SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Jan 16 2024
02:29PM EST
Transaction ID 71811605

STATE OF WEST VIRGINIA,

Respondent,

Supreme Court No.: 23-421
Case No.: 22-F-271
Wood County Circuit Court

MICHAEL KEITH ALLMAN,

Petitioner,

PETITIONER'S REPLY

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

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REPLY ARGUMENT

A police officer recognized Petitioner and decided to arrest him on an outstanding warrant.[1] When the officer first saw Petitioner, he had a backpack slung over his shoulder, and not knowing its contents, sought to separate Petitioner from the container.[2] He did not search the bag immediately. Rather, the officer secured Petitioner in handcuffs, then recovered and stowed the backpack at his police SUV.[3]

Waiting made sense. The officer was alone, about a half-dozen bystanders had only moments ago vacated the area, and the important thing was to secure the bag away from Petitioner.[4] He could—and did—search it later.[5] After he subdued and handcuffed Petitioner, after backup arrived, and after backup secured the scene.[6]

But waiting had a cost. After all exigencies of the arrest subsided, the officer lost the ability to search the bag without a warrant. Petitioner appeals because the officer himself confirmed the bag was not within Petitioner's "immediate control[.]"[7]

The Response argues the exigency persisted but muddles the timeline to reach this conclusion.[8] In actuality, the case shows an unusually clean break between the arrest, when the officer could have, but did not search the bag, and the secured scene, when he could not, but did.[9]

To avoid a decision on the merits, the Response first challenges Petitioner's standing,[10] arguing for the first time on appeal that he abandoned the bag and any protectable interest in it.[11] But rather than relinquish the bag, he sought to hide it from others.[12] This is an exertion of his privacy interest, not its abandonment.

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[1] A.R. 35; A.R. 38.
[2] A.R. 35–36.
[3] *See* A.R. 38–39; A.R. 42.
[4] A.R. 38–39.
[5] A.R. 42.
[6] *See id.*
[7] A.R. 49; *see Arizona v. Gant*, 556 U.S. 332, 335 (2009).
[8] *See* Resp.'s Br. 6.
[9] *Compare* A.R. 38–40 *with* A.R. 42.
[10] *See* Resp.'s Br. 6.
[11] *Id.* at 8, n. 2.
[12] A.R. 38.

I. Petitioner did not abandon the backpack by setting it down prior to approaching the officer for what he thought was a voluntary encounter.

The Response argues for the first time on appeal that when Petitioner hid the backpack, he legally abandoned it and therefore lacked standing to challenge its search.[13] Certainly, the Court can affirm for any reason—if it is apparent on the record. However, as the Response concedes, abandonment is a "highly fact-specific" inquiry.[14] The standard for most factfinding in the search and seizure context is the totality of the circumstances.[15] And the parties below only developed the circumstances relevant to the arguments they *did* make.[16] Therefore, having waived the issue and lacking a developed record, the State cannot prevail.

Fourth Amendment rights are personal.[17] To establish standing to challenge a search or seizure, defendants must show that the State violated their own rights.[18] "A Fourth Amendment inquiry generally consists of two components: (1) whether the defendant asserting the right has a reasonable expectation of privacy in the place searched and (2) whether the search was reasonable."[19] One challenging a search must show, by a preponderance of the evidence, that they had a subjective expectation of privacy that society accepts as legitimate.[20] Abandonment is an argument that the defendant has relinquished their subjectively-held, reasonable expectation of privacy by disclaiming any present or future interest in the items searched.[21] However, Fourth Amendment standing is non-jurisdictional and the State must raise or waive standing.[22]

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[13] *See* Resp.'s Br. 8, n. 2.
[14] Resp.'s Br. 9; *see also State v. Payne*, 239 W. Va. 247, 259, 800 S.E.2d 833, 845 (2016).
[15] *See Missouri v. McNeely*, 569 U.S. 141, 149 (2013).
[16] *Cf. State v. Phipps*, No. 18-0967, 2020 WL 3408058, Pet.r's Br. at 1, (W. Va. June 18, 2020) (raising unpreserved Fourth Amendment claim under WVRAP 10(c)(10) rather than plain error).
[17] *See Rakas v. Illinois*, 439 U.S. 128, 133 (1978).
[18] *Id.*
[19] *State v. Ward*, ___ W. Va. ___, ___, 895 S.E.2d 202, 209 (2023).
[20] *See U.S. v. Turner*, 839 F.3d 429, 432 (5th Cir. 2016).
[21] *See Payne*, 239 W. Va. at 258.
[22] *Ward*, 895 S.E.2d at 210–11.

The Response concedes the State failed to raise abandonment below.[23] Circuits split on the consequence that follows from this failure—waiver, which bars the State from raising the novel claim on appeal, or forfeiture, where the State may raise it if it satisfies the plain error standard.[24]

The better view is that the State must raise or waive substantive challenges to Fourth Amendment standing.[25] First, it creates a bright line, so all parties know where they stand. And second, the State should not ask the Court to resolve cases based upon inadequate records. Inherently fact-intensive inquiries are ill-suited for plain error review.[26] As it stands now, the parties created a record with no inkling the State would later change its position. Short of remand, there is no way to know what the record would have looked like if the State had given proper notice that Petitioner had to meet an abandonment challenge.[27]

Even if the Court finds that the State did not waive the issue,[28] it still forfeited it.[29] The Response's own persuasive authority requires the State to satisfy the plain error test to raise novel standing claims on appeal.[30] Yet it does not address its argument to the plain error standard.[31]

Understandably so. Based upon the record, it cannot show that the court below plainly erred. It is impossible to say what the totality of the circumstances would have shown if the State had put Petitioner on notice prior to the suppression hearing. But as the record stands, Petitioner did not abandon his bag.

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[23] *See* Resp's Br. 8, n. 2.
[24] *See U.S. v. Russell*, 26 F.4th 371, 373 (6th Cir. 2022) (The government must satisfy the plain error standard to raise forfeited argument).
[25] *See, e.g.*, *U.S. v. Golson*, 743 F.3d 44, 55, n. 9 (3d Cir. 2014).
[26] *See Supra* at n. 2, n. 16.
[27] *See Rakas*, 439 U.S. at 130, n. 1 (1978) (The prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden[.]").
[28] *See* Resp.'s Br. 18.
[29] *See Russell*, 26 F.4th at 373.
[30] Resp.'s Br. 14 (citing *Russell*, 26 F.4th at 374).
[31] *See State v. Billy*, No. 16-0345, 2017 WL 383781, at *6 (W. Va. Jan. 27, 2017) (memorandum decision).

Though the Court first recognized abandonment in 1970,[32] the State appears only to have invoked it in this Court decades later.[33] In *State v. Payne*, a murder defendant stayed the night at a friend's home and, before the friend awoke, fled "without any indication as to whether he would return."[34] Federal authorities later tracked down his whereabouts and apprehended him.[35] In the meantime, the friend consented for police to search his home and seize a jacket the defendant had left behind.[36]

The Court found that Payne had abandoned the jacket.[37] He was not present for the search. He was no longer even a guest, having fled early in the morning without his host seeing him off.[38] In flight following the murder and evidently in hiding, there was no indication he would return at all, let alone to recover incriminating items discarded in his wake.[39] He therefore relinquished any privacy interest in those items, including the jacket.[40]

Petitioner's case stands in stark contrast. Rather than flee without any interest in his former property's fate, Petitioner hid his backpack behind a vehicle before approaching the officer to talk.[41] These situations are not at all comparable. Nothing suggests Petitioner had any intent other than to return to the bag after his police interaction. People maintain a privacy interest in their belongings even when they are not actively holding them.

The Response argues "Petitioner knew he was about to be arrested on an outstanding warrant, as Det. McGary told him as much."[42] To the extent this suggests Petitioner anticipated arrest prior to hiding the backpack, it misstates the record. The officer had

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[32] *See* Syl. Pt. 1, *State v. Angel*, 154 W. Va. 615, 177 S.E.2d 562 (1970).
[33] *See generally State v. Payne*, 239 W. Va. 247, 800 S.E.2d 833 (2016).
[34] *Payne*, 239 W. Va. at 253.
[35] *See id.* at 253, n. 17.
[36] *See id.* at 253.
[37] *See id.* at 259.
[38] *See id.* at 256–57.
[39] *See id.* at 259.
[40] *See id.*
[41] A.R. 38.
[42] Resp.'s Br. 10.

simply called Petitioner's name twice.[43] Petitioner hid the backpack, then approached the officer without further summons.[44] Only *after* Petitioner hid the bag did the officer announce an intent to arrest.[45] Any insinuation that the events happened in the opposite order is incorrect.

Prior to the arrest, Petitioner's behavior was consistent with his expectation for a (hopefully short) consensual encounter. He willingly approached the officer, but resisted once the officer made clear the encounter was no more voluntary than it would be brief.[46] And none of Petitioner's actions suggest he would not retrieve the bag after a voluntary interaction. The fact he tried to hide the bag—as the Response acknowledges[47]—shows the opposite.[48] Secreting away property is the quintessential exertion of one's subjective privacy expectation.[49]

Payne as well as the Response's out-of-state-authority all stand for the same proposition: abandonment occurs when a defendant's statements or actions disclaim any present or future interest in property.[50] Setting it down temporarily is not enough. Hiding it from others for safekeeping is precisely how you keep it private.[51]

To find abandonment here, one must conclude Petitioner intended to leave the bag where it lay: that if the conversation with the police officer ended amicably and the two parted, that Petitioner nonetheless would have left the garage without the backpack. This simply is not credible based on the record created below.

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[43] A.R. 35–38.
[44] A.R. 38.
[45] *Id.*
[46] *Id.* at 38–39.
[47] *See* Resp.'s Br. 10.
[48] *See U.S. v. Villegas*, 495 F.3d 761, 767 (7th Cir. 2007) ("In determining whether a defendant held a subjective expectation of privacy, we look at the defendant's efforts to conceal and keep private that which was the subject of the search.").
[49] *See id.*
[50] *See Brown v. U.S.*, 97 A.3d 92, 96 (D.C. 2014) (defendant removed jacket while police were in hot pursuit); *State v. Corbin*, 957 N.E.2d 849, 857 (Oh. App. 2011) (defendant left laundry in the open truck bed of a friend who's home he was no longer a guest); *see also U.S. v. Ferebee*, 957 F.3d 406, 412 (4th Cir. 2020) (defendant expressly disclaimed ownership prior to the search).
[51] *See Villegas*, 495 F.3d at 767.

II. For Fourth Amendment standing, the evidence pretrial sufficed to show Petitioner's ownership of the bag that the State charged him with possessing.

Distinct from abandonment,[52] the Response argues that because Petitioner pleaded not guilty, he disclaimed ownership in the bag and lacked standing to challenge its search.[53] This is absurd. To be clear, Petitioner did not testify. He offered no evidence at the suppression hearing disclaiming his protectable interest. Instead, the Response refers to his lawyer holding the State to its burden of proof.[54] The record more than satisfies Petitioner's burden of showing a reasonable expectation of privacy in the backpack.

The Response correctly points out that the defendant has "the initial burden of demonstrating that he had a reasonable expectation of privacy[,]"[55] but that does not mean the issue is always contested.[56] In *Rakas v. Illinois*, the Supreme Court found it significant that the State had challenged standing prior to the suppression hearing.[57] "The prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden[.]"[58] Rather than meet that challenge, the defendants argued they should not have to.[59] But here, the State made no mention of standing until its concluding argument at the suppression hearing.[60] Prior to the hearing they filed nothing responsive to the motion to suppress.[61]

The Response also concedes that the court did not rule Petitioner lacked standing.[62] The court found the bag belonged to Petitioner to instead reach the question of whether a warrant exception applied.[63] The Response does not contest this.

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[52] *See* Resp.'s Br. 7.
[53] Resp.'s Br. 10 ("There is no stronger evidence of Petitioner's intentional abandonment of the bag than his subsequent attempts to fully disclaim ownership of it during trial.").
[54] *See* Resp.'s Br. 12.
[55] Resp.'s Br. 13 (quoting *Ward*, 895 S.E.2d at 211, n. 14).
[56] *Cf. State v. Simmons*, 239 W. Va. 515, 523, 801 S.E.2d 530, 538 (2017) (although the State bears the burden of proving statements are voluntary, defendants must still move to suppress to alert the State they intend to hold it to that burden).
[57] *See Rakas*, 439 U.S. at 130, n. 1.
[58] *See id.*
[59] *See id.*
[60] A.R. 60.
[61] *See* A.R. Docket Sheet.
[62] Resp.'s Br. 13.
[63] *See* A.R. 553–54; *see also* Resp.'s Br. 14 (calling standing a "threshold inquiry").

Nor does the Response contest that the evidence adduced at the suppression hearing met Petitioner's burden. The officer testified he peered into the garage, saw Petitioner with the backpack slung over his shoulder, then watched him hide it.[64] This evidence was materially indistinguishable from that offered at trial, and if rational jurors could infer the bag and its contents belonged to Petitioner, then it likewise sufficed to show Petitioner had a protectable privacy interest in the bag by a preponderance of the evidence.

The Response cannot contest that the State failed to challenge standing prior to the hearing, that the circuit court found standing, or that the evidence supported the court's ruling. Instead, it argues that Petitioner's lawyer disclaimed her client's ownership of the bag.[65] The record refutes this.

The Response claims that "Petitioner consistently disclaimed ownership of the bag" with three citations,[66] but none of them support this assertion. The first is from the suppression hearing, where Petitioner's lawyer summarized the officer's testimony: "There was an individual that claimed that this was his bag … and he did not consent."[67] This simply acknowledges the historical fact that a third party made a hearsay statement the officer did not follow up on. Even if one takes the claim seriously, it does not extinguish Petitioner's protectable interest in the bag.[68] But more importantly, *no one took the claim seriously*. The officer did not engage the other individual because he "saw [Petitioner] with the bag."[69] The officer did not even seek the mystery claimant's identity.[70] Acknowledging, as a historical fact, that an unknown individual also claimed a privacy interest in the bag falls far short of the Response's representation that "Petitioner claimed consistently and at every stage below that the bag, in fact, was not his[.]"[71]

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[64] A.R. 37–38.
[65] *See*, *e.g.*, Resp.'s Br. 7.
[66] Resp.'s Br. 12.
[67] A.R. 59.
[68] *See*, *e.g.*, *Turner*, 839 F.3d at 432. (more than one person may have a protected privacy interest in the same item).
[69] A.R. 48.
[70] *See* A.R. 39.
[71] Resp.'s Br. 7 (citing A.R. 59).

The other two citations come from the trial itself, and thus are irrelevant to the court's suppression ruling pretrial.[72] But they also do not stand for the Response's assertion. The Response cites to opening statements, when defense counsel said "the evidence will not show beyond a reasonable doubt that the bag … was his[,]" and to closing, when the defense lawyer argued that jurors should discredit the State's theory because of the third party hearsay.[73] Holding the State to its burden of proof is categorically different from affirmatively disclaiming ownership. Otherwise, every contraband defendant would lose Fourth Amendment protection the moment they enter a not guilty plea.

Petitioner understands that on appeal from a suppression ruling, the Court looks at the evidence in the light most favorable to the prevailing party. But the Response mistakenly overstates the record to argue a point it cannot support.

III. The record shows the exigencies surrounding Petitioner's arrest had subsided before the officers conducted their search.

Turning to the legality of the search incident to arrest—the only ground ruled upon below[74]—the Response acknowledges the State must prove that the officer searched the bag while the exigencies of the arrest persisted.[75] That is, the Response must show that without a search of Petitioner's immediate surroundings, he could access evidence or threaten officer safety.[76]

However, it cannot do so without muddling the timeline. The record shows an unusually clean break between the arrest, when the lone officer did not need a warrant, and the secured crime scene, when the multiple officers did. Like all Fourth Amendment inquiries, this is fact-intensive and warrants careful parsing of the record.

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[72] *See State v. Buzzard*, 194 W. Va. 544, 552, 461 S.E.2d 50, 58 (1995) ("[T]here is no authority … that upon appellate review, we should … testimony at trial in upholding the trial court's ruling which arose out of the pre-trial suppression hearing.").
[73] A.R. 475–76.
[74] *See* A.R. 543–44.
[75] *See Gant*, 556 U.S. at 335.
[76] *See id.*

Relevant to the backpack,[77] the officer peered into the garage and saw Petitioner before Petitioner saw him.[78] He called Petitioner by name, who turned and made eye contact.[79] Petitioner had a backpack slung over his shoulder.[80]

The officer called Petitioner's name again, and Petitioner approached him.[81] As Petitioner did so, he removed and tried to hide the backpack.[82]

When Petitioner arrived at the entrance, he disobeyed an order to submit.[83] The officer spun him around and forced him into handcuffs.[84]

As this was happening, an unknown individual—there were six or eight in the garage—tried to claim the backpack.[85] The officer ordered him, and everyone else, to leave.[86] They all complied, and the officer entered the garage with Petitioner in tow.[87]

The officer "took the backpack under control"[88] and confirmed he did so "after [Petitioner] was in [his] custody."[89] The officer escorted the bag and Petitioner outside.[90] The first of several officers arrived as backup, and they stowed the backpack on the police SUV.[91] The record is unclear as to when the other officers began trickling in.[92]

While the original officer remained with Petitioner, his backup entered the empty garage to seize the firearm.[93] The officers then frisked Petitioner.[94]

Finally, the officers searched the bag and put it in one car and Petitioner in another.[95]

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[77] The officer also saw Petitioner remove an object, which the State believed to be a gun it also recovered, from his waistband. A.R. 36–37. Petitioner does not challenge its seizure.
[78] *See* A.R. 35.
[79] *Id.*
[80] A.R. 35–36.
[81] A.R. 38.
[82] *Id.*
[83] *Id.*
[84] A.R. 38–39.
[85] A.R. 39.
[86] A.R. 39.
[87] A.R. 39–40.
[88] A.R. 541.
[89] A.R. 50.
[90] A.R. 41.
[91] A.R. 41; *see also* A.R. 50.
[92] *See id.*
[93] A.R. 41–42.
[94] *Id.*
[95] A.R. 42.

This timeline shows that the officers delayed their search until after the exigencies of the arrest had subsided. This made sense. Under the circumstances, pausing to search the bag mid-arrest would have exposed everyone involved to more danger. But because they waited until the scene, Petitioner, and the bag were all secure, the Fourth Amendment obligated them to wait a bit longer—long enough to ask a magistrate's permission.[96]

In *U.S. v. Davis*, the Fourth Circuit confronted a similar situation: a chaotic arrest, when officers could have searched, and a post-arrest secured scene, when they could not. There, the defendant initially fled police but submitted after discarding a backpack.[97] Police handcuffed him and an officer remained with him at all times.[98] Police then went to where Petitioner had thrown the bag and searched its contents without a warrant.[99] The Fourth Circuit found the search unconstitutional because police had secured the defendant, the scene, and the container prior to opening it.[100]

The Response attempts to distinguish *Davis*, but it is unconvincing.[101] It evaluates isolated facts in the abstract, rather than the totality of the circumstances, and it muddles the timeline. The circumstances at the time of the search must show a persistent exigency, not those at the time of the arrest.[102]

The Response argues Petitioner remained a threat because handcuffs are imperfect, but ignores all other circumstances.[103] In theory, if left to his own devices long enough, perhaps Petitioner could contort his arms from behind his back to the front.[104] But the Petitioner was *never* alone. One or both officers always escorted him.[105]

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[96] *See Gant*, 556 U.S. at 335; *see also Chimel v. California*, 395 U.S. 752 (1969).
[97] *See U.S. v. Davis*, 997 F.3d 191, 194 (4th Cir. 2021).
[98] *See id.*
[99] *See id.*
[100] *Id.* at 197 (Police may search containers if they are within the unsecured arrestee's reach).
[101] Resp.'s Br. 18–19.
[102] *See Davis*, 997 F.3d at 197 ("[O]fficers can conduct warrantless searches … incident to a lawful arrest 'only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search.'") (quoting *Gant*, 556 U.S. at 343).
[103] Resp.'s Br. 18–19.
[104] *See Davis*, 997 F.3d at 198 ("We need not recount the various acrobatic maneuvers [the defendant] would have needed to perform to place the backpack within his reaching distance at the time of the search.").
[105] *See* A.R. 38–42.

The Response likewise looks in isolation at Petitioner's presumed proximity to the backpack.[106] This again ignores the totality of the circumstances—Petitioner was located wherever the police chose to place him, and always in their presence.[107] The officer confirmed that at the point of arrest, "the bag was not within [Petitioner's] immediate control" until the officer walked Petitioner over to it.[108] If Petitioner's location posed a danger, the police would have put him—or the bag—somewhere else.

The Response also argues that bystanders outnumbered police, but the record does not support this.[109] The bystanders all vacated the garage when ordered.[110] While the officer was in the garage, he may not have known whether any remained outside,[111] but that is not when the search occurred.[112] The officer exited with Petitioner into the open alley but did not relate seeing anyone.[113] If other individuals were still nearby, the State should have placed it on the record below. Instead, the record shows that backup arrived and secured the scene.[114] At that point Petitioner was alone with two officers, with others arriving.[115]

Finally, the Response argues that the bag itself, apart from the arrest, posed an exigent danger because it could have contained a gun or fentanyl.[116] But again, the State did not raise this, and the record created below does not suggest the bag posed a threat.

The police had secured Petitioner and taken control of the bag well before their search.[117] With the bag fully in police control, a hypothetical firearm posed no greater danger in the bag than the one on the officer's hip. And if the officers were concerned the bag

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[106] *See* Resp.'s Br. 20–21.
[107] *See* A.R. 38–42.
[108] A.R. 49; *see Gant*, 556 U.S. at 335 ("[P]olice may search incident to arrest only the space within an arrestee's 'immediate control[.]'") (quoting *Chimel*, 395 U.S. at 763).
[109] *See* Resp.'s Br. 20–21.
[110] A.R. 39.
[111] *Id.*
[112] *See* A.R. at 42.
[113] A.R. 40–41.
[114] A.R. 41–42.
[115] A.R. 50.
[116] Resp.'s Br. 23–24.
[117] A.R. 50.

might leak fentanyl, they would have sought to contain it, not expose it. There is no indication the police even used gloves. They did not have a "reasonable belief"[118] the bag contained fentanyl—they had no idea whether it did. That is, until the illegal search.

The State below did not argue the bag itself was dangerous and the police did not voice concerns about it for the straightforward reason that it wasn't true. The police searched Petitioner's bag looking for guns and drugs for their evidentiary value.[119] They thought they could. "He was an arrestee."[120] But they misunderstood the principle from *Chimel* and *Gant*.[121] The safer option was to search the bag after the exigencies ended. But it was also the unconstitutional option. Not without a warrant.

CONCLUSION

Why did the police not search the bag immediately? Because the exigencies of the arrest made it unwise. When did police search the bag instead? After those exigencies ended. It really is that simple. They may have had good reason for waiting, but that does not relieve their burden to get a warrant.

Respectfully submitted,
Michael Keith Allman,
By Counsel

/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

[118] Resp.'s Br. 24.
[119] *See* A.R. 43.
[120] A.R. 48.
[121] *see Gant*, 556 U.S. at 335; *Chimel*, 395 U.S. at 763.