

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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STATE OF WEST VIRGINIA,

Respondent,

Supreme Court No.: 23-421

Case No.: 22-F-271

Wood County Circuit Court

MICHAEL KEITH ALLMAN,

Petitioner.

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PETITIONER'S BRIEF

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Matthew Brummond  
Appellate Counsel  
W.Va. Bar No. 10878  
Public Defender Services  
Appellate Advocacy Division  
One Players Club Drive, Suite 301  
Charleston, WV 25311  
(304) 558-3905  
Matt.D.Brummond@wv.gov

*Counsel for the Petitioner*

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## ASSIGNMENT OF ERROR

A police officer seized Petitioner's backpack incident to arrest, handcuffed him, and awaited backup. After the arresting officer secured Petitioner away from the bag and a backup officer secured the scene, the police searched the bag and discovered drugs.

Under the Fourth Amendment to the United States Constitution and article three, section six of the West Virginia Constitution, could officers search the backpack's contents when Petitioner could no longer access it, or did they require a warrant?

## STATEMENT OF THE CASE

A Wood County jury convicted Petitioner of possessing drugs with intent to distribute and being a prohibited person in possession of a concealed firearm.<sup>1</sup> However, it heard evidence that police discovered through a warrantless search of Petitioner's backpack.<sup>2</sup> Petitioner appeals because the intrusion was not a valid search incident to arrest, and the circuit court ought to have suppressed the bag's contents.<sup>3</sup>

### **1. A Parkersburg police officer arrested Petitioner on an active warrant.**

On the evening of June 4, 2022, a Parkersburg police officer was patrolling an alleyway near Pro-Line Collision, a local mechanic garage.<sup>4</sup> He knew the location to be a high drug traffic area.<sup>5</sup> He saw the garage door open despite the late hour, so he stopped his car to investigate.<sup>6</sup>

The officer could peer into the open door from his patrol car, and inside recognized Petitioner amongst six to eight other individuals.<sup>7</sup> The officer knew Petitioner had an active warrant and called out to him by name.<sup>8</sup>

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<sup>1</sup> A.R. 545–48.

<sup>2</sup> A.R. 335–38; A.R. 343–46; A.R. 350–51; *see also* A.R. 42.

<sup>3</sup> Counsel would like to thank 2023 WVU College of Law graduate Olivia Lee for her contributions to this brief.

<sup>4</sup> A.R. 32–34.

<sup>5</sup> A.R. 34.

<sup>6</sup> A.R. 34–35.

<sup>7</sup> *Id.*; A.R. 38.

<sup>8</sup> A.R. 35.

Petitioner turned, and the officer noted that he had a bookbag slung over his shoulder.<sup>9</sup> The officer exited his car to approach Petitioner, and as he did, Petitioner walked between two cars.<sup>10</sup> The officer saw Petitioner remove and discard an item from his waistband.<sup>11</sup> The officer called out again, and Petitioner approached.<sup>12</sup> As he did so, Petitioner also hid the backpack behind another vehicle.<sup>13</sup>

The officer ordered Petitioner to turn around and put his hands behind his back.<sup>14</sup> Petitioner did not comply and continued facing forward.<sup>15</sup> The officer pushed Petitioner up against a car body and secured him with handcuffs.<sup>16</sup>

**2. The officer seized and secured Petitioner's bag, then backup arrived to assist the officer in securing the scene.**

As the officer, who at that time was alone, handcuffed Petitioner, another individual stepped forward.<sup>17</sup> This unknown person claimed that the backpack the officer saw on Petitioner's shoulder belonged to him.<sup>18</sup>

The officer ordered everyone out of the garage.<sup>19</sup> They complied and departed.<sup>20</sup> After the garage cleared and the officer secured Petitioner, he "took the backpack under control"<sup>21</sup> from where Petitioner had hid it.<sup>22</sup> No one made any further claim on the bag or approached the officer after they left the garage.<sup>23</sup>

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<sup>9</sup> A.R. 35-36.

<sup>10</sup> A.R. 36.

<sup>11</sup> *Id.*

<sup>12</sup> A.R. 38.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> A.R. 39.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> A.R. 541.

<sup>22</sup> A.R. 39-40.

<sup>23</sup> A.R. 41.

The officer placed the backpack on the hood of the police car and backup arrived.<sup>24</sup> While the arresting officer held Petitioner, the backup officer frisked him and discovered an empty holster.<sup>25</sup> The arresting officer remained outside to guard Petitioner and backup retrieved the discarded firearm from inside the now-empty garage.<sup>26</sup>

**3. Police searched the backpack after they secured it, Petitioner, and the scene.**

The officers then turned their attention to the backpack.<sup>27</sup> Up until this point, the officer's concern had been securing the scene: arresting Petitioner, seizing the bag, awaiting backup, and securing the gun.<sup>28</sup>

But now they had accomplished this. Police had recovered the gun.<sup>29</sup> They had secured the backpack.<sup>30</sup> No one remained in the garage.<sup>31</sup> The officers had handcuffed Petitioner behind his back and frisked him.<sup>32</sup> Between the arresting and backup officer, they had two vehicles in which to place Petitioner or the backpack.<sup>33</sup> And more officers were arriving.<sup>34</sup>

The officers then searched Petitioner's bag and found ammunition, drugs, and paraphernalia.<sup>35</sup> They placed Petitioner inside one vehicle, and the arresting officer placed the backpack and its contents in the front seat of his vehicle.<sup>36</sup>

The State charged Petitioner with being a felon in possession of a firearm and concealing it, and various counts of possession with intent based upon the backpack's contents.<sup>37</sup>

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<sup>24</sup> A.R. 41.

<sup>25</sup> A.R. 41–42.

<sup>26</sup> A.R. 42.

<sup>27</sup> *Id.*

<sup>28</sup> A.R. 56–57.

<sup>29</sup> A.R. 42.

<sup>30</sup> A.R. 51; *see also* A.R. 541.

<sup>31</sup> A.R. 41; A.R. 57.

<sup>32</sup> A.R. 39; A.R. 42; A.R. 45.

<sup>33</sup> A.R. 43.

<sup>34</sup> A.R. 50.

<sup>35</sup> A.R. 42.

<sup>36</sup> A.R. 43–45.

<sup>37</sup> A.R. 533–36.

**4. The circuit court denied Petitioner’s motion to suppress and the jury convicted Petitioner.**

Based upon this record, Petitioner moved to suppress the backpack’s contents.<sup>38</sup>

This was not a consent search—the police did not ask anyone whether they would voluntarily submit to any intrusion.<sup>39</sup>

Nor was it a legitimate search incident to arrest.<sup>40</sup> The officers waited until the scene was secure and Petitioner could no longer access the bag or its contents before opening it.<sup>41</sup> Per *U.S. v. Davis*<sup>42</sup> and its application of *Arizona v. Gant*,<sup>43</sup> once the danger to evidence and officer safety passed, the police had to obtain a warrant.<sup>44</sup>

The State responded that officers did not require consent because a warrant exception applied to each intrusion.<sup>45</sup> To whatever extent the third party’s claim muddied ownership, it would only detract from Petitioner’s standing.<sup>46</sup> But the State took the position that Petitioner “clearly was in possession of the bag[.]”<sup>47</sup>

As to the merits, the State conceded that *Gant* limits the warrant exception to its purpose of protecting evidence and officer safety.<sup>48</sup> But focusing on the situation when the first officer seized the bag, the State believed the later search was reasonable.<sup>49</sup>

The circuit court noted that *if* it were Petitioner’s position that the bag was someone else’s, *then* he would not have standing.<sup>50</sup> But rather than rule upon this, the court agreed with the State that the search was reasonable under the circumstances.<sup>51</sup> The jury then convicted him on all counts.<sup>52</sup>

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<sup>38</sup> A.R. 537–38.

<sup>39</sup> A.R. 59.

<sup>40</sup> A.R. 58.

<sup>41</sup> *Id.*

<sup>42</sup> *U.S. v. Davis*, 997 F.3d 191 (4th Cir. 2021).

<sup>43</sup> *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>44</sup> A.R. 58–59; A.R. 537–38.

<sup>45</sup> A.R. 59–60.

<sup>46</sup> A.R. 60.

<sup>47</sup> *Id.*

<sup>48</sup> A.R. 62.

<sup>49</sup> A.R. 64–66.

<sup>50</sup> A.R. 542.

<sup>51</sup> A.R. 540–44.

<sup>52</sup> A.R. 492–93.

## SUMMARY OF ARGUMENT

There's a reason that below, the State and court focused on the facts prior to the arresting officer and backup securing Petitioner, the scene, and the evidence. This is the period during which the officer could permissibly have searched the bag. But he didn't.

Under the circumstances, waiting made sense. He was on his own, with an arrestee, in the vicinity of individuals with unknown motivations. On a pro/con analysis, seizing and securing the bag without searching it was safer even if it did contain a weapon. But by waiting until the exigencies associated with the arrest had passed, his ability to search without a warrant passed as well.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests a Rule 19 argument and a signed opinion. In 2015, this Court acknowledged and adopted the Supreme Court's rule in *Arizona v. Gant*, which reined in overly broad searches incident to arrest.<sup>53</sup> And the Court has long recognized that while arrest justifies a full search of *the person*, a search of their surroundings may only extend to those areas "within [their] immediate control" such that they may destroy evidence or harm the officer.<sup>54</sup>

Furthermore, Petitioner's case is a good vehicle for illustrating when officers may search an arrestee's surroundings. Arrests are fluid and idiosyncratic. But here a relatively bright line separated the arrest, during which the officer could have searched without a warrant, and the post-arrest scene when he could not. Pedagogically speaking, this is an ideal scenario for instructing law enforcement and lower courts that once the dangers associated with an arrest pass, their ability to search without a warrant passes as well.<sup>55</sup>

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<sup>53</sup> See Syl. Pt. 2, *State v. Noel*, 236 W. Va. 335, 779 S.E.2d 877 (2015).

<sup>54</sup> See *State v. Julius*, 185 W. Va. 422, 426, 408 S.E.2d 1, 5 (1991) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)) (police lawfully seized the clothing defendant wore incident to arrest but required a different rationale to seize a coat outside his reach).

<sup>55</sup> Compare *Davis*, 997 F.3d at 198 with *U.S. v. Shakir*, 616 F.3d 315, 318–20 (3rd Cir. 2010).



## ARGUMENT

**After lawfully seizing Petitioner’s backpack incident to arrest, police could not conduct a warrantless search of its contents after the exigencies of the arrest had ended.**

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]”<sup>56</sup> For a search to be reasonable, police must possess a warrant unless a recognized exception applies.<sup>57</sup> One exception is a search incident to arrest.<sup>58</sup> It is reasonable for officers to search an arrestee’s person and immediate sphere of influence to protect officer safety and prevent the destruction of evidence.<sup>59</sup> But only if the search “is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.”<sup>60</sup> The test is functionally related to the exception’s purpose.<sup>61</sup> “[A] search incident to arrest may only include the arrestee’s person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”<sup>62</sup> When evidence and officer safety are no longer endangered, police must obtain a warrant.<sup>63</sup>

When evaluating a suppression ruling, this Court reviews factual determinations under the “clearly erroneous” standard, and the lower court’s legal determinations and ultimate conclusion *de novo*.<sup>64</sup> Here, the lower court erred because the search itself was too attenuated from the arrest. Officers lawfully seized the bag and secured it.<sup>65</sup> But they did not search its contents until after Petitioner lost access to the bag.<sup>66</sup> They therefore needed a warrant before opening it.<sup>67</sup>

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<sup>56</sup> U.S. Const. Amend. IV; *accord.* W. Va. Const. Art. III, § 6.

<sup>57</sup> *Missouri v. McNeely*, 569 U.S. 141, 148 (2013).

<sup>58</sup> *U.S. v. Robinson*, 414 U.S. 218, 224 (1973).

<sup>59</sup> *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

<sup>60</sup> *Stoner v. California*, 376 U.S. 483, 486 (1964).

<sup>61</sup> *See, e.g., Arizona v. Gant*, 556 U.S. 332, 335 (2009).

<sup>62</sup> *Gant*, 556 U.S. at 339 (cleaned up).

<sup>63</sup> *See id.* at 350–51.

<sup>64</sup> *See State v. Noel*, 236 W. Va. 335, 339, 779 S.E.2d 877, 881 (2015).

<sup>65</sup> *See* A.R. 543–44.

<sup>66</sup> *See* A.R. 39–43; *see also* A.R. 48–50; A.R. 51–52.

<sup>67</sup> *See Gant*, 556 U.S. at 350; *Chimel*, 395 U.S. at 762–63.

To lawfully search Petitioner’s discarded backpack without a warrant, the State needed to show that it was still within his immediate zone of control such that Petitioner could have accessed a concealed weapon or destroyed evidence contained within.<sup>68</sup> That may have been true when the arresting officer was alone and in the process of securing Petitioner. But Petitioner does not contest the initial seizure of the backpack. Rather, he challenges the officer’s later search of its contents. That occurred after the scene was secure and Petitioner no longer posed a realistic threat.<sup>69</sup> It may have been proper for the officer to wait for the exigencies of the arrest to abate before conducting the search at his leisure. But at that point, no exception applied, and he first had to get a warrant.<sup>70</sup>

The cases cited by the parties below show this. In *U.S. v. Davis*, the Fourth Circuit considered *Gant*’s reaffirmation of *Chimel*’s requirement that arrest searches serve the purposes for which the warrant exception exists.<sup>71</sup> In doing so, it reversed a conviction on facts materially congruent to those here.<sup>72</sup> There, the defendant fled police, but relented when the chasing officer drew his service weapon.<sup>73</sup> As Davis submitted, he discarded a backpack.<sup>74</sup> The police handcuffed, frisked, and informed him he was under arrest.<sup>75</sup> They then retrieved the discarded backpack and discovered drugs.<sup>76</sup>

The Fourth Circuit ruled this search unconstitutional.<sup>77</sup> The arrestee had discarded the bag, and at the time police seized his person, it was no longer within reach.<sup>78</sup> Although

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<sup>68</sup> See *Gant*, 556 U.S. at 350–51. Unique to the automobile context, police may also look for evidence of the crime of arrest. See *id.* at 335. That does not apply here.

<sup>69</sup> See A.R. 39–43; see also A.R. 48–50; A.R. 51–52.

<sup>70</sup> See *Gant*, 556 U.S. at 350–51; see also *Davis*, 997 F.3d at 198; *Julius*, 185 W. Va. at 426.

<sup>71</sup> See *Davis*, 997 F.3d at 191.

<sup>72</sup> See *id.* at 194.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 200.

<sup>78</sup> See *id.* at 198.

a single officer secured the defendant, backup arrived soon after.<sup>79</sup> Therefore the exigencies of the arrest did not justify a warrantless search.<sup>80</sup>

The similarities to the instant case are undeniable. As in *Davis*, Petitioner had the backpack when police first encountered him.<sup>81</sup> He discarded it in their presence and initially resisted.<sup>82</sup> Both defendants did ultimately submit to the lone officer arresting them.<sup>83</sup> But neither officer searched the backpack immediately.<sup>84</sup> They both waited for backup to arrive and secure the scene.<sup>85</sup> Thus, in both, nothing justified the police in opening the bag without first asking a judge.

There is one other key similarity. The lower court found the officer acted reasonably because handcuffs are not perfect.<sup>86</sup> That may be, but they work more often than not, which is why police trust them over the honor system. “We need not recount the various acrobatic maneuvers [an arrestee] would have needed to perform to place the backpack within his reaching distance at the time of the search.”<sup>87</sup> Where multiple officers secure a defendant and take full possession of their container and could easily re-locate it out of danger, they need a warrant to open it.<sup>88</sup>

The Third Circuit confronted very different facts when it affirmed a duffle bag search in *U.S. v. Shakir*. There, an officer approached a robbery suspect in a hotel lobby.<sup>89</sup> The suspect dropped a bag to his feet.<sup>90</sup> The officer did a quick pat down, but could not secure him with a single set of handcuffs.<sup>91</sup> Until backup arrived with more handcuffs, the

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<sup>79</sup> *See id.*

<sup>80</sup> *See id.*; *cf. U.S. v. Buster*, 26 F.4th 627, 635 (4th Cir. 2022) (Bag search illegal after police assumed full control).

<sup>81</sup> *See* A.R. 38.

<sup>82</sup> *See* A.R. 38–39.

<sup>83</sup> *See* A.R. 39.

<sup>84</sup> *See* A.R. 51–52.

<sup>85</sup> *See id.*

<sup>86</sup> *See* A.R. 543; *Davis*, 997 F.3d at 198.

<sup>87</sup> *Id.*

<sup>88</sup> *See Gant*, 556 U.S. 350–51; *cf. Riley v. California*, 573 U.S. 373, 386 (2014) (officers may seize cellphones incident to arrest but must get a warrant to search their digital contents, which cannot harm officers).

<sup>89</sup> *See Shakir*, 616 F.3d at 316.

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

lone officer had to balance his attention between the unsecured defendant and a confederate held by unarmed civilian security guards.<sup>92</sup> Backup arrived and secured the defendant.<sup>93</sup> As they held the defendant's arms, the initial officer seized the bag and searched it.<sup>94</sup> The court ruled that the arrest's exigencies justified the immediate search.<sup>95</sup>

This stands in stark contrast to Petitioner's arrest. In *Shakir*, backup arrived and secured the suspect contemporaneous to the initial officer seizing and searching the bag. There, the fluid scene, recency of the real arrest, and proximity justified the officer in acting fast to ensure the arrestee could not access a weapon or evidence.<sup>96</sup>

But here, when the officer handcuffed Petitioner, he judged the situation as too insecure to risk an immediate search and waited to gain complete control.<sup>97</sup> He did not search until after the other individuals had dispersed from the garage and another officer arrived to frisk Petitioner and secure the discarded weapon.<sup>98</sup>

Importantly, here the officer waited until long after he had seized the bag itself and divested Petitioner of any control over it.<sup>99</sup> He and backup exercised dominion over both Petitioner and the backpack, unlike the situation in *Shakir* where, until the moment of seizure, the bag sat at the feet of the unsecured suspect.<sup>100</sup> There, the officer had to act fast. But here, police had the leisure to secure the bag and await a warrant. They simply chose not to, contrary to the state and federal constitutions.

The Third Circuit made clear that these distinctions made all the difference.<sup>101</sup> It contrasted *Shakir* with another case more akin to this case and *Davis*.<sup>102</sup> Where the defendant submitted to police, threw a bag away from himself, and the arresting officer

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<sup>92</sup> *See id.*

<sup>93</sup> *See Shakir*, 616 F.3d at 316–17.

<sup>94</sup> *See id.* at 317.

<sup>95</sup> *See id.* at 321.

<sup>96</sup> *See id.*

<sup>97</sup> *See A.R.* 56–57.

<sup>98</sup> *A.R.* 51–52.

<sup>99</sup> *See id.*

<sup>100</sup> *See Shakir*, 616 F.3d at 316–17; *see also U.S. v. Salazar*, 69 F.4th 474, 478 (7th Cir. 2023).

<sup>101</sup> *See Shakir*, 616 F.3d at 318–19.

<sup>102</sup> *See id.*; *see also U.S. v. Meyers*, 308 F.3d 251 (3rd Cir. 2002).

searched at his leisure after backup secured the suspect, the Third Circuit reversed.<sup>103</sup> Just as in *Davis*, and just as should have happened here.

What these cases show is that arrests unfold differently, but the law officers must obey remains the same. If the exigencies of the situation make it safer and more secure to immediately seize and search property the defendant could reach, then they may do so.<sup>104</sup> And if it is safer to completely secure a scene before searching containers, then absolutely they should do that.<sup>105</sup> But if they opt for the latter, they cannot open the containers until they get a warrant.<sup>106</sup>

### CONCLUSION

The arresting officer may have found it cumbersome to arrest Petitioner on the warrant and hold, but not open, the backpack pending a magistrate's permission. Unzipping the bag to confirm what he already surmised was much more efficient.

Forgoing the constitution always is.

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."<sup>107</sup>

Petitioner therefore requests that the Court reverse and remand his case for a new trial in which the bag and its contents are suppressed.

Respectfully submitted,  
Michael Keith Allman,  
By Counsel

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<sup>103</sup> See *id.* at 321.

<sup>104</sup> See *Gant*, 556 U.S. at 350–51; see also *Shakir*, 616 F.3d. at 321.

<sup>105</sup> See *Davis*, 997 F.3d at 198.

<sup>106</sup> See *id.*; see also *Gant*, 556 U.S. at 347 (Broadening scope of search incident to arrest beyond its purposes "would serve no purpose except to provide a police entitlement, and it is anathema to the *Fourth Amendment* to permit a warrantless search on that basis.").

<sup>107</sup> *Johnson v. U.S.*, 333 U.S. 10, 13–14 (1948).

/s/ Matthew Brummond...  
Matthew Brummond  
W. Va. State Bar No. 10878  
Appellate Counsel  
Public Defender Services  
Appellate Advocacy Division  
One Players Club Drive, Suite 301  
Charleston, W. Va. 25311  
Phone: 304-558-3905  
Fax: 304-558-1098  
Matt.D.Brummond@wv.gov

*Counsel for Petitioner*