standing funny," and Corporal Wilson "had a suspicion." App. 169. Corporal Oiler agreed that when the search was performed, there was a "suspicion," based upon how Petitioner was standing, that Petitioner had contraband on his person. App. 169. When asked if it was "possible or reasonable to believe that anyone [he] stop[s]

on a traffic stop can have a weapon," Corporal Oiler responded, "Very much so." App. 169-70. For all of these reasons, the frisk was necessary and proper.

A *Terry* frisk allows an officer to conduct "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 U.S. at 27. In West Virginia, a protective search is permissible if "a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered." Syl. pt. 1, *State v. Hlavacek,* 185 W. Va. 371, 407 S.E.2d 375 (1991) (citations omitted). "Neither a showing of exigent circumstances nor probable cause is required to justify a protective sweep for weapons," provided that the officer can demonstrate "specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable." Syl. pt. 6, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. "If these two elements are satisfied, an officer is entitled to take protective precautions and search in a limited fashion for weapons." *Id.*

In *Minnesota v. Dickerson*, the United States Supreme Court extended *Terry* to allow for the seizure of nonthreatening contraband, finding that "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." 508 U.S. 366, 375 (1993). As such, "if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 375-76. This has been fully adopted by the West Virginia Supreme Court of Appeals, which has affirmed "that the police may seize nonthreatening contraband detected through the sense of touch as a result of a lawful patdown search performed pursuant to a lawful investigatory stop." *State v. Matthew David S.*, 205 W. Va. 392, 396, 518 S.E.2d 396,

400 (1999). Although Corporal Oiler's testimony focused on the fact that the search occurred after Petitioner was placed under arrest, he did testify to his suspicions that Petitioner may be carrying a weapon or contraband. App. 70-71, 75, 137-38, 145, 147-48, 151, 169, 235, 239.

It is especially noteworthy that Corporal Oiler articulated not only concern for a weapon, but also cause to believe that Petitioner was in possession of contraband. In addition to Petitioner's nervousness and the way that he held himself, Corporal Oiler testified that he "detected the odor of marijuana" during the detention of the Petitioner. App 126. In West Virginia, the odor of marijuana can give rise to probable cause. Syl. pt. 4, *Moore*, 165 W. Va. 837, 272 S.E.2d 804. The *Handbook on West Virginia Criminal Procedure* explicitly states that if an officer smells the odor of marijuana in circumstances where the source can be localized to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana. 1 TRISHA ZELLAR, *Chapter III. Arrest, Extradition, and Detainer*, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE (2022). Accordingly, the smell of marijuana alone could demonstrate that the officers had probable cause for possession of marijuana, but when examined under the totality of the circumstances, officers had articulable probable cause for the subsequent search of Petitioner.

This cause is further bolstered by exigent circumstances. In West Virginia, the law permits warrantless searches if law enforcement has both probable cause and exigent circumstances. These exigent circumstances may include situations where the police have reasonable grounds to believe that if an immediate arrest or search is not made, the accused would be able to destroy evidence, flee, or otherwise avoid capture, or might endanger the safety or property of others during the time necessary to procure a warrant. *See State v. Mullins,* 177 W. Va. 531, 355 S.E.2d 24 (1987). "The test for the existence of exigent circumstances is whether the facts would lead a reasonable,

experienced police officer to believe the evidence might be destroyed or removed before a warrant could be secured." *Lacy*, 196 W. Va. at 112 n.7, 468 S.E.2d at 727 n.7. "The exception for 'exigent circumstances' applies when police are engaged in crime-solving activities, such as searching for evidence or suspects." *Ullom v. Miller*, 227 W. Va. 1, 12 n.10, 705 S.E.2d 111, 122 n.10 (2010).

At the time of his detention, Petitioner had an outstanding capias warrant in Wyoming County for fleeing and obstruction. App 55. Corporal Oiler was made aware of this warrant when he ran Petitioner's driver's license through the system. App 235. With a demonstrated history of fleeing, there was a real risk that if Petitioner was not searched immediately, evidence could be destroyed, and Petitioner could escape. Petitioner exhibited behavior which led Corporal Oiler and Corporal Wilson to believe that he was in possession of a weapon or contraband. App. 70-71, 75, 137-38, 145, 147-48, 151, 169, 235, 239. Further armed with probable cause and made aware of Petitioner's past behavior, even if not under arrest, the warrantless search of the Petitioner by responding officers was lawful, and the evidence obtained therein admissible.

III. Petitioner's right against self-incrimination did not mean that he could not be required to remove contraband from his person.

Finally, Petitioner argues that when the search was performed, he was detained, and therefore entitled to be advised of his rights, pursuant to *Miranda v. Arizona*. Pet'r's Br. 18; 384 U.S. 436 (1966). Petitioner then reargues his claim that he was not under arrest—just detained—and conflates the removal of found contraband from his genital region with being coerced into giving a confession. Pet'r's Br. 18-20. As a preliminary matter, it is necessary for the Respondent to reiterate that Petitioner was under arrest. Although this brief includes an academic foray into the hypothetical of "what if" Petitioner was not under arrest, it is—and firmly remains—Respondent's position, *as supported by the evidence*, that Petitioner was under arrest at the time of the search of his person.

As somebody under arrest, Petitioner should have been given his *Miranda* warnings before being questioned by officers—this is neither disputed nor is it relevant to the issue at hand. Petitioner was not, after all, entitled to such warnings prior to being searched. This Court has held that a defendant may not invoke his *Miranda* rights "outside the context of custodial interrogation." Syl. pt. 3, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995). This Court has similarly found that an arrestee may not invoke such rights to preempt a lawful search of his person, and "[w]here physical evidence is lawfully seized from the person of the defendant who has been lawfully arrested, the defendant may not interpose a Sixth Amendment right to counsel to render the seizure invalid." Syl. pt. 5, *Julius*, 185 W. Va. 422, 408 S.E.2d 1.

Whether he was advised of his *Miranda* rights or not, he was not entitled to invoke said rights during a post-arrest pat down search. The pat down search of Petitioner was custodial, but it was not an interrogation. Petitioner was an arrestee, in the custody of law enforcement. Corporal Wilson conducted a pat down search, and located something on Petitioner's person, near his genitalia. App. 162-63, 168-69. The officers had every right and authority, at that time, to retrieve the contraband from Petitioner, as an arrested person in their custody. Indeed, "[w]hen an arrest is made . . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Julius*, 185 W. Va. at 426, 408 S.E.2d at 5 (quoting *Chimel*, 395 U.S. at 763). Here, Petitioner was afforded the opportunity to retrieve the drugs himself so as to save him the embarrassment of having law enforcement do it. App. 162-63, 169. The courtesy extended to Petitioner did not transmute the otherwise lawful search incident to arrest into a confession of any type, let alone a coerced confession. Petitioner was not beaten and coerced into giving a statement against his interest; he was given the choice to either retrieve the contraband or have the officers to do so. Petitioner

could have declined to retrieve the Fentanyl; at which time the officers could have—and would have—lawfully removed it themselves. Simply put, Petitioner could not have stopped the pat down by invoking his *Miranda* rights.

Petitioner cites to *State v. Stanley*, which sets forth that "[a] confession obtained by exploitation of an illegal arrest is inadmissible." Pet'r's Br. 19; Syl. pt. 2, 168 W. Va. 294, 284 S.E.2d 367 (1981). This is inapplicable to the case at hand. First, while Petitioner claims there was *no* arrest, he does not claim that there was an *illegal* arrest. It is presumed that, based on the outstanding warrant, if there was an arrest, it was lawful. Further, the suppression ruling below relates solely to the pat down search of Petitioner and has nothing to do with any statements Petitioner made or any other search performed. Prior to the circuit court's ruling on the suppression issue, the State had already conceded that any inculpatory statements made by Petitioner *after* the arrest would not be used against him. App. 180. At issue is not a confession obtained from an illegal arrest, but a search performed following a lawful arrest.

This Court has recognized that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Newcomb*, 223 W. Va. 843, 862, 679 S.E.2d 675, 694 (2009) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-02 (1980)). A variety of factors pertaining to questioning are considered when looking at whether an interrogation has occurred. Syl. pt. 4, *State v. Farley*, 238 W. Va. 596, 797 S.E.2d 573 (2017). But regardless of which factors may be satisfied, within *Newcomb* and *Innis*, a "response" to questioning by law enforcement must be a *verbal* response. *Id.*

After all, "[t]he Fifth Amendment privilege against self-incrimination has been interpreted to provide protection only whether incriminating evidence of a testimonial or communicative nature is sought from a witness through the vehicle of state compulsion." *Julius*, 185 W. Va. at 429, 408 S.E.2d at 8 (quoting syl. pt. 8, *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988)). This language stems from this Court's review of *Schmerber v. California*, where the United States Supreme Court of Appeals upheld law enforcement obtaining the defendant's blood sample, finding that, "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Id.* (quoting *Schmerber*, 384 U.S. 757, 765 (1966)). Pursuant to *Bradshaw*, Petitioner was not entitled to be advised of—or invoke—*Miranda* rights outside of a custodial interrogation, and pursuant to *Julius*, he was not entitled to Fifth Amendment privilege when the incriminating act was, indeed, an act, rather than communication. Syl. pt. 3, *Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456; *Julius*, 185 W. Va. at 429, 408 S.E.2d at 8. Being directed to remove contraband from his person was not a question which required a verbal response, nor could Petitioner have refused it any more than a suspect can refuse to comply with a search warrant to obtain his DNA.

If there was any doubt as to this point, it falls away in light of Petitioner's status as an arrested person. In *State ex rel. DeChristopher v. Gaujot*, this Court found that "[i]t is not necessary, as a prerequisite to obtaining a voluntary consent to a noncustodial search, that law enforcement officers give *Miranda* warnings or similar warnings relating to Fourth Amendment rights." Syl. pt. 7, 244 W. Va. 631, 856 S.E.2d 223 (2021) (quoting syl. pt. 2, *State v. Basham*, 159 W. Va. 404, 223 S.E.2d 53 (1976), and syl. pt. 1, *State v. Fellers*, 165 W. Va. 253, 267 S.E.2d 738 (1980)). Regardless, "the subject's knowledge of a right to refuse is a relevant factor in

determining whether the consent was voluntary and knowledgeable." *Id.* The key, of course, being that the subject does, in fact, have a right to refuse.

In this case, because Petitioner unequivocally did *not* have a right to refuse the search, whether Petitioner consented was immaterial. He could not have lawfully acted to prevent the officers from retrieving the contraband off his person, any more than he could refuse a strip search at the regional jail. Petitioner did not possess *Miranda* rights within the context of the search, and he did not have a right to refuse consent for the search to be performed. Once the officers had a lawful right to search, the search *was* going to happen. As the circuit court found in its order, Petitioner's rights were not violated when the officers allowed him "to retrieve the item from his pants as a courtesy to him and to save him from embarrassment. Had [Petitioner] not retrieved the item himself, the contraband would have been within [Petitioner]'s control and subject to a lawful search incident to arrest." App. 206-07. This is an entirely correct assessment of the given facts, and the applicable law. Accordingly, Petitioner's assignment of error on this matter should fail.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to affirm the circuit court's May 30, 2023, order denying Petitioner's motion to suppress, and to uphold his conviction.

Respectfully submitted,

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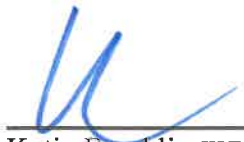
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-88

STATE OF WEST VIRGINIA,

Respondent,

v.

RODERICK LEVI HOWARD,

Petitioner.

CERTIFICATE OF SERVICE

I, Katie Franklin, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & Serve Xpress this 27th day of June, 2024.

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